IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

THURSDAY, THE 16TH DAY OF JUNE 2022 / 26TH JYAISHTA, 1944

AS NO. 86 OF 2003

AGAINST THE JUDGMENT AND DECREE DATED 17/10/1998 IN OS 345/1987 OF I ADDL. SUB COURT,THIRUVANANTHAPURAM

APPELLANTS/DEFENDANTS 1 TO 3 IN THE ORIGINAL SUIT:

1 M/S.C.S.COMPANY, T.B.ROAD, KOTTAYAM
REPRESENTED BY ITS MANAGING PARTNER, JAGANATHA PRASAD.

2 JAGANATHA PRASAD, AGED 43 YEARS, S/O.SAHADEVAN,
RESIDING AT C.S.SADANAM.

3 SAHADEVAN (DIED), AGED 75 YEARS,
S/O. LATE CHINNAN PANICKER
RESIDING AT C.S.SADANAM, KODIMATHA, KOTTAYAM.

BY ADVS.P.T.MOHANKUMAR
GEORGE CHERIAN, RAJESH CHERIAN KARIPPAPARAMBIL

RESPONDENTS/PLAINTIFF & 4TH DEFENDANT IN O.S.:

1 THE KERALA STATE ELECTRICITY BOARD
REPRESENTED BY ITS SECRETARY, VAIDYUTHY BHAVAN, PATTOM P O, THIRUVANANTHAPURAM.

2 RAJENDRA PRASAD, AGED 46, S/O.SAHADEVAN
C.S.SADANAM, KODIMATHA, KOTTAYAM.

* IT IS RECORDED THAT A3 DIED VIDE ORDER DATED 22/10/2019 IN IA 7/18 IN AS 86/03.

BY ADVS.P.MOHANDAS (ERNAKULAM)-R2
K.P.SATHEESAN (SR.)-R2
K.SUDHINKUMAR, S.K.ADHITHYAN-R2
SABU PULLAN, GOKUL D. SUDHAKARAN-R2
M.GOPIKRISHNAN NAMBIAR-AMICUS CURIAE
SRI.C.K.KARUNAKARAN, SC, FOR KSEB
SRI.R.LAKSHMI NARAYAN-R1
SHRI.B.PREMOD, SC, KERALA STATE ELECTRICITY BOARD

THIS APPEAL SUITS HAVING COME UP FOR FINAL HEARING ON 16.06.2022, ALONG WITH AS.113/2003, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

THURSDAY, THE 16TH DAY OF JUNE 2022 / 26TH JYAISHTA, 1944

AS NO. 113 OF 2003

AGAINST THE JUDGMENT AND DECREE DATED 17/10/1998 IN OS 1291/1992
ON THE FILE OF I ADDL. SUB COURT,THIRUVANANTHAPURAM

APPELLANT/PLAINTIFF:

M/S.C.S.COMPANY, A PARTNERSHIP FIRM
HAVING ITS REGISTERED OFFICE AT T.B.ROAD, KOTTAYAM,
REP.BY ITS MANAGING PARTNER, JAGANATHA PRASAD.

BY ADVS.P.T.MOHANKUMAR
GEORGE CHERIAN
RAJESH CHERIAN KARIPPAPARAMBIL

RESPONDENTS/DEFENDANTS:

1 THE KERALA STATE ELECTRICITY BOARD
A STATUTORY-BODY FORMED UNDER SECTION 5 OF THE
ELECTRIC SUPPLY ACT, 1984 HAVING ITS REGISTERED OFFICE
AT VAIDYUTHI BHAVANAM, PATTOM, THIRUVANANTHAPURAM.

2 THE CHIEF ENGINEER (CIVIL) GENERAL
SOUTH KERALA STATE ELECTRICITY BOARD, VAIDYUTHI
BHAVANAM, PATTOM, THIRUVANANTHAPURAM.

BY ADVS.SHRI.K.P.ASHOK KUMAR, SC, KERALA STATE
ELECTRICITY BOARD LIMITED
SRI.R.LAKSHMI NARAYAN, STANDING COUNSEL
SHRI.B.PREMOD, SC, KERALA STATE ELECTRICITY BOARD

THIS APPEAL SUITS HAVING COME UP FOR FINAL HEARING ON 16.06.2022, ALONG WITH AS.86/2003, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

A.S.Nos.86/2003 and 113/2003

Dated this the 16th day of June, 2022

J U D G M E N T

C.S.Sudha, J.

These appeals are against the common judgment and decree dated 17/10/1998 in O.S.No.345/1987 and O.S.No.1291/1992 on the file of the Sub-ordinate Judge's Court, Thiruvananthapuram. O.S.No.345/1987 is a suit for money filed by the Kerala State Electricity Board (the Board) against M/s. C.S. Company, the first defendant, a Firm, and defendants 2 to 4, who are stated to be its partners. O.S.No.1291/1992 is a suit for money filed by the aforesaid Firm against the plaintiff in O.S.No.345/1987 and its Chief Engineer. The court below by the impugned judgment, partly decreed O.S.No.345/1987 and dismissed O.S.No.1291/1992. Aggrieved, defendants 1 to 3 in O.S.No.345/1987 and the plaintiff in O.S.No.1291/1992 have filed A.S.No.86/2003, wherein the plaintiff, namely, the Board and the fourth defendant in O.S.No.345/1987 are the respondents. The plaintiff in O.S.No.1291/1992 is the appellant in A.S.No.113/2003 and the defendants in

O.S.No.1291/1992, the respondents.

2. The brief facts in O.S.No.345/1987 – According to the plaintiff, the Board, the work of "*Kakkad Hydro Electric Project – construction of concrete lined power tunnel"* was initially awarded to a contractor, namely, Sri.G. Gopinathan. However, on 18/06/1981 the contract was terminated by the Board, as the contractor committed breach of the same. Consequent to the termination of the contract, the balance work had to be re-tendered. The defendants submitted their tender dated 20/01/1983, which was accepted by the Board on 13/04/1983. The estimated Probable Amount of Contract (P.A.C.) was ₹3,46,06,440/- whereas the contract P.A.C. was ₹ 5,57,20,680/-, which is 88% above the estimated rate. On 12.05.1983 a contract agreement was executed between the parties, in which the Board has been represented by its Chief Engineer.

2.1. After the work was awarded to the defendants, the Board had handed over the entire site to it. The Officers of the Board had extended their full co-operation to the Firm and had provided all the necessary and required facilities to enable the latter to carry out the work within the period stipulated in the agreement, which was 12/02/1987. The work order issued on 13.04.1983 specified that the Firm should commence the work within 30

days, that is, on or before 12.05.1983 after executing the agreement within that period. Though the agreement was executed on 12.05.1983, the defendants failed to commence the work within the period specified in the agreement. The work was started only on 01.07.1983.

2.2. After the work was awarded to the defendants, they started raising untenable contentions contrary to the terms of the agreement. Though the Board had sanctioned sufficient advance to the defendants, they were unable to maintain or achieve the progress as per the work schedule fixed in the agreement. They failed to mobilize the required number of skilled and unskilled labourers to achieve the desired progress of the work. They were not in possession of the required materials or machinery and did not have the capacity to procure them also. They did not have any past experience in executing works of similar nature and hence was unable to carry out or execute work of such magnitude. In spite of repeated requests by the Board, the progress of the work was very slow. Finally, when the Board was convinced that the defendants would not be in a position to complete the work within the period stipulated, the Chief Engineer on 26/06/1984, issued a notice calling upon the former to show cause why the contract should not be terminated. A reply dated 10/07/1984 was given

raising untenable contentions. As it was found that it would be practically impossible for the defendants to execute the subject work within the agreed period, the Board in its meeting held on 22/08/1984, decided to terminate the contract at the risk and cost of the former. On 30/08/1984, the defendants were intimated of the termination of the contract.

2.3. After the termination of the contract, the Board on 14/12/1985 re-tendered the work, which work had to be entrusted to three different contractors by splitting the work into three parts as the Board wanted the work to be completed at the earliest. The total amount of the re-tendered work comes to ₹899.71 lakhs. Thus, the Board has incurred quite a heavy loss due to the default on the part of the defendants and hence is entitled to recover damages. The exact loss sustained can be ascertained only after the completion of the work. However, based on the difference in P.A.C. while re-tendering the work, the loss and damages sustained by the Board comes to ₹451 lakhs. As the re-tendering was conducted at the risk and cost of the defendants, they are bound to compensate the loss of ₹ 451 lakhs sustained by the Board, which represents the difference in the contract amount, which the plaintiff has already sustained based on the difference in the P.A.C. alone.

2.4. Before the work had been re-tendered, the Board had issued

several notices to the defendants requiring them to be present at the site for taking the measurements of the work already done by them, for assessing its value and preparing an inventory of the tools and plants left by them. However, they never responded to the said notices. Thus, the amount due to the defendants towards the part work done by them could not be settled. Due to the default on the part of the defendants, the Board has sustained considerable loss while re-tendering the work and hence the suit praying for realization of a sum of ₹451 lakhs with interest @ 18% p.a. from the date of suit till realization and costs from the defendants and their assets.

3. The defendants filed written statement disputing and denying the plaint allegations and contended thus- When the contract was awarded to the first defendant Firm, the plaintiff was not in possession of the entire site. It was occupied by the equipment and machineries of the previous contractor. In spite of the plaintiff being requested several times to clear the site and hand over possession, they failed to do so. Finally, in the last week of June, 1983, the defendants cleared the site by shifting the articles of the previous contractor to a portion of the site and was forced to take possession of the remaining site on 29/06/1983. The failure of the plaintiff to hand over the entire site within the date stipulated in the agreement, is a breach of the terms

of the contract.

3.1. The contract contains reciprocal promises to be performed by both sides, which have not been performed by the plaintiff. The defendants were unable to achieve the desired progress in the works only because of the several breaches of the terms of the contract committed by the plaintiff. To the notice of termination issued by the plaintiff, the defendants have sent a reply dated 10/07/1984 stating the true facts. The termination of the contract is arbitrary, illegal and against the provisions of the terms of the contract. On account of the illegal termination of the contract, the defendants suffered huge financial loss apart from severe loss of reputation, humiliation and other losses suffered in the process.

3.2. After the illegal termination of the contract, no inventory was taken in the presence of the defendants with regard to the work done, the plants, the machineries, the tools and other articles of the defendants stored in the premises. The inventory, if any, taken by the plaintiff, is without giving sufficient or proper notice and in the absence of the defendants or their representatives, and therefore not binding on them. After the termination of the contract, the costly machineries, tools, plants and vehicles and other materials brought to the site by the defendants were not allowed to be taken

back and they have been illegally detained at the site by the plaintiff in violation of the agreement. In spite of repeated requests, these articles have not been returned by the plaintiff and they have refused to return the same on frivolous grounds.

3.3. Due to the illegal termination of the contract, the defendants have been deprived of the opportunity of executing a major work for no fault of theirs. Had the work been allowed to be completed by the defendants, they would have obtained 20% of the total contract value as profit, which would come to ₹1,55,96,000/-. Further, they have completed 650 meters of tunnel work in addition to several other works and so are entitled to be paid for the same. The total amount due to the defendants is ₹ 750 lakhs for which the first defendant issued a registered notice dated 17/08/1987 to the plaintiff demanding payment of the said amount. The plaintiff has failed to pay the amount to the defendants. The plaint claim is without any bonafides and hence the suit is liable to be dismissed with costs.

4. Replication has been filed by the plaintiff reiterating the plaint allegations and denying the contention of the defendants that they had committed breach of the contract.

5. Additional written statement has been filed by the defendants

reiterating their contentions in the written statement.

6. O.S.No.1291/1992 - This is a suit for damages filed by the first defendant Firm in O.S.No.345/1987. The defendants in the suit are the Kerala State Electricity Board ('the Board') and its Chief Engineer. The plaint allegations are the same as contained in the written statement and additional written statement in O.S.No.345/1987 and hence the same are not repeated here.

7. The defendants filed written statement denying the plaint allegation. The contentions are the same as stated in the plaint in O.S.No.345/1987.

8. On completion of pleadings, issues were raised by the court below, on the basis of which the parties went to trial. Both the suits were tried jointly and O.S.No.345/1987 was taken as the main case, in which evidence has been recorded. PWs.1 to 6 were examined and Exts.A1 to A103 were marked on the side of the plaintiff. DWs.1 to 5 were examined and Exts.D1 to D142 were marked on the side of the defendants. On a consideration of the oral and documentary evidence and after hearing both sides, the court below partly decreed O.S.No.345/1987 and dismissed O.S.No.1291/1992.

9. In the appeal memorandum it is contended that the judgment and decree of the court below are erroneous in law; those proper issues have not been framed; that the oral and documentary evidence have not been properly appreciated; that the findings of the court below are against the facts, evidence on record and the law on the points and hence unsustainable and therefore liable to be set aside.

10. The points that arise for consideration in A.S.No.86/2003 are -

(i) Has the plaintiff Board incurred any loss due to the re-tendering of the contract, as alleged in O.S.No.345/1987? If so, are they entitled to recover or realize the loss from the defendants?

(ii) Is there any infirmity in the findings of the court below calling for an interference by this Court?

(iii) Reliefs and costs.

10.1. The points that arise for consideration in A.S.No.113/2003 are -

(i) Is there any infirmity in the finding of the court below that O.S.No.1291/1992 is not maintainable?

(ii) Is the termination of the contract by the defendants, illegal or arbitrary as alleged by the plaintiff? If so, is the plaintiff entitled to realize the profit that would have been derived by them had they been permitted to complete the execution of the work?

(iii) Is there any infirmity in the findings of the court below calling for an interference by this Court?

(iv) Reliefs and costs.

11. Heard Sri.P.T. Mohankumar, the learned counsel for the appellant and Sri.R. Lakshmi Narayan, the learned Standing Counsel for the respondents.

12. The appellants in these appeals will be referred to as the Firm and the respondents, as the Board.

13. **Point no.(ii)& (iii) in A.S.No.113/2003**: - It was submitted by the learned counsel for the Firm that the contract envisages performance of reciprocal promises. However, the Board failed to perform its part of the contract and hence the reason why the Firm was unable to achieve the desired progress in the work. That being the position, the termination of the contract is bad and arbitrary and for no fault of the Firm. According to the Board, when Ext.A79 show cause notice dated 26/06/1984 was issued, the

Firm had completed only 1% of the total work as against the 20% that ought to have been achieved. In spite of several directions, no earnest efforts were made by the Firm to speed up the execution of work or deploy necessary men and machinery to achieve the target. Realizing that it would be impossible for the Firm to complete the execution of the work, the Board as per Ext.A77 order dated 30/08/1984 terminated the contract and as per Ext.A78 letter dated 10/10/1984 informed the Firm that the contract had been terminated w.e.f. 22/08/1984 at the risk and cost of the latter. It was also pointed out that the various communications of the Board to the Firm, produced and marked on behalf of the Board would make it absolutely clear that the former was justified in terminating the contract and hence no claim for damages or compensation by the Firm would lie.

14. The Firm refers to breach of several reciprocal promises which required to be performed by the Board, to substantiate their argument that the termination of the contract is bad. Therefore, the first point to be decided is whether the termination of the contract by the Board is justified or whether the same is bad, illegal or arbitrary. To arrive at a conclusion on this point, we will have to deal with the breaches alleged to have been committed by the Board. The first breach alleged to have been committed by the Board

is the delay in handing over the site to the Firm. Pursuant to the bid of the Firm being accepted, Ext.A1(a) work order is seen issued on 13/04/1983. As per the work order, the Firm had to commence work within 30 days, i.e., by 12/05/1983 and within this period, was to execute a written agreement with the Board. Ext.A1 agreement was executed on 12/05/1983. According to the Board, even after the execution of Ext.A1 agreement, the Firm failed to commence work as stipulated in the agreement and commenced work only on 01/07/1983, that too, after repeated directions in the matter. The Firm on the other hand contends that this delay occurred as the site was never handed over to them within the time stipulated in the agreement. According to the Firm, when the contract was awarded to them, the Board was not in possession of the site. On the other hand, it was covered with the machines, plants, sheds etc. of the previous contractor. Though the Firm requested the Board to remove them and handover vacant possession of the site, the same was done after much delay. Hence the delay in commencement of the work occurred only due to fault of the Board.

15. Exts.A31, A6, A7 and A34 would show that there was some delay in handing over the entire site as certain portions of the same was occupied by sheds, machineries, tools etc. of the previous contractor. Ext.A8

letter dated 29/06/1983 by the Firm to the Board would show that the site was taken over by them on 29/06/1983. Now the question whether the delay or the time taken by the Board in clearing the site of the machinery, tools etc. of the earlier contractor, had in any manner affected the commencement of the work by the Firm is certainly a matter that needs to be taken into account. According to the Board, each work site has an extent of about 25 hectares. This is not disputed by the Firm. Nobody has a case that the entire extent of the site was covered by the tools, plants and machinery of the previous contractor. From the aforesaid communications, it appears that certain portions of the site had not been cleared. But that appears to be a miniscule area of the entire site. Therefore, it is quite doubtful whether the aforesaid cause had in any way affected the commencement of the work.

16. Ext.A35 is the minutes of the meeting held on 13/12/1983, which meeting chaired by the Chief Engineer was convened for the purpose of reviewing the progress of work achieved and to finalize the programme for future. We refer to pages 2 and 3 of Ext.A35, the relevant portion of which reads –

" ----------.

Work order issued - 13.04.1983.

Agreement executed	-	*12.05.1983.*
Time of completion	-	*46 months.*
Site made Ready	-	*10.06.1983.*
Site taken over by contractor	-	*28.06.1983.*
Work actually commenced	-	*01.07.1983*

The Chief Engineer (Civil) stated that there was a delay of 3 weeks between the date of availability of site and the date of actual commencement of work. Accepting the explanation offered by the contractor for the delay in starting the work, the C.E.(C) agreed to accept the date of commencement of the work as 1.7.83. ----------." (Emphasis supplied)

In the light of Ext.A35, we will take 01/07/1983 as the date on which the contractor was bound to commence work.

17. The second breach on the part of the Board is stated to be the failure of the Board to issue explanatory and detailed drawings, site plan etc. In the pleadings, the Firm contends that as per the terms of the contract, the whole of the works entrusted to the contractor had to be executed in conformity with the contract documents and such explanatory detailed drawings and directions as may be furnished from time to time by the Engineer for the guidance of the Contractor. Such explanatory detailed drawings and directions were never furnished at any point of time by the

Engineer concerned, which is another reason why the Firm was unable to achieve the desired progress.

18. It is true that as per Clause 13 of the Annexure to the Printed General Conditions of Contract and Instructions to Tenderers (PGCC & ITT), the whole of the works entrusted to the Contractor is to be executed in perfect conformity with the contract documents, and the Engineer concerned may from time to time give such explanatory and detailed drawings and directions for the guidance of the Contractor. As per Clause 14, if the Contractor has any doubt with regard to any details mentioned in the drawings or in the specifications, he may refer the matter to the Engineer in writing and get the clarifications required. Ext.A1, apart from the agreement executed between the parties, contains several other documents including drawings prepared by the Board relating to the tunnels to be constructed. These drawings are referred to in paragraph 10 of the General Specifications. Apart from a vague pleading that drawings and site plans were never given by the Board, the Firm does not specify which drawing(s) or plan(s) required by them was not furnished by the Board.

19. The work to be executed in this case was the construction of a power tunnel having a length of 7½ kilometers. Three adit tunnels,

which provide access to the main tunnel were also required to be constructed. These adit tunnels would be closed or plugged when the construction of the main tunnel was completed. Out of the three adit tunnels, construction of two adit tunnels had been completed by the previous contractor. About 24 meters of adit no.4 had also been constructed by the earlier contractor. In continuation of the same, according to the Board, the Firm had constructed only about 300 meters, which fact is not disputed. The work of the main tunnel had never been started by the Firm. In the light of the nature and the magnitude of work, several drawings and plans would certainly have been necessary, if the work was required to be executed in its entirety. In Ext.A1, several drawings are seen attached. As stated earlier, what drawing or sketch was required by the Firm, has not been specified. Clause13 only says that drawings and directions may be furnished by the Engineer for the guidance of the Contractor. Therefore, what were the detailed drawings or directions required for the guidance of the contractor has not been made clear by the Firm in their pleadings. No documents or communications have been produced to show that the Firm had in fact asked for the same, but the Board had failed to furnish the same. That being the position, it cannot be concluded that there was any default on the part of the Board in furnishing

explanatory and detailed drawings, site plan etc. as alleged by the Firm.

20. The next breach alleged is the delay and deficiency in the supply of materials agreed to be given as per the contract. Materials to be supplied by the Board as per Ext.A1 include explosives, detonators and cement. According to the Firm, the cement store was situated about 15 kms away from the work site. The Office of the Executive Engineer, the authority to approve indent for supply of cement was situated about 60 kms away from the site. Issuance of each indent took about two days' time. But, each time, the supply was only 50% of the requirement, as a result of which the work got delayed and the cost of transportation became quite high. 53 kgs of explosives required for one round of blasting, was requested as per Ext.B18 letter dated 26/09/1983. However, the Firm was only provided with 25kgs. As per the terms of the agreement, 80% special gelatin was required to be supplied. The total supply of gelatin was 7216 kgs. Out of this, 4416 kgs was of 80% special gelatin and the remaining 2800 kgs of 90% gelatin. 90% gelatin was not required for the work. The contract also does not provide for the same. However, the Firm was forced to take it, as 80% gelatin was not available at the store. 90% gelatin caused over blasting on many occasions, which affected the rate of progress of work considerably.

The cost of 90% gelatin was also more compared to the 80% gelatin. Long delay detonators required for better pull during blasting, was not given. Instead, short delay detonators which did not yield the required result during blasting was only supplied. The explosives supplied were of inferior quality. Due to the aforesaid reasons, blasting operations were badly affected. It was also dangerous to use these types of explosives as there was possibility of hazardous consequences affecting the safety of the workers at the site. The Firm relies on the following documents, namely, Exts.B30 to B32, B34, B35, B18, B19, B71, B2, B22, B49, B57, B20, B1 and A16 to substantiate this allegation.

21. We went through the documents relied on by the Firm. Exts.B2 and B34 do not refer the issue of cement or explosives. Exts.B30 to B33 and B35 and B36 are letters addressed by the Firm to the Board requesting for supply of cement. In some of these letters, they also complain of short supply of cement. The demand for cement by the Firm is addressed by the Board in Exts.A9 and A10 letters dated 11/08/1983 and 30/08/1983 respectively. In Ext.A9 letter, the Assistant Executive Engineer reports to the Executive Engineer that the Firm has not made any arrangements for work either at adit no.3 or at adit no.4 and so there is no progress of work that

could be reported. The stock of cement with the contractor Firm is stated to be quite sufficient. It is further reported that the Firm has not even submitted the layout or the estimate including the requirement of cement for the construction of buildings at the site in spite of repeated instructions. The program of works has not been submitted and no tools or plants have been brought to the site. In Ext.A10 letter by the Board to the Firm, the allegation of short supply of cement is disputed. It is also stated that the quantity of cement requested is on the higher side. Firm is also told that as per the register maintained at the site of adit no.3 and 4, there was not even a single instance to show that the work had suffered due to want of cement.

22. The complaint regarding short supply of cement will have to be considered in the light of the amount of work executed by the Firm. As stated earlier, as on the date of termination of the contract, only 1% of the total work as against the 20% that ought to have been achieved, had been completed by the Firm. This figure is not disputed by the Firm. As per Cause 17 of the GCC & ITT, shortly after the contract is awarded, the contractor has to furnish a programme of work keeping in view the target dates. The contractor has to get the programme approved and will have to adhere to it. Whenever the programme is required to be deviated, proper approval of the

Engineer has to be obtained explaining the cause for such a deviation and a revised programme has to be made out. Failure to keep up to the approved programme, would be considered as negligence in the execution of the contract. Clause 2 of the Annexure to the Printed GCC& ITT stipulates that the tenderer should prepare and submit as part of his tender a complete construction programme, showing in detail his proposed programme of operations for the orderly performance of the work within the time specified in the specifications. The construction programme has to be in such form and in such detail, as to show properly the sequence of operations, the progress for each item or group of like items in the schedule of quantities and rates. Clause 19 of the same document says that within 30 calendar days after the date of award of the contract, the contractor shall if found necessary furnish to the Engineer a revision of the construction programme attached to his tender showing in detail his proposed programme of operations, which shall provide for orderly performance of work in a form acceptable to the Engineer. Revised construction programme will have to be submitted at intervals of six months for the approval of the Engineer. Failure to keep up with the approved programme would be considered negligence in the execution of the contract.

23. In Ext.A66 letter dated 08/06/1983, the Board reminds the Firm that the construction programme which ought to have been furnished by 13/05/1983 has not been furnished so far and so the Firm is directed to furnish the same without delay. The fact that the construction programme ought to have been submitted by the aforesaid date, is not disputed. No reason(s) has been given by the Firm as to why the construction programme was not given within the stipulated date. Ext.A66 is followed by Ext.A65 letter dated 16/06/1983; Ext.A63 dated 26/07/1983; Ext.A21 dated 04/08/1983; Ext.A12 dated 05/08/1983; Ext.A9 dated 11/08/1983 and Ext.A11 dated 11/08/1983. In all these letters, the Board keeps reminding the Firm to submit the construction programme without delay. The Firm in Ext.A33 letter dated 08/08/1983 gives an explanation for not submitting the construction programme within the stipulated date. According to them, a realistic construction programme could be prepared only after vacant possession of the site was obtained. Ext.A13 dated 20/09/1983 is the reply given by the Board to Ext.A33. The Board points out that initially the Firm had sought time till 10/09/1983 for preparing the construction programme. Thereafter, as per letter dated 08/09/1983, the Firm said that the construction programme would be dispatched by 16/09/1983. However, the Board has not

received it till 18/09/1983. Therefore, the Board directed the Firm to furnish the same forthwith. Pursuant to the same, Ext.A68 construction programme dated 18/09/1983 was submitted by the Firm. However, Ext.A68 submitted was not authenticated or signed by any representative on behalf of the Firm and hence the Board sent Ext.A14 letter dated 14/10/1983 directing the Firm to forward authenticated copies of the programme without further delay. This is seen followed by Ext.A41 dated 06/03/1984 in which the Board informs the Firm that as per the terms of the contract, the Firm was bound to furnish the programme of work shortly after the contract was awarded. However, the Firm took five months to submit a programme, which was done after several reminders. Finally, when the programme was sent, the same was not authenticated, and so the same was returned. Thereafter in spite of repeated reminders, the Firm did not submit the construction programme. It is further stated that in the conference held on 13/12/1983, the Firm had agreed to forward an authenticated copy of the programme already submitted and also a revised programme on the lines discussed in the meeting. However, the programme that has been forwarded is neither the one returned to the Firm for signature nor as agreed to in the meeting. The construction programme submitted is also not as per the provisions in the agreement. Hence the Firm

was again directed to prepare and forward a construction programme forthwith in tune with the terms of the agreement. In Ext.A52 letter written by the Board to the Firm, the latter is directed to submit a realistic construction programme for the work based on the guidelines given earlier by the Board. The Firm is reminded of the fact that a realistic construction programme has not been submitted even after a lapse of one year from the date of the award. This is followed by Ext.A54 dated 07/06/1984 in which the Firm is informed that the construction programme forwarded on 29/01/1984 is not acceptable to the Board and hence the Firm is directed to forward a realistic construction programme in accordance with the terms in the agreement. Finally, after a lapse of about a year from the date of the award of the contract, Ext.A89 dated 09/08/1984, a revised construction programme was submitted. Curiously, this is after the Board issued Ext.A79 dated 26/06/1984 calling upon the contractor to show cause why the contract should not be terminated.

24. There is no satisfactory material on record on the basis of which, the requirement of cement on the dates on which requests were made by the Firm, can be assessed. On record, we have only some communications which show demand for cement made by the Firm, which are answered by

the Board that the quantity supplied is more than sufficient for the work done by the Firm. There is no material on record to show that on such and such date, this much amount of work had to be completed or was completed, for which this much quantity of cement was required. In the absence of the same, it is not possible to conclude that sufficient quantity of cement had not been supplied by the Board.

25. Same is the case regarding the complaint of short supply of explosives and detonators. The Firm as per Ext.B18 dated 26/09/1983 wrote to the Board regarding the quantity of explosives and detonators required. In Ext.B19 letter dated 01/12/1983, the Board points out that the data adopted by the Firm for arriving at the total quantity of explosives required does not tally with the Departmental provisions. Nevertheless, the Executive Engineer informs the Firm that the Department would at all time make available the required number of explosives to the extent possible. In Ext.B20 dated 01/12/1983, the Board informs the Firm that the low out- turn is due to the poor drilling pattern adopted. The Board directs the Firm to improve the blasting techniques so as to achieve better results by way of increasing the depth of drilling and using minimum quantity of explosives. In Ext.B21 dated 31/12/1983 sent by the Firm to the Board, it is stated that for the proper

execution of the work, long delay detonators are essential. However instead of the same, the Board has only supplied short delay detonators, as a result of which they are not able to proceed with the tunnel driving because they were not getting sufficient out-turn. In Ext.B22 dated 03/01/1984 and Ext.B49 dated 10/06/1984 the Firm reiterates the complaint regarding explosives and detonators. In Ext.A32 letter dated 13/09/1983, the Board informs that apart from several other failures on the part of the Firm in carrying out the work, the terms of the contract require the contractor to furnish a list of workmen proposed to be engaged everyday with their details together with registration details. The contractor is also to furnish the names, addresses, license number of the licensed blasters proposed to be engaged for the work. However, these details have not been submitted. It is also pointed out that no proper arrangement has been made by the Firm for storing the explosives issued by the Department. Further from the documents produced by either side, it is evident that the work had been stopped several times in between due to several factors including alleged labour unrest at the site.

26. The allegation of the Firm regarding short supply of explosives and detonators and that they were of poor quality and not of the required specification, is disputed by the Board. Both sides have produced

documents in support of their respective contentions. Apart from the assertions made by DW1, the Managing partner of the Firm, there is no evidence on record to substantiate the case of the Firm that the explosives or detonators supplied did not produce the required results. There is also nothing on record to show that the explosives supplied were of poor quality or that they did not achieve the desired results. In the light of the quantity of work done also, it is highly doubtful as to whether the quantity of supplies demanded is justifiable or whether the said quantity was actually required. That being the position, it cannot be concluded that there was short supply of detonators or explosives as alleged by the Firm.

27. The next breach alleged is failure to provide electrical connection to the site in time. Power supply was indispensable at the work site. The date of awarding of the work was 12/05/1983. However, provision for the power supply was made only after six months. The inordinate delay in giving electrical connection is a serious breach of the terms of the contract on the part of the Board. Exts.A71, B13, A103, A71, B12 and B2 are the documents relied on to substantiate this contention. Ext.A71 dated 29/01/1984, the statement of accounts regarding the assets and liabilities of the Firm, shows that electricity charges was first levied from the Firm for the

period from 11/1983 to 08/1984. According to the Firm, this corroborates their case that power connection to adit no.4 was given only on 28/10/1983. Ext.B13 relied on by the Firm does not refer to this issue. Ext.A103 shows that transformer at adit no.4 was replaced on 11/09/1983. Ext.B12 dated 02/12/1983 a letter from the Firm to the Board says that the electrical arrangements and other enabling works at adit no.3 had been completed and therefore they expect to start the tunnel work by the end of the said month. By Ext.B2 dated 04/02/1984, the Firm informs the Board that they are using a diesel portable compressor and therefore necessary electrical connection to the site at adit no.3 may be provided to enable them to start work as per the construction programme.

28. In the additional written statement in O.S.No.345/1987, the allegation is that there was six months' delay in providing electric connection. In the plaint in O.S.No.1291/1992, the allegation is that there was three months' delay in providing supply. In the argument notes, the case is that there was 50 days delay in providing supply. As noticed earlier, the actual date of commencement of work was 01/07/1983. Ext.A71 will only show that charges for supply was levied from the Firm only from November, 1983 onwards. From this it cannot be concluded that supply to the site was

provided only in October 1983. This is all the more so, because out of the three adit tunnels to be constructed, the construction of two adit tunnels and the construction of about 24 meter of adit no.4, had already been completed by the previous contractor. It was the work of construction of the remaining portion of adit no.4 and the main tunnel that was awarded to the Firm. Therefore, some sort of arrangement for electric supply must in all probability have been there at the site. Clause 2.4 of the GCC&ITT says that power will be supplied to the contractor if found necessary at tariff rates in force metered on the L.T. side near the work site. The clause also *inter alia* say that any extension of power line required will have to be done at the contractor's cost. In clause 20.1 of the General specifications, it is stated that L.T. Three Phase supply is available at adit nos.3,4 and 5 metered at audit faces. It also says that the contractor should extend the required power lines to the work spots and inside the tunnels at his cost. No evidence has been let in to show that the Firm had in fact drawn the necessary lines to the work spots as contemplated in the aforesaid clauses of the agreement. Instead, the evidence let in is regarding complaints raised concerning related issues. The Firm is seen to have raised complaints regarding certain electrical installations at the site. In Ext.A17 letter dated 04/02/1984, addressed by the

Executive Engineer to the Superintending Engineer, it is stated that pursuant to the complaint, the Assistant Engineer (Electrical) had checked the electrical installations and found everything to be in order and that the trouble actually was with the compressor installed at the site by the Firm. It is also reported that the work had been stopped from 28/01/1984 and that till 03/02/1984, the work had not resumed. He also reports that when he visited the site on 04/02/1984, he was unable to meet any responsible person at the work site and he understands that the agent and other authorized persons have left the station. Therefore, it was not possible for him to ascertain the date on which the work would be resumed. In Ext.A24 dated 25/02/1984, the Board has refuted the allegation of the Firm that the latter's Engineers and electricians had located the trouble in the switch board and had rectified the same. The Board asserts that the Assistant Engineer (Electrical) had inspected the meter board immediately on receipt of the complaint from the Firm and it was found that the cut out of the fuse and connected installations provided in the meter board were in order and that the trouble was in fact with the Firm's compressor and not relating to power supply. The Board then goes on to assert that the reason for stoppage of work from 28/01/1984 cannot be attributed to the Board. In Ext.A55, which is again another letter

from the Board to the Firm, it is reiterated that the defects in the electrical system was not in the meter board provided by the Department, but was due to some trouble with the Firm's compressor. In the light of the aforesaid communications, this breach alleged is also doubtful.

29. The next breach is alleged to be the failure of the Board to provide uninterrupted power supply. According to the Firm, the total period during which there was power failure comes to about 497 hours. This was intimated to the Board as per Exts.A38 to A40 letters. The Firm also relies on Exts.B44, B75, B46, B43, B42 and B41 to substantiate the claim that there were frequent power failures at the site. It is also alleged that strike of the KSEB workers during March - April, 1984 caused heavy damage to the various transformers and that there were frequent power failures during this period. This is stated to have aggravated the labour problems at the site. Exts.B43 and B46 dated 18/02/1984; B39 dated 12/03/1984; B41 dated 17/05/1984, B47 dated 11/07/1984 and B38 dated 19/07/1984 are communications sent by the Firm to the Board complaining of power failures. By Ext.B41 letter dated 17/05/1984, the Firm informs that they have attended and rectified the defects caused by certain defective components by replacing the same. The defective components are stated to

have been installed by the electricians of the Department. It is also stated that work had to be stopped due to power failure on account of the defective components used by the electricians of the Department.

30. The Board disputes this allegation. In Ext.A17 dated 04/02/1984, the Board refers to the complaint of the Firm relating to the burning of the cut-out fuse provided in the meter board because of loose-contact, due to which the work had been stopped from 28/01/1984. According to the Board, as soon as this information had been received, the Assistant Engineer (Electrical) checked the electrical installations and found them to be in order. It was detected that the trouble was with the compressor and not with any of the installations made by the Department. In Ext.A18 letter dated 08/02/1984 the Board points out that the work has been unilaterally stopped on 28/01/1984 alleging labour issues when no such issue was actually existing. In Ext.A19 dated 06/03/1984, the Board again directs the Firm to resume the work which has been stopped without any cogent reasons. In Ext.A43 letter dated 06/02/1984 addressed by various labour Unions to the Board, it is stated that there are no labour problems at the site and that the management of the Firm has unilaterally stopped the work without any reasons. Ext.A51 is a carrier message dated 28/08/1989 sent by

the Executive Engineer to the Chief Engineer, by which the latter is informed that the Firm has stopped work on 22/08/1984 and has left the site. It is also informed that on 24/08/1984 they had removed certain machineries from the site.

31. The complaint of frequent power failures, as seen from the documents relied on by the Firm, is for the period from 18/02/1984 to 19/07/1984. During this period, was any work being actually carried out at the site by the Firm? This is doubtful as can be seen from the aforesaid communications. The work seems to have been stopped at different intervals citing various reasons. In most of the documents marked in the 'A' series on the side of the Board, it can be seen that the Board keeps asking the Firm either to start work or resume work or increase the pace of work. From these communications it appears that at no point of time the work was being carried out to the satisfaction of the Board. It is also alleged that the strike by the KSEB employees caused damage to various transformers. Though such an allegation is raised, no evidence is seen on record to substantiate the said allegation. Further, as per clause 2.4 of the GCC& ITT, the Department cannot be held responsible for any failure in power supply and no compensation can be claimed by the contractor on the said ground. This fact

is reiterated in clause 20.1 of the Technical Specifications. The aforesaid clauses itself would make it clear that the Board cannot be held liable for interruptions, if any, caused in the power supply and the same cannot be stated to be a breach on the part of the Board.

32. The next breach alleged, is the delay on the part of the Board in granting permission to do necessary protective works at the dangerous zone. According to the Firm, during the initial stage of work at adit no.4, a crack had developed inside the tunnel from where water was dripping and rock pieces were continuously falling. This increased with the progress of the work, causing concern to the life of the workers. The crack appeared to be quite dangerous and likely to collapse at any moment. The safety of hundreds of workers and staff members working inside the tunnel was in danger. Therefore, the Firm requested the Board to grant them permission to do extra protection work so as to avoid any danger. The Firm had sought permission to do the protective work immediately on detecting the defect. However, it took about seven months for the Board to grant permission to do the said work. Precious time was therefore lost on account of the negligence and the refusal of the Board to grant timely permission to do the necessary work. This was one another reason for the slow progress of

the work. The Firm relies on Exts.B71, B49, B83, B57 and B23 in support of this allegation.

33. In Ext.B71 dated 29/01/1984; B49 dated 10/06/1984; Ext.B57 dated 10/07/1984 and Ext.B83 dated 13/07/1984, all letters written by the Firm to the Board, reference is seen made to the dangerous condition at adit no.4. The possibility of endangering the life of the workers is pointed out and it is also alleged that the workers are afraid to work with confidence inside the tunnel and that this has had an adverse impact on the smooth execution of the works. In Ext.B57 reply to the show cause notice issued by the Board, the Firm refutes the allegation of the former that the workers are reluctant to enter and work at adit tunnel no.4 due to insufficient ventilation. According to the Firm, the issue regarding ventilation has already been addressed and that the reason for the reluctance of the workers to enter the site is because of its dangerous condition. As per Ext.B23 dated 18/07/1984, the Board is seen to have forwarded the approved drawing showing the proposal for the protective works to be carried out at the weak zone at adit no.4, as per which the Firm was requested to carry out the work immediately. This letter refers to a letter of the Firm dated 17/05/1984. It is in reply to the said letter, Ext.B23 is seen sent. It appears that it is as per the said letter dated

17/05/1984, permission was sought, pursuant to which it was granted as per Ext.B23. The letter dated 17/05/1984 referred to in Ext.B23 has not been produced.

34. The version of the Board is that there was no dangerous situation inside the tunnel as alleged by the Firm. On the other hand, the workers were reluctant to work because of the lack of ventilation facilities and the resultant health problems that made the workers hesitate to work at the site. In Exts.A55 and A56 dated 23/05/1984 and 11/06/1984 respectively, the problem of lack of ventilation inside the tunnel is seen pointed out by the Board. In Ext.A55 the Board states that in spite of repeated instructions from the field officers, proper ventilating system has not been provided at adit no.4. It is stated that after a blast it takes more than 8 hours to get the fumes and smoke even partially cleared to enable the workers to enter the tunnel and remove the muck. As per clause 24(iii) of the General Specifications, ventilation has not been arranged in such a manner that, contaminated air is removed immediately to make it possible under ordinary condition for men to work in the headway in about 15 minutes after blasting. As no ventilating system has been installed, staff of the Board are unable to enter the tunnel to do their routine work. The workers at site have complained about the non

-adherence of the safety code and inadequate arrangement regarding ventilation. Natural ventilation is not possible, as the heading has gone to such distance and so the Board is seen to have directed the Firm to install a ventilating system as per specifications in the agreement within a week of the receipt of the letter, failing which the Firm was warned that that the Board would be constrained to stop work till the defects are rectified. In Ext. B56, the unhealthy working condition of the workers due to lack of ventilation inside the tunnel, non-observance of health and sanitary conditions are pointed out. These communications again raise doubts regarding the allegation of dangerous condition inside the tunnel.

35. It is further alleged that there was violation of the clauses of Ext.B9 supplemental agreement. As per Ext.A5 letter dated 06/05/1983, the Firm had requested the Board for mobilization advance which was initially rejected. Later the Board suggested certain terms and conditions for payment of mobilization advance which was accepted by the Firm. Accordingly, Ext.B9 supplementary agreement dated 24/06/1983 was executed. In the said agreement, furnishing of bank guarantee was never stipulated. Pursuant to execution of Ext.B9, the Executive Engineer issued a cheque dated 29/06/1983 for ₹19 lakhs towards mobilization advance. On the

same date, the Firm had presented the cheque and the amount was also credited to their account. But immediately thereafter, the bank in collusion with the Board fabricated and fudged the registers and accounts of the bank and withdrew the amount that had been credited to the account of the Firm without its knowledge. This is evident from Exts.B117 to B120. As the mobilization advance was not sanctioned promptly, the same affected the financial credibility and liquidity of the Firm as they were unable to honour several financial commitments made by them.

36. Admittedly there is no provision in the agreement executed between the parties for grant of mobilization advance. However, as per Ext.A5 dated 06/05/1983 the Firm requested the Board to give them ₹25 lakhs as mobilization advance and ₹35 lakhs for the purchase of machinery for which they expressed their willingness to provide bank guarantee. Therefore, it is the Firm themselves who had made the offer to furnish bank guarantee and the allegation that it was the Board that demanded the bank guarantee is incorrect. Admittedly an amount of ₹19 lakhs had been sanctioned and the same had been credited to the account of the Firm also. The allegation that the bank and the Board colluded together, manipulated the records and withdrew the amount from their account without their

knowledge is not true. This is evident from Ext.A20 letter given by the Executive Engineer to the Manager, SBT, Vadasserikkara, in which they request for stop payment of the cheque dated 29/06/1983 for ₹19 lakhs issued in favour of the Firm. It is stated that this payment was made on the assurance by the Firm that they would start the work from the morning of 30/06/1983. As they failed to start the work as agreed to by them, the same was treated as a breach of the contract and so the Engineer requested the Bank to stop the payment of the particular cheque until further intimation. The Firm does not have a case that they did commence the work as agreed to by them on the morning of 30/06/1983. Admittedly after about two weeks or so, the mobilization advance was released after the work commenced. Therefore, there cannot be any breach of the contract as alleged by the Firm.

37. The last breach alleged is nonpayment of part bills and advance payments. According to the Firm, there was illegal stop payment of mobilization advance violating the terms of Ext.B9; full amount of mobilization advance had not been given; monthly part payments for the work done were never made; advance for the machineries purchased and brought to the site was never paid; advance payment for the preliminary and enabling works was never made. Several payments due to the Firm were

never paid promptly which also affected the progress of the work. The allegation regarding mobilization advance has already been answered. The allegation that they were not paid for the works done by them is also incorrect because several communications on record, namely, Exts.A83, A83(a), A84, A85, A86, A97 etc. show that the Board had requested the representatives of the Firm to be available at the site for preparation of inventory and for taking measurements of the work completed by them. But it is seen that the Firm never co-operated and they also did not send any of their representatives to the site. After having not co-operated with the preparation of the inventory, they later on started objecting to the inventory prepared by the Board. In such circumstances, the Firm cannot be heard to contend that the amounts due to them were not paid promptly by the Board. Therefore, it can only be concluded that there was no breach of the terms of contract by the Board as alleged by the Firm. That being the position, the Firm cannot claim any loss of profit from the Board. Hence there is no infirmity in the court below rejecting the plaint claim and so no interference is called for into the findings of the court below. Points answered accordingly.

38. **Point no.(i) & (ii) in A.S.No.86/2003** -According to the

Board, after terminating the contract with the Firm, the work was re-tendered on 14/12/1985. The total amount for which the work was allotted to three contractors came to ₹899.71 lakhs. As a result of the re-tender, the Board suffered a loss of ₹451 lakhs. As the re-tendering was conducted at the risk and cost of the Firm, they are bound to compensate the Board for the loss and damages to the extent of ₹451 lakhs, which represent the difference in the contract amount, which the Board has sustained based on the difference in P.A.C. alone.

39. The fact that the work had to be re-tendered for the aforesaid sum is not disputed by the Firm. The only contention of the Firm is that they are not liable for the same as the contract was illegally, arbitrarily and wrongly terminated by the Board, which contention has already been rejected. Ext.A81 letter dated 02/12/1995 from the Chief Engineer to the Secretary, KSEB, states that the expenditure incurred in the three re-arranged contract after the termination of the contract with the Firm comes to ₹12,70,46,557/-. This document has not been disproved or discredited. Ext.A81 shows that the Board has incurred more expenditure than what is claimed in the plaint. The Board has sought for ₹451 lakhs but the court below has granted only ₹35 lakhs. What was the logic or the ground or how

the figure of ₹35 lakhs was arrived at is not clear. However, as the Board has not preferred any appeal, we do not intend to go into the same. In these circumstances, no interference is called for into the findings of the court below on this aspect also. Points answered accordingly.

40. **Point no.(i) in A.S.No.113/2003:** - The court below held O.S.No.1291/1992 to be not maintainable on the ground that one of the plaintiffs was not a partner when the cause of action arose and hence there was no privity of contract between the said partner and the Board. Finding so, the court below held the suit to be not maintainable.

41. There is only one plaintiff in the suit, who is described as- M/s. C.S. Company, represented by its Managing Partner, Jaganatha Prasad. According to the Firm, one of the partners had retired subsequent to execution of Ext.A1 agreement with the Board. The partnership was reconstituted and a new partner came in. This happened before the suits were instituted. Section 32 of the Indian Partnership Act, 1932 deals with the liability of a retiring partner. Sub-section (2) to Section 32 says that a retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made by him with such third party and the partners of the reconstituted firm, and such

agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement. Sub-section (3) says that notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement. Therefore, unless a retiring partner follows the procedure contemplated under the aforesaid provisions, he cannot just resign from the partnership and escape from the liabilities, if any, of the firm. In this case, there is no evidence on record to show that such a course has been adopted. Therefore, all the persons who were partners at the time of accrual of the cause of action would certainly be liable for the liabilities incurred by the Firm. Section 11 of the Partnership Act says that subject to the provisions of the Act, the mutual rights and duties of the partners may be determined by a contract between the partners, which contract can be express or implied. The terms and conditions under which the partnership in this case was reconstituted and the contract if any relating to the mutual rights and duties of the partners when a new partner came in are not known.

42. The court below has relied on Order XXX Rule 1 CPC to

conclude that the suit is not maintainable. Order XXX of the Code merely prescribes the procedure in suits by or against partnership firms and persons carrying on business in names other than their own. A firm is a compendious collective name for the individual members who constitute the firm. The Code, however, does not treat the firm as a juristic person. It only confers a privilege on the individuals constituting the firm to sue or be sued in the name of the firm. Rule 1 of Order XXX enables any two or more persons claiming or being liable as partners and carrying on business in India to sue or be sued in the name of the firm, if any, of which such persons were partners at the time of the accruing of the cause of action. It provides a new and convenient mode of describing in a suit two or more persons claiming or being liable as partners. The partners may adopt this method and bring the suit in their firm name. So also, they may be sued in their firm name. When a suit is instituted by or against a firm it is in reality a suit by or against all the partners of the firm. The firm name stands for all those persons who were its partners at the time of the accruing of the cause of action. In other words, the effect of using the name of the firm is to bring all the partners before the court. This enabling provision contained in Rule 1 of Order XXX does not, however, do away with the traditional method of bringing a suit by or against

the partners individually.

43. As held by the Hon'ble Supreme Court in **Purushottam Umedbhai & Co. vs. M/s. Manilal and Sons**, **AIR 1961 SC 325**, Order XXX is an exception to Section 45 of the Contract Act, insofar as it allows one more partner to institute a suit, provided, the suit is brought in the name of the Firm. The policy underlying Order XXX is no more than to afford facilities in the joinder of numerous parties. It thus seeks to avoid a long array of plaintiffs or defendants and allows a convenient mode of institution of suits by or against partners collectively who carry on business under a particular name.

44. The expression "such persons" in Order XXX would mean persons who are partners at the time when the cause of action accrued (**Mathuradas Canji Matani vs. Ebrahim Fazalbhoy, AIR 1927 BOMBAY 581**). A decree passed against a Firm is binding on all persons who were partners on the day when the cause of action accrued. That being the position, at best, the consequence of a new person coming in would only mean that he would not be entitled to the fruits of the decree if any obtained by the persons who were partners at the time of the accrual of the cause of action.

45. Further, the scope and ambit of the provisions of Rules 1 and 2 of Order XXX of the Code is different from the provisions of S. 69(2) of the Partnership Act. The provisions contained in Rules 1 and 2 are procedural, whereas the provisions of S. 69(2) are substantive and create a bar at the threshold of the filing of a suit by or on behalf of a firm if the conditions mentioned therein are not fulfilled. If the parties had not been properly described or if there was a defective description of the parties, it was open to the court to have allowed or directed amendment of the pleadings. Such defect cannot be said to be fundamental or in the nature which cannot be permitted to be corrected. [**Purushottam Umedbhai & Co.** (*Supra*)]. Therefore, if at all there was a defect in the cause title, an amendment could have been permitted by the court below. Such defect if any cannot be made a ground to hold the suit to be not maintainable. Point answered accordingly.

46. Before we conclude, we briefly refer to I.A.No.2/2019_filed by the second respondent in A.S No.86/2003, that is, the fourth defendant in O.S. No.345/1987. He contends that he had never been served with summons in the case; that he was unaware of the institution of the suit and that he came to know about the judgment and decree only in the year 2012. Therefore, he filed I.A.No.2460/2012 under Section 47 C.P.C. before the court below for

setting aside the impugned judgment. Along with the said petition, he had also filed I.A.No.2461/2012 under Sections 5 and 17 of the Limitation Act. The court below dismissed both the applications.

47. In I.A.No.2/2019 it is alleged that though I.A.No.2461/2012 had been filed quoting Sections 47 and 151 of the C.P.C, the petition was actually under Order IX Rule 13, for setting aside the decree passed *ex parte* against the 4th defendant. Against the order of the court below dismissing the aforesaid I.As., he filed O.P.(Civil) No.16/2014 before this Court. The said O.P.(Civil) was posted along with A.S.No.86/2003. Thereafter it was de-linked on the premise that it has to be heard separately. As the said O.P. (Civil) is connected to the issue in O.S.No.345/1987, no prejudice would be caused to the parties, if the said petition is converted into an FAO and heard along with the present appeal. Therefore, he filed I.A.No.3/2019, an application under Order 43 Rule 1(d) read with Section 151 C.P.C in O.P. (Civil) No.16/2014, requesting this Court to permit the petitioner, namely the 2nd respondent in the appeal, who is the 4th defendant in O.S.No.345/1987, to make his submissions regarding the facts and contents in O.P.(Civil) No.16/2014 along with the present appeal. The 4th defendant who has suffered a decree, has not filed any appeal before this Court and therefore his

arguments cannot be entertained by this Court. I.A.No.2/2019 is thus dismissed.

48. **Point no.(iii) in A.S.No.86/2003 & Point no.(iv) in A.S.No.113/2003:**

In the result, we find no merit in the appeals. Hence both the appeals are dismissed.

All interlocutory applications, if any pending, shall stand disposed of.

Sd/-

P.B. SURESH KUMAR
JUDGE

Sd/-

C.S. SUDHA
JUDGE

ami/Jms