THE ANDHRA PRADESH PRELIMINARY SPECIFICATIONS

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PRELIMINARY SPECIFICATIONS

A. — Preface

P.S. 1. Intent and reference to Andhra Pradesh Standard Specifications :— It is intended by these Andhra Pradesh Standard Specifications to describe—

(a) the character of the materials to be used;

(b) the method of execution of work; and

(c) the contractor's responsibilities and liabilities to the Public, Government, and his workmen and general contract conditions which are to be accepted by every contractor who executes work entrusted to him by the Public Works Department of Andhra Pradesh.

Whenever the term "*Standard Specification*" or the abbreviation "*A.P.S.S.*" is used in estimates or contract documents, it shall refer to the relevant specification in the Andhra Pradesh Standard Specifications book and its addenda volume.

P.S. 2. Applicability of the Andhra Pradesh Standard Specifications :—It shall be unnecessary to include in any contract documents a specification for any item of work which is defined in the tender notice or in the contract schedule of work to be done, by a standard specification number. The fact that the item is defined as standard specification shall mean that the contractor is to execute the work according to such standard specification, modified as may be necessary by an addendum specification for that particular item of work.

This preliminary specification shall apply to all agreements entered into by contractors with the Public Works Department and shall form an inseparable condition of contract, and it shall not be necessary to append a copy of the same to agreement.

P.S. 3. Contractor to sign in the Divisional or the Sub-Divisional copy of the A.P.S.S. :—Every contractor who executes work for the Public Works Department shall carefully study the standard specification for all items of work which are included in the schedule for work to be done as standard specifications and his obligations under the "Preliminary Specification" which apply to all agreements, and he shall sign in the Divisional office copy of the A.P.D.S.S. (or the Sub-Divisional copy if so arranged by the Executive Engineer) as evidence that he understands clearly the conditions of contract governing his agreement and accepts the same.

It shall not be necessary for the contractor to sign the Divisional office copy of the A.P.S.S. for every contract awarded to him, but his signature there in will be evidence that he accepts the conditions of contract (which includes the standard specifications) as detailed in the A.P.D.S.S. for every contract into which he enters. I shall also be the contractor's responsibility by frequent perusal of the Divisional office (or the Sub-Divisional office) copy to become conversant with sanctioned alterations or additions made to the A.P.S.S. as soon as they are made. A separate volume of addenda to the A.P.D.S.S. will be maintained in each Division (or Sub-

Division office as the case may be) in which will be entered all sanctioned corrections and additions. This must also be studied and signed by every contractor before executing an agreement. Interleaving correction slips will not be made for this purpose. The contractor should purchase a book of the A.P.D.S.S. for his reference while executing work.

P.S. 4. Term "Specification" apart from "Standard Specification" :—Whenever the term "*Specification*" is used in contract documents apart from "Standard Specification", it shall mean the specification or plan prepared for the particular item referred to in the document, for the instruction of the contractor in executing that item of work.

P.S. 5. Sub-Specifications :—Works of a similar nature having many common clauses in their specifications are grouped under one specification number with a "General", preface thereto, and the sub-specifications are therefore given an alphabetical affix.

P.S. 6. Additions and alterations to the standard specifications In the A.P.S.S.:—Which do not involve legal implications will be approved by the Chief Engineer (General) in consultation with the other Chief Engineers. Additions and alterations to the preliminary specifications and standard forms in the A.P.S.S. will be approved by the Government.

P.S. 7. Powers of Superintending Engineers and Executive Engineers to supplement or alter the A.P.S.S. :—Superintending and Executive Engineers may alter the standard specifications for any particular contract, which is within their respective powers of sanction —, when such alteration is found necessary, by attachment of a correction sheet to the contract form, bearing the standard specification number, the corrections, and the signature of the Superintending or the Executive Engineer, as the case may be, together with the signature of the contractor. Similarly, additional specifications for items for which there are no standard specifications will be made by attachment to the contract documents of addendum specification sheets bearing the signature of the Superintending or the Executive Engineer as the case may be and the signature of the contractor.

P.S. 8. Definition of terms :—Wherever the words defined in this clause or pronouns used in their stead occur in contract documents (which includes the A.P.S.S.), they shall have the meanings here given.

(a) *Executive Engineer* :—Wherever the term Executive Engineer is used, it shall be understood to refer the Executive Engineer for the time being in charge of the concerned work under execution or such other departmental assistants or subordinates to whom the Executive Engineer may have delegated certain duties, acting severally within the scope of the particular duty entrusted to them.

(b) No delegation by Executive Engineer, Superintending Engineer or higher authority which affects agreement. it is, however, to be distinctly understood that the Executive Engineer or the Superintending Engineer or the higher authority who is vested with the powers of acceptance of the particular agreement under reference will make no delegation of powers to such assistant or subordinates which in any way affects the agreement and its contracts condition when such agreement is to be or has been accepted by the Executive Engineer or by the other higher

authority respectively. The duties of such assistants or subordinates will be solely duties of supervision to ensure compliance with contract conditions.

(c) ***Contractor*** :—Wherever the term "Contractor" is used, it shall be understood to refer to the particular person, firm or corporation with whom an agreement has been made by the Executive Engineer or higher authority as the case may be, for executing work defined in the concerned agreement, and for purposes of instructions regarding compliance with contract conditions, it shall include the contractor's authorized agent, who is maintained on the work by the contractor. When two or more contractors are engaged on installation or construction work in the same vicinity, the Executive Engineer shall be authorized to direct the manner in which each shall conduct the work so far as it affects other contractors.

Note :—The terms Sub-Divisional Officer, Assistant Engineer, Executive Engineer, Superintending Engineer and Chief Engineer used in the following clauses shall, where the context so requires, be construed as including officers of the corresponding grade in the Highways Department.

P.S. 9. Evidence of Experience :—Tenderers shall, if required, present satisfactory evidence to the Executive Engineer that they have been regularly engaged in constructing such works as they propose to execute and that they are fully prepared with the necessary capital, machinery and materials to begin the work promptly and to conduct it as required by the A.P.S.S. and the other specifications for the particular work tendered for, in the event of their tender being accepted.

P.S. 10. Legal address — Notices :—Tenderers should gave in their tender, their place of residence and postal address. The delivering at the above named place or posting in a post box regularly maintained by the Post Office Department or sending by letter registered for acknowledgement of any notice, letter or other communication to the contractor shall be deemed sufficient service thereof upon the contractor in writing as may be changed at any time by an instrument executed by the contractor, and delivered to the Executive Engineer.

Nothing contained in the agreement and its contract conditions shall be deemed to preclude or render inoperative the service of any notice, letter, or other communication upon the contractor personally.

B. — Statement of approximate quantities in Schedule A

PS. 11. Quantities approximate and contractor to verify the nature and amount of work :—The quantities mentioned in tender notices and given in agreement (Schedule A) are worked out from the relevant drawings in Public Works Department Office and may or may not be the actuals required for execution. The Executive Engineer does not expressly or by implication agree that the actual amount of work to be done will correspond therewith but reserves the right to increase or decrease the quantity of any class or portion of the work as he deems necessary. Provided there is no change in the over all scope of the work.

(Amended by G.O.Ms.No. 1007, Tr. Roads & Blds. (c) Dept., Dt. 5-11-1976)

Tenderers must satisfy themselves by a personal examination of the site of the proposed work, by examination of the plans and specifications and by other

means as they prefer as to the accuracy and sufficiency of the statement of quantities and all conditions affecting the work and shall not at any time after the submission of their tender, dispute or complain of such statement of qualities, not assert that there was any misunderstanding in regard to the nature or amount of the work to be done nor in consequence apply for extension of time for completion beyond the agreement date.

P.S. 12. Approximate not to mean deviation from drawings and specifications:—The declaration of the approximate nature of the statement of quantities in Schedule A does not, however, in any way imply that the quantities will be increased for departure by the contractor from strict compliance with sanctioned drawings and specifications to suit his own given convenience or reduce
costs.

P.S. 13. To compare tenders :—The quantities in Schedule A are for a uniform comparison of lump-sum tenders.

C. — Drawings and Specifications

P.S. 14. Purpose :—The contract drawings if any read together with the contract specification are intended to show and explain the manner of executing the work and to indicate the type and class of material to be used.

P.S. 15. Conformance :—(a) The works shall be carried out in accordance with the directions and to the reasonable satisfaction of the Executive Engineer, in accordance with the drawings and specifications which form part of the contract and in accordance with such further drawings, details and instructions, supplementing or explaining the same as may from time to time be given by the Executive Engineer.

(b) If the work shown on any such further drawings or details, or other work necessary to comply with any such instructions, directions or explanations, be in the opinion of the contractor, of a nature which the schedule rate in the contract does not legitimately cover, he shall before proceeding with such work, give notice in writing to this effect to the Executive Engineer. In the event of the Executive Engineer and the contractor failing to agree as to whether or not there is any excess rate to be fixed and the Executive Engineer deciding that the contractor is to carry out the said work, the contractor shall accordingly do so, and the question whether or not there is any excess, and if so the amount thereof, shall, failing agreement, be settled by an arbitrator as provided in the arbitration clause, unless the subject is one which is left to the sole discretion of the Executive Engineer under the clauses of his preliminary specification, and the contractor shall be paid accordingly.

(c) It shall be the responsibility of the contractor to give timely notice to the Executive Engineer, regarding anything shown on the drawings and not mentioned in the specifications, or mentioned in the specifications and not shown on the drawings, or any error or discrepancy in drawings or specifications and obtain his orders thereon Figured dimensions are to be taken and not those obtained from scaling the drawings. In any discrepancy between drawings and specifications, the latter shall prevail. In any such case or in case any feature of the work is not

fully described and set forth in the drawings and specifications, the contractor shall forthwith apply to the Executive Engineer for such further instructions, drawings, or specifications as he requires, it being understood that the subject is to be dealt with under building procedure of best modern practice. The Executive Engineer will furnish the further instructions, drawings, or specifications, if in his opinion, they are required by competent workmen, for the proper execution of the work.

P.S. 16. Variations by way of modifications, omissions or additions :- (a) For all modifications, omissions from or additions to the drawings and specifications, the Executive Engineer will issue revised plans, or written instructions or both and no modification, omission or addition shall be made unless so authorized and directed by the Executive Engineer in writing.

(b) The Executive Engineer shall have the privilege of ordering modifications, omissions or additions at any time before the completion of the work and such orders shall not operate to annul those portions of the specifications with which said changes do not conflict.

P.S. 17. Copies of drawings and specifications :—One copy of the available drawings and specifications for (apart from the A.P.S.S. a copy of which the contractor should purchase for his reference) shall be furnished free of cost to the contractor for his own use. Such copies and copies of supplementary details furnished by the Executive Engineer shall be kept on the work until the completion thereof, and the Executive Engineer shall at all times have access to them.

P.S. 18. Signed drawings — No authority to the contractor :—No signed drawing shall be taken as in itself an order for variation, unless either it is entered in the agreement schedule of drawings under proper attestation of the contractor and the Executive Engineer, or unless it has been sent to the contractor by the Executive Engineer, with a covering letter confirm that the drawing is an authority for variation for the contract under reference.

P.S. 19. Finished sizes :—The whole of the specified or figured dimensions or drawings are to be finished sizes, after dressing or planning or cutting, subject however to the condition that, unless marked “nett,” 1.5 mm will be allowed for planning for each planed finished surface of wood-work, when the contractor is permitted to use carefully sawed market size cut scantlings. This allowance will only be permitted in the case of Sections 15mm thick or over. The figure dimensions of masonry walls and reinforced concrete are exclusive of the thickness of plaster or skirtings or cement or wall linings, unless otherwise specifically stated.

D. — Materials and Workmanship

P.S. 20. To be the best quality :—All materials, articles and workmanship shall be the best of their respective kinds for the class of work described in the contract specification and schedule, materials being obtained from sources approved by the Executive Engineer. The word “best”, as used in these specifications shall mean, that in the opinion of the Executive Engineer there is no superior quality of material or finish or articles on the market and that there is no better class of workmanship available for the nature of the particular item described in the contract schedule. The contractor shall, upon the request of the. Executive Engineer, furnish him with the vouchers to prove that the materials are such as are specified.

Samples of materials shall be furnished at the contractor's expense to the Executive Engineer when called for in the tender notice or ordered to be furnished by the Executive Engineer prior to execution of any work.

P.S. 21. Conventions for proportions :—Wherever the proportions are written by figures without further descriptions and there the meaning is otherwise clear as to which figures is intended to apply to each material, then the usual conventions will be understood to apply

For example :

1:2 means 1 lime (or cement in accordance with the context) and 2 sand.

1:2:4 means 1 lime (or cement in accordance with the context), 2 sand, and 4 broken stone (or other aggregate in accordance with the context).

P.S. 22. Measurement and mixing :—In the case of loose materials such as lime, sand, cement broken stone, surki, mortar, etc., the proportions demanded by the specifications must be measured in properly constructed measuring boxes, or in such other manner as shall be instructed by the Executive Engineer. Measurement is not to be done in loose heaps when intimate mixtures such as mortar, concrete, etc., are to be formed. The mixing must always be done on closely constructed platforms so that there will be no leakage of any of the materials through the floor of the platform and also so that no foreign material can be incorporated during the mixing. These platforms must be approved by the Executive Engineer. The cost of such measuring boxes and platforms and all the work referred to herein shall be borne by the contractor.

P.S. 23. Data :—The materials and labour utilized in the execution work by the contractor shall not be less than that given in the A.P.P.W.D. standard data for the relevant item.

P.S. 24. Lay-out of material stacks :—The contractor shall deposit materials for the purpose of the work on such parts only of the ground as may be approved by the Executive Engineer. He shall submit, for the approval of the Executive Engineer, before starting work, a detailed site survey clearly indicating positions and areas where materials shall be stacked and sheds built.

P.S. 25. Source of purchase of materials and stores :—The Executive Engineer shall, during the progress of the work, have power to cause the contractor to purchase and use such materials, or supplies from Government brick-fields, stores or other sources as may be specified in the contract, for the purposes therein specified.

P.S. 26. Contractor liable for materials supplied by the Government :— The contractor shall be responsible for all materials and other articles and things which may be supplied by Government from the time he takes delivery thereof and shall use them only for the purposes of this contract and shall make good any loss, damage, wastage or undue wear and tear that may take place from whatever cause and pay to Government, for such loss, damage, wastage or undue wear and tear such sum as the Executive Engineer may determine.

P.S. 27. Test inspection and rejection of defective materials and work :—
(a) The contractor shall provide proper facilities at all times, for the testing

of materials and inspection of the work by the Executive Engineer and the Executive Engineer shall accordingly also have access at all times to the place of storage or manufacture where materials are being made for use under the contract to determine that manufacture is proceeding in accordance with the drawings and specifications.

(b) The contractor shall, upon demand, also forward for the Executive Engineer's inspection, test certificates supplied by the vendors, when he is purchasing consignments of cement, steel and other materials in respect of which such certificates are usually available.

(c) The Executive Engineer shall have power to reject at any stage, any work which he considers to be defective in quality of material or workmanship and he shall not be debarred from rejecting wrought materials by reason of his having previously passed them in an unworked condition. Any portion of the work or materials rejected or pronounced to be inferior or not in accordance with the drawings and specifications, shall be taken down and removed from the work-site at the contractor's expense, within 24 hours after written instructions to that effect have been given by the Executive Engineer. Replacement shall at once be made in accordance with the specifications and drawings, at the contractor's expense.

In case of default on the part of the contractor to carry out such orders, the Executive Engineer shall have power to employ and pay other persons to carry out the orders at the contractor's risk and all expenses consequent thereon and incidental thereto shall be borne by the Contractor.

In lieu of rejecting work not done in accordance with the contract, the Executive Engineer may allow such work to remain, and in that case shall make such allowance for the difference in value, as in his opinion may be reasonable.

(d) ***Works opened for inspections*** :—The contractor shall at the request of the Executive Engineer, within such time as the Executive Engineer shall name, open for inspection any work covered up; and should the contractor refuse or neglect to comply with such a request, the Executive Engineer may employ workmen to open the same. If the said work has been covered up in contravention of the Executive Engineer's instructions, or if on being opened up, it be found not in accordance with the drawings and specifications or the written instructions of the Executive Engineer the expenses of opening it and covering it up again, whether done by the contractor or such workmen, shall be borne by, or recovered from the contractor. If the work has not been covered up in contravention of such instructions, or if on being opened up it be found to be in accordance with the drawings and specifications or the written instructions of the Executive Engineer, then the expenses aforesaid shall be borne by Government and shall be added to the contract sum, provided always that in the case of foundations, or any other urgent work so opened up and requiring immediate attention, the Executive Engineer shall, within reasonable time after the receipt of a notice from the contractor that the work has been so opened, make or cause the inspection thereof to be made and at the expiration of such time if such inspection shall not have been made, the contractor may cover up the, same and shall not be required to open it up again for inspection except at the expense of Government.

P.S. 28. Defects, shrinkage, etc., after completion :—Any defects, shrinkage or other faults which may appear within six months from the completion of the works arising, in the opinion of the Executive Engineer, from faulty materials or workmanship not in accordance with the drawings and specifications or the instructions of the Executive Engineer, shall, upon the directions in writing of the Executive Engineer and within such reasonable time shall as be specified therein, be amended and made good by the contractor at his own cost, unless the Executive Engineer shall decide that the contractor ought to be paid for the same at the rates agreed or such reduced or other rates as the Executive Engineer may fix and in case of default, the Executive Engineer may employ and pay other persons to amend and make good such defects, shrinkage or other faults or damage and all expenses consequent thereon and incidental thereto shall be borne by the contractor.

[In the event of Government taking over portions of the works as and when they are completed, the liability of the contractor shall be limited to the period of six months from the date of taking over the portion or portions of the work, provided that the portion or portions taken over has no connection with the remaining portions of the main work and is independent of it].

[Subs. by G.O.Ms.No. 1007, Tr., R. & B.(Cl) Dept., Dt. 5-11-1976]

P.S. 29. Executive Engineer's decision :—To prevent disputes and litigation, it shall be accepted as in inseparable part of the contract that in matters regarding materials, workmanship, removal of improper work, interpretation of the contract drawings and contract specifications, mode of procedure, and the carrying out of the work, the decision of the Executive Engineer shall be final and binding on the contractor, and in any technical question which may arise touching the contract, the Executive Engineer's decision shall be final and conclusive.

[In the case of any difference between Executive Engineer and contractor on matters regarding materials, workmanship, removal of improper work, interpretation of contract drawings and contract specifications, mode of procedure and the carrying out of work, the contractor shall have a right of appeal to the next higher authority viz., the Superintending Engineer of the Circle, and the decision of the latter shall be final and conclusive].

[Added by G.O.Ms.No. 1007, Tr.,Rds., & Blds. (Cl) Dept., Dt. 5-11-1976]

P.S.30. Dismissal of Workmen :—The contractor shall, on the request of the Executive Engineer, immediately dismiss from the works any person employed thereon who may, in the opinion of the Executive Engineer, be incompetent or misconduct himself, and such person shall not be again employed on the works without the written permission of the Executive Engineer, but the contractor may appeal to the Superintending Engineer of the Circle against such dismissal.

P.S. 31. Contractor's maistri or agent and Contractor's staff :—The contractor shall, in his own absence keep constantly on the works a competent maistri or agent, and any directions or explanations given by the Executive Engineer or his representatives to such maistri or agent shall be held to have been given to the contractor.

The contractor shall further provide all staff which is necessary for the supervision, execution and measurement of the work to ensure full compliance with the terms of the contract.

P.S. 32. Government maistries or agents :—The Government may be represented on the works by an agent, clerk of the works, or maistri who is not borne on the official list of officers and subordinates of the Public Works Department. He (if appointed) shall, in the absence of the Executive Engineer, furnish the contractor with the Executive Engineer's or his representative's instructions and directions as to the progress and execution of the works and the contractor shall duly comply with such instructions and directions and shall, on the written requisition of the maistri, clerk of works or agent, stay the further progress of any portion of the works which in his judgment is being constructed with unsound or improper materials or workmanship, until the opinion and determination of the Executive Engineer shall be obtained thereon, but such maistri, clerk of works or agent, is to have no power whatever to order any extra works or deviation from the specifications and drawings.

E. — Included in the Contract Rates

The items mentioned in this Section 'E' are to be provided by the contractor and are therefore to be allowed for in his contract rates for the various items of work in the contract schedule, notwithstanding any contrary manual procedure claimed by the contractor, unless there are definite superseding instructions in the specifications relating to the contract in question.

P.S. 33. Defining Contract Schedule Rates :—The rate entered in a contract schedule for any class of work shall be for finished work in site and shall include all contingent expenses whether direct construction expenses involved in the building in place in accordance with the drawings and specifications, or whether they be expenses imposed by an outside authority such as a local body Such contingent expenses shall not entitle the contractor to claim an extra in respect thereof.

P.S. 34. Carriage :—(a) Rates for finished work shall always include the cost of conveyance and all leads, lifts, loading, unloading and stacking in the manner and at the place ordered by the officer in immediate charge of the work, unless circumstances necessitate provisions for a separate schedule item, in which case such will be specified in the tender notice or schedule. When materials are supplied by Government, the place of supply shall be specified in the Descriptive Specification Sheet mentioned in the Tender Notice and no extra payment will be stacking. If the place of supply is not so specified, the parties intending to tender should obtain the information from the Executive Engineer before tendering. Otherwise, the absence of information in regard to place of supply will not entitle the contract to any extra payment.

(b) Whether the term "carriage" or "conveyance" is used in a schedule item, it shall, in the absence of other schedule provision or modifying description in the specification, be taken to include all leads, lifts, loading, unloading and stacking in uniform stacks to the satisfaction, of the Executive Engineer, with careful attention to close packing in the case of materials which are to be measured in stacks as a basis of payment for finished work.

Note :—In the case of important leads and lifts as may occur in River Conservancy and other such works, where lifts over flood banks and long leads

may be involved, it is usual to make separate schedule item provision with a specification defined the exact work to be done for each tendered rate.

Payment for carriage will ordinarily be by bulk or weight at a mileage rate between specified places and on the basis of the method adopted in the standard schedule of rates for carriage of materials. The distance will be measured by the nearest practicable and cheapest route, whether metalled or unmettalled road or cart- track.

(c) When carts or vehicles of any sort are engaged by the day, the quantity of material to be converted, the distance to be travelled and the number of trips to be made shall, if he considers it necessary, be fixed by the Executive Engineer.

(d) The contractor is responsible for making good all loss in transporting material entrusted to him or his agents, whether caused by wastage, breakage, theft, or any other cause.

(e) No payment shall, in any case, be made for the return trip with carts empty. Where there are loads also for the return trip, the agreement rates should allow for the reduced cost thereby on each set of materials so conveyed..

P.S. 35. Construction Plant :—The contractor shall include in his tendered price, and shall provide and install all necessary construction plant and shall use such methods and appliances for the performance of all the operations connected with the work embraced under the contract as will secure a satisfactory quality of work and rate of progress which, in the opinion of the Executive Engineer, will ensure the completion of the work within the time specified. If at any time before the commencement, or during the progress of the work, or any part of it, such methods or appliances appear to the Executive Engineer to be insufficient or inappropriate for securing the quality of the work required, or the said rate of progress, he may order the contractors to increase their efficiency, or to improve their character, and the contractor shall comply with such orders; but the failure of the Executive Engineer to demand such increase of efficiency or improvement shall not relieve the contractor from his obligation to secure the quality of work and the rate of progress required by the contract, and the contractor alone shall be responsible for the efficiency and safety of his plant, appliances and methods.

[If the department intends to supply any tools and plant to the contractor on hire, the details of such tools and plant, the hire charges leviable and the terms of hiring them should invariably be specified in the tender schedules and in the agreement, and the same should not be varied during the contract period. If, however, the department is not able to supply any of the tools and plant indicated in the agreement, the contractor shall claim no compensation but can only claim reasonable extension of contract tine. If any other tools and plant, that are available with the department but are no indicated in the agreement, are supplied to the contractor during the course of the work, the hire charges and conditions of hire prevailing in the department at the time of actual supply shall be applicable].

[Subs. by G.O.Ms.No. 1007, Tr., R&B (C) Dept., Dt. 5-11.1976]

P.S. 36. Scaffolding instructions :—All requisite scaffolding shall be provided at the contractor’s expense and shall be double, i.e., it must have two sets of upright supports. Care must be taken to ensure the safety of the workpeople and

the contractor must comply with such instructions as the Executive Engineer may issue to ensure such safety. The contractor will be entirely responsible for any damage or injuries to persons or property resulting from ill-erected scaffolding, defective la4ders, or - otherwise arising out of his default in this respect.

P.S. 37. Temporary instructions :—The contractor shall erect and maintain at his own cost temporary weather-proof sheds at such places and in a manner approved by the Executive Engineer for keeping materials under cover. The contractor shall also provide and maintain at his own expense such temporary fences, guards, bridges and roads as may be necessary for the execution of his contract work or for safeguarding or accommodating the public. If the Executive Engineer shall order any departure from any arrangements made by the contractor, the contractor shall comply with such orders as the Executive Engineer may issue to safeguard or accommodate the public. Sheds for housing workmen shall be provided at the contractor's expense, if in the opinion of the Executive Engineer such are necessary or desirable.

P.S. 38. Water and lighting :—The contractor shall pay fees and provide water and light as required from Municipal mains or other sources, and shall pay all charges therefor (including storage tanks, meters, etc.) for the use of the works and workmen, unless otherwise arranged and decided on, in writing, with the Executive Engineer. The water for the works shall be, so far as practicable, free from earthy, vegetable, or organic matter, and from salts or other substances likely to interfere with the setting of mortar or otherwise prove harmful to the work.

P.S. 39. Latrines for Work-people :—The contractor shall provide and erect, prior to the commencement of work, sufficient latrines for the use of the work people, male and female, and shall keep the same disinfected and clear at all time during progress of the works, and shall remove the same, disinfect the ground and make good all damage on the completion of the work.

P.S. 40. Sun protection, keeping dry and pumping :—The contractor shall at his own expense arrange all requisite protection of the work and materials against sun or rain effects and shall keep all portions of the work free from water to the satisfaction of the Executive Engineer and shall use his own plant for the purpose, unless otherwise specifically provided in the contract specifications.

P.S. 41. Tools and seigniorage :—The contractor shall, unless otherwise specially stated in the tender notice and subsequently on this basis in the contract be responsible for the payment wherever payable of all import duties, tolls, octroi duties, seigniorages, quarry fees, etc., on all materials and articles that he may use.

The contractor shall be solely responsible for the payment of sales tax under the provisions of the Andhra Pradesh General Sales Tax Act, as in force for the time being and the rates for the various items of work shall remain unaffected by any change that may be made from time to time in the rate at which such tax is payable.

Notwithstanding anything contained in Section 10 of the Indian Tariff Act of 1894 the rates for items involving the use or supply of articles obtained by the contractor from outside India shall remain unaffected by any charges that may be introduced in the Customs duties.

Note :—For works carried out on behalf of the Government of India seigniorage fees, etc., referred to in this clause will have to be levied in every case.

P.S. 42. Setting out works :—The contractor shall be responsible-for the correct setting out of all works, providing at his own cost all labour3 materials and staff required for so doing.

P.S. 43. Cleaning up during progress and for delivery :—All rubbish shall be burnt or removed from the site as it accumulates. All floors, stairs, landings, doors, windows, surface and soil drains shall be cleaned down and put in a thoroughly complete, clean, sound and workman like state to the satisfaction of the Executive Engineer before the work is finally handed over, all rubbish and surplus materials not required by the Executive Engineer having first been removed by the contractor. The contractor shall give notice in writing to the Executive Engineer when the work is so ready to be handed over, and shall be responsible for its maintenance until it is taken over by the Executive Engineer.

[The Executive Engineer should take over the work within one month of such notice from the contractor, if the work has been satisfactorily completed in terms of the agreement].

[Added by G.O.Ms.No. 1007, Tr., Roads and Blds. (Cl) Dept., Dt. 5-1 1-1 976]

F. — Responsibilities and Liabilities of the Contractor

Explanation :—This section sets forth some responsibilities which the contractor shall assume in addition to those mentioned in other sections of this "Preliminary Specifications" under every contract which he enters into, with the Andhra Pradesh Public Works Department and he should therefore calculate his unit prices for schedule items of work accordingly.

P.S. 44. Observance of Laws — Local regulations and notices — Attachments:—The contractor shall conform to the regulations and bye-laws of any local authority and/or of any water or lighting companies with whose systems the structure is proposed to be connected and shall, before making any variations from the drawings or specifications that may be necessitated by so conforming, give to the Executive Engineer written notice, specifying the variations proposed to be made and the reasons for making them, and apply for instructions thereon. In case the contractor shall not receive such instructions within seven days, he shall proceed with the work, conforming to the provision; regulation or bye-law in question; and any variations in the drawings or specifications so necessitated shall be dealt with under clause 63. The contractor shall give all notices required by the said Acts, regulations or bye-laws and pay all fees in connection therewith, unless otherwise arranged and deciding on in writing with the Executive Engineer. He shall also ensure that no attachments are made against materials or work forming part of or for the use of the contract. In every case referred to in this clause the contractor shall protect and indemnify Government against any claim or liability arising from or based on the violation of any such law, ordinance, regulation, order, decree, or attachment whether by himself or by his employees.

P.S. 45. Accidents — Hoarding, Lightings, Observations — Watchmen :—
(a) When excavations have been made or obstacles have been put in public
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through fares or in places where there is any likelihood of accidents, the contractors shall comply with any requirement of law on the subject, and shall provide suitable hoarding, lighting and watchmen as necessary.

[(b) it shall be the Contractor's sole responsibility to protect the Public and his employees against accident from any cause and he shall indemnify Government against any claims for damages for injury to person or property, resulting from any such accidents, and shall where the provisions of the Workmen's Compensation Act, 1923, apply, take steps to properly insure against any claims 3hereunder. The contractor shall execute the 'Indemnity pond' in the prescribed form noted below for the payment of claims coming under (a) Workmen's Compensation Act, 1923, (b) Minimum Wages Act, 1948, (c) Payment of Wages Act, 1936, (d) Contract Labour (Regulation and Abolition) Act, 1970 and all other such Acts in force and that may be enacted from time to time during the currency of the agreement.

The following Indemnity Bond is to be executed by the Contractor while entering into an agreement in respect of contract Works:

Indemnity Bond

Name of the Works:

Agreement No.

I, ……. Contractor, s/o ……..
Aged …….. Resident of …….
do hereby bind myself to pay all the claims which may come (a) under Workmen's Compensation Act, 1923, with any statutory modification thereof and rules thereunder or otherwise for or in respect of any damage or compensation payable in connection with any accident or injury sustained, (b) under Minimum Wages Act, 194, (c) under Payment of Wages Act, 1936, (d) under the Contract Labour (Regulation and Abolition) Act, 1970 by any workmen engaged for the performance of the business relating to the above contract i.e. ……
……
failing such payment of claims of workmen engaged in the above work I abide in accepting for the recovery of such claims affected from any of my assets with the Department.] (Subs. by G.O.Ms. No. 85, TR & B (B.I.(2) Dept. Dt. 12-2-1986)

(c) On the occurrence of an accident which results in the death of any of the workmen employed by the contractor or which is so serious as to be likely to result in the death of any such workmen, the contractor shall, within 24 hours of the happening of such accident, intimate in writing to the concerned Section Officer of the Public Works Department, the fact of such accident. The contractor shall indemnify Government against all loss or damage sustained by Government resulting directly or indirectly from his failure to give intimation in the manner aforesaid including the penalties or fines if any payable by Government as a consequence of Government's failure to give notice under the Workmen's Compensation Act or otherwise confirm to the provisions of the said Act in regard to such accident.

(d) In the event of an accident in respect of which compensation may become payable under the Workmen's Compensation Act, VIII of 1923 whether by the contractor or by the Government as principal it shall be lawful for the

Executive Engineer to retain out of monies due and payable to the contractor such sums of money as may, in the opinion of the said Executive Engineer, be sufficient to meet such liability. The opinion of the Executive Engineer shall be final in regard to all matters arising under this clause.

P.S. 46. Blasting :—Blasting executed by contractors in connection with Government works shall be carried out in the manner described under "Blasting operations - Instructions to contractors" of the A.P.S.S.

P.S. 47: Protection of adjoining and existing premises :—The contractor is to protect the whole of the adjoining and, where necessary, the existing premises, and all works and all fittings to all buildings on and adjoining the site against structural and decorative damage caused by the execution of these works and make good in all respects all such damage done or occurring to the same, and leave such reinstatement in perfect order. He is also to make good any damage done in the execution of the work to existing public or private footways or roadways.

P.S. 48. Permit other Workmen — Co-operation — Afford facilities :— The Executive Engineer shall have full empower to send workmen upon the premises to execute fittings and other works not included in the contract, for whose operations the contractor is to afford every reasonable facility during ordinary working hours, provided that such operations shall be carried on in such a manner as not to impede the progress of the work included in the contract, but the contractor is not to be responsible for any damage which may happen to or to be occasioned by any such fittings or other works, provided he complies with the Executive Engineer's Instructions in connection therewith, and provided that the damage is not caused by himself or his workmen.

The contractor shall, to all times, co-operate, assist, attend on, and afford facilities for such specialist as may be employed by the Executive Engineer or other works in connection with the building, allowing them, free of charge, the use of all plant, light and water installed in the works. The contractor shall also cause such special work or protect it as instructed to avoid injury during progress of the works. For failure so to protect, the contract or must make good any damage caused.

P.S. 49. Holes for water service, gas, electrical and sanitary fittings :— The contractor shall leave all holes in masonry and floors for the insertion of water services, gas and electrical connections and sanitary fittings in the exact positions indicated by the Executive Engineer during the progress of the work. These holes must be properly built up, in a workman like manner, at the contractor's cost, as soon as the fittings have been installed, in cases where the installations are made during the construction of the building and where, in the opinion of the Executive Engineer, delays in settlement of accounts will not thereby occur.

P.S. 50. Contractor's risk and Insurance :—The work executed by the contractor under the contract shall be maintained at the contractor's risk until the work is taken over by the Executive Engineer. The contractor shall accordingly arrange his own insurance against fire and other usual risks during such period unless otherwise specified:

Provided however that the contractor shall not be liable for all or any loss or damage occasioned by or arising out of acts of God, and in particular unprecedented

flood, volcanic eruption, earthquake or other convulsion of nature, invasion, the act of foreign enemies hostilities or warlike operations (before or after declaration of war) rebellion, military or usurped power.

P.S. 51. Holidays :—No work shall be done on Sundays without the written permission of the Executive Engineer or of the officer in charge of the work, and the contractor shall comply with the provisions of the Factories Act, in and so far as the same are applicable.

G.—Miscellaneous

P.S. 52. Sand and gravel :—The contractor shall not make any excavation upon the site for the purpose of obtaining gravel, sand or soil other than that shown on or implied by the drawings, except with the previous permission of the Executive Engineer.

P.S. 53. Old curiosities :—All old curiosities, relics, coins, minerals, etc., found in excavating or pulling down, shall be the property of the Government and be handed over to the Executive Engineer. Should any ancient masonry, or other old work of interest be opened up, the Executive Engineer's attention shall be called to the same before demolition or removal.

P.S. 54. Assignment or sub-letting :—The contractor shall not, without the written consent of the Executive Engineer) assign the contract nor sublet any portion of the same. Ordinarily no sub-letting will be permitted, but in case such should be permitted by the Executive Engineer, it shall in no way free the contractor from any of his responsibilities under any clause of his Preliminary Specification or of the "Articles of Agreement".

P.S. 55. Specialists :—The Executive Engineer shall, during the progress of the work, have power to select, nominate or recommend tradesmen or specialists to supply material or execute such portion of the work as he may consider desirable in the interests of the Government.

[**P.S. 56. Ratification of the orders of the Executive Engineer** :—Should the acceptance of the tender be beyond the authorized powers of the Executive Engineer ad laid down in the Public Works Department Code, the orders and decision of such Executive Engineer with regard to extension of time for completing the contract or the termination of the contract or of the employment of specialists for certain portions of the work as described in the previous clause will be subject to the ratification of the higher authority who entered into the agreement].

[Amended by G.O.Ms.No. 1007, Tr. Roads & Buildings (C) Dept., Dt. 5-11-1976]

P.S. 57. Order book :—An order book shall be kept at the Public Works Department office on the site of the work. As far as possible, all orders regarding the work are to be entered in this book. All entries shall be signed and dated by the Public Works Department Officer in direct charge of the work and by the contractor or by his representative. In important cases, the Executive Engineer or the Superintending Engineer will countersign the entries which have been made. The order book shall not be removed from the work, except with the written permission of the Executive Engineer.

H. — Date of commencement, completion, delays, extensions, suspension of work and forfeiture

P.S. 58. Date of commencement and completion:— On notification of possession of the site (or premises) being given to the contractor by letter registered for acknowledgement as provided in paragraph 10 *Supra*, he shall forthwith begin the work, shall regularly and continuously proceed with them, and shall complete the same (except for painting or other work which, in the opinion of the Executive Engineer, it may be desirable to delay) by the date of completion as defined in "Articles of Agreement", subject, nevertheless, to the provisions of extension of time mentioned in the next clause. The contractor shall under no circumstances be entitled to claim any damages from Government if he incurs any expense or liabilities to payment under the contract before the date of commencement defined above. The contractor shall have the right to withdraw from the contract and obtain refund of his security deposit is such intimation of handling over the site is delayed more than two months from the date of acceptance of the agreement by competent authority.

P.S. 59. Delays and extension of time :—No claim for compensation on account of delays or hindrances to the work from any cause whatever shall lie, except, as hereinafter defined. Reasonable extension of time will be allowed by the Executive Engineer or by the officer competent to sanction the extension for unavoidable delays, such as may result from causes, which, in the opinion of the Executive Engineer, are undoubtedly beyond the control of the contractor. The Executive Engineer shall assess the period of delay or hindrance caused by and written instructions issued by him, at twenty five per cent in excess of the actual working period so lost.

In the event of the Executive Engineer failing to issue necessary instructions and thereby causing delay and hindrance to the contractor, the latter shall have the right to claim an assessment of such delay by the Superintending Engineer of the Circle whose decision will be final and binding. The contractor shall lodge in writing with the Executive Engineer a statement of claim for any delay or hindrance referred to above, within fourteen days from its commencement, otherwise no extension of time will be allowed.

Whenever authorized alterations or additions made during the progress of the work are of such a nature in the opinion of the Executive Engineer as to justify an extension of time in consequence thereof, such extension will be granted in writing by the Executive Engineer or other competent authority when ordering such alterations of additions.

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JUDGMENT

P.S. 59. BARS A CLAIM FOR COMPENSATION ON ACCOUNT OF ANY DELAYS CAUSED BY THE DEPARTMENT

The Hon'ble Mr. Justice Jeevan Reddy

and

The Hon'ble Mr. Justice Neeladri Rao

1989 (2) ALT 372 (D.B.)

[C.M.A.No. 684/85 & C.R.P. 1581/85, Dt. 24-3-1989]

State of A.P. *Petitioner.*

vs.

M/s. Associated Engineering Enterprises, Hyderabad. *Respondent.*

Judgment

(Judgment of the Bench delivered by Jeevan Reddy, J.)

1. The appeal and the Civil Revision Petition arise from a common judgment and order of the learned Subordinate Judge, Rajahmundry, marking the award a rule of the Court and dismissing the petition filed by the appellant — State for setting aside the award.

2. An agreement was entered into between the State of Andhra Pradesh and the respondent-contractor for execution of the work of constructing approaches the rail-cum-road bridge across Godavari, at Rajahmundry. The agreement is dated 17-6-1970, and the value of the work is Rs. 70,29,925/-. A period of 42 months was stipulated for completing the work, i.e., on or before 21-12-1973. The respondent actually completed the work by 10-12-1974, after the period of contract was extended twice. The first letter of the contractor requesting for extension was addressed on 17-12-1973. Extension was granted upto 31-5-1974. By another letter, dated 22-7-1974 the contractor requested another extension till the end of August, 1974. It was granted subject to imposition of penalty of Rs. 50/- per day, after 1-9-1974.

3. After the work was completed, disputes arose between the parties with respect to the amount payable to the respondent. They were referred to the sole arbitration of the Superintending Engineer, R & B, Cuddapah Circle, in accordance with the agreement. The arbitrator made his award on 25-3-1981. Apart from interest and costs, the respondent had preferred eight claims. The arbitrator awarded some or other amount under each claim. Claim No. 9 related to interest. The arbitrator awarded interest as the rate of 15% per annum from the date of award, till the date of payment. So far as costs are concerned (claim No. 10), he directed the parties to bear their own costs.

4. The award is a non-speaking one. It does not give reasons for the several amounts awarded under each of the claims. It reads as follows:—

> "Now, I, Sri P. Vishnu Rao, Superintending Engineer, (R&B), Cuddapah Circle, Cuddapah, having taken upon myself the burden of reference and having examined and considered the statements of parties and arguments produced before me and having heard the parties, do hereby make and publish this day my award in writing of and concerning the matter referred to me.
>
> **Claim No. 1** :—This includes:
>
> (a) Compensation for delay in handing over site on Kovvur side involving Rs. 1,61,790.93 towards escalation in price index and Rs. 1,65,

150-00 towards establishment and over-head charges. Total Rs. 3,26,940.93, and (b) Compensation by way of reimbursement for extra expenditure incurred to an extent of Rs. 14,330-00 for removal and re-erection of the sheds, fencing etc., of railway contractors, Rs. 2,000-00 for removal of caving in earth and forming temporary roads, and Rs. 30,000-00 towards compensation paid to owners of buildings, huts, etc., in the area dismantling the same on Rajahmundry side.

Award :—I award the respondents shall pay to the claimants Rs. 2,81,800-00 (Rupees two lath eighty one thousand eight hundred only) towards this claim.

Claim No. 2 :—This includes:

(a) Rs. 45,000-00 towards refund of recovery made, and

(b) Rs. 38,000-00 towards reimbursement of expenditure incurred regarding load testing. Total Rs. 83,000-00.

Award :—I award that the respondents shall pay to the claimants under (a) and (b), a total sum of Rs. 83,000-00 (Rupees eighty three thousand only) towards this claim.

Claim No. 3 :—this comprises of Rs. 22,441-00 towards cost of excavation of excess depth in foundations of Rajahmundry.

Award :—I award that the respondents shall pay the claimants Rs. 22,441-00 towards the claim. (Rupees twenty two thousand four hundred forty one only).

Claim No. 4 :—This comprises of Rs. 2,000-00 being the cost of expenditure incurred for the footpath slab extension and coaxial centering.

Award :—I award that the respondents shall pay the claimants Rs. 2,000-00 (Rupees two thousand only) towards this claim.

Claim No.5 :—This comprises of Rs. 32,050-00 being payment to be made for conveyance of excess earth to embankment.

Award :—I award that the respondents shall pay the claimants Rs. 32,050-00 (Rupees thirty two thousand and fifty only) towards this claim.

Claim No. 6 :—This comprises of waiver of refund of fines imposed to an extent of Rs. 13,500-00.

Award :—I award that the respondents shall pay claimants Rs. 13,500-00 (Rupees thirteen thousand five hundred only) towards this claim.

Claim No. 7 :—This comprises of Rs. 2,000-00 being the refund of fine imposed for absence of Site Engineer on Rajahmundry side.

Award :—I award that the respondents shall pay the claimants Rs. 2,000-00 (Rupees two thousand only) towards this claim.

Claim No. 8 :—This comprises of Rs. 72,645-42 towards refund of recovery made for excess steel consumed.

Award :—I award that the respondents shall pay the claimants Rs. 72,64542 (Rupees seventy two thousand six hundred and forty five and paise forty two only) towards the claim.

Claim No.9 :—This comprises of Rs. 1,32,359-00 towards interest on amounts claimed and disputed.

Award :—This claim is rejected. However, after careful consideration of all the factors the claimants are awarded interest on the awarded amounts from the date of this award, i.e., 25th March, 1981 till the date of payment of 15% (fifteen per cent) per annum.

Claim No. 10 :—This refers to costs of the claimants in these proceedings.

Award :—Each party to the reference shall bear their costs. The claimants shall bear the cost of the stamp-paper for this award of Rs. 200-00 (Rupees two hundred only).

This award is made, signed and published by me on this, the twenty fifth day of March, one thousand nine hundred eighty one".

O.S.No. 119/1981 was filed by the respondent contractor to make the award a rule of the Court. The state filed O.P.No. 51/1981 to set aside the award under Section 30 of the Arbitration Act. No evidence was adduced by either party before the learned Subordinate Judge. After hearing the parties, the learned Subordinate Judge, as stated above, made the award a rule of the Court, and dismissed the petition filed by the State for setting it aside. The result is that the award in favour of the respondent in a sum of Rs. 5,09,436-42 Ps. with interest thereon at 15% per annum from the date of award, i.e., 25-3-1981, till the date of payment or decree, is affirmed. The present appeal and Civil Revision Petition are directed against the said judgment.

5. The learned Addl. Advocate-General, appearing for the State, disputed the validity and legality of the award in so far as claims Nos. 1, 8 and 9 are concerned. He did not dispute the amounts awarded under other claims.

6. The respondent claimed a total sum of Rs. 3,73,270-93 Ps., under claim No. 1, which was divided into two sub-heads. They are:

(a) compensation for delay in handling over site on Kovvur side involving Rs. 1,61,790-93 Ps. towards escalation in price index and Rs. 1,65,150-00 towards establishment and over-head charges, making a total of Rs.
3,26,940-93 Ps.

(b) compensation by way of reimbursement for extra expenditure incurred to an extent of Rs. 14,330-00 for removal and re-erection of sheds, fencing etc., of railway contractors;

Rs. 2,000-00 for removal of caving in earth and forming temporary roads; and

Rs. 30,000-00 towards compensation paid to owners of buildings, huts, etc., in the area dismantling the same on Rajahmundry side.

The arbitrator awarded a total sum of Rs. 2,81,800-00 under the claim without specifying the amount under each of sub-heads or each of the items under each sub-bead. Claim No. 8 is in a sum of Rs. 72,645-42. The respondent claimed refund of this amount which was recovered from him towards excess steel consumed by him. The arbitrator allowed the claim in full. Claim No. 9 pertains to grant of interest from the date of the award till the date of realization.

7. For the sake of convenience we may take up claim No. 9 first. Following the principle of the decision of the Supreme Court in *Executive Engineer (Irrigation) Galimala vs. Abnaduta Jena* (AIR 1988, SC, 1520), it has been held by two Benches of this Court in (i) C.M.A.No. 292/1938 disposed of on 15-11-1988 (consisting of Jeevan Reddy & Y. Bhaskar Rao, JJ.) and (ii) C.M.A.No. 993/1984 and batch, disposed of on 17-3-1989 (consisting of Jeevan Reddy & V. Neeladri Rao, JJ.), that the arbitrator has no power in law to award interest even for the period subsequent to the date of award. In this case, the arbitrator has not awarded interest for the period prior to the date of reference, nor has he awarded interest for the period the dispute was pending before him. He has awarded interest only from the date of the award. Since the reference to arbitration in this case is governed by Chapter II, i.e., without the intervention of the Court, the arbitrator was not competent to award the said interest. It must, accordingly, he held that the award of interest is incompetent and to that extent the award suffers from an error apparent on the face of the record. The awards is liable to be set aside to the extent it allows claim No.9.

8. We shall next take up claim No. 8. The respondent's claim in this behalf is to the following effect: According to the agreement, the steel required for the work was to be supplied by the department at a recovery rate of Rs. 877-00 per Metric Tonne. The agreement provided a margin of 5% wastage over the requirements as per schedule. Any excess quantity of steel used over and above the said 5% wastage margin was to be charged at the market value plus 10%, or the supply rate, whichever is higher. By the time the work was completed, the respondent utilized 1550-251 Metric tonnes of steel. The quantity actually used on the work was 1439-174 Metric Tonnes, accounting for an excess issue of 1111-077 Metric Tonnes. The excess thus worked out to 6.93%. For the excess wastage the Government recovered an amount of Rs. 72,645-42 Ps. This recovery was protested by the respondent, who set out his case in his letter, dated 26-2-1975. According to him 110-235 Metric Tonnes of steel was used for bolts and frames of the centering erected for execution of RCC items and that it cannot be treated as wastage. The wastage actually comes to 0-842 Metric Tonnes, which is negligible. However, the Government neither responded to this representation nor did it refund the amount recovered. The respondent, therefore, claimed refund of this amount.

9. In their counter the Govt. disputed the respondent's claim. They denied that the steel used for bolts and frames of the entering erected for RCC items is a *bona fide* use of the steel supplied by the Government. If any such material is required the contractor has to procure his own steel therefor. The matter was indeed considered by the Government, which refused to accept any wastage beyond 5%.

10. Condition 5.0.4 of the relevant Section of the agreement reads as follows:-

"**5.0. 4** :—Cement and steel will be supplied in sufficient quantity as when required as is consistent with the out turn of the work. In case of non- availability of these materials, the contractors shall make their own arrangements at their own cost. The department shall not be held liable for any loss that is likely to be caused to the contractor on account of delay in supply. In case of delay the contractor shall be eligible only for suitable extension of time. The scrap or cut pieces of steel left over shall not be taken back by the department. The loss, if any, on account of these scrap or cut pieces shall be borne by the contractor. The recovery of steel supplied by the Department shall be made for the quantities issued. The rates to be quoted by the contractor shall be for the supply and fabrication of steel including probable wastage upto 5% over the requirement as per schedule.

Recovery for any excess quantity used over 5% wastage, shall be made at the market value plus 10% or supply rate whichever is higher. The contractor shall get binding wire required for use on the work at his own cost ....".

The preceding conditions in the same Section says that the cement, steel, and bitumen required for the work shall be supplied by the department at the specified rates, and that the cost thereof shall be recovered from the contractor's bills and other dues. The contractor was obligated to use the material exclusively for the purpose of the work, and to make good any loss, damage, or wastage that may take place from whatever cause. Condition 5.0.5 states that "the recovery of steel supplied by the Department shall be made for the quantities issued". It says further that "the scrap or cut pieces of steel left over shall not be taken back by the Department" and that "the loss, if any, on account of these scrap or cut pieces shall be borne by the contractor". It also provides that recovery for any excess quantity used over and above 5% wastage shall be made at the rates specified. Now, in the case before us there was no dispute as to the quantity issued. The only dispute was whether the steel used for bolts and frames of the centring erected for execution of RCC items should be treated as wastage, or should be treated as having been utilized for the purpose of the work. In the absence of any specific provision in the agreement that steel used for bolts and frames shall not be treated as steel used for the purpose of the work, we are unable to say that the arbitrator was not competent to allow the said claim of the contractor. In the absence of any specific provision in that behalf it was open to the arbitrator to decide the issue taking an overall view of the several terms and conditions of the agreement. We are, therefore, unable to say that the arbitrator acted contrary to, or outside the terms of contract in allowing the said claim.

11. We shall not take up the main dispute between the parties. It centres round claim No. 1. The respondent contractor's claim under claim No. 1, stated briefly, is this: Though the site for the approach on Rajahmundry side was handed over well in time there was abnormal delay in handing over the site on Kovvur side. The respondent addressed several letters to the appropriate authorities in this behalf, but to no effect. These was a delay ranging between two months to 26 months in handing over the piers. The particulars of delays and the compensation claimed by the respondent-contractor are the following:-

Compensation Particulars

	Location	*Date on which site is to be handed over*	*Date on which site is actually handed over*	*Delay*	*Difference in price index in points*	*Difference in cost Rs.*
(a)	K23 to K12	22-6-1970	End of 12/1970	6 months	12(7.7%)	11,057.80
	K11	6/71	8/71	2 months	9(4.89%)	7,022.40
	K10	6/71	10/71	4 months	14(7.4%)	10,627.00
	K9	6/71	1/72	6 months	13(6.9%)	9,909.00
	K8	6/71	4/72	10 months	19(9.79%)	14,059.30
	K1 to K3	1/72	1/72 to complete foundations and 5/73 to do substructure & superstructure.	17 months	34(15.31%)	21,987.00
	K4 & K3	1/72	9/73	21 months	39(17.18%)	24,672.00
	K5 & K6	1/72	10/73	22 months	45(19.3%)	27,716.00
	K7	1/72	2/74	26 months	60(24.19%)	34,739.00
(b)	ADD 5% for Establishment and Overheads on Rs.33,03,000/-					1,65,150.00
(c)	ADD for removing and re-erecting sheds, fencing, etc., of Railway contractors as per Annexure I.					14,330.00
(d)	ADD for removing caves in earth and forming Temporary Road					2,000.00
(e)	ADD compensation paid to owners of buildings, huts, etc., in the area and dismantling the same on the Rajahmundry side.					30,000.00
					Rs.	3,73,270.00
						OR
					Rs.	3,73,271.00

The Government disputed the respondent's claim. It relied upon the letters of the respondent, dated 23-1-1970 and 13-3-1970, and the letter of the Chief Engineer, dated 8-3-1970 in this behalf. Under these letters the time for delivering the sites/piers was postponed. It was also stated that because of the said delay, the period of contract will be extended by six months. The Government's contention, therefore, is that there is no basis of claiming any compensation on account of the delays in handling over the sites. It submitted that there were several delays on the part of the contractor in carrying out the work, and that he did not keep up to the schedule of work. Since no compensation was contemplated either by the

agreement or by the letters aforesaid, it submitted, the contractor cannot claim any compensation. Reliance was placed upon Section 55 of the Contract Act, and the several terms and conditions of the agreement, including Clauses 58 and 59 of the A.P. Detailed Standard Specifications (APDDS). It denied that the contractor paid any moneys to the owners of the structures, as claimed by him, and submitted that he is not, therefore entitled, to any compensation on that account also.

12. The agreement entered into between the parties contained, *inter alia*, clauses 4 and 5, which read :—

> "(4) Time shall be considered as of the essence of the agreement and the Contractor hereby agrees to commence the work as soon as the agreement is accepted by the competent authority as defined by the Madras Public Works Department Code and the site (or premises) is handed over to him as provided for in the said conditions and agrees to complete the work within (42) Forty two months from the date of such handling over of he site (or premises) and to show progress as defined in the tabular statement, "Rate of progress" below, subject nevertheless to the provisions for extension of time contained in Clause 59 of the Standard Preliminary Specification.
>
> (5) The said condition shall be read and construed as forming part of this agreement and the parties hereto will respectively abide by and submit themselves to the conditions and stipulations and perform the agreements on their parts, respectively……..".

The 'Preliminary Specifications' mentioned, in APDSS constitute the terms of agreement between the parties, Clause 58 of Preliminary Specifications says that on notification of possession or the site being given to the contractor, he shall begin the work forthwith and shall regularly and continuously proceed with the work and complete the same as provided in the agreement subject, nevertheless, to provision of extension of time, mentioned in the next clause. Clause 59, which is relevant for our purposes, reads thus:—

"59. Delays and extension of time :—x x x"

Clause 60 says that time shall be considered the essence of the contract, and if the contractor is guilty of delay in commencing or carrying on the work and fails to improve inspite of notice, it shall be lawful for the Executive Engineer to determine the contract, which shall entail forfeiture of security deposit and other amounts. It shall open to the Government to have the balance of the work carried out by another contractor at the risk and cost of the contractor.

13. Before proceeding further, it would be appropriate to refer to certain other relevant material. In his letter, dated 23-1-1970 the respondent-contractor wrote to the Superintending Engineer, Eluru, stating *inter alia* : "12. We agree that compensation need not be paid if the delay in handling over the site occupied by the Railway is not more than 3 months". It is clear that certain portions of the site which were to be handed over to the respondent were occupied by the railway in connection with its own work; the agreement between the parties was that as soon as the Railway vacated its occupation, the site shall be handed over to the contractor within three months. The next letter is dated 8-3-70 from the Chief

Engineer, PWD, Hyderabad, to the respondent, in which it was stated, *inter alia*, "12. (a) : In your letter reference (3) cited (reference is to the respondent's letter, dated 23-1-1970 referred to above), you have agreed for not claiming any compensation for the delay in handing over site at piers 14 to 21 on Kovvur side beyond middle of 71" if the delay is not more than 3 months. You are informed that the last 6 spans can be handed over in the beginning of 1972 …… This letter is rather ambiguous. It speaks of delivery of piers 14 to 21 "beyond middle of 1971". Suffice it to note that as soon as the Railways delivered possession of the said sites, they were to be handed over to the contractor within three months.

14. The third letter is dated 13-3-1970 from the respondent to the Chief Engineer. In this letter it was stated, *inter alia*, "(12)(a) : We note that the site for piers 14 to 21 on Kovvur side will be handed over ii3 the beginning of 1972. Since there is a delay of 6 months in handing over the site, the time of completion of the work on Kovvur side will have to be extended by 6 months …… " This letter shows that the site for piers 14 to 21 on Kovvur side was to be delivered in the beginning of 1972, which meant a delay of six months over the time agreed earlier, and in lieu thereof it was agreed that the period of contract shall be extended by six months.

15. Now, the contention of Sri P. Ramchandra Reddy, learned council for the respondent-contractor, is that in as much as admittedly, there was delay in the handing over the sites on Kovvur side, the cost of work went up and the contractor is entitled to be compensated therefor. According to him, the consumer price-index went up by 24.19% between June, 1971 and February, 1974. It is on this basis that he claimed Rs. 1,61,790/- by way of compensation. To this he added establishment and overhead charges calculated at the rate of 5% of the total cost of Viaduct on Kovvur side. Some other minor claims were also made. Mr. Ramachandra Reddy says, because of the delay in handing over the site, the period of contract had to be extended, which meant extra cost to the respondent, and it must be paid for by the Government which is responsible for the delay. The contention of the learned Addl. Advocate-General, on the other hand, is that no such compensation is contemplated, or provided for, either by the contract, or by the correspondence between the parties. Indeed, the letter of the respondent, dated 13-3-1970 clearly speaks of extension of the period of contract by six months in lieu of the delay in handing over the site for piers 14 to 21. Even if there is any delay in handing over the site, no claim for compensation can be made since any such claim is barred b Clause 59 of the APDSS. It is also submitted that the contract does not provide for any such compensation, and hence the arbitrator, who had to operate within the four-corners of the contract, had no power to award any compensation on this account.

16. The first aspect to be noticed in this behalf is that the contractor did not choose to terminate the contract on account of the Government's delay in handing over the sites. He requested for, and agreed to extension of the period of contract, and completed the work. It is not the respondent's case that while agreeing to extension of the period of contract he put the Government on notice of his intention to claim compensation on that account. Section 55 of the Contract Act reads thus :—

> ***"55. Effect of failure o perform at fixed time, in contract in which time is essential*** :—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promise, if the intention of the parties was that time should be of the essence of the contract.
>
> If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned, to him by such failure.
>
> If, in case of a contract voidable on account of the promisor's failure to perform his promise at the agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so".

According to this Section it was open to the respondent to avoid the contract on account of the Government's breach of promise to deliver the sites at a particular time ; but, he did not choose to do so, and accepted the delivery of sites. at a time other than what was agreed upon between them earlier. If so, he is precluded from claiming compensation for any loss occasioned by such delay, unless,, of course, at the time of such delayed acceptance of the sites, he had given note to the Government of his intention to claim compensation on that account. It must be remembered that this provision of law was specifically referred to, and relied upon in the counter filed by the Government to the respondent's claim before the arbitrator. But, it is not brought to our notice that the contractor bad given such a notice (contemplated by the last sentence in Section 55). We must make it clear that we are not entering into the merits of the decision of the arbitrator. What we are saying is that such a claim for compensation is barred by law, except in a particular specified situation—and inasmuch as such a particular specified situation is not present in this case, the claim for compensation is barred. It is well settled that an arbitrator, while making his award, has to act in accordance with law of the land, except in a case where a specific question of law is referred for his decision.

17. Even apart from Section 55, we are of the opinion that the arbitrator had no power to award compensation as claimed by the respondent. Clause 59 of the APDSS specifically bars such a claim. We have set out the clause in full hereinbefore. The meaning of the said clause was considered by a Bench of this Court—of which one of us (Jeevan Reddy, 3.) was a member—in A.A.O. No. 677/ 81 & C.R.P.No. 385/1982 disposed of on 19-4-82. It was held:

> "Coming to Clause 59 of the preliminary specifications of "APDSS", it provides that neither party to the contractor shall claim compensation on account of delays or hindrances to work from any cause whatever". That

the delays and hindrances contemplated by Clause 59 include the stoppage, hindrances and delays on the part of the department as well, is clear from the following sentence in this first part of the said clause, viz., "the Executive Engineer shall assess the period of delay or hindrances caused by any written instructions issued by him, at 25% in excess of the actual work period so lost". Indeed, the second para of the clause also contemplates delays and hindrances being caused on account of the failure of the Executive Engineer to issue necessary instructions. In such a case, the contractor has a right to claim the assessment of such delay by the Superintending Engineer of the Circle, whose decision is declared to be final and binding on the parties. But, any such claim has to be lodged in writing to the Executive Engineer within fourteen days of the commencement of such delay, or hindrances, as the case may be. We find it difficult, therefore, to say that Clause 59 has no application to the present case. The words "from any cause whatever", occurring Clause 59, are wide enough to take in delays and hindrance of all types, caused by the department, or arising from other reasons, as the case may be. Thus, by virtue of Clause 59, the contractor is precluded from claiming any compensation on account of delays or hindrances arising from any cause whatever, including those arising on account of the acts or omissions of the departmental authorities ……".

In this context, we must refer to two conflicting decisions of this Court, though they are not strictly relevant in the facts of this case. Since they are relied upon by the parties before us, It would be appropriate to refer to them briefly. In these cases the question arose whether a contractor is entitled to claim escalation charges on account of delay on the part of the Government in handing over the site. The first decision is in *Chief Engineer, Panchayatraj Department vs. B. Balaiah*, (1985 (1), APU 224). The Bench held that inasmuch as the contract between the parties does not provide for payment of escalation charges, awarding an amount on account of escalation charges is in excess of the arbitrator's jurisdiction, and is void. In the later decision of another Bench, in *State of A.P. vs. S. Shivaraj Reddy*, (988(2), APLJ 465), a different view was taken. The claim in this case pertained to the work done beyond the contract period. The Court held that the contract or must be paid as per the standard specification rates, for the reason that the Government had defaulted in handing over the site at the time agreed. It was held that such a claim is not barred by Clause 59 of APDSS. When the decision of this Court in C.M.A. No. 677/8 1 and C.R.P. No. 385/82, dated 19- 4-1982 was brought to the notice of this Bench, it distinguished the same holding that was a case where the claim was for compensation, whereas in the case before them the claim was not for compensation, but for payment as per the standard specification rates for the reason that the site was not handed over to the contractor at the agreed time. This is what the Bench said:

"In our view Section 59 has no application. It pertain to compensation. In the present case, we are concerned with the rates for the work done. The contractor is not claiming any compensation for loss or damage or loss of profit which he would have made but for the delay committed by the department. What is asked for here is that beyond the contractual date he must be paid as per the standard specification rates as the site was not handed

over in time due to the fault of the department itself. We do not think P.S. 59 has any application at all. The decision of the Division Bench referred to by the learned Government Pleader has as relevance in the present context. In this Division Bench case, the contractor having agreed for reduction of rates and executing the final agreement, demanded escalation of rates complaining that the department committed delays and defaults. The Government relied upon Clause 59 and Foot Note 7 of Schedule 'A' which prohibited payment of rates at the enhanced rates even during the extended period. The Division Bench negatived the claim of the contractor on the ground that the Foot Note 7 is clear to the effect that the agreed rate should prevail even during the extended period of the agreement. The judgment of the Division Bench was more based on the specific prohibition contained in Foot Note 7 of Schedule 'A' of the agreement therein. There is no such clause in the present agreement. It is not a case of escalation of rates. Here the major portion of the site was handed over beyond the period of agreement during which period the cost of labour and other materials have gone up. Without the site was impossible for the contractor to complete the work and what the Arbitrators have done is only to permit the contractor to claim the rates prevalent as per the S.S.Rs. in force. In our view, it is not prohibited either under the APDSS Rules or by any clause in the agreement ……..".

We must clarify that, so far as the case before us is concerned the claim of the respondent-contractor is not for escalation of rates, nor is it a claim for payment of rates as per the standard specification rates in force for the period beyond the originally agreed contract period. If so, the decision in *State of A.P. vs. S. Shivaraj Reddy (3 Supra)* has no application herein. In the case before us, the claim is a pure and simple claim for compensation. The amount claimed has been worked out on the basis of the rise in consumer price-index, and also on account of establishment and overhead charges. It would, therefore, be a case squarely governed by the principle of the decision in A.A.O. No. 677/81 & C.R.P. No. 385/82, dated 19-4-1982.

18. The learned Addl. Advocate-General also relied upon the decision of the Supreme Court in *Continental Construction Co., Ltd. vs. State of M.P.,* (1988 (3), SCC 82 ; AIR 1988, SC 1166). In that. case the contract was entered into between the State of Madhya Pradesh and the applicant before the Supreme Court, for construction of a bund. The work could not be completed within the stipulated time because of the delays on the part of the State in allotment of work and discharge of its obligations under the contract. On account of this, the appellant incurred unforseen extra expenditure, which claim was referred to arbitration. The State denied that there was any delay on its part. Apart from that, it submitted that the appellant's claim was barred by Clause 3.3.15 of the contract, which read: "3.3.15: Clause 15 *: Time limit for a unforeseen claims* : Under no circumstances whatever shall the contractor be entitled to any compensation from Government on any account unless the contractor shall have submitted claim in writing to the Engineer-in-charge within one month of the cause of such claim occurring …… ". The contractor did not avoid the contract on the ground of delays or defaults on the part of the State. He contemplated the work. On these facts, the Supreme Court held:

> "The arbitrator misconducted himself in allowing the claim without deciding the objection of the State. In view of the specific clauses, the appellant was not legally entitled to claim for extra cost. The decision of this Court in *Seth Thawardas vs. Union of India* (AIR 1955, SC 468) is of no avail on this point. If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction, and indeed essential for him to decide the question incidentally. The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do so what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the Court provided his error appears on the face of the award. In this case, the contractor having contracted he cannot go back to the agreement simply because it does not suit him to abide by it. The decision of this Court in *M/s. Alopi Prasad vs. Union of India* (AIR 1960, SC 588) may be examined. There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contractor to ignore the express covenants thereof, and the claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vogue plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the Courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous …….. ".

When it was argued by the appellant that since the Award was a non- speaking Award and no mistake of law was apparent on the face of the record, the Supreme Court repelled the same holding that "this being a general question, in our opinion, the District Judge rightly examined the question and found that the appellant was not entitled to claim for extra cost in view of the terms of the contract and the arbitrator misdirected himself by not considering this objection of the State before giving the award...". Reference was also made to the decision of the Privy Council in *Champsey Bhara & Co. vs. Jivraj Ballo Spinning & Weaving Co. Ltd.* (AIR 1923, SC 6), where it was held that the award of an arbitrator can be set aside on the ground of ah error apparent on the face of the record only where the error is apparent either on the face of the award or from any document incorporated in it. After referring to several authorities, the Supreme Court held that" the District Judge was entitled to examine the contract in order to find out the legality of the claim of the appellant regarding extra cost towards rise in price of material and labour", and observed further, "as was pointed out by the learned District Judge, Cls. 2.16 and 2.4 stipulated that the contractor had to complete the work inspite of rise in prices of materials and also rise in labour charges at the rates stipulated in the contract. There was a clear finding of the arbitrator that the contract was not rendered ineffective in terms of Section 56 of the Contract Act due to abnormal

rise in prices of material and labour. This being so and the contractor having completed the work, it was not open to him to claim extra cost towards rise in prices of material and labour. The arbitrator misconducted himself in not deciding this specific objection raised by the State regarding the legality of extra claim of the appellant ……..".

19. Applying the principal of the above decision to the facts of the case before us, it must be held that Clause 59 bars a claim for compensation on account of any delays or hindrances caused by the department. In such a case, the contractor is entitled only to extension of the period of contract. Indeed, such an extension was asked for, and granted on more than one occasion. (The penalty levied for completing the work beyond the extended period of contract has been waived in this case). The contract was not avoided by the contractor, but he chose to complete the work within the extended time. In such a case, the claim for compensation is clearly barred by Clause 59 of the APDSS which is, admittedly, a term of the agreement between the parties.

20. Mr. P. Ramachandra Reddy, learned counsel for the respondent- contractor, however, relied upon certain decisions as laying down a contrary proposition, to which we should now refer. The first decision relied upon is in *P.M Paul vs. Union of India*, (1989(1), Scale 221). In this case, the appellant-contractor urged that there was delay on the part of the respondent-Government in handing over the site, and that, on that account, he has incurred extra cost which he must be reimbursed. His claim was rejected, as also his request to refer the same to arbitration. Thereupon, it is said, the appellant-contractor abandoned the work. The dispute was thereafter referred to the arbitrator. One of the claims put forward by the appellant-contractor and allowed by the arbitrator related to the loss caused to the contractor due to increase in prices of material, cost of labour and transport during the extended period of contract. The respondent-State submitted that no such claim is contemplated, or provided for, by the agreement between the parties and hence the arbitrator was not competent to allow the said claim. The Supreme Court observed that the dispute referred to the arbitrator, *inter alia* was as to who is responsible for delay and what are the repercussions of the delay in completion of the work and how to apportion the consequences of such responsibility. It was observed: "After discussing the evidence and the submissions the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20% of the compensation under Claim 1; he has accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator and hence, the arbitrator has not misconducted himself in awarding the amount as he has done Once it was found that the-arbitrator had jurisdiction to find that there was delay in execution-of the contract due to the conduct of the respondent, the respondent, was liable for consequence of the delay, namely, increase in prices. Therefore, the arbitrator had jurisdiction to go into this question. He has gone into that question and has awarded as he did. Claim 1 is not outside the purview of the contractor. It arises as an incident of the contract and the arbitrator has jurisdiction ……". It must, however, be noticed that in this case the contract did not contain a clause like contained in Clause 59 of the APDSS. Where a similar clause was found as in the case *Continental Construction Co. Ltd. vs. State of Madhya Pradesh (4 Supra)* the Supreme Court held clearly

that the arbitrator had no jurisdiction. It must be noted that the award in this case was a speaking/reasoned award.

21. Mr. Ramachandra Reddy placed strong reliance upon the decision of the Supreme Court in *M/s. Sudarsan Trading Co. vs. The Government of Kerala & another*, (1989 (1), Scale 395) Three questions were considered in this case, namely, (i) when is an award a speaking award; (ii) in the case of a non-speaking award, how and to what extent can the Court go to determine whether there is an error apparent on the face of the award; and (iii) to what extent can the Court examine the contract between the parties which is not incorporated or referred to in the award? We are not concerned with the first question in this case. The second and third questions are, however, relevant. On the second question arising before it, the Supreme Court referred to the decision of the Privy Council in *Champsey Bhara & Co. vs. Jivraj Balloo Spinning & Weaving Co. Ltd. (5 Supra)* and held that an award can be set aside on the ground of an error apparent on the face of the award only where the award, or any document incorporated therein contain some legal proposition which constitutes the basis of the award, and which is erroneous. It was observed that in the case of a non-speaking award it is not open to the Court to probe the mental process of the arbitrator and speculate as to what impelled the arbitrator to arrive at the conclusion which he did. In this connection, the Court referred to its earlier decision in *M/s. Alopi Parshad vs. Union of India*, (AIR 1960, SC 588), wherein it was held that an award can be set aside on the ground of an error apparent on the face of it, when the reasons given for the decision either in the award or in any document incorporated in it, are based upon a legal proposition which is erroneous. The other principle enunciated in the said decision to the effect that "an award which ignores express terms of the contract, is bad" was also affirmed. It was pointed out that the ground of "error apparent on the face of the award" is distinct from the ground that the arbitrator exceed his jurisdiction. It was pointed out that while in the latter case the Court can look into the arbitration agreement to determine whether the arbitrator exceed his jurisdiction, in the former case the Court must confine its attention only to the award and to any other document or material incorporated therein. It was held that for determining whether there is an error apparent on the face of the award the Court has no jurisdiction to look beyond the award and the documents, if any, incorporated therein. Now, in the case before us the question is not whether the award suffers from an error apparent on its face, but whether the arbitrator has exceeded his jurisdiction in awarding compensation when the agreement specifically prohibits the same. In such a case, it is open to the Court to look to the terms of the agreement between the parties.

22. Mr. P. Ramchandra Reddy also relied upon the decisions of the Supreme Court in *State of Orissa vs. M/s. Lall Brothers* (AIR 1988, SC 2018) and *Neelkantan & Brothers Construction vs. Superintending Engineer, National Highways, Salem*, (AIR 1988, SC 2045) but which, in our opinion, are not quite relevant to the issue before us. In the first case it was held that a non-reasoned Award, which awards a lumpsum without specifying the amount awarded under each claim/count is still good between the parties. It is not open to the Court it was held to set it aside by speculating as to the reasons which must have impelled the arbitrator to

come to the conclusion which he did, nor is it permissible for the purpose to establish by a process of inference and argument that the arbitrator he committed some mistake in arriving at his conclusion. In the second case, it was held that a non-reasoned award which contains no legal proposition which can be said to constitute the basis of the award cannot be interfered with by the Court.

23. We are, therefore, of the opinion that the decisions relied upon by Mr. Ramachandra Reddy do not lay down the proposition that where an award is questioned on the ground that the arbitrator had no jurisdiction to entertain a claim by virtue of the terms of the contract the court is precluded from looking to the terms of the contract. On the contrary such a power is expressly recognized in one of the decision cited, viz., *Sudarsan Trading Company vs. The Government of Kerala & another (7 supra)*. Further, as held by the Supreme Court in *Continental Construction Co., Ltd. vs. State of Madhya Pradesh (4 supra)*, where the argument bars a particular claim, the arbitrator has no jurisdiction to award any amount towards such a claim, and that any such award would be incompetent and void.

24. There is yet another objection to the competency of the arbitrator to award any amount under claim No. i, in this case. A would be evident from the claim of the respondent-contractor (extracted herein before), the claim for compensation pertains (except in this case of one pier/K7) to the period of contract. The period of contract stipulated in the agreement expired on 21- 12-1973. Out of 9 items, mentioned in the Table (containing particulars of compensation), 8 items pertain to the original period of contract itself. Moreover, in the case, it was agreed between the parties even before the formal agreement was executed that the period of contract shall be extended by six months, which is evident from the respondent's letter, dated 13-3-70 referred to above. (The formal contract was executed in this case on 17-6-70). It must, therefore, be assumed that in this case the period of contract expired on 21-6-74. In any event, even if we take the original period of contract, the claim for compensation to a very major extent pertains to the original period of contract. The question is whether any claim for compensation is permissible for the original period of contract? It was held by a Bench of this Court of which one of us (Jeevan Reddy, 3.) was a member in A.A.O.No. 786/1986, dated 1-12- 1988, that such a claim is not permissible by virtue of Clause 59 of the APDSS. We may also mention that in this decision the Bench distinguished another decision of this Court in *State of Andhra Pradesh vs. R. V. Rajaram*, (1988(1), APLJ 536), where the contractor's claim on account of statutory increase in the minimum wages and other categories of labour was allowed by the arbitrator and upheld by the Court. We need not, whoever, refer to the facts and principles of the said decision since in the case before us the claim is not similar to the one in the said case. As already stated, in the case before us the claim is squarely one for compensation which is worked out on two bases, viz., (i) rise in consumer's price-index, and (ii) establishment and overhead charges and a large portion of the claim pertains to the original period of contract itself.

25. We may also state that it is not possible for us to apportion the amount awarded for the original period of contract and the amount awarded for the extended period, even assuming that the arbitrator was competent to make such an award for the extended period of contract.

26. For the above reasons, we are of the opinion that the arbitrator exceeded his jurisdiction in awarding the amount of Rs. 2,81,800/- under claim No. 1. The award of the said amount is liable to be deleted from the Award.

27. Accordingly, the Civil Miscellaneous Appeal and the Civil Revision Petition are allowed in part, the amount awarded by the arbitrator under claim No. 1 shall be deleted. It is also held that the arbitrator had no power, in law to award interest for the period commencing from the date of Award till the date of decree of the Civil Court. However, the respondent-contractor shall be entitled to interest from the date of the decree (i.e., from 19-2-1985) at the rate of 15% per annum till realization. We are awarding interest at the rate of 15% per annum since that happens to be the rate which was adopted by the arbitrator in the Award. There shall be no order as to costs.

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JUDGMENT

CLAIM FOR COMPENSATION — WAWER OF RIGHT (P.S. 59) BY THE DEPARTMENT

1996 (3) ALT 53 (D.B.)

The Hon'ble Mr. Justice P. Venkatarama Reddy

and

The Hon'ble Mr. Justice G. Bikshapathy

M. Gangareddy *Petitioner*.

vs.

State of A.P. *Respondent*.

Judgment

(Judgment of the Bench delivered by Venkatarama Reddy, J.)

Held:

In *Prasad and Company's* case [1995 (3) ALT 537], the Division Bench, of which one of us (Venkatarama Reddi, J.) was a member, held that escalation over and above the agreed rates during the currency of the agreement period was clearly barred by P.S. 59 of APDSS. In *Ramalinga Reddy 's* case (1994 (5) SCALE 67), the Supreme Court had gone a step further and held that the claim for the payment of extra rate even for the workdone beyond the agreement period was unsustainable in the light of the specific prohibition contained in Clause 59. However, it is not discernible from the Judgment whether the prolongation of the contract was for reasons attributable to the contractor or on account of breach of contractual obligations by the employer as in the instant case. Be that as it may, even assuming that Clause 59 would have in the normal course come in the way of the petitioner claiming escalation in rates for the work done beyond the contractual period, the special facts and circumstances of this case stand apart and do not attract the bar of Clause 59. We agree with the learned counsel for the contractor that the immunity conferred by the exclusionary clause 59 must be deemed to have been waived and the Department is estopped from taking shelter under it. (Para 8)

On the facts of the case, it can be reasonably said that there was waiver f the right to enforce Clause 59. Alternatively, we hold that the arbitrator's finding that there was an assurance to pay the extra rates cannot be said to be perverse or vitiated by an error of law apparent on the face of the award. The assurance may not be direct or express but it is possible to take the view that there was an implied promise to pay the extra rates for the work done beyond the agreement period notwithstanding Clause 59. The promise had emanated from a competent officer who signed the agreement itself. If the view taken by the arbitrator is reasonably possible or plausible, we cannot interfere with the award on the ground of error apparent on the face of the award. We, therefore, uphold the award in regard to Claim No. 1 (e) and the learned Additional Judge, City Civil Court was justified in confirming the award to this item. (Para 11)

Further see also *S.E., Irrigation and another vs. M/s. Progressive Engineering Co. Hyd and others, 1997 (2) ALT 701 (D.B.)*

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JUDGMENT

PROHIBITION OF PAYMENT OF ANY AMOUNT OVER AND ABOVE THE CONTRACTUAL RATE IS APPLICABLE TO COMPENSATION BUT NOT IN THE RATES FOR THE WORK DONE

It was held by a Division Bench of A.P. High Court, in *State of A.P. vs. S.S. Reddy*, reported in 1988(2), A.P.L.J., pages 465 to 469, consisting of Mrs. Justice Amareswari and Bhaskar Rao, J., that Clause 59 pertains to compensation. If the present case, we are concerned with the rates for the work done. The Contractor is not claiming any compensation for loss or damage or loss of profit which he would have made but for the delay committed by the department. What is asked for here is that beyond the contractual date he must be paid as per the standard specification rates as the site was not handed over in time due to the fault of the department itself. We do not think P.S. 59 has any application at all." (Para 9)

"The major portion of the site was handed over beyond the period of agreement during which period the cost of labour and other materials have gone up. Without the site it was impossible for the contractor to complete the work and what the Arbitrators have done is only permit the contractor to claim the rates prevalent as per the S.S. Rs. in force. In our view, it is not prohibited either under the A.P.D.S.S. Rules or by and clause in the agreement". (Para 9)

LAPSE ON THE PART OF THE DEPARTMENT IN NOT HANDING OVER THE SITE TO THE CONTRACTOR TN FULL AT A TIME - CONTRACTOR IS ENTITLED TO BE PAID AT THE STANDARD SCHEDULE OF RATES TN FORCE

Held :—After the lapse of more than 2 years from the stipulated date of completion namely, 13-11-1979, extension of time was granted by the department upto September, 1982. This clearly shows that there was lapse on the part of the department in not handing over the site to the Contractor in full at a time, since

there is an increase in the cost of labour, material and machinery during the period beyond the agreement, the claimants are entitled to be paid at the standard schedule of rates in force. (Para 12)

JUDGEMENT

(Judgment of the Bench delivered by Amareswari, J.)

1. These three appeals arise out of a common order of the IInd Additional Judge, City Civil Court, Hyderabad, dated 27-12-1983. The matter arises under arbitration proceedings.

2. O.S.No. 1557 of 1982 is filed under Sections 14 and 17 of the Arbitration Act for making the award the rule of the Court and O.P.No. 377 of 1983 is filed under Sections 30 and 33 of the Indian Arbitration Act for setting aside the award.

3. The Executive Engineer, Roads and Buildings Department entered into an agreement with Shivraj Reddy, (3rd defendant in O.S.No. 1557 of 1982) on 14-7-1978 formation including metalling and Block topping of inner ring road at Uppal junction. As disputes arose between the parties, the matter was referred to a panel of Arbitrator as per the terms of the agreement. The Contractor made as many as 7 claims. The Arbitrators allowed Claims 1(a) and 1(b) and rejected the other claims by their award, dated 13-9-1982, Ex. A-i. Thereafter, the Arbitrators filed O.S.No.l557 of 1982 for making the award the rule of the Court. The award is contested by the 1st and 2nd defendants.

4. The Contractor filed a written statement that the award should be made the rule of the Court. The trial Court, after considering the material on record made the award the rule of the Court and dismissed the O.P. filed by the 1st and 2nd defendants to set aside the award.

5. Aggrieved thereby, the State preferred two appeals C.M.A. Nos. 470 and 471 of 1984 and Contractor preferred one C.M.A. No. 820 of 1984. The main contention of the appellant-Government is that the Arbitrators exceeded their jurisdiction in accepting claims 1(a) and 1(b) and the trial Court should have set aside the award to that extent.

6. In this case tenders were invited for the work in early 1977. Tenders were made by the 3rd defendant on 2-5-1977 and the final agreement was concluded on 14-10-1978. On 27-11-1978 the Department instead of handing over the entire site in one stretch, only a portion was handed over to the Contractor with an assurance that the remaining portion will be handed over shortly. The remaining site was handed over in bits on 23-7-1980 and on 11-12-1981. That was more than 2 years from the stipulated date of completion on 26-11-1979. The Contractor made a claim under head 1(a) for the work done upto the period of agreed date of completion namely, 26-11-1979 for payment at the rates agreed to in Schedule ‘A’ and for quantities of work done beyond the agreed date of 26-11.1979 upto 31-12-1981 at the standard specification rates in force during the period of execution plus over all tender percentage amounting to Rs. 2,43,800/-. The Arbitrators accepted the claim of the Contractor in this regard and granted rates as originally agreed for the work done upto the period of originally agreed date of completion

and for the work done thereafter at the standard specification rates in force during the period of execution of further work beyond the date of completion pins over all accepted percentage.

7. The main submission of Miss. V. Lakshmi Devi, the learned Counsel for the appellant is that Clause 59 of the Andhra Pradesh Detailed Standard Specification Rules prohibits payment of any amount over and above the contractual rate. In support of this contention, she relied upon a decision of the Division Bench of this Court in C.M.A. No.677 of 1981 and C.R.P. No.385 of 1982, dated 19-4- 1982.

8. P.S. 59 of the Andhra Pradesh Detailed Standard Specifications is as follows:—

"P.s. 59. Delays and extension of time :—x x x "

9. In our view P.S. 59 has no application. It pertains to compensation. In the present case, we are concerned with the rates for the work done. The Contractor is not claiming any compensation for loss or damage or loss of profit which he would have made but for the delay committed by the department. What is asked for here is that beyond the contractual date he must be paid as per the standard specification rates as the site was not handed over in time due to the fault of the department itself. We do not think P.S. 59 has any application at all. The decision of the Division Bench referred to by the learned Government Pleader has no relevance in the present context. In this Division Bench case, the contractor having agreed for reduction of rates and executing the final agreement, demanded escalation of rates complaining that the department committed delays and defaults. The Government relied upon Clause 59 and Foot Note 7 of Schedule 'A' which prohibited payment of rates at the enhanced rates even during the extended period. The Division Bench negatived the claim of the Contractor on the ground that the Foot Note 7 is clear to the effect that the agreed rate should prevail even during the extended period of the agreement. The judgment of the Division Bench was more based on the specific prohibition contained in Foot Note 7 of Schedule 'A' of the agreement therein. There is no such clause in the present agreement. It is not a case of escalation of rates. Here the major portion of the site was handed over beyond the period of agreement during which period the cost of labour and other materials have gone up. Without the site it was impossible for the contractor to complete the work and what the Arbitrators have done is only to permit the contractor to claim the rates prevalent as per the S.S.Rs. in force. In our view, it is not prohibited either under the APDSS Rules or by any clause in the agreement.

10. In *Chellappan vs. Kerala State Electricity Board*, (2) AIR 1975, Supreme Court, Page 230, it was held that the award can be set aside only when it is vitiated by an error of law apparent on the face of the record.

11. In *Jeevarai Bai vs. Chintamani Rao*, (3) AIR 1965, Supreme Court, Page 214, it was held that the Courts cannot interfere with the decision of the Arbitrators on the ground that a different conclusion is possible. The adjudication by the Arbitrators must be considered as binding for he is a Tribunal selected by the parties.

12. As per the agreement, the work has to be completed within 12 months from the date of handing over the site. A portion of the site was handed over on 27-11-1978 and the remaining portion in bits on 23-7-1980 and 16-12-1981. After the lapse of more than 2 years from the stipulated date of completion namely, 30-11-1979, extension of time was granted by the department upto September, 1982. This clearly shows that there was a lapse on the part of the department in not handing over the site to the Contractor in full at a time, since there is an increase in the cost of labour, material and machinery during the period beyond the agreement, the claimants are entitled to be paid at the standard schedule of rates in force. The award of the arbitrators is just and reasonable and it is not vitiated by an error of law apparent on the face of the record.

13. In the result, the appeals preferred by the State dismissed with costs.

14. In C.M.A.No. 820 of 1984 preferred by the Contractor, it is contented that the decree is not in accordance with the award passed by the Arbitrators. We find substance in this connection. While the judgment said that the award is made the rule of the Court, the decree refers to only one relief viz., that the contractor should be paid at the standard schedule of rates in force from December, 1979 to June, 1980, July, 1980 to June, 1981 and July, 1981 to September, 1982 plus the accepted over all tender percentage. The decree does not refer to Claim No. 1(a) which was allowed by the Arbitrators namely that for the work done upto the period of original agreed rate of completion, the Contractor is entitled at the rates agreed to in Schedule 'A' including the work done in excess of the quantities in Schedule 'A'. Claim 1(b) which was also allowed by the Arbitrators says that the Contractor is entitled for payment at the S.S.Rs. in force for the work done beyond the original agreed date of completion during the period of execution of further work plus over all accepted tender percentage. Hence the decree of the lower Court is modified in terms of the award to the following effect:—

(1) The defendants 1 and 2 shall pay the contractor, 3rd defendant at he agreed rates in Schedule 'A' including the work done in excess of the quantities in Schedule 'A'

(2) The defendants 1 and 2 shall pay defendant No. 3 Contractor at the standard schedule of rates-in force for the further work done beyond the originally stipulated date of completion i.e., 30-11-1979 till the date of completion plus the accepted over all tender percentage; and

(3) The amount deposited by the Department and withdrawn by the contractor shall be adjusted in the final payment.

C.M.A. No. 820 of 1984 is allowed. No costs.

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JUDGMENT

CERTAIN CLAUSES OF P.S. 59 ARE ARBITRARY AND UNJUST

HON 'BLE SRI JUSTICE K RAMASWAMY

W.P.No. 9797 of 1983, dated 25-1-1988 (Reported in 1988 (1) A.L.T. 461

V. Raghunadha Rao *Petitioner*

vs.

State of A.P. and others *Respondents*

Held :—The execution of the Government contracts has constitutional flavour emanating from Articles 298 and 299 of the Constitution. Public law element imposes limitation of imports and obligation upon the State's executive power to conform to rule of law. It cannot compel a citizen or person to forego the constitutional or statutory rights as a condition to grant contracts. The conditions! covenants must satisfy the rigour of Article 14 unless they are otherwise constitutionally authorized. Thereby the imposition of the unconstitutional conditions is ultravires the executive power of the State. (Para 13)

Unless sufficient long time is given between the date of unilateral calling of the tenders and the last date to submit tender, clause 11 remains to be a mere paper statement affording no adequate opportunity to the intending contractor. Paragraph 2 of Clause II by itself cannot be declared to be *perse* arbitrary but on a given facts and circumstances and it has to be tested with reference to the timelag and relief given to the parties. (Para 41)

Limiting or self-relieving obligations on the part of the State are self- exculpatory and breeding source to extra-constitutional behaviour. Omission to recompose a contractor of the damages or loss suffered due to inaction, non- performance or under performance or substantial unilateral variation of the terms of the contract are obnoxious to justness, fairness, or reasonableness offending Article 14. Thus considered, the opening part of first sub-clause of clause 59 and the supplementary specifications (relieving the liability of the State) are arbitrary, unreasonable, unjust, unfair, and unconscionable. (Para 42).

The Executive Engineer and the Superintending Engineer are the subordinates to the State. Their decision shall not be made final and conclusive but must be left to a decision, though may be raised at a later stage by an independent authority, viz., the Court or an independent arbitrator or panel of arbitrators. No one shall be a Judge of his own cause. Clause 29 of the specifications is not arbitrary but the exclusion of the decisions of the authorities mentioned thereunder (Executive Engineer and Superintending Engineer) from the purview of arbitration under Clause 73 is invalid offending Articles 14 and 21. In matters relating to Government contracts fair procedure is that the disputes shall be referred to an independent arbitrator or panel of arbitrators of "their known integrity". The procedure provided in Clause 73 to refer to an arbitrator or a body of official arbitrators is an unfair procedure offending Article 21. (Paras 44 and 48)

Under Clause 62(b) power has been given to deduct part amounts pending execution of the contract. It is an interim measure. Therefore it is not arbitrary. (Para 49)

The decision only applies to the petitioner's contract and to the contracts to be executed hereinafter. (Para 50)

P.S. 60. Delays in commencement or progress or neglect of work and forfeiture of earnest money, security deposit and withheld amounts :—(a) Time shall be considered as of the essence of the contract. If, at any time the Executive Engineer shall be of the opinion that contractor is delaying commencement of the work or violating any of the provisions of the contract or is neglecting or delaying the progress of the work as defined by the tabular statement "Rate of progress" in the "Articles of agreement", he shall so advise the contractor in writing and at the same time, demand compliance. If the contractor neglects to comply with such demand within seven days after receipt of such notice, it shall then, or at any time thereafter, be lawful for the Executive Engineer to determine the contract, which determination shall carry with it the forfeiture of the Security deposit and the total of the amount withheld under Clause 68 below, together with the value of such work as may have been executed and not paid for, or such proportion of such total sums, as shah be assessed by the Executive Engineer.

[However, any authority higher in rank than the Executive Engineer may, in his absolute discretion, waive or modify any penalty or forfeiture imposed by the Executive Engineer, under the provisions of the clause].

[Added by G.O.Ms.No. 1007, Tr.Roads & Blds.(C1) Dept., Dt. 5-11-1976]

[(b) If, however, the Executive Engineer notwithstanding the failure of the contractor to comply with the demand referred to in sub-clause (a) of this clause or failure to maintain the "Rate of Progress" specified in the "Articles of Agreement" plus any extension of time that may have been allowed to the contractor as defined in Clause 59, shall permit the contractor to proceed with the whole or part and continue and complete the whole or such part of the work, such permission shall not be deemed to be a waiver in any respect by the Executive Engineer of the right of forfeiture under this clause:

Provided however that any such forfeiture under this sub-clause shall not exceed 5 per cent of the total of the contract amount:

Provided however that any authority higher in rank than the Executive Engineer may in his absolute discretion waive or modify any penalty or forfeiture imposed by the Executive Engineer under the provisions of this clause].

[Amended by Memo No. 972, Codn./74-5, P.W.D., Dt. 18-9-1974]

(c) It shall be a further right of the Executive Engineer, under this clause, at any time the "Rate of Progress" in the agreement is not maintained, to give any part of the work to any other contractor at his discretion, in order to maintain the "Rae of progress" upon the completion of that part of the work that is withdrawn. the Executive Engineer shall certify the amount of expenditure incurred by the department for getting it completed by another contractor or contractors. Should the amount so certified be less than the amount which would have been due to the contractor on the completion of that part of the work by him, the difference shall not be paid to the contractor. [Should, however the former exceed the latter, the difference shall be recovered from the contractor by the Government, provided however that such a recovery shall not exceed 5% of the total contract amount.

[Subs. by G.O.Ms.No. 140, Tr.R & B(B. III), Dept., Dt. 1-7-1992]

[***Note*** :—The contractor who makes a standing security deposit of Rs. 1,00,000 (Rs. one lakh) with the Chief Engineer under whom he wishes to tender

for works is eligible for concessional rates of Earnest money deposit and retention from bills. However, for the purpose of forfeiture under the above clause, security deposit will be reckoned at the normal rate, assuming that there is no standing security and not at the concessional rate].

[Amended by G.O.Ms.No. 471, Tr., R.&B. (C) Dept., Dt. 7-10-1983]

Clarification

Execution of Balance work after determination of Contract under Clause 60(c) of P.S. to A.P.D.S.S.

[Memo.No. 1778/C1/78-18, Tr.&R.B. (CI) Dept.. Dt. 10-8-1981]

Clarification has been made as to the mode of execution of balance Work and the rate of which it may let out.

It is clarified that the Executive Engineer should have the right to allot the balance work on nomination to any other contractor at his description in order to maintain the rate and progress. No tenders need be invited so long as the Executive Engineer can get the balance work executed satisfactorily at the rate in the agreement of the original contractor. If the Executive Engineer is, however unable to find a contractor to execute the balance work at the original agreement rate, he shall call for tenders at short notice and obtain realistic rates. If the work so covered out and completed by the other contractor or contractors involves any extra cost, the difference shall be received from the original contractor under Clause 60(c) aforesaid provided, however, that such recovery shall not exceed 5% of the total finished contract amount.

P.S. 61. Suspension of the works by the Contractor :—If, the contractor (except on account of any legal restraint not occasioned by his own wilful act or default or orders from Government preventing the continuance of act or default or orders from Government preventing the continuance of the extension of time has been sanctioned by competent authority) shall suspend the works, or sublet the work or a portion thereof without sanction of the Executive Engineer, or in the opinion of the Executive Engineer, shall neglect or fail to proceed with due diligence in the performance of his part of the contract as laid down in the schedule rate of progress, or if he shall continue to default or repeat such default in the respects mentioned in Clause 27 the Executive Engineer shall have power to give notice in writing to the contractor requiring that the works be proceeded with in accordance with the terms of the contract. Such notice shall not be unreasonable, or vexatiously given, and must signify' that it purports to be a notice under the provisions of this clause, and must specify that act or default on the part of the contractor upon which it is based. After such notice shall have been given, the contractor shall not be at liberty to remove from the site or the works, or from the ground contiguous thereto, any plant or materials belonging to him, which shall have been placed thereon for the purpose of the work; and Government shall have a lien upon all such plant and materials, to subsist from the date of such notice being given until the notice shall have been complied with. The Government shall have power to post watchmen at the site of the works and or the ground contiguous thereto in order to prevent the removal of any plant or materials upon which the Government shall have a lien. If the contractor shall fail, for fourteen days after such notice has been given, to comply with the same to the satisfaction of the Executive Engineer as certified by him in writing, Government may enter upon and take possession of the works and

site, and of all such plant and materials thereon (or any ground contiguous thereto) and all such plant and materials as above mentioned shall thereupon be at the disposal of Government absolutely, for the purpose of completing the work.

If Government shall exercise the above power to enter upon the works and take possession of the works, plant and materials they may engage any other person to complete the works, and exclude the contractor, his agents and servants from entry upon or access to the same, except that the contractor or any person nominated by him may have access at all reasonable times to inspect, survey and measure the works already executed by him. And Government shall thereupon take such steps as they may consider necessary for completing the works without undue delay or expense, using for that purpose the plant and materials above mentioned and obtain such additional plant and materials as the Executive Engineer shall decide is necessary for the due prosecution and competition of the work. Upon the completion of the works, the Executive Engineer shall certify the amount of the expenses properly incurred consequent on, and incidental to, the default of the contractor as aforesaid and in having the works completed by other persons having credited the contractor with the value of the materials utilized as aforesaid. Should the amount so certified be less than the amount which would have been due to the contractor on the completion of the works by him the difference shall not be paid to the contractor by Government; should the amount of the former exceed the latter, the difference shall be paid by the contractor to Government. Government shall not be liable to make any payment to the contractor on account of the use of such plant for the completion of the works under the provisions hereinbefore contained. Government may at any time give notice in writing to the contractor to remove any of his plant or materials from the site and not required for completion of the works. If such plant and or materials are not removed within fourteen days after notice shall have been so given Government may remove and sell the same, holding the proceeds less the cost of removal and sale, to the credit of the contractor.

In case Government shall exercise the power contained in this clause and shall complete the works by any other person as therein provided, the Executive Engineer, after instituting such inquiries as he may deem fit, with or without notice to the contractor, shall certify what amount (if any) had at the time of the Government exercising such power as aforesaid, been reasonably earned or would reasonably accrue to the contractor in respect of work then actually done by him in the premises and such certificate shall be final and binding on the contractor.

Notwithstanding anything contained in Clause 50 above, when possession of the work and site is taken by Government in exercise of the power contained in this clause the portion of the work actually completed by the contractor in the premises shall be maintained by Government as the risk and expense of the contractor until the whole of the work is completed by other agency and possession thereof taken by Government.

I. — Particulars of Payment

P.S. 62. Payment on lump-sum basis or by final measurement or unit prices:—(a) Payment for the work done by the contractor will be made on the basis of the measurements recorded in the measurement books or level field books

by an officer not below the rank of the Supervisor and check measured by an officer not below the rank of an Assistant Engineer. The measurements will be recorded at the various stages of the work, while it is in progress, for the proper assessment of the quantities of work, done and also after the work is completed or when the contract is determined. The contractor or his authorized agent shall be present at the recording of each set of measurement and check measurement and accept them, then and there, so as to avoid disputes at a later stage. The set of measurements and check measurements may also be taken by the Department even in the absence of the contractor or his authorized agent, three days after the issue of a notice to the later, in writing of such intention by the department.

[Subs. by G.O.Ms.No. 1007, Tr., Roads & Blds. (C1) Dept., Dt. 5-11-1976]

(b) In cases of over-payment or wrong payment made, if any, to the contractor due to wrong interpretation of the provisions of the contract, the Andhra Pradesh Standard Specification or otherwise, such unauthorized payment will be deducted in the subsequent bills or final bill of the work, or failing that, from the bills under any other contract with the Government or at any time thereafter, from his security deposits available with the department.

[Subs. by G0.Ms.No. 1007, Tr., Roads & Blds. (Cl) Dept., Dt. 5-11-1976]

(c) It shall be accepted as a condition of the contract that a payment of the final bill to the contractor less the withheld amount and his acceptance thereof shall constitute a full and absolute release of Government from all further claims by the contractor under the contract.

P.S. 63. Payment for additions and deductions for omissions:- The contractor is bound to execute all supplemental items that are found essential, incidental and inevitable during the execution of the work, at the rates to be worked out as detailed below

[(a) For all items of work in excess of the quantities shown in Schedule A of the tender the rates payable for such items shall be either the tender rates or the standard schedule of rates for the items plus or minus the overall tender percentage accepted by the competent authority whichever is less.

(b) For items directly deducible from similar items in the agreement, the rates shall be derived by adding to or subtracting from the agreement rate of such similar item, the cost of difference in quantity of material or labour between the new items and the similar items in the agreement, worked out with reference to the Schedule of rates adopted in the sanctioned estimate plus or minus the over all tender percentage].

[Subs. by G.O.Ms.No. 1007, Tr., Roads & Blds. (C) Dept., Dt. 5-11-1976]

(c) For new items which do not correspond to any items in the agreement, the rates shall be the standard schedule rate plus or minus the overall tender percentage.

The terms ‘standard schedule of rates’ used in the above sub-clauses (a), (b) & (c) means the schedule of rates on which the sanctioned estimate was prepared.

(d) In the event of the Executive Engineer and the Contractor failing to agree on a rate for such additional work, the Executive Engineer may, at his opinion either :—

(i) employ other parties to carry out the additional work in the same manner as provided for under Clause 48, or

(ii) the contractor shall execute the work upon written orders from the Executive Engineer and the cost of labour and materials plus 10 per cent thereon shall be allowed therefor, provided that the vouchers for the labour and materials employed shall have been delivered to the Executive Engineer or his representative within seven days after such work shall have been completed. If the Executive Engineer considers that payment for such work on the basis of the vouchers presented is unduly high, he shall make payment in accordance with such valuation as he considers fair and reasonable and his decision to the matter shall be final, if the amount involved in additional payment is Rs. 1,000 or less, for each occasion on which such additional works shall have been authorized. If such amount exceeds Rs. 1,000, the contractor shall have the right to submit the matter to arbitration under the provisions of the arbitration Clause 73.

(e) If, in the opinion of the Executive Engineer, a rate for the additional work is not capable of being properly arrived at prior to execution of work, or if the work is not capable of being properly measured, then the cost and payment thereof shall be dealt with as provided for in the preceding sub-clause (d)(ii).

P.s. 64. No payment for unsanctioned extras :—It shall be distinctly understood that no payment whatever will be made to the contractor for variations by way of extras in cases where such variations have been made without the written sanction of the Executive Engineer.

P.S. 65. Accounts, receipts and vouchers :—The contractor shall at any time, upon the request of the Executive Engineer furnish him with all invoices, accounts, receipts and other vouchers that he may require in connection with the contract.

P.S. 66. Fraud, wilful neglect or default :—No final or other certificate of payment of completion, acceptance or settlement of account shall, in any circumstances, relieve the contractor from his liability for any fraud or wilful neglect or default in the execution of the contract or any wilful or unauthorized deviations from the drawings, specifications, instructions and directions for the time being binding upon him.

P.S. 67. Unfixed materials :—No payment or advance will be made for unfixed materials when the rates are for finished work in site.

P.S. 68. Payments and certificates :—Payment will be made to the contractor under the certificate to be issued at reasonably frequent intervals by the Executive Engineer or by the sub-divisional officer. Within fourteen days of the date of each certificate, an intermediate payment will be made by the Executive Engineer or the sub-divisional officer of a sum equal to 92 ½ per cent (96 ½ % in the case of contractors who have lodged the standing security deposit of [Rs. 1,00,000) (Rs. 1-00 lakh)] of the value of work, as so certified and the balance of 7½ percent, (3½% in the case of contractors who have the standing security deposit) will be withheld and retained as a security for the due fulfilment of the contractor. Under the certificate to be issued by the Executive Engineer or the Sub-

Divisional Officer on the completion of the entire works the contractor will receive the final payment of all the moneys due or payable to him under or by virtue of the contractor except earnest money deposit retained as security and a sum equal to 2 ½ % of the total value of the work done, provided there is no recovery from or forfeiture by the contractor to be made under Clause 60. The amount withheld from the final bill will be retained under "deposits" and paid to the contractor together with the earnest money deposit retained as security after a period of six months as all defects shall have been made good according to the true intent and meaning thereof. However in the case of works like conveyance of materials, supply of materials, slit clearance where the fixation of observation period is not necessary, the deposit amount could be refunded after the work is completed in accordance with the terms of the agreement.

[Subs. by G.O.Ms.No. 471, Tr., Roads & Blds. (Cl) Dept., Dt. 7-10-1983]

No certificate of the Executive Engineer or the Sub-Divisional Officer shall be considered conclusive evidence as to the sufficiency of any work or materials or correctness of measurements to which it relates, nor shall it relieve the contractor from his liability to make good defects as provided by the contractor. The contractor, when applying for a certificate, shall prepare a sufficiently detailed bill, based on the original figures of quantities and rates in the contract (Schedule A) to the satisfaction of the Executive Engineer, to enable the Executive Engineer or the Sub-Divisional Officer to check the claim and issue the certificate. The certificate as to such of the claims mentioned in the application as are allowed by the Executive Engineer or the Sub-Divisional Officer shall be issued within fourteen days of the application. No application for a certificate shall be made within fourteen days of a previous application.

In calculating the amount of each item due to contractor in every bill submitted for payment under this contract, fractions of below five paise shall be omitted and five paise or over shall be reckoned as ten paise. In calculating the total on each bill amounting to Rs. 25 or more under this contract, fractions of less than half rupee shall be disregarded and half a rupee and over shall be reckoned as one rupee.

[The above clause will not apply to contracts entered into for designing, manufacture, supply, erection, testing, etc. (mechanical contracts) where special conditions are incorporated providing for retention of 10% of the contract value for twelve months after the payment upto 90% on erection and testing].

[Inserted by G.O.Ms.No. 416, T., R. & B. (C) Dept., Dt. 27-12-1980]

P.S. 69. Interest on money due to the contractor :—(a) No omission by the Executive Engineer or the Sub-Divisional Officer to pay the amount due upon certificates shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee fund or payments in arrear, nor upon any balance which may, on the final settlement of his accounts, be found to be due to him.

(b) Whenever the withheld amount reaches Rs. 1,000 or a multiple thereof, the contractor may, at his option, deposit with Executive Engineer Rs. 1,000 or a multiple thereof, in any of the forms of interest bearing securities recognized for

the purpose by the Andhra Pradesh Public Works Accounts Code and subject to the provisions therein contained, in which case in the equivalent withheld amount shall be paid to him forthwith. The contractor will be permitted to exercise the option in this clause, subject only to the condition that the rate of progress contained in the Articles of Agreement is properly maintained.

JUDGMENT

CANNOT BE CONSTRUED AS A TOTAL PROHIBITION OF PAYMENT OF INTEREST

1989(1) ALT 195

The Hon 'ble Mr. Justice P. Kodandaramayya

Appeal No. 932 of 1986 and Memo. of Cross Objections, Dt. 5-2-1988

A.P.S.R.T.C. rep. by its General Manager
(Now re-designated as Managing Director)
Mushirabad, Hyderabad and others *Appellant*

vs.

P. Ramanareddi *Respondent*

Judgement

The Andhra Pradesh State Road Transport Corporation represented by its Managing Director, the first defendant and its officers, defendants 2 and 3, are the appellants in this appeal. The suit is laid for recovery of Rs. 81,018-93 Ps. towards the work done for the Corporation for constructing a building and bus stand at Srikalahasthi, Chittoor District.

2. The plaintiff case in short is that the plaintiff entered into an agreement Ex. A-i on 19-11-1978 and the work was completed on 22-5-1980 and the amount due to him under the work done by him and the deposits refundable to him were not paid even after 22-11-1980, six months' period stipulated under the contract and with the details given in the plaint the suit claim is made with interest. The defence is that the plaintiff failed to comply with the terms of the contract and for recovery of amount due for two items 37 and 38 a separate suit was filed, by the plaintiff and the plaintiff refused to sign the final bill and declined to accept the estimate-made by them and he is entitled to Rs. 21,401-48 Ps., towards the work done and Rs. 30,531/- towards deposits and a sum of Rs. 49,082-22 Ps., has to be adjusted from the bills and hence he is entitled to only a sum of Rs. 2,850-25 Ps.

3. On this controversy, very strangely, the Court below framed a solitary issue, whether the plaintiff is entitled to recover suit amount, from the defendants as prayed for. This can hardly be described as a satisfactory method of framing issues. No doubt it discussed the evidence in respect of each item claimed by the defendant for being adjusted but took the view that the claim of the defendant constitutes set-off and in as much as the Court-fee is not paid no claim can be sustained even in respect of the items found due to the defendant which are liable to be deducted from the bill. However, in view of the admission made by the

defendants that a sum of Rs. 51,922-48 Ps., is due negativing the claim of the plaintiff for Rs. 49,082-22 Ps., decreed the suit for the said sum with interest at 12% p.a. from 22-1-1980 upto the filing of the suit and also granted interest on Rs. 7 1,653-02 Ps., at 6% per annum from the date of the suit till the date of realization. Against this decree and judgment the present appeal is filed.

4. The learned counsel for the appellants, Sri K. Harinath, argued three questions before me.

1. The view of the trial Court that the deductions sought from the bill payable to the plaintiff constitute set off is incorrect and no Court-fee need be paid and the claim of the defendants for adjustment of these items must be examined on merits.

2. Awarding of interest at 12% per annum from 22-1-1980 the date of completion of contract is illegal and further awarding interest on interest is illegal.

3. He also canvassed the correctness of the finding of the trial Court on the items claimed by the defendants.

5. It is true as per Section 8 of the Andhra Pradesh Court-fees and Suits Valuation Act, 1956 (Act VII of 1956) a written statement pleading a set-off or counter-claim shall be chargeable with fee in the same manner as plaint. It is necessary to examine whether the present claim of deduction made by the defendants constitutes set-off. A perusal of Ex. A-i shows the items supplied by the Corporation such as cement, steel and other material had to be deducted in order to arrive at the total bill payable. They are virtually in the nature of payments in kind. But they are not sums of money payable to the defendants under the terms of the contract. If the total sum payable has to be arrived at on the adjustment of these amounts, it does not amount to set-off and no Court-fee need be payable. I may usefully refer to the following dicta of the Supreme Court in this regard reported in *M/s. Lakshmichand & Baichand vs. State of Andhra Pradesh*, (1986(2), APLJ 45). No doubt in that case the question of Court-fee did not arise. It is also a case where some amounts were deducted by the Government for the work done while upholding the right of set-off. While dealing with the right of the defendant to claim set-off in the execution proceedings under Order XXI, Rule 18 of the C.P.C., the Supreme Court observed as follows with reference to Clause 68 of the contract which enables final payment to be made to the contractor after taking into account the amount which had been received by him earlier. They described such amount and the process of deduction as adjustment. The passage runs thus

> "So far as the first claim to adjustment is concerned, t1ie matter is covered by Clause 68 of the contract. What was awarded to the contractor under the decree was an amount relating to a part only of the work entrusted to him. The contract was still in the process of execution. Any amount claimed by him for such work was subject to a final settlement of account on the preparation of the final bill. The right to payment depended on the terms of the contract. Any payment made while the contract was still being worked out was in the nature of a provisional payment. It is always subject to adjustment against amounts found due against the contractor on preparation

> of the final bill. Such adjustment was implied in the very terms of the contract. Therefore, in regard to the adjustment claimed by the State Government on the first count the High Court is right in our opinion, in holding that the amount claimed by the State Government as determined on arbitration, was entitled to set off against the decretal amount claimed by the contractor and that payment of the decretal amount was to be subject to such adjustment."

6. Though in this case the finding is in respect of set-off, the passage is relied upon very rightly by the learned counsel to show that it is really in the nature of adjustment. No doubt the Court is not concerned with reference to the Court fee payable but only substantive right of set-off. It is necessary to remember that even if adjustment is made if a dispute is raised about the right to adjustment, the Court may have to examine it. It is not as if the adjustment pleaded will be accepted automatically or it must be one which is indisputable. We are concerned with the problem of payment of Court-fee. The Court is bound to make any enquiry and adjudicate the rights of the parties irrespective of the plea raised by the plaintiff whether it is set-off or adjustment, but if it is an adjustment, no Court-fee need be payable.

7. This view is fairly settled and there are decided judicial opinions on this question. We have got a similar provision under the Central Court-fee Act, 1870. In Schedule I, Item 1 which enjoins payment of Court-fee on plaint, written statement pleading a set-off or counter-claim. Courts have examined this provision and ruled that when the plea raised is only an adjustment or payment no Court fee need be payable. It is necessary to distinguish set-off from adjustment. A Full Bench of this Court in *Boganandam Seshaiah vs. Budhi Veerabadrayya*, (AIR 1972, A.P. 134; 1971(2), ALT 227 F.B.) defined set-off in the following terms

> "The principle of set-off may be defined as the extinction of debts of which two persons are reciprocal debtors to one another, by the credits of which they are reciprocally creditors to one another."

8. Stroud's Judicial Dictionary defines set-off as

> **"(A) A legal set-off is** : "where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator....one debt may be set against the other".

The author relying on a dicta of Brett L.J., also says, "set-off' and "counter-claim" confer definite and independent remedies upon a defendant against the plaintiff. Thus it is seen, 'set-off' is a claim that arises under the same transaction which confers a right to recover the same as an independent debt, but an adjustment or payment in respect of the amount due to the plaintiff has extinguished the debt as the defendant is not claiming any right to recover the amount but only seeking to establish that the claim of the plaintiff cannot be arrived at without reference to the payment or adjustment already made.

9. It is unnecessary to multiply the authority on this question. A Division Bench of the Orissa High Court in *The Tata iron and Steel Co.Ltd. vs. R.N. Gupta*, (AIR 1963, Orissa 174), arising under the Central Court-fee Act rightly took the view holding that:

> "A plea of satisfaction or extinguishment of a debt or a claim, set up merely by way of defence is very different. A plea of payment necessarily refers to a satisfaction or extinguishment of a debt effected prior to the stage of the defence, whereas a plea of set-off is in the nature of a cross-claim and in effect it prays for a satisfaction, or extinguishment of a claim, to be made in the future 'after the date' when the plea has been set up. If it were held to be merely a plea regarding adjustment of accounts and no more, no Court-Fee would be payable on the amount mentioned in such a plea".

10. The above case also noticed earlier judgments in support of this view. Hence I am clearly of opinion that the payment of adjustment is not set-off as the defendant has no independent right to recover the amount without settling the claim of the plaintiff. It is not a cross-claim though arising under the same transaction as in the case of set-off.

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11. Applying this principle to the facts of this case, it is clear Ex. A-1 envisages that the Corporation should supply cement, steel and other material and the price must be deducted in the bills payable to the plaintiff. The defendant has no right to recover as a cross-claim though arising under the same transaction. He cannot plead that the plaintiff must refund these amounts and he will pay the amount due to the plaintiff. On the other hand, the amount paid by him should go towards the deduction of the claim made by the plaintiff and hence in the absence of a right to recover as an independent debt due from the plaintiff it clearly constitutes an adjustment or payment. Accordingly I am of the opinion that the Court below misdirected itself in thinking that these deductions that have to be made by the Corporation are in the nature of counter-claim and Court-fee requires to be paid.

12. Fortunately the Court below alternatively examined each item claimed by the defendant and rejected all the items except two items. But at the end of the judgment it held that in view of the non-payment of Court-fee no claim made by the defendant can be examined and hence I have new no examine the claim of the defendant on merits as I hold that no Court-fee need be paid.

13. Now I shall deal with the merits of the case.

14. The defendant claimed as many as 8 items to be deducted out of the amounts admitted by him due to the plaintiff. The first item is cement supplied

to the plaintiff. The defendant's counsel made two alternative submissions. (1) The Court below decreed only the amount admitted by the defendant i.e., Rs.51,932-43 Ps., but did not deduct even 6.25 metric tons of cement admittedly deducted by the plaintiff in his plaint while arriving at the total sum payable to him. Secondly the value of cement is not 125 bags as claimed by the plaintiff, but it must be 267 bags. This is refuted by the learned counsel for the plaintiff stating no doubt the plaintiff deducted 6.25 metric tons of cement in the plaint but on that basis total amount arrived at Rs.81,080-93 Ps. Unless the Court examine these items and reject a part of the claim as untenable, the mere deduction shown in the plaint at Rs.2,875-00 Ps., cannot constitute an admission. The alternative argument was answered by him saying though the plaintiff deducted 6.25 metric tons on the basis of his calculation, he claimed some illegal deductions made in the bill at Rs. 4,761-00 and that was accepted by the trial Court in which event the claim for 267 bags of cement or the statement in the plaint for 6.25 metric tons is not fatal and the total amount must be rejected. I am inclined to accept the submission on behalf of the plaintiff. No doubt the plaintiff on the method of calculation arrived at sought to deduct 6.25 metric tons i.e., 125 bags but the Court did not examine the correctness of the figure arrived by the plaintiff at Rs. 81,082-93 Ps. but proceeded to decree the suit claim on the basis of the admission made by him. In view of the fact the plaintiff has claimed Rs. 4,761/- and the interest payable therein respect of the excess cement already used, he might have shown the deduction for Rs. 6,25 Metric Tons or 125 bags. Both the counsel did not take me to details of calculation adopted either by the plaintiff or the defendant. The defendant's counsel contended that the statement in the plaint constitutes an admission whereas the plaintiff's counsel contended that when the Court rejected the plaintiff's method of calculation the statement of deducting a portion of the cement used by him cannot constitute an admission. In fact the Court also accepted the plea of the plaintiff in this regard and said that DW-2 stated that the cost of 3866 bags of cement given to the plaintiff was recovered by 11th bill itself and it also held that no evidence has been produced to show that the plaintiff did not spend the cement of 3724 bags as per the measurement in M.Book. The contention of the learned counsel for the defendant is that though the plaintiff has used all 3991 bags his claim for the entire thing is illegal as the estimated amount is less. The relevant clause in the agreement Ex. A-1 shows that the plaintiff is entitled to use the cement required and hence the Court below also recorded a finding that no evidence has been produced to show that the plaintiff did not use the cement issued from the 1st bill to the 11th bill or subsequently except stating that the measurements were noted in the M Book. Hence I am of the opinion that no separate deduction towards the cement is warranted in view of the finding arrived at by the trial Court.

15. The trial Court on the question of steel, recorded a finding that the defendants are entitled to recover cost of excess steel 3.52 metric tons at Rs. 2,500-00 per metric ton i.e., Rs. 8,800-00. It also held that a sum of Rs. 800-00 can be claimed by the defendant for non engagement of technical agents. On these two items the learned counsel for the plaintiff contended that if the Court-fee is paid, his claim can be allowed. But he did not say how the finding is incorrect. In view of the fact that I have taken the view that the Court-fee need not be paid, these two items must be allowed as deduction towards the bill payable to the plaintiff.

16. The Court below also held seigniorage charge of Rs. 3,884-00 and also Income-Tax of Rs. 428-00 cannot be deducted. When we look to the relevant clause 22 it not only enables the defendant-Corporation to deduct that amount if it actually paid on behalf of the plaintiff or if any outstanding income or other dues. If the plaintiff failed to produce Income-tax clearance certificate, the Corporation is not entitled to deduct them in the absence of any proof of payment made by them on behalf of the plaintiff.

17. The last item is damages claimed by them at Rs.16,130-84 Ps. The learned counsel for the defendant vehemently argued that admittedly the plaintiff let out certain items in the contract without performing them and they have to get it done by some other person and the damages incurred by them must be allowed to be recovered from the bill payable to the plaintiff. I must say there is no specific clause in the agreement enabling the Corporation to deduct any amount towards damages. It is admitted by the defendant that it is only under general law of damages. Assuming that the Corporation has a right, I am clearly of the view that no one connected with the work entrusted was examined. The actual amount spent is not forthcoming. But the learned counsel for the defendant argued that this item was not disputed. I must say it is clearly an untenable contention. What was urged by the defendant is that at the instance of the Corporation's Engineer he released certain items to the third parties. On the other hand he is disputing the plaintiff's statement that the defendant committed default. The fact that he released certain items for being entrusted to third parties does not mean that be admitted the claim of the defendants. I must hold that in the absence of any evidence of actual loss, - the claim for damages at Rs. 16,130-84 Ps. is clearly untenable. In the result out of the total amount found due and admitted by the defendant at Rs. 51,922-48 Ps. the two sums i.e., Rs. 8,800-00 and Rs.. 800-00 totalling Rs. 9,600-00 are liable to be deducted and the plaintiff is entitled to the said amount.

18. On the question of interest I took the assistance of Sri J. Prabhakar and I place on record of my appreciation for his able assistance to the Court. The argument of the learned counsel is two fold. Under Clause 69 of the Andhra Pradesh Detailed Standard Specifications which is made applicable to the contract in question, no interest is payable. In view of that prohibition the decree regarding payment of interest is unsustainable. Secondly even assuming that Clause 69 is not a bear or inapplicable for a claiming interest as stated in the plaint, the provisions of the Interest Act, 1839 are not attracted to the facts of the case. On the first part of the argument, he relied on the judgment of this Court in *Koppisetti Venkateswara Rao vs. Superintending Engineer, P.H. East Circle* (1986 (2), ALT 547), wherein Ramaswamy, 3., held that Clause 69 bars the claim for interest. Sri Prabhakar brought to my notice the judgement of another single Judge, Amareshwari, 3., who took a contrary view. In view of the judgement of the Supreme Court in *Hyderabad Municipal Corporation vs. M. Krishnaswami Mudaliar* (AIR 1985, SC 607) and *State of Rajasthan vs. Raghubir Singh* (AIR 1979, SC 852), 1 cannot give effect to this agreement. Before I draw support from these two cases it is necessary to refer to Clauses 68 and 69 of the Andhra Pradesh Detailed Standard Specifications. The first paragraph of Clause 68 reads as follows:

> **"68. Payments and certificates** :—Payment will be made to the contractor under the certificate to be issued at reasonably frequent intervals

by the Executive Engineer or by the Sub-divisional Officer. Within fourteen days of the date of each certificate, an intermediate payment will be made by the Executive Engineer or the sub-divisional officer of a sum equal to 92 ½ % (96 ½ % in the case of contractors who have lodged the standing security deposit of [Rs. 1,00,000) (Rs. 1-00 lakh)] of the value of work, as so certified and the balance of 7 ½ percent, (3 ½ % in the case of contractors who have the standing security deposit) will be with-held and retained as a security for the due fulfilments of the contractor. Under the certificate to be issued by the Executive Engineer or the Sub-divisional Officer on the completion of the entire works the contractors will receive the final payment of all the moneys due or payable to him under or by virtue of the contractor except earnest money Deposit retained as security and a sum equal to 2 ½ % of the total value of the work done, provided there is no recover from or forfeiture by the contractor to be made under Clause 60. The amount withheld from the final bill will be retained under "deposits" and paid to the contractor together with the earnest money deposit retained as Security after a period of six months as all defects shall have been made good according to the true intent and meaning thereof. However in the case of works like conveyance of materials supply of materials, slit clearance where the fixation of observation period is not necessary, the deposit amount could be refunded after the work is completed in accordance with the terms of the agreement. [Subs. by G.O.Ms.No. 471, Tr., R. & Bldgs. (C), Dept., Dt. 7-10-1983]

19. Clause 69 reads as follows:

"69. Interest on money due to the contractor :—(a) No omission by the Executive Engineer or the sub-divisional officer to pay the amount due upon certificates shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee found or payments in arrear, nor upon any balance which may, on the final settlement of his accounts, be found to be due to him.

(b) Wherever the withheld amount reaches Rs. 1,000 or a multiple thereof, the contractor may, at his option, deposit with Executive Engineer Rs. 1,000 or a multiple thereof in any or the forms of interest bearing securities recognized for the purpose by the Andhra Pradesh Public Works Accounts Code and subject to the provisions therein contained in which case in the equivalent withheld amount shall be paid to him forthwith. The contractor will be permitted to exercise the option in this clause, subject only to the condition that the rate of progress contained in the Articles of Agreement is properly maintained".

20. A close reading of these two clauses discloses that in respect of each bill and after obtaining the certificate an amount of 3 ½ % or 7 ½ %, as the case may be, can be withheld. Further even after completion of the entire work, the contractor cannot receive the earnest money deposit and also a sum equivalent to 2 ½ % of the total value of the work done, and that will be payable only at the end of 6 months which is considered to be observation period. By a reading of this clause we can easily follow the ambit of Clause 69 which envisages that no claim for interest can be entertained in respect of payment of arrears or final settlement be

found to be due to the contractor. The balance of 3 ½ % or 7 ½ % that may be retained in respect of each bill even after the completion of the work constitutes payment in arrears and the earnest money deposit and also 2 ½ % of the total value of the work done is the balance due on the final settlement of the amount found due to him. So the scope of Clause 69 is to retain these sums even though the work was done completely. This is exactly what was held in *Hyd. Municipal Corporation's* case *(supra)* when a similar clause was relied on to deny the claim of interest. The clause relied on by the Supreme Court judgment is identical. It read thus

> "The contractor shall not be entitled to interest, upon any payment in arrears or upon any balance which may on final settlement of his accounts be found due to him".

Considering the scope and effect of this clause, it was observed:

> "In our view the reliance on this clause is of no avail to the appellant for the simple reason that this clause will be applicable provided the work was completed according to the specifications and the time schedule fixed in the original contract".

Thus it is clear that notwithstanding the completion of the work as per the specifications, the terms of the contract contemplates retention of the sum without paying them immediately. In view of the liability of the contracting party to pay the amount immediately on completion of the work, this clause contemplates retention of the money even though the work is completed and it specifically negatives the claim for interest on any such arrears due or on any amount deposited with the Department as earnest money deposit or sum equal to 2 ½ % of the total value of the work done till the expiry of the period of six months. Similarly in *State of Rajasthan vs. Raghubir Singh*, (AIR 1979, SC 852), the clause relied on to negative the claim of interest reads thus

> "Neither the earnest money deposit nor the withheld amount shall bear any interest".

It was observed that:

> "This sentence far from supporting the case of the appellant appears to support the case of the plaintiff. The reference to "the withheld amounts" is to the amounts representing five percent of the running bills. The provision that the contractor is not entitled to interest on these withheld amounts appears to imply that interest is claimable on other amounts due to the contractor".

21. Thus it is clear that this Clause 69 is intended to really prevent any claim for interest during the running period when final bills is not settled and also in respect of earnest money deposit on the sum equal to 2 ½ % of the total value of the work done till the expiry of the period of six months. This six months' period is called 'observation period' ; so that the Department can see whether the work was done satisfactorily or not. Clause 69 cannot be construed as a total prohibition, but it operates a limited period of six months from the date of the completion of the work and hence I negative this contention that Clause 69 is a bar to claim interest.

22. It is fairly well settled that the claim for interest can either be under the agreement, or under the usage of trade having force of law, or under the provisions of substantive law or under the provisions of the Interest Act, 1839 or when the Court exercises equitable jurisdiction as envisaged in the proviso to Sec. 1 of the said Act. Vide *Vithaldass vs. Rup Chand*, (AIR 1967, SC 188). So far as the requirement of Interest Act is concerned, the Supreme Court in *Thawardas vs. Union of India*, (AIR 1955, SC 468) laid down five conditions :

1. the interest is not payable under any other law,

2. there must be a debt or a sum certain,

3. it must be payable at a certain time or otherwise,

4. these debts or sums must be payable by virtue of some written instrument,

5. there must have been 34emand in writing stating that interest will be demanded from the date of the demand.

23. The learned counsel for the defendant on the strength of this dicta urged that the contract in question is such that no definite sum is due till it is settled by the parties or by the Court and the claim of interest can only be made after the decree is passed. Though the Interest Act 22 of 1839 is repealed by Act 14 of 1978, we are concerned with the previous Act as substantive rights cannot be affected by the repeal of the Act as Sec. 6 of the General Clauses Act is made applicable. The learned counsel relied on a judgment of the Division Bench of the Madras High Court in *Sri Rajah Ravu Venkta Kumaramahipati Surya Rao Bahadur Garu vs. Ballapragada Pallamraju*, (XL MU 18 ; 1921, Mad. 76). There the claim for interest by a contractor who undertook a building contract was negatived on the ground that no certain sum is due payable within the time as contemplated under Section 1 of the Act apart from the infirmity in that case of want of notice. It is necessary to refer the clause in that case.

> "The contract provides that, "all work done by the contractor shall be paid for by the Rajah according to the rates herein specified within a reasonable time after it has been inspected and finally approved and passed".

In that view it was held that the said provision is not one for payment of sum certain or for the payment of such sum on certain date. I cannot give effect to the submission of the learned counsel on the strength of this case. We have already noticed Clauses 68 and 69 of the Andhra Pradesh Detailed Standard Specifications. There is a clear obligation on the part of the authority to pass the bill and also make payment and finally pay entire amount within six months after the completion of the work. "A sum certain" within the meaning of Section 1 does not mean the sum must be calculated sum. It is enough it is capable of being calculated. Let us look to Section 1 of the Interest Act.

> **"Power of the Court to allow interest** :—It is, therefore hereby enacted that, upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may,

if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable otherwise, than from the time when demand of payment shall have been made in writing, so as to such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the terms of payment; provided that interest shall be payable in all cases in which it is now payable by law".

24. It is true this provision envisages as held by the Supreme Court that sum must be a certain sum and it is payable within a certain time and a demand thereof is made. It is no doubt made payable under the contract which is an instrument within the meaning of the Act. The word 'certain sum' occurring in the Act does not mean sum actually calculated or ascertained sum. A sum (which) is capable of being ascertained is sufficient to attract the section. Once the bill is prepared as per the measurements it is capable of being ascertained. It is not a case where it depends upon the consent of the parties as envisaged in 1921, Madras, 76 as a matter of objective verification ascertainable and capable of being ascertained. Regarding time factor also it is payable on certain times as the right of retaining the amount beyond six months after the completion of the work is not envisaged on the terms of the contract and the liability to pay entire sum arises on the expiry of six months' period after completion of contract, and hence I am satisfied that all the requirements of 'sum certain' and 'payable before certain time' and 'making the demand' were satisfied. The plaintiff issued a notice under Ex. A-3 making the demand and no reply was given to him. The fact that lesser amount was found due is not a ground for rejecting the claim for interest. Once a sum is certain and payable at a particular time and demand is made for that, the requirement of Section 1 of the Interest Act are satisfied irrespective of the fact that Court came to a different conclusion about the actual amounts payable. Hence I am clearly of the opinion that the interest is payable from 22-4-1982 till the date o the suit. Regarding the rate once I hold Section 1 is attracted it is the current rate of interest. The current rate of interest was considered by Courts as a fair and reasonable rate in the absence of special circumstances. Hence I am of the opinion that 12% interest from the date of demand till the suit is just and proper. The suit is filed on 2-2-1984 and pending to suit till the date of decree and from the date of decree till the date of payment the plaintiff is entitled to only 6% interest as that period is governed by Section 34, C.P.C.

25. In the result, the decree of the trial Court is modified directing that from a sum of Rs. 51,932-48 Ps. a sum of Rs. 8, 925-00 should be deducted. The plaintiff is entitled to interest at 12% p.a. from 22-4-1982 till 2-2-1984 on Rs. 43,007-48Ps. and on the same amount he is entitled to interest at 6% per annum from the date of suit till the date of decree and from the date of decree till the date of realization.

26. The appeal is allowed in part as indicated above with proportionate costs. The cross-objections are not substantiated. Hence they are accordingly dismissed.

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Case law

Interest pendente lite

In *Executive Engineer (Irrigation) vs. Abhaduta Jena* , (1988) 1 SCC 418 it was held that the arbitrator to whom the reference is made without the intervention of the Court, does not have jurisdiction to award interest pendente lite.

A Constitution Bench in Secretary, *Irrigation Dept., Govt. of Orissa vs. G. C. Roy*, (1992) 1 SCC 508, AIR 1992 SC 732 overruling Abhaduta Jena case held:

"The arbitrator acted with jurisdiction in awarding pendente lite interest to the contractor-respondent when the agreement was silent as to award of interest.

Where the agreement between the parties does riot prohibit grant of interest and where a party claims interest and that dispute (along, with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest *pendente lite*. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes or refer the dispute as to interest as such to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest *pendente lite*. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view.

The following principles emerge:

(1) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it, by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of S. 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative forum for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest *pendente lite*, the party claiming it would have to approach the Court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It, is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think, fit, so long as they are not opposed to law. (The proviso to S. 41 and S. 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest *pendente lite*.

(v) Interest *pendente lite* is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For, doing complete justice between the parties, such power has always been inferred.

The decision in *Abhaduta Jena* case does not lay down good law on this aspect. However, the present decision shall only be prospective in operation, which means that this decision shall not entitle any party, nor shall it empower any Court to reopen proceedings which have already become final. In other words, the law declared herein shall apply only to pending proceedings."

See also M. Ganga Reddy vs. State of A.P., 1996 (3) ALT 53 (DB)

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P.S. 70. Acceptance of final measurements :—The contractor agrees that before payment of the final bill shall be made on the contract, he will sign and deliver to the Executive Engineer either in the measurement book or otherwise demanded, a valid release and discharge from any and all claims and demands whatsoever for all matters arising out of, are connected with the contract; provided that nothing in this clause shall discharge or release the contractor from his liabilities under the contract. He shall also produce a certificate from the income tax authorities that all income tax payable by him up-to-date has been duly paid in the case of contracts the value of which is over Rs. 10,000. It is further expressly agreed that Executive Engineer in supplying the final measurement certificate, need not be found by the preceding measurements and payments. The final measurements, if any, of the Executive Engineer shall be final, conclusive and binding on the contractor.

P.S. 71. Recovery of money from contractor in certain cases :—In every case which provision is made for recovery of money from the contractor, Government shall be entitled to retain or deduct the amount thereof from any moneys that may be due or may be due or may become due to the contractor under these presents and/or under any other extract or contracts or any other account whatsoever.

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JUDGMENT

CLAIM BY CONTRACTOR FOR CERTAIN AMOUNT

1988 (1) ALT 736

The Hon 'ble Mr. Justice M.N. Rao

C. Raghava Reddy *Petitioner*

vs.

Superintending Engineer, Irrigation
Circle No. 3, Nizamabad & another. *Respondent*

Order

1. The petitioner is a recognized Class I contractor. His tender for construction of Masonry Blocks of spill way at left flank from Blocks 7 to 14 of Singoor Project was accepted by the Superintending Engineer, ID., Irrigation Circle-3, Nizamabad, the first respondent herein and an agreement was entered into on 5-9-1983 for execution of the said work costing about Rs. 1,21,59,459/-. The agreement contemplated completion of the work within eight months from the date of handing over of the site. The site was handed over on 14.11-1983 and the work was to be completed by 23-5-1985. It so happened that due to various reasons, the work could not be completed some of the main reasons, according to the petitioner, are delay on the part of the Geologist to approve the foundations, short supply of cement by the Department, deposit of heavy silt and slush beyond the contemplation of the parties and out-break of cholera in the area affecting the supply of labour, etc. The petitioner applied for extension of time for 4 months from 23-5-1985. The Department granted extension of time only upto 30-6-1985 and subsequently went on extending the contract period. The petitioner requested the Department to grant enhanced rates in view of the steep escalation in the cost of material and labour after the expiry of the original contract period. The Department did not agree. The petitioner, therefore, stopped work from 4-1-1986.

2. The agreement provides for arbitration of disputes that arise under the contract. The petitioner, therefore, filed O.S.No. 3 of 1986 in the Court of the Subordinate Judge, Medak under Section 20 of the Arbitration Act for appointment of sole arbitrator. The Executive Engineer, Singoor Project Division-2, the second respondent herein, addressed all the Executive Engineers of Irrigation Department asking them to send him (Executive Engineer) all the amounts payable to the petitioner under different bills pertaining to different agreements. The petitioner, therefore, filed I.A.No. 106 of 1986 in O.S.No. 3 of 1986 seeking injunction restraining the respondents from stopping payments of bills or any other amounts payable to him in respect of other contracts carried out by him. He contended that he was entitled to get an amount of Rs. 33 lakhs from the Department and the alleged claim of the Department in respect of the work in question for Rs. 12,58,300/- was totally incorrect. The Civil Court, after hearing both sides, granted status quo. That order was questioned by the petitioner in C.M.A. No. 1137 of 1986 in this Court. The C.M.A. was dismissed by this Court taking the view that under Section 41(b) read with Second Schedule of the Arbitration Act, an injunction restraining the Government from withholding payments to the petitioner in respect of other contracts is not permissible since the injunction cannot be said to be for the purpose of and in relation to the proceedings before the Court.

3. The petitioner is seeking a, writ of *Mandamus* declaring that the action of the respondents in seeking to withhold the amounts payable to him for the works executed under agreements other than the agreement No. 10/83 is illegal and unconstitutional.

4. Sri V.R. Reddy, learned counsel for the petitioner, relying upon a decision in *M/s. Lakshmichand & Baichand vs. State of A.P.,* (AIR 1980, SC 20), contends that unless the amount due from him is determined the respondents cannot take action to withhold payments to him in respect of the other contracts carried

out. by him. On the other hand, the learned Government Pleader relying upon Cl. 71—of the Andhra Pradesh Standard Specifications which reads

> "***71. Recovery of money from contractor in certain cases*** :—In every case in which provision is made for recovery of money from the contractor, Government shall be entitled to retain or deduct the amount thereof from any moneys that may be due or may become due to the contractor under these presents and/or under any other extract or contracts or any other account whatsoever".

which formed part of the contract, contends that the Government is entitled to retain or deduct the amounts from any moneys that may be due or may become due to the contractor on any other account.

5. The question that fell for consideration before the Supreme Court *Lakshmichand & Baichand vs. State of A.P., (1 supra)* is similar to the one that has now arisen in this case. Dealing with the contentions based on C. 71, the Supreme Court observed:

> "In regard to the claim to adjustment on the second count the position is more controversial. The claim is founded in the doctrine of equitable set off but we do not find evidence before us to bring the case within the operation of the doctrine. It is not a case where cross demands rise out of the same transaction or the demands are so connected in their nature and circumstances that they can be looked upon as part of one transaction. Nor can assistance be derived from Clause 71. The benefit of that provision can be claimed only if the amount sought to be retained is an ascertained, sum, an amount which can be readily adjusted against the amount payable under the other contract. Here, the amount sought to be adjusted has yet to be determined as a liability against the contractor. It has been disputed by the appellant. Accordingly Clause 71 cannot be invoked".

The reasoning fully applies to the case on hand. Merely because the Government have specified that a sum of Rs. 12,58,300/- was due from the petitioner, it would not become a sum ascertained. In order to become an ascertained sum, there must be determination. There was no determination in the present case. The petitioner wants the matter to be decided by the arbitrator, his claim is that he is entitled for Rs. 33 lakhs from the Government in respect of the contract in question and he is disputing that claim of the Government that in respect of the very same contract, a sum of Rs. 12,58,300/. was due from him. In the circumstances, invocation of Clause 71 is illegal.

6. For the foregoing reasons, the writ petition is allowed. A *Mandamus* will issue directing the second respondent not to withhold the amounts payable to the petitioner for the works executed under the agreements other than the agreement No. 10/83. There shall be no order as to costs. Advocate's fee Rs. 250/-.

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P.S. 72. Contractor dying, becoming insolvent, insane, or imprisoned :—In the event of the death or insanity or insolvency or imprisonment of the contractor or where the contractor being a partnership or firm becomes dissolved

or being corporation goes into liquidation, voluntary or otherwise, the contract may, at the option of the Executive Engineer, be terminated by notice in writing posted at the site of the works and advertised in one issue of the local District Gazette, and all accepted and acceptance works shall forthwith be measured up and paid for at the rates provided in the contract schedule where such apply, or otherwise, by the most recent schedule of rates of the division approved by competent authority, to the person or persons entitled to receive and give a discharge for the payment.

J. — Arbitration and Claims of Contractors on Arbitration Cases

P.S. 73. Arbitration :—In case of any dispute or difference between the parties to the contract either during the progress or after the completion of the works or after the determination, abandonment, or breach of the contract, as to the interpretation of the contract, or as to any matter or thing arising there under except as to the matters left to the sole discretion of the Executive Engineer under clauses 20, 22, 27 (C), 29, 36, 37 and 40 of the Preliminary Specifications or as to the withholding by the Executive Engineer or payment of any bill to which the contractor may claim to be entitled, then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration of the Superintending Engineer of the nominated circle mentioned in the "Articles of Agreement" (hereinafter called the "Arbitrator") and the award or such Arbitrator shall be final and binding of the parties unless contested by either party in a Court of law. Provided however that in cases where the Executive Engineer has entered into the contract on behalf of the Governor, the dispute or difference shall, in the first instant, be referred by or through the Executive Engineer to the Superintending Engineers of the Circle, in which the work lies and his decision thereon obtained before referring such dispute or difference to arbitration under this clause. Progress of the work shall not be suspended or delayed on account of the reference of any dispute or difference to the Superintending Engineer of the circle in which the work lies or to arbitration under this clause. The decision of the Executive Engineer or the Superintending Engineer of the Circle in which the work lies, as the case may be on such dispute or difference shall be conclusive until reversed by the Superintending Engineer or the arbitrator. Either party may within a period, which shall be fixed by the arbitrator, file before the arbitrator a statement of the case and also all 'the documents relating to or having a bearing on the case. The arbitrator shall set that the award is passed, if reasonably possible, within a period of four months from the date of his entering upon the reference, but if any extension of that period is considered by him to be necessary, either *suo moto* or on the application of either party to the reference, the parties hereby agree and consent to such extension as the arbitrator may from time to time consider reasonably necessary, and any such extension shall forthwith be communicated by him in writing to each of the parties hereto. The arbitrator shall not be bound to observe the ordinary rules of procedure applicable to trials before Judicial tribunals not to hear to receive formal evidence but may pass on award on the documents or statements of the case filed by both the parties under or on personal inspection. The arbitrator shall have power to view the subject matter of the dispute with or without the parties or their agents. The arbitrator shall also have power to open up, review and revise any Certificate, opinion, decision, requisition or notice, save in regard to the matters expressly excepted and to determine all

matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given upon every any such reference the costs of any incidental to the reference and award respectively shall be in the discretion of the arbitrator, subject to the condition that the amount of such cost to be divided to either party shall not in respect of, i.e., monitory claim exceed the percentage set out below of any such award irrespective of the actual fees, Costs and expenses incurred by either party; provided that where a monitory claim is disallowed in full, the said percentage shall be calculated on the amount of the claim. The arbitrator may determine the amount of the costs to be awarded or direct the same to be taxed as between solicitor and client or a party and shall direct by whom and to whom and in what manner the same shall be borne and paid.

The percentage above referred to in this clause is 5 per cent on any such monitory award which does not exceeds Rs. 10,000, 3 per cent on the next Rs.40,000 or any part thereof, 2 per cent on the next Rs.50,000 or any part thereof and I per cent on any excess over Rs. 1,00,000

Provided that Government shall not be liable to any claim in respect of any such dispute or difference until liabilities, and the amount referred to is decided by the arbitrator ;

Provided that payment to the contractor based on the arbitration award shall be made only after acceptance of the award by the Chief Engineer if the value of the award is less than Rs. 20,000/- be and the Government if the value is Rs. 20,000 above.

Note 1 :—*Arbitration awards whose value is below Rs. 20,000:*

The Chief Engineer is authorized to accept arbitration awards below Rs. 20,000 in value. The Chief Engineer shall make a review of the arbitration award within 15 days of service of the notice of the making of the awards in consultation with the local counsel and if in his opinion the award has to be contested, he shall file an application in the Court Within 30 days of service of the notice of making of the award for the filing of the award and take steps to contest the award.

If, for any reason, the Chief Engineer considers it in advisable to act according to the advice of the local counsel, he shall refer the matter to the Government for examination within 15 days of the service of the notice of making of the award.

Arbitration Awards whose value is Rs 20,000 or above:

The Chief Engineer shall make a review of the arbitration awards whose value is Rs. 20,000 and above and submit a report to the Government within 10 days of service of the notice of the making of the award. In such case a summary of the case, a copy of the agreement for the work, the facts pressed before the arbitrator by the parties along with the recommendations of the Chief Engineer, should be furnished to the Government for all appreciation of the case. The Government will then take a decision in consultation with the law department whether the award should be accepted or not and communicate the same within 25 days of service of the notice of making of the award so as to enable the Chief Engineer either to take action on the basis of the award or to file an application

in the Court within 30 days of service of the notice of the making of the award for filing of the award and for contesting it.

Note 2 :—Applications of contractors seeking arbitration should bear a Court fee stamp as per clause 10(K) of Schedule (II) to the Andhra Pradesh Court Fees and Suits Valuation Act, 1956 but no stamp duty need be levied.

The awards passed by arbitrators shall be made on stamped paper the value of which should according to the value of claim to which the award relates as per Article 12 of Schedule I-A to the Indian Stamp Act.

If the aggrieved party goes to a Court of law challenging the award, he should pay the necessary Court fee.

[***Note 3*** :—Except as otherwise provided in the contract any disputes and differences arising out of or relating to the Contract shall be referred to adjudication as follows :

I. (i) Settlement of all Claims upto Rs. 50,000/- in value by way of Arbitration to be referred as follows :

(a) Claims upto Rs. 10,000/- in value,	Superintending Engineer of another Circle in the Dept.
(b) Claims above Rs. 10,000/- and upto Rs. 50,000/- in value	Another Chief Engineer of same Department.

The arbitration proceedings will be conducted in accordance with the provisions of the Arbitration Act, 1940 as amended from time to time. The Arbitrator shall invariably give reasons in the award.

II. Settlement of all Claims above Rs. 50,000/- in value:

All Claims above Rs. 50,000/- in value shall be decided by the Civil Court of competent jurisdiction by way of a regular suit and not by arbitration.

A reference for adjudication under this Clause shall be made by either party to the Contract within six months from the date of intimating the Contractor of the preparation of final bill or his having accepted payment.

The relevant Clauses of Andhra Pradesh Detailed Standard Specifications stand modified to the extent provided in this Clause].

[Added by G.O.Ms.No. 158, Tr. & B. (B. III), Dt. 13-7-1992]

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JUDGMENT

SPECIFIC ELIMINATION OF ARBITRATION CLAUSE
CLAUSE 73 WOULD BE INOPERATIVE

AIR 1989, Kerala 241

V. Siva Ramannair and N. Fathima Beevi, JJ.

M/s. Leo Construction Contractors *Appellant*

vs.

Government of Kerala *Respondent*

Sivaraman Nair, J. :—The appellant is the Managing Partner of a registered firm of contractors. He had filed O.S.No. 411 of 1981 under Sec. 20 of the Arbitration Act. That suit was dismissed on the finding that the contract which the appellant had entered into with the respondents did not provide for reference to the arbitrator. Hence this appeal.

2. The appellant had submitted a tender for construction of a building for the Government Secondary School, Quilandy, consequent on the acceptance of his tender, he executed an agreement on 18-11-1978 with the second respondent. According to the appellant, Cl. 14 of the Form of Tender and Cls. 24, 24(a) and 44 of Form No. 83 were expressly made part of the agreement. These clauses were to the effect, that in case of any dispute or difference that may arise in the working of the contract, the same should be referred to arbitration before the Government Arbitrator, at the instance of either party. Several disputes arose between the parties regarding execution of the work. It was because his request for referring the dispute to the Arbitrator was not allowed that he filed O.S.No. 411 of 1981.

3. In their written statement, the respondents submitted that condition No. 14 of the Form of Tender and Cls. 24 and 24(a) of Form No. 83 had been specifically eliminated from the contract and the dispute could not be referred for Arbitration. Reference was also made to Ext. B2 Government Order, Dt. 8-5-197 8 to the effect that arbitration would be restricted only to works the estimated P.A.C. of which was Rs. 2 laths and below. They also contended that Art. 3 of the Agreement was deleted and the appellant had endorsed such deletion. Consequence of such deletion, read in conjunction with Ext. B2 Government Order, and the removal of Cls. 24 and 24(a) of Form No.83 was said to be to shut out Arbitration in the instant case, since, admittedly, the estimated amount of contract exceeded Rs. 2 lakhs by over Rs. 2,40,000/-.

4. The trial Court considered the question whether the disputes were liable to be referred for Arbitration under the terms of the contract. The trial Court found that Cl. 44 has the only effect of incorporating general conditions forming part of the contract documents and that general Cl. 73 in Madras Detailed Standard Specifications which necessarily formed part of the notice inviting tender and therefore of the agreement could not survive the deletion of Cls. 3,24 and 24(a), which related specifically to arbitration. Those clauses were scored off. The trial Court also found that in the light of the specific deletion of Cls. 24 and 24(a), it was not reasonable to hold that Cl. 14 of the Tender Form was incorporated in the agreement by virtue of the provisions of Cl. in Form No. 83. The Court held further that the appellant having signed Form No. 83, from which Cl. 24 & 24(a) relating to Arbitration were deleted, could not be heard to seek arbitration in spite of such deletion. Appellant submits, that Cl. 44 of Form No. 83 and Cl. 14 of the tender notice do survive and such survival in the contract willingly entered into between the parties do provide for a reference of dispute arising out of the contract to the Government Arbitrator.

5. The very question as to whether the provision for arbitration as contained in the Madras Detailed Standard Specifications, which are corporated as terms of the contract, would enable a contractor to claim reference of disputes for arbitration notwithstanding the deletion of clauses similar to Cls. 3, 24 and 24(a) had come up for consideration before this Court in a number of decisions. *State of Kerala vs. Joseph*, 1983, Ker. LT 583, a Division Bench of this Court held, that incorporation of the terms of M.D.S.S. had the effect of providing for arbitration of disputes notwithstanding the specific deletion of arbitration clauses in the agreement. A different view was taken in M.F.A. No. 158 of 1984. In yet another decision, *State of Kerala vs. Siby Varghese*, 1987 (1), Ker. LT 860, another Division Bench adopted a slightly different view. In that decision, it was held in unmistakable terms that the M.D.S.S. served an entirely different area and would not supply or supplement provisions dealing with arbitration. A Full Bench of this Court considered the divergetice of views expressed in the above decisions in the judgment in M.F.A. Nos. 586 and 789 of 1987, 1988 (2), Ker. LT 768 ; (AIR 1989, Ker. 61) (FB), and held that C1.73 of the M.D.S.S., which was to be read as part of the contract, was not meant to render the deletion of Cls. 3, 24 and 24(a) of the contract ineffective. The Full Bench, therefore, held that the effect of the deletion of those clauses was that not only the arbitration clause, but the entire arbitration process itself was consciously annihilated. The Full Bench also referred to G.O.Ms.No. 53/ 78/PW&E, Dt. 8-5-1978 (Ext. B2) and held, that the order unmistakably indicated the intention of the Government to do away with the provision for arbitration in contracts, the P.A.C. of which was more than Rs. 2 lakhs. The Full Bench concluded, that a situation in which Cls. 3 and 24 were deliberately and consciously struck down, the entire arbitration provisions collapsed. We are bound by the decision and have necessarily to dismiss this appeal.

6. We have to come to the said conclusion for yet another reason also. Art. 299 of the Constitution of India deals with contracts made in the exercise of the executive power of the Union or of a State. It provides for the manner in which the contract shall be expressed to be made and executed on behalf of the President or the Governor. A contract which does not comply with Art. 299 of the Constitution is not enforceable against the executive Government. Art. 299 of the Constitution, dealing with the executive power of the Union or a State in respect of contracts is in the following terms

> "***299. Contracts*** :—(1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize".

Ext. B2 is an order of the executive Government and is expressed in the name of the Governor as required by Art. 166 of the Constitution of India. That clearly and unmistakably indicated that no contract with the Executive Government, comprehended by Art. 299 of the Constitution of India, shall contain a provision for arbitration if the estimated PAC was more than Rs. 2 lakhs. Even assuming that Cl.73 of the M.D.S.S. should be read as part of the Form of contract, the

existence of that condition which is contrary to the expressed intention of the executive Government will be inoperative, because it will be contrary to the direction which the Governor is competent to issue under Art.299 of the Constitution of India. A provision of a contract which is contrary to the stipulations contained in directions issued by the Governor under the above Article cannot be enforced against the executive Government.

7. Counsel for the appellant submitted that though the appellant had countersigned the deletion of Cl. 3, he had not countersigned deletion of Cls. 24 and (a) of the agreement. He submitted further, that according to Cl. 44 of the agreement, Cl. 14 of Form No. 84 which provides for arbitration should be read into the contract. He, therefore, submits that the finding of the trial Court is unsustainable. We have perused the agreement, the tender notice and Cl. 14 of Form No. 84 dealing with specifications. What we find is that Form No. 84 is not part of the tender notice and cannot therefore be read into the contract by virtue of the provisions contained in Cl. 44 of the agreement.

8. In addition to the reasons stated by the Full Bench in the decision referred to above, we hold that a provision for arbitration would not survive the promulgation of Ext. B2 Order by the Governor in relation to the manner in which contracts shall be executed on behalf of the executive Government. A term in a contract contrary to the directions issued by the Governor is incapable of enforcement against the executive Government.

The appeal is, therefore, devoid of merits and is hereby dismissed. The parties will suffer their respective costs.

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Claims of Contractors on Arbitration Cases

Claims of contractor on Arbitration cases — revised procedure — Orders — Issued.

[G.O.Ms.No. 430, irrigation (irr. V) Dept., Dt. 24-10-1983]

Ref :—G.O.Ms.No. 876, PW., Dt. 31-7-1975.

Order :—In the G.O. read above, orders were issued introducing the system of arbitration by a Panel of Arbitrators as detailed below:

	Value of amount	*Panel of Arbitrations*
1.	Claims upto Rs.20,000/- in value.	Superintending Engineer of another Circle.
2.	Claims of Rs.20,000/- above upto Rs.1.00 lakh.	1. Superintending Engineer of another Circle. 2. Directors of Accounts/Dy.Chief Accounts Officer. 3. Chief Engineer.

3.	Claims of Rs.1.00 lakh above.	1. Chief Engineer. 2. Representative of the Finance and Planning Dept. to be nominated and 3. Director of Accounts or Dy.Chief Accounts Officer.

2. The question of the revising the above procedure has been receiving the attention of Govt. for some time past. The Govt. after careful consideration of various aspects of issues involved direct the procedure be revised as follows:

	Value of amount	*Panel of Arbitrations*
1.	Claims upto Rs.10,000/-	Superintending Engineer of another Circle in the same Department.
2.	Claims above 10,000/- and upto Rs.50,000/-	(a) Another Chief Engineer of the same Department. (b) Where there is only one Chief Engineer, in the Dept., the Chief Engineer will submit proposals to Govt. in the Administrative Dept., for nomination of another Chief Engineers as Arbitrator by Govt.
3.	x x x	x x x

3. All claims above Rs. 50,000/- shall be decided by a Civil Court of competent jurisdiction by way of a regular suit.]

(Amended by G.O.Ms.No. 160, Irrigation & CAD (PW) Dept., Dt. 1-6-1987)

4. Claim means all claims in that contract.

5. The orders referred to in paras 2 and 3 above shall be applicable to all the agreements entered into by Government from the date of issue of this order and will be applicable to all the Engineering Department, in the State Govt. referred in para (6) *Supra*.

6. The Engineer-in-Chief is requested to submit necessary suitable draft amendments to the codal provisions wherever necessary including amendment to the A.P.D.S.S. urgently.

7. Government also direct that pending amendments to the codal provisions and A.P.D.S.S. referred to in para (5) above, the Chief Engineers/Superintending Engineers of Irrigation Department, and the Chief Engineers of other Departments, i.e., Panchayat Raj, Roads and Buildings and Public Health Depts., Chief Engineer (Electrical) are hereby directed to take necessary action in regard to incorporation of the revised procedure referred to in paras 2 and 3 above in all the future agreements to be entered into with the contractors with immediate effect.

Claims of contractor on Arbitration cases — revised procedure — Orders— Issued.

[G. O.Ms.No. 20. Irrigation & CAD (PW) Dept, Dt. 31-1-1989]

Order :—x x x x x

Except as otherwise provided in the contract, all disputes and differences arising out of or relating to the contract shall be referred to adjudication as follows :—

(1) (i) Settlement of all claims upto Rs. 50,000/- in value and below by way of arbitration to be referred as follows :—

(a) Claims upto Rs. 10,000/-	Superintending Engineer of another Circle, in the same Department.
(b) Claims above, 10,000/- and upto Rs. 50,000/-.	Another Chief Engineer of the same Department.

The arbitration proceedings will be conducted in accordance with the provisions of the Arbitration Act, is to be prepared from time to time. The Arbitrator shall invariably give reasons in the award.

(ii) Settlement of all claims above Rs. 50,000/- in value :—All claims above Rs. 50,000/- in value shall be decided by a Civil Court of competent jurisdiction by way of a regular suit and not by arbitration.

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Claims of Contractors on Arbitration cases — Revised procedure — Orders — Issued — Nomination of Chief Engineers in Irrigation and Projects in respect of claims above Rs. 10,000/- upto Rs. 50,000/- orders — Issued.

[G. O.Ms.No. 456, irrigation (V) Department, Dt. 10-11-1983]

Ref :—G.O.Ms.No. 430, Irrigation, dated 24-10-1983.

Order :—In the G.O. read above, orders have been issued prescribing the revised procedure on claims of contractors on Arbitration cases.

2. In of the orders issued in the GO. read above, Govt. direct that

I. In respect of claims upto Rs. 10,000/- the Engineer-in-Chief shall nominate another Superintending Engineer of a circle as Arbitrator.

II. In respect of claims above Rs. 10,000/- upto Rs. 50,000/- the following Chief Engineers are nominated as Arbitrators as indicated in columns (2) below:

	Name of the Unit *(1)*	*Arbitrator* *(2)*
1.	Chief Engineer, Major Irrigation	Chief Engineer, Sriramsagar Project.
2.	Chief Engineer, Medium and Minor Irrigation.	Chief Engineer, Srisailam Project.

3.	Chief Engineer, Nagarjunasagar Project (Dam, Right & Left Canals).	Chief Engineer, Medium & Minor Irrigation.
4.	Chief Engineer, Srisailam Project.	Chief Engineer, Major Irrigation.
5.	Chief Engineer, Sriramsagar project.	Chief Engineer, Nagarjunasagar Project.
6.	Telugu Ganga Project (Including Somasila Project)	Engineer-in-Chief.

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ARBITRATION AWARDS — STAMP DUTY

Arbitration awards bearing Cost of stamped papers — Clarification.

[Memo.No. 176, - Codn/75-1, P. W.D., Dt. 5-3-1975]

An extract of item 12 in Schedule 1-A to the Indian Stamp Act is printed below:

	Description of instrument *(1)*	*Proper Stamp Duty* *(2)*
12.	Award	
	(a) Where the amount does not exceed Rs.1,000/-	3%
	(b) Where the amount exceeds Rs.1,000/- but does not exceed Rs.5,000/-	50 Rs.
	and for every additional Rs.1,000/- or part thereof in excess of Rs.5,000/-	2 Rs. subject to a maximum of Rs.200/-

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