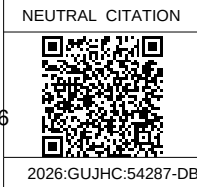


**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/FIRST APPEAL NO. 3469 of 2006****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE ILESH J. VORA****and****HONOURABLE MR. JUSTICE R. T. VACHHANI**

=====		
Approved for Reporting	Yes	No

GUJARAT WATER SUPPLY AND SEWAGE BOARD**Versus****GUJARAT LAXMI MAJOOR KAMGAR SHAHKARI MANDLI LTD****Appearance:****MR RC JANI(357) for the Appellant(s) No. 1****MR KG SUKHWANI(871) for the Defendant(s) No. 1****CORAM: HONOURABLE MR. JUSTICE ILESH J. VORA****and****HONOURABLE MR. JUSTICE R. T. VACHHANI****Date : 25/08/2026****ORAL JUDGMENT****(PER : HONOURABLE MR. JUSTICE R. T. VACHHANI)**

1. By way of this First Appeal, the appellant – original defendant challenges the judgment and decree dated 22/12/2005 passed in Special Civil Suit No.409 of 1989 by the learned 7th Additional Senior Civil Judge, Gandhinagar whereby the suit preferred by the respondent – plaintiff came to be partly allowed and the appellant – defendant is

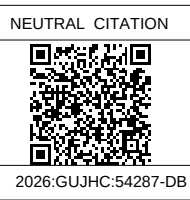


directed to pay a sum of Rs.44,28,524/- with 10% interest from 30/01/1989 till realization.

2. The short facts of the case are as under:

2.1 The respondent–plaintiff is a registered Mandali and approved Contractor for construction works of public works department. The tender for the work of laying -lowering & Jointing sewer collecting system for Himmatnagar Drainage Scheme, Zone 'D' was accepted and work for Rs.46,25,487.86 ps. was allotted to respondent herein-plaintiff vide agreement No.B-2/27 of 1985-86 and work was to be completed on or before 21/07/1987. It is the case of the respondent – plaintiff that since the work was not completed within the stipulated time period on account of the non-compliance of contractual obligations & fundamental breaches of contract by defendant.

2.2 It is to be noted that the work order was issued on 22/07/1985 with the deadline to complete the work by 21/07/1987; however the work was significantly delayed due to the reasons attributable to the appellant herein and it was stopped by the defendant on 12/06/1986. Thereafter, several correspondence between the parties including a letter dated 01/04/1986 stating therein shortage of materials from the 7th month and the letter dated 08/12/1987 complaining of continued shortage of frame covers and a letter dated 30/03/1988 stating that trees belonging to the Forest Department prevented a clear line for the work. The appellant – defendant paid 22nd and final bill on 22/10/1989 which was accepted without protest and the legal notices came to be issued on 30/01/1989 and



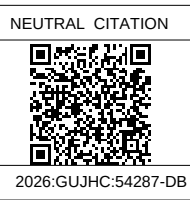
12/08/1989.

2.3 The respondent – plaintiff called upon the appellant-defendant to pay the said amount, but the appellant has neither replied nor complied with the same.

2.4 The respondent – plaintiff was, therefore, constrained to institute the above suit against the appellant – plaintiff to claim Rs.47,70,077/- from the defendant.

2.5 Upon filing of the suit, the reply / written statement was filed by the appellant – defendant denying the claim made by the appellant – defendant. The learned Judge of the Trial Court has framed mainly five issues and evidence was led by the parties oral as well as documentary in nature and after considering the arguments made before the learned Trial Court, the learned Judge of the Trial Court has partly allowed the suit by the impugned order which has been carried before this Court by way of present appeal.

3. Learned Counsel Mr.R C Jani appearing for the appellant – original defendant has submitted that the learned Judge of the Trial Court has committed serious error of law by not believing the case of the appellant – defendant. It is submitted that the learned Judge of Trial Court has materially erred in law and on facts, in allowing the suit of the plaintiff though no oral or documentary evidence is produced by the respondent – plaintiff, whereas more than enough documentary evidence have been produced along with oral evidence by the appellant – defendant, which is



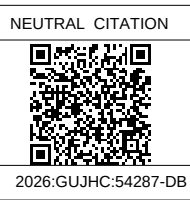
not considered at all by learned Judge of the Trial Court while passing the impugned judgement and decree.

3.1 Learned Advocate for the appellant – defendant has submitted that no such true and correct facts have been stated by the plaintiff and there was no fault on the part of the defendant restraining to complete the work in time limit. He would submit that it was the plaintiff who committed the breach of contract though the possession of the site was given alongwith plans, drawings, etc., with the work order. It is further submitted that item wise programme was given and no such work was suspended on account of paucity of the fund. However, the learned Judge of the Trial Court has not considered this aspect and committed error in passing the judgment and decree in favour of the respondent herein – plaintiff.

3.2 While taking this Court through the impugned judgment and decree, it is submitted that there is no proof or evidence produced by the plaintiff in support of his claim and the learned Judge of the Trial Court has without there being any evidence has passed the judgment and decree which is contrary to the law and evidence.

3.3 In support of his submissions, learned Advocate for the appellant has relied upon the following decisions.

1. M/S Unibros vs. All India Radio [2023 LiveLaw (SC) 918].
2. A decision rendered by the learned Single Judge of this Court in CAV Judgment in First Appeal No. 4979 of 2001 in the case of Gujarat Water Supply & Sewage Board & Anr vs. Evergreen

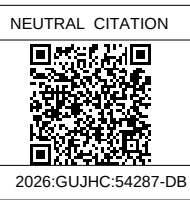


Trading & Construction Company.

3.4 Learned Advocate for the appellant to substantiate his arguments has also placed reliance upon Section 6 of the Societies Registration Act, 1860 stating and contending that in view of the CAV order passed by the learned Single Judge of this Court in First Appeal No.4979 of 2001 wherein the suit in question was filed in the name of the firm without impleading any partner was held to be not maintainable and while equating the aforesaid observations with the facts of the case on hand in consonance with the provision of Section 6 of the Act, it is submitted that the suit filed by and against the society under the Act is to be filed in the name of the President, Chairman or Secretary of the society. However, the provisions of Section 69 of the Indian Partnership Act which clearly holds that no suit to enforce any right arose can be instituted unless the firm is registered and the person suing has been shown in the register of a firm is a partner in the firm. However, considering the provisions of Section 6 of the Act, there is no such similar mandate and therefore, the suit filed by the Contractor of the Mandali cannot be said to be hit in contravention of the said provision as the society has been duly represented by the authorized person.

3.5 By making the above submissions, learned Advocate Mr.R C Jani would submit to allow the present appeal and to quash and set aside the judgment and decree passed by the learned Judge of the Trial Court.

4. *Per contra*, learned Advocate Mr.Sukhwani appearing for the respondent – plaintiff while supporting the judgment and decree passed

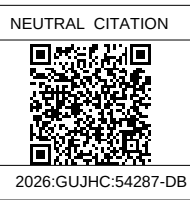


by the learned Judge of the Trial Court would submit that the learned Judge of the Trial Court has examined the issue in consonance with the evidence led by the parties and thereafter arrived at the finding of partly allowing the suit and therefore, it cannot be said that learned Judge of the Trial Court has not considered any evidence.

4.1 While taking this Court through the finding recorded by the learned Judge of the Trial Court partly allowing the suit for recovery, learned Advocate for the respondent – plaintiff would submit that the learned Judge of the Trial Court has after considering the evidence adduced before the Court and having carefully examined the same allowed the suit and therefore, this Court may not entertain the present appeal and it is urged to dismiss the present appeal.

4.2 In support of his submissions, learned Advocate appearing for the respondent – plaintiff has relied upon the following decisions.

1. State of West Bengal And others vs. S.K. Maji 2025 SCC OnLine Cal 3945.
2. M/s. A.T. Brij Paul Singh and Bros vs. State Of Gujarat AIR 1984 SUPREME COURT 1703.
3. Mcdermott International Inc. vs. Burn Standard Co. Ltd and Ors 2006 AIR SCW 3376(1).
4. Associate Builders vs. Delhi Development Authority (2015) 3 Supreme Court Cases 49.
5. Atlanta Limited vs. Union Of India (2022) 1 SCALE 652.
6. State Of Gujarat vs. Kothari And Associates (2016) 14 Supreme Court Cases 761.



7. Dwarka Das vs. State Of M.P. AIR 1999 Supreme Court 1031

4.3 While referring to and relying upon the decisions cited by learned Advocate for the respondent – plaintiff in the case of *State of West Bengal And others (supra)*; *M/s. A.T. Brij Paul Singh and Bros (supra)*; *Mcdermott International Inc. (supra)* and *Dwarka Das (supra)*, it is submitted that the said decisions pertain to the loss of profit and loss of profitability. It is established position of law that such claims for loss of profitability are not generally to be allowed in absence of any proof of evidence of loss. Simultaneously, it is submitted that in view of the aforesaid decision, the claim raised by the contractor for recovery of amount as damages as accepted profit out of the contract cannot be disallowed on the ground that there was no proof that he suffered actual loss to the extent of the amount claimed on account of breach of contract.

4.4 While referring to decision in case of *Associate Builders (supra)*, learned Counsel for the respondent – plaintiff would submit that even the application for Hudson's formula to arrive at a claim made under different heads and the same cannot be mechanically applied as the documents produced by the parties are required to be considered and the same has rightly been considered by the learned Judge of the Trial Court and therefore in view of such position, it does not warrant any interference.

4.5 While referring to the decision in the case *Atlanta Limited (supra)*, learned Counsel for the respondent – plaintiff would submit that claim of the machinery having been stationed idle due to no fault on the part of the



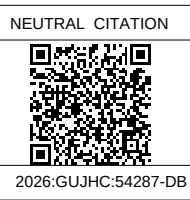
respondent would entitle to higher charges and value of its machinery and equipment lying at the site, in view of the negligence attributable to the appellant, the machinery including the equipment sought to be laid at the site which would entitle the respondent to raise such claim for breach of contract.

4.6 While referring to the decision in case of ***Kothari & Associates (supra)***, learned Counsel for the respondent – plaintiff would submit that there was a delay in handing over the site and design and therefore, the project could not have been completed in time which makes the respondent – plaintiff entitle to raise such claim which cannot be said to be beyond limitation.

4.7 By making the above submissions, learned Counsel for the respondent – plaintiff would submit to dismiss the present appeal.

5. Having heard the learned Counsel appearing for the respective parties and examining the impugned judgment and decree passed by the learned Judge of the Trial Court, following undisputed facts emerges from the record:

1. The dispute involves between the parties relating to construction contract for the work of “Laying – lowering and Jointing Sewer Collecting system for Himmatnagar Drainage Scheme, Zone “D”.
2. The tender was issued and tender of the plaintiff was accepted being lowest bidder.
3. The work order was issued on 22/07/1985 and agreement between the parties was executed setting out the terms and conditions for



execution of the said work and as per the said agreement, the work was to be completed within a period of 24 months from the date of issuance of the work order.

4. The stipulated date of completion of work was 21/07/1987.
5. Since the plaintiff could not complete the work within stipulated period of time, the request for extension was sought which was considered sympathetically and time to complete the work was granted upto 31/12/1989.
6. The work was completed after about more than two years of a stipulated period of time and thereby alleged to have committed breach of terms and conditions.
7. The causes cited by the respondent in correspondence looks between the parties including the letter dated 01/04/1986 stating shortage of material from the seventh month, as also the letter dated 08/12/1987 complaining continued shortage of frame covers and the letter dated 30/03/1988 stating therein that trees belonging to the Forest Department prevented a clear line for the work.
8. The appellant – defendant paid 22nd final bill on 22/10/1989 which was accepted without protest by the plaintiff.
9. Legal Notices were issued and ultimately the suit in question came to be filed.
10. Since the parties litigating for their respective rights solely on the ground of claim arising out of the contract, then it is the terms and conditions of the contract and the germane to decide the claim / breaches and not the subsequent correspondence; without there being having force by any cogent evidence on completion of the work on extended period for the agreement contract rate at

Rs.46,25,487.86 Paise against which the payment of which Rs.49,55,175-70 Paise has been duly received by the respondent without protest. Thus, due weight age is required to be given to the terms and conditions of the contract and the claims raised therein by one party and objected rather confronted by the other side solely rests on the fulfillment and the contravention respectively and therefore, without there being any substance attributing the fault or negligence of any party to the contract which is required to be proved by substantial evidence. The subsequent correspondence and bare claims outside the contract or rather the intention of the parties as governed from the contract cannot be accorded.

6. It appears from the record that as many as eleven claims have been raised on behalf of the plaintiff – respondent herein; details of which reads thus:

Name of the claim	Amount prayed for in the plaint	Awarded amount by the learned Trial Court
Claim No.1 work done but payment was not given.	Rs.33,000/-	Nil
Claim No.2 preparing 2515 inspection chambers at the rate of Rs.150/- per chamber.	Rs.3,77,250/-	Rs.3,77,250/-
Claim No.3 preparing 3500 CMT Surplus with road.	Rs.52,500/-	Nil

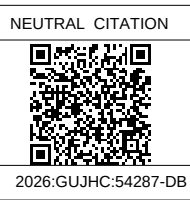


Claim No.4 delayed work due to fault of defendant.	Rs.1,20,000/-	Rs.1,20,000/-
Claim No.5 Loss suffered as the plaintiff's supervisory staff and other technical and clerical staff remained idle for 14 months.	Rs.5,25,200/-	Rs.5,25,200/-
Claim No.6 Loss suffered as the machinery remained idle for 13 months.	Rs.3,51,000/-	Rs.3,51,000/-
Claim No.7 loss suffered as the plaintiff was not allowed to carry out full work.	Rs.3,60,000/-	Rs.1,80,000/- (10%)
Claim No.8 loss suffered as the plaintiff purchased 400 M.T. Cement from Market.	Rs.50,000/-	Rs.50,000/-
Claim No.9 loss due to the fault of defendant, the plaintiff completed work of Rs.30,00,000/- after stipulated date and expended this amount.	Rs.27,00,000/-	Rs.27,00,000/-
Claim No.10 loss of profit from other business due to project delayed.	Rs.1,25,274/-	Rs.1,25,274/- (At the rate of 5%)
Claim No.11 pre-suit	Rs.75,853/-	Awarded interest as per

interest (20% from 30/01/1989 to 19/11/1989)		final order.
Total amount	Rs.47,70,077/-	Rs.44,28,524/-

7. At the outset, it is required to be noted that several claims raised by the respondent-plaintiff are required to be proved by leading substantial evidence. e.g. claim for damages whether general or special, cannot as a matter of course result in an award without proof of the claimant having suffered injury. Thus, it is submitted that every claim raised by the respondent herein is required to be proved which in the facts on hand has not been proved; simply by relying upon the one sided correspondence made by the respondent and the same having been not answered is no ground to believe the claim having been duly considered by the appellant as the whole case of the parties rests on the agreement duly executed between them subject to such terms and conditions and several recitals introduced therein by which either of the parties shall abide by it and therefore, the learned Judge of the Trial Court seems to have committed an error in allowing claims raised by the respondent without the same being duly proved as well as the same appears to be in contravention of terms and condition of the contract.

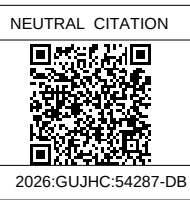
8. In continuation of the aforesaid, it is further submitted by the respondent that such claims though while pertaining to the loss of profit and profitability and therefore to get / succeed the same, the respondent was required to establish the following conditions (01) there was a delay in the completion of the contract (02) such delay is not attributable to the claimant, (03) the claimant's status as an established contractor, handling



substantial projects and (04) credible evidence to substantiate the claim of the loss of profitability.

9. Thus, the aforesaid ingredients are required to be established by the claimant so as to succeed by leading substantial evidence rather by proving the same which in the facts on hand has not been done rather the sole reliance has been placed on the letter addressed by the respondent to the appellant.

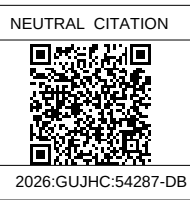
10. Now, in light of the aforesaid fact situation, the undisputed facts as emerging from the record are that the tender having been floated by the defendant for the work of “laying–lowering and jointing sewer collection system for Himmatnagar Drainage Scheme, Zone-D which was allotted to the plaintiff followed by the issuance of the work order subject to the conditions that the contract in question has to be completed within a period of 12 months and there is no issue with regard to the aforesaid. However, the fact remains that the work in question could not have been completed by the plaintiff within stipulated period of time as the defendant failed to follow its obligation such as by not giving the possession of the site exclusively and uninterruptedly and thereby committed breach of the terms and conditions of the contract. Not only that, the plans, drawings, MS wires alongwith the work order and the item wise programme were not given in time. Even the Superintending Engineer was not able to work out the completion of the item and the material which was required to be provided as per the terms and conditions of the contract have also not been provided in time despite there being a repeated demands and requests made by the plaintiff which



resulted into delaying the execution of the work.

11. To prove the facts asserted by the plaintiff, the reliance has been placed upon the correspondence rather the letter addressed by the plaintiff to the defendant and the learned Judge of the Trial Court relying upon the aforesaid correspondence has come to the conclusion that the same having not been duly responded by the representative of the appellant, constrained the plaintiff to stop the work due to non-payment. While referring to documents produced at Exhibit-24, 25, 27 and 29, the learned Judge of the Trial Court opined that the frame covers were not provided despite the same having been put into the knowledge of the authority. More so, the existence of the trees of the Forest Department which requires to be removed could not have been removed due to the lack of the permission of the Forest Department and in furtherance thereto, it has been pleaded that due to the shortage of frame covers and that clear line was not given as also the extension of the time was not granted resulted into the work in question could not have been continued. Furthermore, due to the shortage of fund, etc., constrained the respondent – plaintiff to make a request for the price rise. Thus, the learned Judge of the Trial Court while referring to the aforesaid correspondences have concluded that the letters and contents thereof proved the factum of delay having been occurred due to the negligence on the part of the appellant – authority.

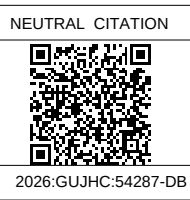
However, the fact reveals that the contents of the correspondence as referred to and relied upon by the learned Trial Court do not seem to have been proved by leading substantial evidence or by placing the



cogent material on record. Simply by addressing the letter expressing their grievance cannot be considered to oust the very germane of the terms and conditions entered into by and between the parties.

12. It also appears that not a single terms and conditions as has been agreed upon between the parties in regards to the several claims raised by the respondent have been referred to and dealt with by the learned Judge of the Trial Court and simply by putting the burden on the defendant of the correspondence entered into by the plaintiff having been not responded by the defendant is no ground to shoulder the liability upon them as the burden lies on the person who asserts the particular facts. Even while relying upon the so-called Notices issued by the plaintiff, the reason put-forward by the plaintiff for keeping the work on halt is solely on the basis of the oral instructions by the defendant.

However, nothing sort of any cogent material except in the form of correspondence have been placed on record as the whole case of the plaintiff rests on the several correspondences adhered by respondent and the appellant. Not only that, the cause behind stopping of the work solely rests on the basis of the letter issued by the defendant asking the plaintiff to stop the work forthwith as the defendant has been facing financial difficulty. No such material except the bare reference has been placed on record. Thus, the issue No.3 appears to have been answered in affirmative in favour of the respondent – plaintiff by the learned Judge of the Trial Court on the aforesaid basis for which no cogent material seems to have been placed; only bare reference of the letter addressed by the respondent is the core reason to accord the said claim and therefore,



finding arrived at by the learned Judge of the Trial Court does warrant interference.

13. Now, insofar as the claim amount awarded by the learned Judge of the Trial Court is concerned, in regards to claim No.1 which pertains to the work done but not paid to the extent of Rs.33,000/-, which has been turned down on the ground of same having been not proved by the plaintiff as the details of the amount and the bills having not been provided nor the same having been proved. It is pertinent to place on record that even the rest of the claim more or less on the similar facts and the claims thereof seem to have accorded while referring to and relying upon the same aspect.

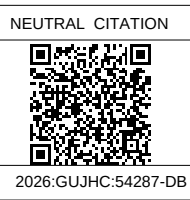
14. In regards to claim No.2 which pertains to extra rate for executing 2515 inspection chambers, as per the claim of the plaintiff, that 2515 inspection chambers were prepared and therefore, the plaintiff is entitled to get Rs.15,000/- per chambers in addition to the tender rate. As per the claim of the plaintiff, the said work was done after the prescribed time limit as the total work has been divided into three parts i.e. $\frac{1}{4}$, $\frac{1}{2}$ and $\frac{3}{4}$. However, nowhere it has been mentioned that inspection chambers was made at what stage of the work since these are the finding of the learned Judge of the Trial Court. However while concluding on the basis of the assumption that initial work is of the excavation for pipe trenches etc., and thereafter the construction work is to be started and again for the aforesaid purpose, the respondent placed its finger to prove the same on the letter addressed by the plaintiff to the defendant vide Exh.21 wherein the reference with regard to the shortage of material like cement, frame,



cover, etc., were made so also the periodical payment was also not made to the contractor because of which the plaintiff was constrained to purchase 500 MT cement from the open market and therefore considering the aforesaid aspect solely on the assumptions and presumptions; without there being any such substance with regard to the same having been purchased from the open market at what cost and at what rate and what actual loss having been suffered by the plaintiff, the claim has been awarded in toto.

15. In regards to claim No.4 to 6 which pertains to refilling trenches, idle supervisory, technical and clerical staff, idle machinery (13 months) made by the plaintiff, as emerges from the material on record, so also the conclusions arrived at by the learned Judge of the Trial Court, it is not in dispute that the work in question and the period thereof was delayed and was extended for a period of 24 months at the request of the plaintiff. Now, the moot question which is required to be considered is as to who can be said to be the responsible for the delay caused though the learned Judge of the Trial Court concluded while attributing the said delay on the defendant solely on the basis of the correspondence reference of which has been made in the earlier paragraphs.

16. Again at the cost of repetition, it can be said that the aforesaid claims have been allowed in holding the absence of any response from the defendant and thereby the learned Trial Court concluded that since no documents have been produced by the defendant, the aforesaid claims have been allowed. In spite of the fact that, such kind of issue is required to be gone into in detail has been dealt with superficially as mere non-



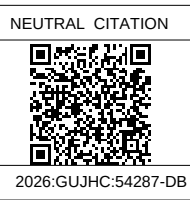
responding to the letters addressed by the plaintiff cannot saddle the defendant with the liability; particularly when the whole case of the parties rests on the contract and the subject to the terms and conditions entered into by and between the parties.

17. It is apparent that the work in question could not have been completed within the stipulated time period and it is only at the request of the plaintiff the period was extended for 24 months though while seeking extension of time, no such delay seems to have been attributed to the defendant. To the contrary, the stand of the defendant that the said request has been sympathetically considered which itself is the self-explanatory of the fact that in the aforesaid circumstances, the delay cannot be attributable to the defendant and therefore, the construction work carried forward for further period of 24 months for which the plaintiff is duty bound to stay at the site with the man power and the equipment and for which as per the claim of the plaintiff, the said work has been completed on 13/10/1989 and the amount to the extent of Rs.49,55,175-70 Paise has been received without any protest which establishes the fact that man power deployed by the contractor–plaintiff and the machinery lying at the site cannot be said to have been placed idle, particularly where no such cogent material has been put-forward by the plaintiff to establish the aforesaid fact. More so, no prudent person particularly the contractor engaged in established business is expected to put the machinery and the man power idle for the considerable period of 13 months which lacks the credibility of clauses which otherwise seems to have been raised after receiving amount without protest.



18. In regards to claim No.7 to 10 which pertains to loss of 20% profit, loss on 400 M.T. cement purchased from open market, extra expenditure incurred for work done after stipulated date and loss of profit from other business due to project delays, the said claims have also been allowed on the same cause i.e. one sided letter addressed by the plaintiff which appears to have been unanswered by the defendant and therefore, the conclusion of the learned Trial Court that since the said correspondence have remained unchallenged nor denied by the defendant and therefore work of Rs.18,00,000/- remained executed. In furtherance thereto, the claim with regard to the loss of profit at 20% held to be very high considering the estimated cost of the tender which goes below 7.82% and therefore, while considering the loss of profit to the extent of 10% amount of Rs.1,80,000/- has been granted.

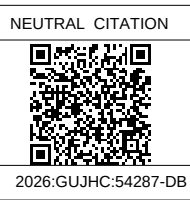
19. Thus, in view of the aforesaid except relying upon the correspondence, no such other evidence has been placed on record by the defendant to show that profit percentage as claimed towards the loss of profit for realistic one at that time and consequently there was no change in the market and also that the work of at least the same level of profitability would have been available to the plaintiff at the end of the stipulated contract period. The sum and substance of the aforesaid is that the evidence in respect of such claims appear to be definitely not available on record and consequently in absence of any such credible evidence and the claims as raised herein above made by the plaintiff were allowed despite there being no such supporting material on record indicating the increase in price rise / rates of the work executed after stipulated contract period and also on account of establishment of



machinery, cementary, deployment of man power, etc., and therefore, the conclusion arrived at by the learned Judge of the Trial Court without there being any observations as to the establishment of the sufficient evidence presented by the plaintiff pertaining to the claim as to the loss of profit seems to be not supported by any legal basis.

20. Though the efforts seem to be made by the learned Counsel for the respondent - plaintiff while referring to the decision as discussed in the foregoing paragraph, again at the cost of repetition, it is to state that Hudson's formula which has received legal acceptance and is generally used by the Court and other judicial bodies in awarding loss of profit. While referring to the said formula, it is submitted that the said formula works on the number and figure as envisaged by the party at the time of signing the contract rather than the actual on going work and therefore, the actual number of man power, machinery allocated by the plaintiff appears no relevance whatsoever while calculating the loss of profit claim to have been incurred by the plaintiff solely rests on the breach of contract attributable to the defendant. Since as per the claim of the respondent – plaintiff the case being that of delay simplicitor and therefore, Hudson's formula would have no application to award any amount of loss of profit without an aggrieved party leading any evidence as conditions precedent to the applications of the said formula.

21. In nutshell, the plaintiff has to establish (01) there was a delay in the completion of the contract (02) such delay is not attributable to the claimant, (03) the claimant's status as an established contractor, handling substantial projects and (04) credible evidence to substantiate the claim of



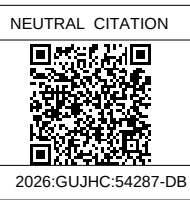
the loss of profitability.

22. Thus, the aforesaid conditions are required to be fulfilled satisfactorily and cogent evidence *sine qua non* even if the loss is of not of a remote or imaginary nature. In the absence of cogent evidence substantiating a genuine loss of profit or opportunity, it would be unjustifiable to allow the claims solely on account of mere correspondence.

23. It is pertinent to note that while allowing the aforesaid claims, the observations of the learned Judge of the Trial Court is required to be reproduced herein under:

“... Here the documentary evidence produced are not sufficient. Defendant has not produced any his correspondence, bills and/or letter of warnings for alleged slow going work and non maintenance of time schedule by the plaintiff. Mere allegations without documentary evidence has not value...”

24. Thus, the aforesaid reasoning are sufficient to discard the claim of the plaintiff which otherwise has no stand and support of any such cogent material. Though the reasoning recorded by the learned Judge of the Trial Court while attributing the delay to the defendant solely rests on the claim of the respondent that it is due to paucity of fund, shortage of material and non-cooperation of the defendant which again lacks any plausible material except bare claims. However, while equating the aforesaid, the learned Trial Court went on to hold that the rates of the



material in question must have been increased during the extended period of two years despite the necessary funds shown by the plaintiff to complete the work and have done some of the work though the defendant had not promised for any extra payment. These reasoning are sufficient to hold that the aforesaid claims have been granted solely on the assumptions and presumptions and no such actual and cogent material has been placed on record.

25. At this juncture, to meet with the aforesaid issue, several terms and conditions entered into between the parties in the agreement is required to have a glance through which in fact has not been referred to in detail or dealt with by the learned Judge of the Trial Court.

“CLAUSE 6.- (Extension of Time)

If the Contractor shall desire an extension of the time for completion of the work on the ground of his having been unavoidably hindered in its execution or any other ground, he shall apply, in writing of the executive engineer before the expiration of the period stipulated in the tender or before the expiration of 30 days from the date on which he was hindered as aforesaid or on which the cause for asking for extension occurred, whichever is earlier and the Executive Engineer may, if in his opinion, believe that there are reasonable grounds for granting an extension, grant such extension as he thinks necessary or proper. The decision of the Executive Engineer in this matter shall be final.

CLAUSE 13:- (Works to be executed in accordance with specifications, drawing orders etc.,)

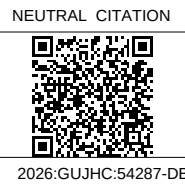
The Contractor shall execute the whole and every of part of the work in the most substantial and workman like manner and both as regards materials and in other respects in strict accordance with specifications.

The Contractor shall also conform exactly, fully and faithfully to the design drawing and instruction in writing relating to the work

signed by the Engineer-in-charge and lodged his office and to the which the Contractor shall be entitled to have an access for the purpose of inspection at such office or on the site of the work during office hours. The contractor will be entitled to receive three sets of contract drawing and working drawing as well as certified copy of the accepted tender along-with the work order free of cost. Further copies of the contract drawings and working drawings required by him shall be supplied at the rate of Rupees 10 percentage of contract drawings and Re. 1 per working drawing except where otherwise specified. Also the rate specified vide G.R.P.W.D. No. CAT-1268 (397)-C, dated 29-1-68 should be recoverable for additional drawing(s) required.

CLAUSE 14:- (Alteration in specification and designs not to invalidate contract – Rates for works not entered in estimate or schedule or rates for the Division)

The engineer in charge shall have power to make any alterations in or additions to the original specifications, drawings, designs and instructions that may appear to him to be necessary or advisable during the progress of the work and the contractor shall be bound to carry out the work in accordance with any instructions in this connections which may be given to him in writing signed by the engineer in charge and such alternation shall not invalidate the contract and any additional work with contractor may be directed to do in the manner above specified as part of the of the work shall be carried out by the Contractor on the same conditions in all respects on which he agreed to do the main work, and at the same rates as are specified in the tender for the main work And in the additional altered works includes any, class of work for which no rate is specified in this contract, then such class of work shall be carried out at the rates entered in the Schedule of Rates of the Division or at the rates mutually agreed upon between the Engineer-in charge and the Contractor, whichever are lower. If the additional or alternative work for which no rate is entered in the schedule of rates of decision is ordered to be carried out before the rates are agreed upon then the contractor shall, within 7 days of the date of receipt by him of the order to carry out the work inform the Engineer- in - Charge of the rate which it is his intention to charge for such class of work and if the Engineer- in -charge does not agree to this rate, he shall by notice in writing be at liberty to cancel his order to carry out such class of work and arrange to



carry it out in such manner as he may consider advisable, provided always that if the contractor shall commence work or incur any expenditure in regards thereto before the rates shall have been determined as lastly herein before mentioned then in such case, he shall only be entitled to be paid in respect of the work carried out it expenditure incurred by him prior to the date of determination of the rate as aforementioned according to such rate or rates as shall be fixed by engineer - in - charge. In the event of a dispute, the decision of the Superintending Engineer of the circle shall be final.

Extension of time in consonance of additions or alterations.

The time limit for the completion of the work shall be extended in the proportion that the increase in the cost occasioned by alterations or additions bears to the cost of the original contract work and the certificate of Engineer-in-charge as to such proportion shall be conclusive.

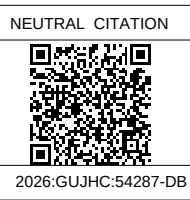
CLAUSE 15 A. – (No claim or compensation on account of loss due to delay in supply of materials by Government)

The contractor shall not be entitled to claim any compensation from Government for the loss suffered by him on account of delay by Government in the supply of materials entered in Schedule 'A' where delay is occurred by---

CLAUSE 40:- (Claim for compensation for delay in the execution of work.)

No compensation shall be allowed for any delay in execution of the work on account of water standing in borrow pits or compartments. The rates are inclusive of hard or cracked soil excavation in mud, sub-soil water or water standing in borrow pits and no claim for an extra rate shall be entertained unless otherwise expressly specified."

As quoted herein above, no such terms and conditions of the contract has been adhered to by the plaintiff while raising such claim and the learned Judge of the Trial Court has also not referred to any of such conditions which clearly stipulates and rest on reciprocal duties upon contracting parties and several clauses such as Extension of time,



Alteration in specification and designs not to invalidate contract, No claim of compensation on account of loss due to delay in supply of materials by Government, Claim for compensation for delay in the execution of work and merely on the basis of the one sided correspondence made by the plaintiff, the claim raised by the plaintiff appears to have been allowed.

26. Relevant to note that Clause No.14 of the contract clearly prescribes that the time limit for the completion of the work shall be extended in the proportion that the increase in the cost occasioned by alterations or additions bears to the cost of the original contract work ***and the certificate of Engineer-in-charge as to such proportion shall be conclusive.*** However, no such certificate has been procured and placed on record by the plaintiff. Clause 15 A of the contract also clearly stipulates that no claim or compensation on account of loss due to delay in supply of materials by Government. Even for the extra work, the certificate of Engineer-in-charge is required to be obtained or at least such claims are to be processed based on the material evidence supplied to the appellant authority irrespective of the decision taken by the appellate authority. However, in the facts of the case on hand, several claims which were subject to scrutiny and requisite certificate as afore-stated is required to be obtained; but none of such claims have been supported any such certificate; nor such material reflects refusing to such request tendered by the respondent.

27. More so, none of such conditions has been observed by the learned Judge of the Trial Court while awarding the compensation and therefore



in the opinion of this Court, the conclusion arrived at by the learned Judge of the Trial Court requires interference.

28. It is pertinent to note that facts of the case referred to and relied upon by the learned Advocate for the appellant in the CAV order passed by the learned Single Judge of this Court in First Appeal No.4979 of 2001 stands on a different footing as no such contentions raised by the appellant before the learned Trial Court. Be that as it may, even considering the aforesaid, all the pleadings and affidavit seems to have been sworn in by the representative of the society in question and therefore it does not come to the rescue of the appellant.

29. For the foregoing reasons, the present appeal deserves to be allowed and it is accordingly allowed while quashing and setting aside the judgment and decree dated 22/12/2005 passed in Special Civil Suit No.409 of 1989 by the learned 7th Additional Senior Civil Judge, Gandhinagar. Registry to remit the records and proceedings to the learned Trial Court concerned.

(ILESH J. VORA,J)

(R. T. VACHHANI, J)

sompura