

**IN THE COURT OF 2ND ADDL. SENIOR CIVIL JUDGE,
BHUBANESWAR, DISTRICT-KHURDA.**

PRESENT:- **Shri S.K. Pattanaik, M.A., LL.,M,**
2nd Addl. Senior Civil Judge, Bhubaneswar.

M.S. NO. 15/54 of 2010/2007

Bhata Kishore Dalei, aged about 60 years,
S/o. Late Banchhanidhi Dalei,
At. Parabala, P.O. Haripur Sasan,
Via-Gangadharpur, P.S. Tangi,
Dist : Khurda.

..... Plaintiff

-Versus-

State of Orissa represented through

1. The Secretary,
Rural Works Department,
Govt. of Orissa,
Bhubaneswar.
2. The Chief Engineer,
Rural Works (1)
Govt. of Orissa,
Bhubaneswar.
3. The Superintending Engineer,
Central Circle, Rural Works,
Bhubaneswar.
4. The Executive Engineer,
Rural Works Division,
Bhubaneswar.

.....Defendants

COUNSELS APPEARED FOR THE PARTIES:

For the Plaintiff: M/s. A.P. Jena & Associates

For Defendants : M/s. R.P. Nanda, G.P.

DATE OF ARGUMENT: 01.11.2013

DATE OF JUDGMENT: 14.11.2013

J U D G M E N T

This is a suit for realisation of claim amount of Rs. 8,71,775/- (Rupees Eight lakhs seventy one thousand seven hundred seventy five).

2. The gist of the plaintiff's case is as follows :-

The Defendant No.4 invited tender for the work "Construction of High School Building at Bhagabati Bidyapitha at Soran for 2000-2001". The plaintiff submitted his tender being lowest was approved and accepted by the defendant No.4 for Rs. 10,82,624/- (Rupees Ten lakhs eighty two thousand six hundred twenty four). The acceptance of tender was communicated to the plaintiff vide letter No. 2951 dated 06.08.2000 and the plaintiff was requested to attend the office of Executive Engineer for signing of the agreement. Thereafter, the plaintiff submitted the required EMD by shape of NSC duly pledged in favour of the defendant No.4 and executed the contract Agreement with defendant No.4 on dated 31.10.2000 bearing No. 727 F2 of 2000-2001. Accordingly, work order was issued to the plaintiff with date of commencement of work as on 31.10.2000 and the work was to be completed within 31.01.2001 having 24 items of works to be executed.

It is also the case of the plaintiff is that during course of execution of the work, the local people including the employees and teachers of school demanded for construction of plinth and walls with laterite stone in place of bricks. The agreement item No. 5 indicated specifically for execution of work with kiln burnt bricks masonry but the plaintiff was instructed by Engineer in charge to construct the plinth and wall of the ground floor with laterite stones and the plaintiff had to bear the extra cost and for which the work was delayed and for the above said change the plaintiff is no way responsible. Further in agreement Item No. 24 there was provision for fixation of piasal shutters with iron fittings but nothing was indicated about fixation of choukath. The plaintiff intimated the above and sought for instruction about fixation of

choukath vide his letter dated 18.12.2000 and 16.01.2001 but instead of giving necessary instruction the defendant No.4 issued a letter No.1787 dated 26.05.2001 alleging that the plaintiff has not completed the work within stipulated three months period and asked to give show cause why the contract would not be rescinded as per the clause of the contract. With reference to the above letter, plaintiff in his reply letter dated 06.06.2001 described the detail hindrances occurred during execution of work and sought for necessary direction about the mode of fixation of shutters and to go ahead with the work. After receipt of plaintiff's letter dated 06.06.2001 the defendants realized their mistake, the defendant No.4 instructed the Assistant Engineer vide letter No. 2016 dated 07.06.2001 to arrange for fixing the wooden choukath as the said item has not been included in F2 agreement. In compliance to the said letter the plaintiff procured for a quantity of 62 sq.mt. of sal choukath, 53.26 sq.mt of 33 mm thick piasal wood planks as per item No. 24 of the agreement. The defendant No.4 vide his letter No. 2642 dated 26.07.2001 also requested the plaintiff for extension of time for sanction by the competent authority as the period of completion stipulated in the agreement has been passed.

When the plaintiff get ready for fixation of choukath and shutters he was intimated that the decision had been subsequently changed for fixation of iron doors and windows. Such arbitrary and whimsical decision of the authorities was put to heavy financial loss to the plaintiff. The defendant No.4 vide his letter No. 5698 dated 18.12.2001 alleged about the non-completion of the work and invited show cause within 7 days from the plaintiff that why action would not be taken against him. The plaintiff after receipt of the letter dated 08.01.2002 explained details with copy to Superintending Engineer and Assistant Engineer in respect of hindrances occurred for fixation of choukath. The plaintiff had learnt from SDO, R.W. Sub-Division, Tangi that the department had procured the iron doors fitted with angles which were to be fixed in the building. Since there is no provision in the agreement for fixation of iron doors supplied by the Government. It might not be

possible to do the same as an extra item without permission of the department and requested to permit him for fixation of iron doors with angles departmentally so that he would be able to complete the balance work at the earliest time. The plaintiff issued another letter dated 21.01.2002 enclosing his previous representation dated 06.06.2001 and 08.01.2002 to the defendant No.4 requesting therein to pass necessary orders for fixation of choukath and shutters for which he would be able to complete the work. Due to subsequent change the sal choukath and piasal woods procured by the plaintiff for fixation by spending Rs. 1,50,000/- were lying at the site being unused. The iron shutters and windows were fixed. For the fixation of iron shutters and windows which were brought from the departmental store situate at a distance of 20 kilometers to the work site the plaintiff had to spend the labour charges and intimated the above loss to the Executive Engineer, R.W. Division, Bhubaneswar vide his letter dated 04.03.2002. Due to the above changes the work could not be completed within stipulated time and the work was delayed by the department. Unless choukath shutters were fixed those items of finishing of flooring and colouring etc. could not be done. The plaintiff under such circumstance engaged two watchers for a petty long time from 06.06.2001 to 11.10.2002 and incurred extra expenditure. The plaintiff further stated that as per demand of local people, students and teachers the Engineer in charge instructed him to construct a pendal with size of 7.5 mt. x 7.5 mts on the school premises to facilitate the students and teachers to have a function. There was scarcity of water at the work place and the authorities/department had their knowledge about carry of water by the plaintiff from a distance of 2 kilometers from work site. However, the plaintiff was granted extension to complete the work up to 30.06.2002. This itself proves the department breached the contract. In spite of all hindrances the plaintiff completed the work in all respect but the final payments against the works executed were not paid to the plaintiff. The plaintiff frequently met the departmental authorities and approached to pay his legal dues and issued several letters for payment but no payments were made. The department after a petty

long time whimsically prepared a final bill which was not accepted by the plaintiff so he signed under protest on dated 28.03.2004 on the measurement book. An amount of Rs. 1,32,000/- (Rupees One lakh thirty two thousand) was withheld from the R/A bills. On several requests and persuasion the defendant No.4 only released Rs. 77,000/- (Rupees Seventy seven thousand) vide Voucher No. 283 dated 20.07.2004 leaving the amount of Rs. 55,000/- (Rupees Fifty five thousand) which was withheld from the 3rd R/A bill. The plaintiff after getting no alternative issued Advocate notice U/s. 80 CPC and claimed the following dues :

1.	Earth work in foundation	Rs. 1,026.99
2.	Cement Concrete (1:4:8)	Rs. 6,087.00
3.	Laterite Masonry	Rs. 56,139.18
4.	Laterite Masonry Ground Floor (1:6)	Rs. 42,156.42
5.	RCC work in foundation and column footing	Rs. 32,520.00
6.	RCC work in column (Ground floor & first floor)	Rs. 26,400.00
7.	RCC work in Beam (Ground floor & first floor)	Rs. 25,556.00
8.	Bending, binding etc. with steel rod	Rs. 1,06,400.00
9.	16mm thick cement plaster (1:6) (Ground Floor)	Rs. 1,309.00
10.	32" thick piasal wood shutter	Rs. 1,50,000.00
11.	Carriage of iron shutters windows for fittings and fixtures of those iron shutters etc.	Rs. 22,884.00
12.	Drama Pandal & Grill fittings.	Rs. 49,020.00
13.	Payments made towards choukidar	Rs. 59,160.00
14.	Carriage of water	Rs. 50,000.00
15.	Price escalation	Rs. 1,53,462.00
16.	Security deposit	Rs. 34,625.00
17.	Limit of quantity/withheld amount	Rs. 55,000.00
	Total :	<u>Rs. 8,71,774.96</u>
	Or say	<u>Rs. 8,71,775.00</u>

Under the above circumstances the plaintiff prayed for compensation of Rs. 8,71,775/- with grant compensation towards breach of contract at the rate of 12% and grant interest @ 18% per annum from 30.06.2002 with P.I. and F.I.

3. The defendants have challenged the suit on various grounds about its maintainability, cause of action, limitation. The defendants

submitted that the plaintiff has executed laterite masonry in foundation and plinth and also in super structure. The rate of which was determined as per the prevailing schedule of rate, Government of Orissa during the time of execution as per agreement in 2000-01. Further regarding provision of chokath in agreement it is to state that iron chokath as per EPM rate has been provided at a lesser cost than wooden chokath. Hence only piasal shutters were provided in the agreement. The hindrances in completion of work are totally attributable to the plaintiff. The plaintiff has been intimated regarding the slow progress of work vide letter No. 1787 dated 26.05.2001, letter No. 2642 dated 26.07.2002 and also letter No. 30 dated 17.07.2001. Further timely instruction has been communicated to the plaintiff regarding fixation of iron chokath. The delay in completion of work due to slow progress of work by the plaintiff and accordingly the said letter was issued as per the clause of the agreement. The extension of time applied by the plaintiff was duly approved up to 30.06.2002 by the competent authority and no instruction has been issued to the plaintiff for procurement of sal wood chokath. As per direction of higher authority iron chokath and shutters as per EPM were produced and used in the work. The plaintiff had not casted the first floor roof slab by July, 2001 as per letter No. 30 dated 17.07.2001 of Junior Engineer, R.W. Section, Tangi and another letter No. 2642 dated 26.07.2001 of Executive Engineer, R.W. Division, Bhubaneswar even though the stipulated date of completion was over since 30.01.2001. As such, notice was issued as per provision of agreement. The plaintiff was never requested to contact the Assistant Engineer, R.W. Sub Division, Tangi for drawing of K2 agreement for fixing of iron shutter and grills. The supply order issued to the supplier by the Executive Engineer, RW Division, Bhubaneswar was inclusive of carriage for the finished items of fabrication work to the work site. Timely decision has been communicated to the plaintiff but he failed to complete the work in time due to his slow progress. No watchman was engaged by the plaintiff for watch and ward of any school building. Hence, the expenditure claimed to have been incurred towards engagement of watchman are

totally false and fabricated. The measurement of pendal constructed by the plaintiff has been duly entered in the final M.B. No. 3771 at page 1 to 3 which has been accepted by him. The plaintiff is only entitled to get the final amount of Rs. 19,568/- vide MB No.3771 at page 23 after necessary deductions. The plaintiff is only entitled to get Rs. 19,568/- (Rupees Nineteen thousand five hundred sixty eight) from the defendants and he is not entitled to get Rs. 8,71,775/- (Rupees eight lakhs seventy one thousand seven hundred seventy five) at the rate of 18% interest per annum.

Claim Item No.1 –Earth work in foundation-The plaintiff has executed the earth work for a quantity of 172.089 cum which has been entered in MB No. 2935 at page 1 to 14 duly accepted by the plaintiff without any prejudice. So the excess quantity of 11.411 cum claimed by him is false.

Claim Item No.2- Cement concrete (1:4:8)- The plaintiff has executed cement concrete (1:4:8) in foundation and floors of 21.41 cum entered in MB No.2935 at Page 4 -7 and MB No. 3771 at Page-2 duly accepted and the excess quantity of 6.087 cum is false and not acceptable.

Claim Item No.3-Laterite Masonry- The plaintiff has executed 72.927 cum of laterite masonry in foundation and in plinth and 65.65 cum L.S. masonry in the said work. The same has been accepted in MB No. 2935 at page 33 and also in MB No.3771 at Page-2 and the excess claim is not correct and totally false and baseless.

Claim Item No.4-Laterite Masonry ground floor (1:6)- The plaintiff has executed 65.65 cum of L.S. masonry. The same has been accepted by the agency vide MB No.2935 page 34-36 and page 73-77. Hence, the claim of excess quantity is not correct.

Claim Item No.5-RCC work in foundation & column footing-The said work was executed and entered in MB No. 2935 page 11-14 and excess amount claimed by the plaintiff is baseless and unjustified.

Claim Item No.-6-RCC work in column (Ground floor)- The said work has been accepted by the plaintiff vide MB No. 2935 page 17 and 63, so the extra execution of work is not at all correct.

First floor-Similarly the said work was accepted by the plaintiff vide MB No. 2935 page 100, so the claim of the plaintiff is not justified.

Claim Item No.7-RCC work in Beam-The said work was accepted by the plaintiff in MB No. 2935 page 66, so the claim is not correct.

Claim Item No.8-Bending, binding, etc, with steel rod-There was provision for 130.00 quintal of steel reinforcement in the agreement in Item No.15. But as per actual measurement recorded in MB No. 2936 page 13 and MB No. 2935 page 73 the total quantity comes to 74.80 quintal which is accepted by the plaintiff. Hence, the claim is not correct.

Claim Item No.9-16mm thick cement plaster (1:6)-The plaintiff accepted the above work in MB No. 2935 page 110 and 133 and also MB No. 3771 page 3, so the extra amount of claim is not correct.

Claim Item No.10-32" thick piasal wood shutter-There are no provision of chokath in the agreement, only 32mm piasal wood shutter has been provided in the agreement. No instruction has been issued for procurement of sal chokath. As per direction of higher authority, the iron chokath and shutter as per EPM rate contract has been procured and utilized in the work, question of heavy loss does not arise.

Claim Item No. 11-Carriage of iron shutters windows for fittings and fixtures of those iron shutters etc.-The claim for carriage of the above materials is not correct.

Claim Item No.12-Drama pendal and grill fittings-The measurement of pendal has been entered in final bill vide MB No. 3771 page 1 to 3, the said amount has also been accepted by the plaintiff. In this regard the claim of plaintiff is not correct.

Claim Item No. 13-Payment made towards chokidar-The payment made towards chokidar is totally false and fabricated, the claim is not accepted.

Claim Item No. 14-Carriage of water-Since the provision for curing is included in the agreement, hence the claim in this regard is not acceptable.

Claim Item No. 15-Price escalation-Since the work has been delayed and completed lately due to fault of the plaintiff, the question of price escalation is also not justified and accepted.

Claim Item No.16-security deposit-Since the final bill has not yet been received by the plaintiff the release of the security deposit could not be made.

Claim Item No.17-Limit of quantity/withheld amount –The question of releasing Rs.55,000/- towards withheld amount is not at all correct.

Claim Item No.18-The plaintiff has not completed the work within the stipulated period and the EOT has been granted up to 30.06.2002. The defendant has not violated the terms of contract. So the question of interest at the rate of 12% is not all correct.

Claim Item No.19-The plaintiff is only entitled to get his final bill amount and after receiving of the said amount the security deposit of the work will be released. As such, the claim of the plaintiff is false and the interest at the rate of 18% per annum does not arise.

4. Basing on the plaint averments and written statement, following issues are framed :

I S S U E S

1. Whether the suit is maintainable ?
2. Whether there is any cause of action to file the suit ?
3. Whether the plaintiff is entitled for the claim amount of Rs. 8,71,775/- (Rupees Eight lakhs seventy one thousand seven hundred seventy five) ?
4. Whether the plaintiff is entitled to get compensation towards breach of contract @ 12% on the contract value ?
5. Whether the plaintiff is entitled for interest @ 18% per annum from 30.06.2002 along with P.I. and F.I. on the principal amount ?
6. To what other relief, the plaintiff is entitled ?

5. In order to substantiate the allegation, plaintiff examined himself as P.W.1 and relied upon Ext.1 to Ext.21 in support of his claim. The defence examined Sri Harihar Sahoo, Executive Engineer, Rural Works Division, Bhubaneswar as D.W.1 and relied upon Ext.A to K/1 in support of their claim.

FINDINGS

ISSUE NOS. 3, 4 and 5 :

6. These two issues are interlinked and interdependent to each other and need common evidence for discussion for which these issues have been taken up together. Plaintiff has filed the suit for realisation of Rs. 8,71,775/- (Rupees eight lakhs seventy one thousand seven hundred seventy five) from the defendants. The plaintiff Kishore Dalei examined himself as P.W.1 and fully corroborated his evidence as per the plaint averred. According to him defendant No.4 invited tender for construction of High School Building at Bhagabati Bidyapitha at Soran for 2000-2001. He submitted his tender and being the lowest bidder his tender was approved and accepted by defendant No.4 for Rs. 10,82,624/- (Rupees Ten lakhs eighty two thousand six hundred twenty four). There was agreement between the defendant No.4 bearing No.727 F2 2000-2001, the work order was issued with date of commencement of work 31.10.2000 and the work was to be completed within 30.01.2001 having 24 items of works to be executed. For such work he proved Ext.1 to Ext.21 which are relied in this case. In cross examination stated that he has signed the agreement after reading the contents of it. The work has not been completed within the stipulated period of three months. He has applied for extension of time and the same has been granted and approved by the higher authorities. The work has been completed by 30.06.2002. During the work period he has not submitted any measurement book regarding measurement of work, the department has measured the work which has been mentioned in MB No. 2935, 2936 and 3771 and he has taken four running bills and signed in each running bill and objected the running bill while receiving the payment in respect of the measurement work. Further stated that he has not engaged any engineer to look after the work. He has not objected the 5th final running bill but objected in MB. It is admitted by him (P.W.1) that due to slow progress of work the department has given him letter No. 1787 dated 26.05.2001. Ext.J/1 is

the signature of plaintiff in no claim certificate. Further stated that he has no knowledge about deviation approval. He has signed on MB No. 2935 for earth work and got its payment. In agreement it has been mentioned about shutter and in that agreement there is condition to fix the door. He has not employed any engineer to supervise his work. He has not filed any document showing detail measurement of work executed by him.

7. D.W.1 Harihar Sahoo the Executive Engineer in his evidence has also fully corroborated the written statement submitted by him and deposed in a parrot like manner of evidence denying the claim of the plaintiff. In support he proved Ext. A to Ext.K/1 for the department. In cross examination has stated that the Junior Engineer and Assistant Engineer regularly supervising and monitoring the works and as per their instruction the work was being executed. He admitted that as per the instruction of the department the contractor executed the work through laterite stone unless the contractor agreed upon to execute the substitute item. The cost of laterite stone is less than K.B. bricks. The shutter in the building are fixed after the choukath are fixed. In the present agreement there is no provision of choukath Item No. 24 clearly disclosed about the fitting of shutter unless the choukath are fixed no shutter can be fixed. When there is no provision of choukath in the agreement the department has supplied the choukath. In the present work the iron choukath has been fitted. The work has not been delayed. The then Executive Engineer, Assistant Engineer might have taken the decision regarding fixation of choukath but he cannot say the exact date. For delay of the work penalty has been deducted from the running bill and contractor has signed as token of acceptance of running bill as per F2 agreement. Ext.13 is the letter given by Assistant Engineer regarding fixation of iron choukath procured by department and the labour charges is to be paid by the contractor. There was fixation of iron choukath fitted in the building. The contractor has completed the work within the extended period i.e. 30.06.2002. As per Clause 8 after completion of work within one month the final bill shall

be prepared. He further stated that the final bill is ought to be prepared and paid within one month after completion of the work as per Clause 8 of the agreement. The measurement of the final bill is made in presence of the contractor. The payments are made to the contractor in running bills as per the work executed and as per the rates of agreement. In the third running bill the amount of Rs. 55,000/- has been withheld for want of deviation. In 4th running bill the amount of Rs.70,000/- has been withheld for deviation and time extension. The deviation has been approved after pass of 4th running bill. The withheld amount has not been paid in 4th running bill due to subjudice. It is the duty of the Executive Engineer to pursue the deviation for its approval. The final bill amount along with security deposit was not disbursed because the contractor did not turn up to the office as the case is subjudice. The plaintiff has signed in this manner i.e. Apati Thai Dastakhat Kariachhi

8. Learned counsel for the plaintiff during course of his argument submitted that in this peculiar type of cases the Government defendants violated the terms and conditions as stipulated in the agreement. Therefore, the defendants are liable to pay the compensation amount as claimed in the plaint for breach of contract. As per the agreement it was stipulated to do the foundation work by kiln bricks but due to demand of local people the authority instructed the contractor plaintiff for construction of plinth with better quality of laterite stone in place of bricks. Further in Item No. 24 there was no provision of fixation of chokath for which decision always taken by the department caused delay time consumed and due to the fault of the department again sought for direction relating to fixation of shutters and time extension and extension was granted by the authority and later the schedule of work was completed within the stipulated extension of time. For this the department breached the contract and in this circumstance the plaintiff claimed his plaint dues along with 18% interest. He relied on the decisions reported in AIR 1981 Calcutta 101 (Jiwani Engineering Works-vs.-Union of India), AIR 1997 Bombay 284 (R.A. Deshmukh-vs-City & Indl. Devp.Corpn. of Mharashtra Ltd.), AIR 1977 SC 1481

(Mohd.Salamatullah-vs-Govt. of A.P.) and AIR 1984 SC 1703 (M/s.A.T. Brij Paul Singh & Bros-vs.-State of Gujarat)

9. Learned counsel for the Government on the other hand submitted that as per the agreement and measurement, the Govt. has paid all the dues to the plaintiff except the final bill amount of Rs. 19,568/- and the plaintiff has also submitted no claim certificate while passing all these bills. Therefore, the stand taken by the plaintiff is not at all genuine and prayed for dismissal of the suit.

10. Let me examine the real exercise on the oral as well as documentary evidence relating to the fact in issue. The plaintiff in his evidence has categorically given more emphasis on three items out of 24 items. At the outset, the plaintiff claimed that as per the contract the agreement for construction of High School building at Soren for 2000-01 the agreement value of work was Rs.10,82,624/- and the agreement No. 727 F2 of 2000-2001. The work order was issued on 21.11.2000 vide Ext.3 with date of commencement as on 31.10.2000. The same may be completed by 30.01.2001. During course of execution on the demand of local people the construction of plinth wall of the building of ground floor was made with better quality of laterite stone in stead of kiln burnt masonry as per the agreement. In this regard, the plaintiff claims that he obtained the stones from Lingaraj Temple Query, Bhubaneswar for which the work was delayed and for this he was to bear the extra cost. In this regard the D.W.1 in his evidence has categorically admitted that the department allow the contractor to do the work through laterite stone as kiln burnt bricks are not available in the locality, unless the contractor agreed upon to execute the substitute item. Further it is stated by D.W.1 that the cost of the laterite stone is less than the K.B. bricks. Therefore, in this circumstance the contractor was well aware to execute the agreement with substituted item in stead of K.B. bricks as the laterite stone is less costlier than the KB bricks. Since the substituted item of work is done as per the OPWD Code and F2 agreement and the plaintiff agreed upon to execute the work with that substituted item of work it can safely be

concluded that the laterite stone work is less costlier than the KB bricks. Had the laterite stone work is more costlier the plaintiff would not have proceed with the work with the stipulated price as per the agreement. Thus, the claim raised by the plaintiff in this regard is not entertainable.

11. As regards to the fixation of shutter P.W.1 stated that in Item No. 24 of the agreement which indicates fixation of piasal shutter with iron fittings but no approval was made for fixation of choukath, due to non-fixation of choukath plastering could not be done in time. For this above hindrances the work was delayed. The plaintiff intimated the above fact to the authorities vide Ext.5 and 6 but the defendants asked for show cause why the contract would not be rescinded in Ext.6. The plaintiff vide Ext.7 explained the position of delay and sought for direction relating to fixation of shutter and later extension was granted to complete the work up to 30.06.2002. The defendant No.1 in his evidence has also admitted that the shutters in the building are fixed after choukaths are fixed. Item No. 24 clearly discloses about the fitting of the shutters. In fact in agreement there is no provision of choukath. Unless, the choukaths are fixed no shutter can be fixed. D.W.1 further says when there is no provision of choukath in the agreement the department has supplied the choukath. He was not in post when the work was executed the then Executive Engineer and Assistant Engineer might have taken a decision regarding fixation of choukath. From these above statement of both the plaintiff and defendants it reveals in Ext.21 that the letter issued from Executive Engineer to Assistant Engineer to instruct for arrangement for fixing wooden choukath as the said items have not been included in the F2 agreement in enclosing the letter dated 06.06.2001 of the plaintiff. The plaintiff referring to this Ext.21 claiming purchase of sal choukath and piasal wood for an amount of Rs. 1,50,000/- (Rupees One lakh fifty thousand). It is not disputed that the department has changed the decision and intimated to the plaintiff for fixation of iron door and windows. But due to non-utilization of the materials procured by the

plaintiff was put to heavy loss as claimed. In fact, the letter vide Ext.21 is a direction issued by the Executive Engineer to the Assistant Engineer to give instruction to the plaintiff for fixation of choukath. The purchase of choukath as alleged by the plaintiff are not commonly available in the market. The plaintiff in this regard must have to produce how many sheets he has purchased wherefrom the procurement was made and its transit permit so that it can be believable that such things would have been procured at his hand. In this regard, the plaintiff except submitting oral evidence not a single scarp of paper submitted so that it can be said he has procured certain size of sal and piasal from a particular shop. In absence of such materials mere saying an oral version it cannot be said to be believable that an amount of Rs. 1,50,000/- (Rupees One lakh fifty thousand) was invested for purchase of sal and piasal choukath.

12. According to plaintiff an amount of Rs. 1,32,000/- (Rupees One lakh thirty two thousand) was withheld from the running bill i.e. Rs. 55,000/- (Rupees fifty five thousand) withheld from the third running bill vide voucher No. 67 dated 27.11.2001 and Rs. 77,000/- (Rupees seventy seven thousand) from 4th running bill vide voucher No. 770 dated 31.03.2003. When the payment was not made the plaintiff issued 80 CPC notice vide Ext.18. D.W.1 in this regard has stated that the final bill was prepared on 28.03.2004. The measurement of the final bill is made in presence of the contractor. The payments are made to the contractor in the running bill as per the work executed. The payments are made as per the rate of the agreement. The calculation is not final as per the OPWD Code. It is also admitted that in third running bill an amount of Rs. 55,000/- has been withheld for want of deviation, in 4th running bill an amount of Rs. 77,000/- has been withheld for deviation and extension of time. The withheld amount has not been paid in the 4th running bill due to the subjudice of the present case. It is the duty of the Executive Engineer to pursue the deviation for its approval. It is pleaded in the plaint by the plaintiff that on several requests and persuasion as the plaintiff was put to financial loss, the

defendant No.4 only released Rs. 77,000/- (Rupees seventy seven thousand) vide voucher No. 283 dated 20.07.2004 leaving the amount of Rs. 55,000/- (Rupees fifty five thousand) which was withheld from third running bill. This fact is undisputed. Therefore, the claim of the plaintiff as regards to the withheld amount he is only entitled to get Rs. 55,000/- (Rupees fifty five thousand) from the third running bill.

13. As regards to Rs. 55,000/- (Rupees fifty five thousand) the department in fact deducted a sum of Rs. 55,000/- (towards deviation for Rs. 37,000/- and time extension for Rs. 18,000/-) which is reflected in page 129 of MB No. 2935 vide Ext.B. In 4th running bill the said amount Rs. 55,000/- (Rs.37,000/- + Rs.18,000/-) is added while preparing the 4th running bill which the amount goes to Rs. 1,59,198/- and pass for payment and paid only an amount of Rs. 70,000/- leaving other deductions including Rs. 77,000/-. The said Rs. 77,000/- which was withheld later released vide voucher No. 283 dated 20.07.2004 as stated by the plaintiff. Therefore the amount of Rs. 55,000/- which is being claimed as regards to the withheld the same is subsequently released by the department in 4th running bill to the plaintiff. The statement of D.W.1 regarding non payment of withheld amount is not at all acceptable as he has stated without verifying the records. However, from the documentary evidence from the 3rd and 4th running bill it is crystal clear that the withheld amount of Rs. 55,000/- has already been paid as well as the withheld amount of Rs. 77,000/- is also released and paid to the plaintiff. Therefore, the claim made by the plaintiff is not sustainable as regards to the withheld of amount.

14. It is further contended by P.W.1 that due to the local people, students and teachers a pendal was constructed size of 7.5mtr x 7.5mtr in the school premises. But the final payment was not made to the plaintiff. In Ext.15, 16 and 17, the plaintiff requested for payment of final bill. However, at a long persuasion the Chief Engineer approved the deviation on dated 27.03.2004 and the department thereafter whimsically prepared the final bill which was not accepted by the

plaintiff. The defendants in their W.S. has categorically pleaded that the pendal constructed by the plaintiff has been entered into the final bill vide MB No. 3771 at Page 1 to 3 and the said measurement has been accepted by the plaintiff vide Ext.C/1. Admittedly, the final bill has not been paid to the plaintiff so his claim has already entered into the MB as accepted by the plaintiff.

15. As regards to the other claim the plaintiff has submitted his bills after proper verification the MB was entered later he received phase wise running bills without giving any objections. At last the plaintiff filed no claim certificate vide Ext.J/1 which clearly indicates that whatever the amount he has received is correct and nothing outstanding remains with the department except the final bill. Moreover, D.W.1 in his evidence has stated that the final bill amount along with security was not disbursed because the contractor did not turn up to the office as the case is subjudice and the plaintiff signed in this manner that Apati Thai Dastakhat Kariachhi. D.W.1 has categorically stated that the final bill is prepared on 28.03.2004 and the contractor has completed the work within the extended period i.e. 30.06.2002. It is also stated that as per Clause 8 after completion of work within one month the final bill shall be prepared. He further stated that the bill is ought to be prepared and paid within one month after completion of the work as per Clause 8 of the agreement. When the work is completed within the extended period i.e. 30.06.2002 but the final bill is prepared on 28.03.2004 definitely fault lies with the department regarding preparation of the bill as well as return of the security deposit. In this circumstance the defendants have to release the final bill along with security deposit by a proper calculation as per the work done. Besides that as regards to the breach of contract at the outset when the plaintiff started the construction work himself allow the deviation on the instruction of the Engineer in charge without raising any protest. Subsequently, he also issued letter regarding fixation of choukath which is another deviation. Once deviation is allowed and continued to do the work question of breach of contract does not arise. Therefore, the plaintiff is not entitled

to get any interest towards breach of contract. However, since the amount of 5th running bill as well as the security deposit has not been released within the stipulated period the plaintiff is entitled to get 14% interest per annum from 30.06.2002. These issues are answered accordingly.

ISSUE NO. 1, 2 & 6

16. These issues are formal in nature, need no elaboration. In the discussion, supra, the suit is maintainable in the eye of law and there exists cause of action to bring the suit. There is no other evidence with regard to any other relief. So these issues are answered accordingly.

Hence, it is ordered.

ORDER

The suit be and the same is decreed in part on contest against the Defendants with cost. The Plaintiff is entitled to get final running bill as well as the security deposit along with 14% interest per annum from 30.06.2002 till realisation. The defendants are directed to release the said amount within three months hence, failing which the plaintiff is at liberty to realize the same in due course of law.

Lawyer's fee at contested scale.

2nd Addl. Senior Civil Judge,
Bhubaneswar

Judgment is transcribed to my dictation, corrected and pronounced in open court, on this 14th day of November, 2013 under the seal and signature of this court.

2nd Addl. Senior Civil Judge,
Bhubaneswar.

LIST OF WITNESS EXAMINED FOR THE PLAINTIFF:

P.W.1 : Sri Bhata Kishore Dalai

LIST OF WITNESS EXAMINED FOR THE DEFENDANTS:

D.W.1 : Sri Harihar Sahoo

LIST OF DOCUMENTS ADMITTED INTO EVIDENCE ON BEHALF OF PLAINTIFF:

- Ext.1 : Letter dated 2951 dated 06.08.2000.
 Ext.2 : Certified copy of agreement No. 727 F2 of 2000-2001 dated 31.10.2000.
 Ext.3 : Letter No. 5282 dated 21.11.2000.
 Ext.4 : Office copy of letter dated 18.12.2000.
 Ext.4/a: Seal and signature of receiving clerk.
 Ext.5 : Office copy of letter dated 16.01.2001.
 Ext.5/a: Seal and signature of receiving clerk.
 Ext.6 : Letter No. 1787 dated 26.05.2001.
 Ext.7 : Office copy of letter dated 06.06.2001.
 Ext.7/a to 7/d: Signatures of receiving officers of defendant offices.
 Ext.8 : Office copy of letter dated 30.06.2001.
 Ext.8/a: Seal and signature of receiving officer.
 Ext.9 : Letter No. 2642 dated 26.07.2011.
 Ext.10 : Office copy of letter No. 5698 dated 18.12.2001.
 Ext.11 : Reply to show cause vide letter dated 08.01.2002.
 Ext.11/a: Postal receipts No.EE.1261 dated 08.01.2002.
 Ext.12 : Office copy of letter dated 21.01.2002.
 Ext.12/a : Postal receipts No. 4949.
 Ext.13 : Letter No. 99 dated 06.02.2002.
 Ext.14 : Office copy of letter dated 04.03.2002.
 Ext.14/a: Seal and signature of receiving officer of Executive Engineer.
 Ext.15 : Office copy of letter dated 22.11.2002.
 Ext.15/a: Postal receipts No. 4040 dated 22.11.2002.
 Ext.16 : Office copy of letter dated 30.03.2003.
 Ext.16/a & 16/b: Postal receipts No. 1681 & 1682.
 Ext.17 : Office copy of advocate notice dated 05.09.2003.
 Ext.17/a & 17/b : Postal receipts No. 2900 and 2901.
 Ext.17/c & 17/d: Postal ADs.
 Ext.18 : Office copy of 80 CPC notice dated 14.05.2005.
 Ext.18/a to 18/d: Postal receipts No. 9654 to 9657.
 Ext.19 : Letter No.2792 dated 02.06.2005.
 Ext.20 : M.B. No. 2935.
 Ext.21 : Letter No. 2016 dated 07.06.2001 issued from Executive Engineer to Asst. Engineer, Tangi.

LIST OF DOCUMENTS ADMITTED INTO EVIDENCE ON BEHALF OF DEFENDANTS:

- Ext.A : Signature of P.W.1 B.K.Dalei.
 Ext.B : MB No. 2935

Ext.B/1 : Signature of P.W.1 at Page No. 41.
Ext.B/2 : Signature of P.W.1 at Page No. 57
Ext.B/3 : Signature of P.W.1 at Page No. 93
Ext.B/4 : Signature of P.W.1 at Page No. 111
Ext.B/5 : Signature of P.W.1 at Page No. 174
Ext.C : M.B. 3771
Ext.C/1 : Signature of P.W.1 at Page No. 5.
Ext.C/2 : Signature of P.W.1 at page No.22.
Ext.A/1 : Signature of P.W.1 on Ext.A.
Ext.D : Original agreement.
Ext.D/1 : Signature of P.W.1.
Ext.E : Original bill.
Ext.E/1: Signature of P.W.1.
Ext.F : Running bill.
Ext.F/1 : Signature of P.W.1.
Ext.G : Running Bill.
Ext.G/1 : Signature of P.W.1.
Ext.H : Final Bill.
Ext.H/1 : Signature of P.W.1.
Ext.J : No claim certificate.
Ext.J/1 : Signature of P.W.1.
Ext.K : E.O.T. Certificate.
Ext.K/1 : Signature of P.W.1.

2nd Addl. Senior. Civil Judge
Bhubaneswar.