HIGH COURT OF TRIPURA
_A_G_A_R_T_A_L_A_
RFA No.03 of 2016
Along With
RFA No.04 of 2020

RFA No.03 of 2016

1. The Chairman cum Managing Director, Food Corporation of India, H.Q. 16-20 Bara Khamba Lane, New Delhi-110001.

2. The General Manager (Region), Food Corporation of India, NEF Region, Shillong-33.

3. The Executive Director (Zone), FCI Zonal Office, Guwahati-7 (Sl. No.1 to 3 are represented by Sl. No.4).

4. The Area Manager, Food Corporation of India, District Office-Colonel Chowmuhani, Agartala, West Tripura.

..... Appellant(s)

V E R S U S

Sri Ratan Bardhan, son of late Chandranath Bardhan, resident of Shibbari Road, Tarapur, Silchar, District- Cachar, Assam. (Proprietor) Ratan Bardhan, Transport Contractor of F.C.I., Churaibari, P.S. Churaibari, District- North Tripura.

..…. Respondent(s)

RFA No.04 of 2020

1. The Food Corporation of India having its registered office (Headquarter) at Khadya Sadan, 16-20, Barakhamba lane, New Delhi, Pin-110001 being registered by the General Manager (R), Food Corporation of India, N.E.F. Region, Mawlai-Mawroh, Golf link, Shillong-3, Meghalaya.

2. The Area Manager (now Divisional Manager), Food Corporation of India, Office- Colonel Chowmuhani, P.O.- Agartala, P.S.- West Agartala, District- West Tripura.

..... Appellant(s)

V E R S U S

Sri Ratan Bardhan, son of late Chandranath Bardhan, resident of Shibbari Road, P.O.- Silchar, P.S.- Tarapur, District- Cachar, Silchar, Assam, 788008.

..…. Respondent(s)

For Appellant(s) : Mr. Ratan Datta, Advocate,

For Respondent(s) : Mr. Indrajit Chakraborty, Advocate.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR JUSTICE ARINDAM LODH

Date of Argument : 21st February, 2024.

Date of Judgment & Order : ***27th March, 2024***.

Whether Fit for Reporting : YES.

JUDGMENT & ORDER

I=N=D=E=X
PART-A (RFA No.03 of 2016)
Introduction
Impugned judgment dated 28.11.2015 and decree dated 08.12.2015 arising out of T.S. No.15 of 2012
Written statement of the FCI-Corporation
Issues framed by the learned Trial Court
Materials exhibited by both sides
Findings of the learned Trial Court
Grounds assailed by the appellant-Corporation
Invocation of Clause-X(c) of the tender agreement vide letter dated 24.11.2010
Letter issued by the Area Manager, FCI, Agartala dated 19.10.2010
Findings rendered by this Court
Conclusion

PART-A (RFA No.03 of 2016)

Aparesh Kumar Singh, CJ

Heard Mr. Ratan Datta, learned counsel appearing for the appellants-Corporation and also heard Mr. Indrajit Chakraborty, learned counsel appearing for the respondent.

[2] [RFA No.03 of 2016] arises out of the impugned judgment dated 28.11.2015 and decree dated 08.12.2015 passed in T.S No.15 of 2012 by the Court of learned Civil Judge (Sr. Division), North Tripura, Dharmanagar. [RFA No.04 of 2020] arises out of the impugned judgment and decree dated 30.09.2019 passed in Commercial Suit No.01 of 2016 by the court of learned District Judge (Commercial Disputes), North Tripura, Dharmanagar. Both the appeals are by the appellant-Corporation. T.S. No.15 of 2012 has been allowed in favour of the plaintiff-contractor/respondent herein holding him entitled to get the earnest money and security deposit of Rs.79,55,241/ along with interest @ 9% per annum calculated from the date of contract *with effect from* 11.11.2009 till its realization; further entitled to balance security deposit of Rs.13,82,557/- with similar interest *with effect from* the same date till its realization; further entitled to Rs.22,30,036/- along with 9% interest calculated from January, 2011 till its realization towards the difference of the value of remaining work @ 49.49% and the actual work done @ 159% as referred in schedule(C) of the plaint; further entitled to get refund of the railway demurrage charges to the tune of Rs.39,474/- along with 9% interest per annum calculated from May, 2010 till its realization; all the dues with respective interest have been directed to be paid within a period of 60 days from the date of the judgment. Commercial Suit No.01 of 2016 instituted by the plaintiff-FCI/appellant herein has been dismissed.

[3] Both the appeals have been tagged together as they arise out of the same agreement executed between the parties dated 15.09.2009 as per the letter of acceptance and appointment of the contractor Ratan Bardhan, defendant-

respondent herein and work order dated 11.11.2009. The contractor was appointed under the tender No.NEFR/TC/CBZ-NGR/11915. Therefore, they have been heard together and are being decided by the instant judgment.

[4] T.S. No.15 of 2012 was instituted by the contractor for declaration that the defendant-FCI have illegally and arbitrarily imposed Clause-X(c) of the agreement of the work against the plaintiff and for realization of a sum of Rs.2,03,21,634/- along with interest @ 13% per annum on the principal amount being instituted by plaintiff against the defendants. The plaintiff-contractor's case, as pleaded, has been succinctly recorded in the impugned judgment dated 28.11.2015 and decree dated 08.12.2015 which reads as under:

> "The factual background of the plaintiff's case, in a nutshell, is that plaintiff-respondent has been engaged as transport contractor for a period of two years vide letter No.CONT.9/NEFR/TC/CBZ-HGR/09/11915 dated 11-11-2009 issued by the Assistant General Manager on behalf of General Manager (NEFR) of the Food Corporation of India (in short, FCI) for the purpose of transportation of food grains, sugar and alied materials from railway siding, Churaibari to F.S.D, Nandannagar and from railway siding, Churaibari to F.S.D, Churaibari and the plaintiff was advised to start the work with effect from 16.11.2009. As per adopted procedure indents are issued by the authority of FCI to be followed by supply of empty trucks by the contractor for transport and carrying of food grains and the work continued from 01.12.2009 to 30.12.2010. It is also pleaded that the plaintiff had requested the Area Manager of FCI, District Office, Agartala by a Fax dated 09.07.2010 to increase the numbers of trucks to be indented considering the placement of wagons by the Railway for smooth running of the transport and carrying work. According to plaintiff, in spite of supply of sufficient numbers of empty trucks at Nandannagar the loaded trucks were detained for several days together with load at Agartala on several occasions for which the arrival of empty trucks at Churaibari was disturbed without any fault of plaintiff-contractor and this situation was intimated to the Area Manager of FCI by plaintiff in time vide Fax dated 07.12.2009, 03.03.2010, 10.03.2010, 14.10.2010, 27.10.2010, 30.10.2010 & 02.11.2010. But no remedial measure was taken by defendants while plaintiff performed the work to the entire satisfaction of the FCI authority.
>
> The next plea of plaintiff is that defendants suddenly minimized the loading of food grain bags to the empty trucks reducing the quantum of load in October 2010. Then one joint representation dated 26-11-2010 signed by 8 Nos carrying contractors was given to the Area Manager, FCI defendant No.4 with a request for escalation of the rate of work to at least 60% from the existing rate of 49.49 % which was made due to changed situation and to avoid financial loss of contractors but the defendants declined their representation and without any reason Deputy General

> Manager of FCI by Fax dated 24-11-2010 imposed the Clause -X(c) of the tender contract on the plaintiff at his risk and cost and engaged one Sreema Stone Crusher on 27-12-2010 vide appointment letter No.Cont.9/DO-AGT/TC/CBZ-NDN/FSD/CBZ/Adhoc/2010 dated 27-12-2010 @ 159% for the work of rest contract period. It is also asserted by plaintiff that subsequently defendant No.2 vide his letter dated 25-06-2011 enhanced the rate of work at 156% ASOR by misusing his power to the detriment of the interest of plaintiff and also misused the exchequer of FCI. It is further alleged that this enhancement of rate of work showed the vindictive steps of the defendants against plaintiff and due to such escalation of the rate of work in favour of the new contractor namely Sreema Stone Crusher, there was difference of Rs.56,99,182/- as the excess amount in comparison to the existing rate of work of 49.49%.
>
> According to plaintiff, the defendants also did not release his security deposit and earnest money paid by him but they sent demand notices to plaintiff constantly for payment of extra expenses incurred due to transportation of stocks at his risk and cost. It is also submitted that the defendants disqualified plaintiff to compete fresh tender of FCI and in reply plaintiff also sent letters dated 02.06.2011 & 15.11.2011 claiming to release and refund his security money and earnest money at the tune of 79,55,241/- and for withdrawal of the tender clause X(C). Plaintiff also claimed interest @ 13% per annum for blockage of his security money. It is further submitted that 65790/- was deducted from the admitted bills of the plaintiff w.e.f the month of May, 2010 to December, 2010 on the ground of making payment towards demurrage charges of the Railway authority though it has waved 60% demurrage charges and for this plaintiff is entitled to get back said 60% amount out of the total deducted demurrage charges from defendant along with interest @ 13%. Plaintiff served one advocate notice dated 06.02.2012 through registered post to defendants claiming his dues but no response was made by defendants. According to plaintiff, the cause of action for the suit arose firstly in the month of October, 2010 and subsequently on 27.12.2010 when work was assigned to another agency at the risk and cost of plaintiff. Plaintiff also categorically mentioned his claim amount under different heads in schedule 'A' 'B' 'C' & 'D' at the tune of total 2,03,21,634/- for realisation from defendants along with interest @ 13% per annum with declaration that defendants illegally and arbitrarily imposed clause X(C) of the tender agreement dated 11.11.2009 upon plaintiff. Plaintiff valued the suit at Rs.2,04,21,634/- and paid the court fees as per section 7(iv)(c) & 7(vi) of the Court Fees Act."

[5] The defendant-FCI in T.S. No.15 of 2012 appeared and contested the suit by filing written statement. The stand of the FCI, as described in brief, is also being extracted hereunder to avoid prolixity in the verbatim narration of pleadings of both the parties.

> "In response to the summons issued upon the defendants, all the defendants appeared and contested the suit by filing written statement wherein they categorically denied the claim of plaintiff questioning the maintainability of the suit on the ground that plaintiff failed to comply with the mandatory provision of section 80 CPC to serve upon the

defendants before instituting the suit. The plea of defendants is that the performance of plaintiff was not up to the standard and satisfactory as per physical assessment made by defendant No.4 at the work site and defendant No.4 vide his certificate dated 01-12-2010 opined that the performance of plaintiff as contractor under defendants at the route entrusted to him for transportation of food grains, sugar and the allied materials were found unsatisfactory beyond 18-10-2010 while the grounds mentioned by plaintiff have no merit. It is further contended by defendants that plaintiff was well aware about quoting of the rate for transportation of FCI goods which was settled after negotiation in terms of metric tons and not in terms of bags and so the overloading made earlier by plaintiff was illegal resulting to wrongful gain for which defendants cannot be made responsible to reduce or restrict the load capacity of the trucks engaged for the contractual works by the plaintiff and as such the escalation of 60% against the existing rate of 49.49% ASOR was not feasible under the terms and conditions of the contract agreement.

The next plea of defendants is that the defendants were under compulsion to impose Clause-X(C) of the contractual agreement in view of the poor performance of plaintiff beyond 18-10-2010 and for this work was given to M/S Sreema Stone Crusher at the risk and cost of plaintiff as per terms and conditions of the contract which was made after giving sufficient scope to obey the contract while the imposition of Clause-X(C) of agreement was inevitable. It is also submitted that several notices were sent to plaintiff for reimbursing the extra cost and expenditures of transportation paid to the adhoc contractor to complete the remaining works at the risk and cost of plaintiff but plaintiff neither made any response nor paid any money as per the demand notice and for this defendants were unable to release the security money of plaintiff. Defendants also denied and disputed the claim of plaintiff for waiver part of demurrage charges on the reason that such waived demurrage will be released after final fixation of responsibility of demurrage charges upon plaintiff subject to the settlement of relevant dues between the parties.

It is also pleaded that as per the terms of the contract the competent authority of defendants reserved the right to appoint contractor on ad hoc basis to complete the carrying of rest part of defendants goods for the route at the risk and cost of the subsisting contractor in case he failed to perform the work efficiently while plaintiff having miserably failed to perform his part of contract particularly beyond 18-10-2010 resulting to the suffering to public distribution system in the State of Tripura adversely, defendants imposed the Clause-X(c) of the agreement after giving repeated warnings for acceleration of the transportation. On this ground defendants also denied to pay any compensation to the plaintiff as his calculation is baseless, imaginary and hypothetical while the original agreement was extended for further 3 months without terminating the contract for successful completion of the defendants work. With these grounds the defendants submitted that though the cause of action shown is relevant to institute the suit but as per the spirit of the contractual agreement no equitable consideration or relief can be given to the plaintiff as the rights and duties under contract are reciprocal and so the claim of plaintiff has no basis and the suit is liable to be dismissed.

It is worth to note here that earlier learned predecessor has decreed the suit vide its judgment dated 01-03-2014 and decree dated 05-03-2014 afterwhich the defendants preferred appeal vide No.RFA.03 of 2014 before the Hon'ble High Court of Tripura against that judgment and

decree. Then the Hon'ble High Court vide its judgment and order dated 02-12-2014 set aside the previous judgment and decree of this court and remanded the case to this court for fresh decision in accordance with given direction and to dispose of the suit not later than 30-11-2015. Then after hearing the both parties and considering the pleadings of parties and documents two additional issues have been framed which are recast with the previous issues and thereafter evidence of both parties has been recorded afresh as per direction of the Hon'ble High Court."

[6] The learned trial Court framed the following issues and two additional issues based on the pleadings and the documents relied upon by both the parties.

(i) Is the suit maintainable in its present form?

(ii) Is there any cause of action in the suit?

(iii) Whether the public distribution system was disturbed in Tripura State for want of delivery of food grains from FCI to State food go-down?

(iv) Whether the imposition of Clause X(c) with penalty of 159% risk and cost of the tender agreement in respect of work order No. NEER/TC/ CBZ/NGR/11915, dated, 11-11-2009 was illegal, arbitrary and against natural justice?

(v) Whether the plaintiff is entitled to get the decree to realize the sum of rupees 2,03,21,634/- from the defendants and decree of declaration that clause-X(c) of the tender agreement was illegal?

Additional Issues

(vi) Whether there was any failure on the part of plaintiff in the placement of vehicle for carrying of food grains as per the indent and requisition?

(vii) Whether any prior notice was given by the defendants to the plaintiff to regularize the placement of vehicle as per indent and terms of contract before imposing clause-X(c) of the tender agreement?

[7] Before the learned trial Court also the following exhibits were relied upon by the parties.

"(A) Plaintiff's Exhibits :

Ext.-1 : Appointment letter dated 11.01.2009 issued by defendant (on admission).
Ext.2 : Statement of Indent and supply of trucks with effect from 01.12.2009 till 30.12.2010 (on admission).
Ext.3 : Letter of certificate dated 01.12.2010 issued by defendant No.4.
Ext.3/1 : Signature of defendant No.4 on the letter of certificate. (On admission)
Ext.4 : Appointment letter dated 27.12.2010 in favour of Srimaa Stone Crusher issued by defendant No.4. (On admission)
Ext.4/1 : Signature of defendant No.4 on the letter dated 27.12.2010 (on admission).

Ext.5 : Letter dated 07.02.2012 issued by the Assistant General Manager (Cont) to plaintiff (On admission).
Ext.5/1 : Signature of author of letter dated 07.02.2012
Ext.6 : Advocate notice dated 06.02.2012 along with original Postal receipts sent by plaintiff. (On admission).
Ext.7 : Letter dated 09.07.2010.
Ext.7/1 : Signature of plaintiff on the letter dated 09.07.2010;
Ext.8 : Letter dated 02.06.2011 along with postal receipt;
Ext.8/1 : Signature of plaintiff on the letter dated 02.06.2011;
Ext.9 : Original letter dated 20.02.2012;
Ext.9/1 : Signature of plaintiff on the letter dated 20.02.2012;
Ext.10 : Original accounts statement of loan;
Ext.10/1 : Signature of plaintiff on the accounts statement of loan;
Ext.11 : Original news paper dated 17.02.2015;
Ext.12 : Original letter dated 21.04.2011 along with postal receipts;
Ext.12/1 : Signature of plaintiff on the letter dated 21.04.2011.

(B) <u>Defendant's Exhibit</u> :

Exbt.A : Self certified copy of indent and supply of vehicle under vehicle (on admission).
Exbt.B : Copy of price Bid.
Exbt.C : Copy of accepted tender.
Exbt.D : Signature of Area Manager Sr. S.C. Sarkar on the letter dated 20.10.2010.
Exbt.E : Letter dated 01.12.2010 of Director, Food & Civil Supplies, Government of Tripura.

(C) <u>Plaintiff's Witness</u>:
PW.1 Ratan Bardhan

(D) <u>Defendant's Witness</u>:
D.W.1 Ranjit Kr. Ghosh
(E) Court Witness : NIL
(F) Material Exhibit : NIL"

[8] The learned trial Court first took up the issue No.(vi) and decided it in the negative against the defendants after discussion of the pleadings and the evidence adduced by the parties. The learned trial Court though found that there was no doubt that on 19.10.2010 there was irregularity in supplying the indented trucks at Nandannagar but this could not be regarded as total failure on the part of plaintiff to comply the indent.

[9] Issue No.(iii) was also decided in negative. The learned trial Court upon consideration of the pleadings and evidence on record came to a conclusion that the allegation of public distribution system was disturbed in the

State of Tripura for want of delivery of food grains from FCI to the State food go-down could not be convincingly proved. Plaintiff was under no obligation to carry the food grains to the food go-downs of Government of Tripura. Clause-X(c) of the agreement was imposed on 24.11.2010 whereas the letter of Director, Food Department, Government of Tripura dated 01.12.2010, Exbt.[E] was issued after imposition of Clause-X(c) of the agreement. The learned court also took note of the statement of D.W.1 that there were 5/6 contractors working under the FCI and plaintiff was not the only contractor to deliver the food grains from the go-down of FCI to the go-down of State of Tripura. Therefore, it could not be said with absoluteness that due to irregular or short supply of vehicle by plaintiff, the crisis in stock position of PDS goods at Nandannagar FSD arose and the whole responsibility of such crisis throughout the State of Tripura could not be shifted upon the plaintiff when other contractors were also involved in the work of supply of vehicles at the go-downs of FCI.

[10] The learned trial Court then proceeded to decide issue No.(iv) and (vii) together. Learned trial Court referred to Clause-X(c) of the tender agreement and held that even though it did not contemplate any prior notice to be given to the contractors before invocation but considering the nature of the work it was prudent to give prior notice to the contractor to regularize the supply of trucks in case of any deficiency found in the work before invoking Clause-X(c). The learned court referred to the exhibits adduced by the FCI for supporting the invocation of Clause-X(c). It also referred to the findings on additional issue No.(vi) where it was found that the defendants could not

discharge the burden of proof that there was absolute failure on part of plaintiff to supply the trucks as per indent. Therefore, it held that the defendants have invoked Clause-X(c) on 24.11.2010 without giving sufficient opportunity to the plaintiff about his unsatisfactory performance, if any, after 18.10.2010. The learned court also took into consideration that the performance report of plaintiff since the inception of contract on 16.09.2009 till 18.10.2010 i.e. for more than one year was satisfactory. It could not be believed that in the next one month after 18.10.2010 the performance of plaintiff became alarmingly so adverse and unsatisfactory that the defendants had no other option but to invoke the risk and cost clause of agreement upon plaintiff. The defendants were found to have engaged one Sreema Stone Crusher at an enhanced rate of 159% to complete the remaining part of work of original contract on *ad hoc* basis for the next 6 months. It felt that since there were other contractors working under the defendants at the same time they could have been engaged to complete the remaining or the deficient work, if any, under the original contract so as to avoid the provision of risk and cost of the original contractor. They instead chose to engage fresh contractor at the rate of 159% which was 110% more than the original rate of contract made with the plaintiff. They were unable to explain through their pleadings and oral evidence the reason about awarding such huge quantum of rate of 159% ASOR to complete the remaining work in favour of the *ad hoc* contractor. Thus, the FCI opted to accept excessive and unusual rate of 159% to the Sreema Stone Crusher though the original rate of work was only 49.49%. Evidence also revealed that plaintiff and other contractors had requested the defendant-FCI for enhancement of the rate of work at least 60% from the existing rate of 49.49% as referred to in the Exbt.6

notice but their representation was not accepted and instead work was awarded to an *ad hoc* contractor at a very high rate of 159%. The learned Court therefore held that it was unjust, irrational, and not in consonance with the terms of the tender agreement and moreover detrimental to the rights and interest of plaintiff under the contract. Therefore, issue No.(iv) was decided in favour of the plaintiff and additional issue No.(vii) was decided in the negative in favour of plaintiff.

[11] The learned trial Court thereafter took up issue No.(i) and (ii) which relate to the maintainability of the suit and the cause of action. The learned Court drew upon the findings in relation to issue No.(iv) and additional issue Nos.(vi) and (vii) and held that the defendant-FCI had arbitrarily and illegally imposed Clause-X(c) of the tender agreement. The learned Court held that cause of action in the suit arose firstly on 24.11.2010 when Clause-X(c) was unjustifiably invoked by FCI and subsequently on several dates when defendants made demand to plaintiff to make good the extra expenditure incurred due to engagement of *ad hoc* contractor at the risk and cost of plaintiff as well as on those dates when plaintiff requested the defendants-FCI for immediate withdrawal of the tender Clause-X(c) and stoppage of transportation work at the risk and cost of plaintiff. The learned Court held that giving of advocate notice on 06.02.2012 through registered post along with postal receipt Exbt.6 on admission amounted to sufficient compliance with the provisions of Section 80(1) of CPC as the suit was filed on 19.04.2012 after lapse of two months of this notice. Hence, issue No.(i) and (ii) were decided in favour of the plaintiff.

[12] Lastly, the learned trial Court proceeded to examine issue No.(v) which relates to the claim of plaintiff for realization of Rs.2,03,21,634/- from the defendant. The Court found that the plaintiff had claimed the total earnest money and security deposit of Rs.79,55,241/- along with 13% interest i.e. Rs.35,78,439/-. The security money was deposited between 2006 to 2011. Plaintiff also claimed loss during the period of January, 2011 up to 15th February, 2012 to the tune of Rs.70,26,211/- and further claimed Rs.97,687/- as per Schedule-D of the plaint. In total, Rs.2,03,21,634/- was claimed from the defendant-FCI.

[13] The learned Court arrived at the findings that the difference between the rates of 159% from January, 2011 to June, 2011 and from July, 2011 to 15th February, 2012 at the rate of 156% allocated to the *ad hoc* contractors compared to the original rate of 49.49% to the original contractor should be awarded to the plaintiff. As such, plaintiff was held entitled to get the sum of Rs.22,30,036/- along with interest at the rate of 9% per annum to be calculated *with effect from* January, 2011 till its realization.

[14] As regards the demurrage charges, the learned Court found that Rs.65,790/- was deducted from the admitted bill of the plaintiff *with effect from* May, 2010 to December, 2010 towards demurrage charges paid to the railway authority but the railway authority had waived 60% of the demurrage charges and refunded the same to the FCI which the plaintiff was also entitled to get back as deducted from his earlier admitted bills.

[15] As regards the claim of Rs.97,687/- with interest @ 30% as described in Schedule-D of the plaint, the Court was however not convinced as to the plaintiff's claim for Rs.97,687/- along with interest based upon the letters dated 14.07.2010 and 18.08.2011 as the contents of these letters were neither described in the plaint nor relevant for the purposes of the claim nor the oral evidence of P.W.1 could substantiate it. The learned Court proceeded to award interest @ 6% instead of 13% as claimed by the plaintiff taking into account the rate of interest on which loans are advanced by Nationalized Bank in relation to commercial transaction since there was no contractual rate of interest specified in the tender agreement in view of the proviso to Section 34 of CPC. The learned Court, however, proceeded to hold that plaintiff is entitled to get 9% interest on the principal money which he is entitled to recover from defendants as above. Accordingly, issue No.5 was decided in favour of the plaintiff. The suit was accordingly decreed in the manner indicated in the opening paragraph.

[16] Let it be indicated here that the impugned judgment and decree was delivered after remand by this Court vide judgment dated 02.12.2014 passed in RFA No.03 of 2014 directed against the earlier judgment rendered in the same T.S. No.15 of 2012 on 01.03.2014 by the learned trial Court.

[17] The appellant-FCI being aggrieved has preferred this appeal. The appellant has *inter alia* raised the following grounds to assail the impugned findings.

> (a) That the learned trial Court not only failed to appreciate the evidence in its entirety but also committed a serious error in rendering the findings in favour of the plaintiff-contractor even though he had not been able to discharge the burden of proof;

(b) The learned Court also committed a serious error while granting relief in absence of any primary or secondary proof on the part of the plaintiff to substantiate the cause of action and the separate claims under different heads made by it;

(c) There has been complete misreading of the evidence placed by the respondents relating to the statement of indent and supply of trucks adduced by the respondent-FCI. The learned Court also failed to appreciate whether rate can be enhanced other than the contractual rate in an existing contract as per the provisions of Contract Act;

(d) It also failed to appreciate as to how the respondent violated the indent issued to him from time to time and has indulged in suppression of material facts while deciding the issue in favour of the plaintiff;

(e) The learned Court miserably failed to appreciate that the *ad hoc* contractor was selected after due tender;

(f) The learned Court has not properly appreciated that imposition of Clause-X(c) was proper in view of the irregular supply of trucks by the contractor;

(g) The award of interest beyond the prevailing rate by the Nationalized Bank is also illegal and arbitrary;

(h) The findings as to waiver of railway demurrage are untenable in absence of final statement;

(i) The learned Court failed to declare that appointment of second contractor for performance of remaining part of the job under the contract was illegal though it held that imposition of Clause-X(c) was illegal;

(j) The learned Court has also arrived at an erroneous finding that no restrictions are imposed by the FCI-appellant as they are enforced by the local State Government authority on the load capacity of the trucks used for transporting the food grains;

(k) The learned Court did not properly appreciate the grounds for detention of security deposit of the respondent-contractor;

(l) It has failed to appreciate the negligence intentionally committed by the respondent for his narrow gains and thereby caused wrongful loss to the appellants, a public sector undertaking;

(m) Learned trial Court failed to appreciate that Clause-X(c) permits FCI to appoint *ad hoc* contractors without terminating the original contract. The original contract continues to subsist even though *ad hoc* contractors are appointed on emergency situation where the original contractor fails to perform his contractual obligations.

[18] Based on these grounds, Mr. Ratan Datta, learned counsel for the appellants-FCI has assailed the impugned judgment and decree.

[19] We have heard learned counsel for the parties and perused the impugned judgment of the learned trial Court. We have also taken note of the pleadings of the parties and the material evidence adduced both oral and documentary during trial. The case at hand set up by the plaintiff-contractor is regarding the wrongful invocation of Clause-X(c) of the agreement by the appellant-corporation and consequent loss of profit and forfeiture of earnest money and security deposit by the appellant corporation. The NIT and the consequent agreement between the parties related to transportation of food grains/sugar/allied materials from railway siding/FSD, Churaibari to FSD, Nandannagar, Agartala and railway siding, Churaibari to FSD, Churaibari on regular basis for a period of 2(two) years from the date of commencement of work i.e. 16.11.2009. The agreement was executed between the parties on 15.09.2009. The work was awarded in favour of the plaintiff-contractor at the rate of 49.49%. The transportation of food grains on the part of the plaintiff remained satisfactory between November, 2009 till October, 2010.

[20] The appellant-Corporation invoked Clause-X(c) of the agreement for appointment of an *ad hoc* contractor vide letter dated 24th November, 2010 on being dissatisfied with the performance of the contractor Exbt.[D] series which is extracted hereunder:

"***Food Corporation of India***
Regional Office, NEF Region,
Shillong – 793003

No. Cont.9/NEFR/TC/CBZ-NGR/09 ***Dated 24.11.2010***

To
Sri Ratan Bordhan
Tarapur, Shib Bari Road,
Silchar – 788 008

Sub: Transport contract on regular basis for two years for transportation of food grain/sugar/allied materials from Railway Siding Churaibari–FSD Nandannagar and Rly. Siding Churaibari to FSD Churaibari

Ref : This office letter No.F9/NEFR/HTC/Misc-Corres/2008-09 dated 18.10.2010, 19.10.2010, 4/6.11.10 issued by Area Manager, Agartala.

Sir,
Kindly refer to this office letter of even no. dtd. 11.11.09 appointing you as transport contractor on regular basis for two years for transportation of food grain/sugar/allied materials from Railway siding Churaibari to FSD Nandannagar and Rly siding Churaibari to FSD Churaibari and you had joined the work on 16.11.2009.

2. Whereas your performance being not to the satisfaction of the Corporation you were repeatedly requested/advised to improve your performance. In this connection the communication cited above may be referred. As your performance in executing the work entrusted to you has not be satisfactory. You were repeatedly requested to improve performance by placing trucks to clear the wagons indented to you and to transport stocks to the destination depots. Despite repeated requests to you from Area Manager, Agartala you have not paid any heed and the placement of trucks at Churaibari in the month of October & November 2010 has drastically come thus causing depletion of stock position food grains in the depots at Agartala. FCI has been faced with extreme difficulty to meet the PDS & other requirements of the State Govt. The position has now reached an alarming level and may lead to food crisis in the State of Tripura.

3. In spite of repeated notices and letters you cared a little to improve your performance on behaved in a most un-workmanlike manner and thus putting the Corporation to continuous loss and injustice whereas because of your un-workmanlike performance and as you have not responded to the repeated requests to improve performance, the undersigned has no other option but to take action as per tender clause.

4. Whereas the FCI is of the opinion that you have failed to carry out the contract work as per agreement and also there is no chance of any further improvement in your performance and suffer due to lack of supply of food grains at the depots in Agartala.

5. Now, in exercise of the powers vested upon the undersigned under Clause-X, hereby invoked upon you Clause X'C of the contract agreement entered between you and the Corporation transportation of food grains, sugar, allied materials from Railway Siding Churaibari to FSD Nandannagar Rly siding Churaibari to FSD Churaibari and to get the work done at your risk and cost for the remaining period of the contract with you and you shall be liable to make good to the Corporation all, the additional charges/expenses, cost or losses that the Corporation may incur or suffer thereby.

Yours faithfully
S/d
(B.B. Singh)
Dy General Manager"

[21] This letter refers to the previous letters dated 19.10.2010, 20.10.2010, 4/6.11.2010 issued by the Area Manager, Agartala which are notices and letters to improve performance by the plaintiff. These letters are addressed to 6(six) such transporters including the plaintiff on the subject of failure in supply of trucks at FCI Rail sidings at Churaibari and Dharmanagar. These letters have been adduced as Annexure-D series by the respondent. For the purposes of appreciation of the findings of the learned trial Court on issue Nos.(vi), (vii) and (iv) decided in favour of the plaintiff-contractor, letter dated 19.10.2010 is quoted hereunder as a specimen:

"Food Corporation of India
District Office,
Agartala

No.F.9/NEFR/HTC/MISC-CORRES/2008-09/ Dated, the *19th October, 2010*

To

(1) M/s. Namita Paul, HTC, Agartala	(2) M/s. R.K. Saha & Sons HTC, Agartala	(3) M/s. Saikia Trade &Transport,HTC, Guwahati
(4) M/s. S.C. Dey & partner HTC, Dharmanagar	(5) Sri A.K. Dey HTC, Dharmanagar	(6) Ratan Bardhan HTC, Silchar
(7) M/s. Purbanchal Banikya Vikash HTC, Guwahati		(8) Sri Bimlendu Roy T.C. Silchar

Sub : Non placement of empty trucks till 2.00 pm at Rail siding Churaibari/ Dharmanagar

Ref: This office letter of even no dtd. 18.10.2010

Sir/Madam

Consequent upon serious shortage of food grains at FCI Agartala and as well as within the State of Tripura, you have been pre informed about placement of wagon on date vide this office letter as above.

Accordingly 22 Rice wagons at Churaibari and 18 wagons Rice at Dharmanagar have been placed. But it has been reported by concern Depot in-charges that no trucks has yet been placed in any of the depot by you against indents placed for supply of 24 trucks at Churaibari and 23 trucks at Dharmanagar resulting detention of wagons and accrual of demurrage which becomes a serious lapse on your part as per contract agreement and as well as to maintain the P.D.S. of the State.

In this juncture, you are once again advised to take immediate action for placement of empty trucks as per indent to the Rail head depots

without fail, failing which the present food shortage with FCI and State Government could not be tackled.

In this connection, it may be noted that if your performance is not improved in response to this office advise immediately, such failure would be dealt with as per contractual agreement and the matter will be referred to the appropriate authority of FCI for taking action under the purview of clause No.X(C) of the contractual agreement for the interest of movement of food grains for maintenance of the P.D.S of the State.

Please treat the matter most urgent.

Yours faithfully
Sd/
(S.C. SARKAR)
AREA MANAGER"

[22] In order to properly appreciate the issues raised, it is apposite to also reproduce the relevant Clause-X and XI of the agreement hereunder:

X. Summary Termination

(a) In the event of contractors having adjudged insolvent or going into liquidation or winding up their business or making arrangements with their creditors or failing to observe any of the provisions of this contract or any of the terms and conditions governing the contract, the General Manager shall be at liberty to terminate the contract forthwith without prejudice or any other rights or remedies under the contract and to get the work done for the unexpired period of the contract at the risk and cost of the contractors and to claim from contractors any resultant loss sustained or costs incurred.

(b) The General Manager shall also have without prejudice to other rights and remedies the right, in the event of breach by the contractors of any of the terms and conditions of the contract to terminate the contract forthwith and to get the work done for the unexpired period of the contract at the risk and cost of the contractors and/or forfeit the security deposit or any part thereof for the sum or sums due for any damages, losses, charges, expenses or costs that may be suffered or incurred by the Corporation due to the contractor's negligence or un-workman like performance of any of the services under the contract.

(c) The contractors shall be responsible to supply adequate and sufficient labour, scales/trucks/carts/any other transport vehicle for loading/unloading, transport & carrying out any other services under the contract in accordance with the instructions issued by the General Manager or an officer acting on his behalf. If the contractors fail to supply the requisite number of labour, scales and trucks/carts, the General Manager shall at his entire discretion without terminating the contract, be at liberty to engage other labour, scales, trucks/carts, etc. at the risk and cost of the contractors, who shall be liable to make good to the Corporation all additional charges, expenses, cost or losses that the Corporation may incur or suffer thereby. The contractors shall not, however, be entitled to any

gain resulting from entrustment of the work to another party. The decision of the General Manager shall be final and binding on the contractors.

XI. Security Deposit

(a) The contractor shall furnish within a week of the acceptance of their tender, security deposit as prescribed in the invitation to tender failing which the contract shall be liable to cancellation at the risk and cost of the contractors and subject to such other remedies as may be open to the General Manager under the terms of the contract. The contractors at their option may deposit fifty percent of the prescribed security in any of the prescribed forms at the time of award of the contract while the balance fifty percent may be paid by the contractors by deductions at the rate of five percent from the admitted bills of the contractors.

(b) The security deposit will be refunded to the contractors on due and satisfactory performance of the services and on completion of all obligations by the contractors under the terms of the contract and on submission of a No Demand Certificate, subject to such deduction from the security as may be necessary for making up of the Corporation claims against the contractor.

(c) In the event of termination of the contract envisaged in Clause-X, the General Manager, shall have the rights to forfeit the entire or part of the amount of security deposit lodged by the contractors or to appropriate the security deposit or any part, thereof in or towards the satisfaction of any sum due to the claimed for any damages, losses charges, expenses or costs that may be suffered or incurred by the Corporation.

(d) The decision of the General Manager in respect of such damages, losses, charges, costs or expenses shall be final and binding on the contractors.

(e) In the event of the security being insufficient or if the security has been wholly forfeited, the balance of the total sum recoverable as the case may be shall be deducted from any sum then due or which at any time thereafter may become due to the contractors under this or any other contract with the Corporation, should that sum also be not sufficient to cover the full amount recoverable the contractors shall pay to the corporation on demand the remaining balance due.

(f) Whenever the security deposited falls short of the specified amount the contractors shall make good the deficit so that the total amount of security deposit shall not at any time be less than the specified amount.

[23] The learned trial Court has in answer to the issue No.(vi) held that the subsequent irregularity in supplying the vehicles after 18.10.2010 cannot be reasonably treated as failure on part of the plaintiff to supply the vehicles as per indent. Further, in answer to issue Nos.(iv) & (vii) it has held that imposition of Clause-X(c) vide letter dated 24.11.2010 was illegal, arbitrary and against

natural justice as no prior notice was given to the contractor. Clause-X(c) as quoted above, contemplates that the employer shall at his entire discretion without terminating the contract, be at liberty to engage other labour, scales, trucks/carts, etc. at the risk and cost of the contractors, who shall be liable to make good to the Corporation all additional charges, expenses, cost or losses that the Corporation may incur or suffer thereby in case the contractor has failed to supply the requisite number of labour, scales and trucks/carts for loading/unloading, transport & carrying out any other services under the contract, in accordance with the instructions issued by the General Manager or an officer acting on his behalf.

[24] Clause-X(b) on the other hand contemplates the right of the employer to terminate the contract in the event of breach by the contractors of any of the terms and conditions of the contract and get the work done for the unexpired period of the contract at the risk and cost of the contractors and/or forfeit the security deposit or any part thereof for the sum due for any damages, losses, charges, expenses or costs that may be suffered or incurred by the Corporation due to the contractor's negligence or un-workman like performance of any of the services under the contract.

[25] Clause-XI(c) contemplates the right of the employer to forfeit the entire or part of the amount of security deposit lodged by the contractors or to appropriate the security deposit or any part thereof towards satisfaction of any sum due to be claimed for any damages, losses, charges, expenses etc. that may

be suffered or incurred by the Corporation in the event of termination of the contract envisaged in Clause-X.

[26] The aforesaid vital terms of the contract confers the right of either termination of the contract or without termination of the contract, liberty to engage other contractor under the agreement to meet exigencies which may arise due to failure on part of the contractor on two different situations (i) the event of breach by the contractor of any of the terms and conditions of the contract leading to its termination (ii) failure to supply the requisite number of labour/trucks/carts by the contractor leading to engagement of *ad hoc* contractor without terminating the contract at the discretion of the employer/General Manager.

[27] The events between commencement of work on 16th November, 2009 till 18th December, 2010 regarding transportation of food grains by the plaintiff-contractor to the satisfaction of the appellant-Corporation is not disputed. For example, Exibit-3 series contains the statement of indent and supply of trucks between Page 141 to 146 of the Paper Book for the period of 1st December, 2009 till 30th December, 2010. This document has been exhibited on admission. The statement from 24th September, 2010 till 30th December, 2010 i.e. even after appointment of the *ad hoc* contractor on 27th December, 2010 shows that the plaintiff-contractor had been supplying the trucks on a regular and consistent basis throughout this period except on certain dates, such as, 13th November, 2010, 15th November, 2010, 20th November, 2010. In fact, the supply of trucks during the period in question when the appellant-

Corporation started issuing notices i.e. 19th October, 2010 indicates that against the indented number of trucks, 8 and 9 in number, the plaintiff had supplied 17 trucks for local movement. Prior to 19th October, 2010, 4 and 7 numbers of trucks were indented for NDN and local supply and equal number of trucks were supplied by the contractor. Between 9th October, 2010 to 19th October, 2010 this statement exhibited on admission does not show any indent being placed for supply of trucks. Further, on 20th October, 2010, 7 numbers of trucks were indented for local supply and 6 were supplied. On 21st October, 2010, 4 trucks were indented for NDN and 4 were supplied. On 25th October, 2010, 7 and 9 numbers of trucks were indented for NDN and local supply in which 9 and 9 were placed by the transporter. The figures available from the statement for 27th October, 2010, 29th October, 2010, 30th October, 2010, 31st October, 2010, 1st November, 2010, 2nd November, 2010, 3rd November, 2010, 4th November, 2010, 6th November, 2010, 7th November, 2010, 8th November, 2010, 9th November, 2010 and similarly on 13th November, 2010, 15th November, 2010, 20th November, 2010, 22nd November, 2010 and 23rd November, 2010 i.e. the date just prior to the invocation of Clause-X(c) show that the transporter had been supplying the number of trucks indented both for NDN and local supply almost on a regular and consistent basis.

[28] In this background, we may look to Exbt.3 which is a certificate dated 1st December, 2010 issued by the respondent No.4 to the following effect:

"***Food Corporation of India***

TO WHOM IT MAY CONCERN

This is to clarify that Sri Ratan Bardhan, Shib Bari Road, Tarapur, Silchar, is the existing Transport contractor of FCI in the route of Rly. Siding Churaibari to FSD, Nandannagar & Rly siding Churaibari to FSD, Churaibari vide work order No.Cont.9/NEFR/TC//CBZ-NGR/09 dtd. 11.11.09. His performance was satisfactory although w.e.f. 16.11.09 to 18.10.2010. But due to unsatisfactory performance beyond

18.10.2010, the clause-xc of contract agreement has been imposed upon Sri Ratan Bardhan vide Regional Office, Shillong letter No.Cont.9/NEFR/TC/CBZ-NGR/09 dtd. 24.11.2010."

Sd/
(S.C. Sarkar)
AREA MANAGER"

It indicates that the Area Manager, FCI had certified satisfactory performance of supply of trucks between 16th November, 2009 to 18th October, 2010 but the remarks that beyond 18th October, 2010 his performance was unsatisfactory which led to invocation of Clause-X(c), is not in conformity with the statement at Exbt.2 series relating to indent and supply of trucks by the contractor for the period in question.

[29] The contention of the plaintiff that a joint representation was made by 8 transporters on 26th November, 2010 to raise the margin of profit from 49.49% to 60% is not specifically denied by the appellant-Corporation in its written statement. The demand for increase in profit ratio was made by the transporters upon whom these notices of 18th October, 2010, 19th October, 2010 and subsequent notices contained in Exbt.D series were issued by the FCI on account of the changed situation wherein the FCI had suddenly imposed and minimized the loading capacity of food grain bags on the empty trucks from October, 2010 decreasing the quantum of load as was given since November, 2009. Instead of acceding to the demand of the transporters on account of a valid reason in reduction of the load capacity of empty trucks in terms of profit ratio from 49.49% to 60% which was only a request for marginal increase, the officials of appellant-Corporation instead of negotiating with the transporters for increase of reasonable amount of profit ratio in the changed circumstances necessitated at the instance of the FCI, choose to go for appointment of an *ad*

hoc contractor by invoking Clause-X(c) of the agreement at a much higher rate of 159% at the risk and cost of the contractor. One Sreema Stone Crusher was appointed as such on 27th December, 2010 at the rate of 159% for the rest contract period as was with the plaintiff. For the period from June, 2011, the rate was fixed at 156% till February, 2012.

[30] This action of the respondents was arbitrary, illegal and not in the interest of the Corporation as rightly held by the learned trial Court in answer to issue Nos.(iv) and (vi). In a subsisting agreement with 6 transporters including the plaintiff, the appellant in the best interest of the Corporation could have negotiated the genuine demands of the transporters and escalated the profit ratio to a reasonable extent by novation of the terms of the agreement entered with them due to the changed circumstances. Instead, they choose to invoke Clause-X(c) by appointment of an *ad hoc* contractor at a much higher rate of 159%. The remaining part of the work was executed by the *ad hoc* contractor from December, 2010 till February, 2012. The statement of indent and supplies made by the plaintiff-contractor vide Exbt.3 series up to 30th December, 2010 even after the date of appointment of an *ad hoc* contractor goes to indicate that the contractor continued to make supplies of trucks even after invocation of Clause-X(c) by letter dated 24th November, 2010.

[31] The learned trial Court however has in answer to issue No.(vii) wrongly held that prior notice for invocation of Clause-X(c) was not given as the correspondences contained in Exbt.D series between 19th October, 2010 to 4th November, 2010 do indicate that several contractors including the plaintiff were being given notice regarding placement of trucks as per indents. However,

mere issuance of notice in the facts and circumstances of the changed situation necessitated due to insistence of the appellant-Corporation to load lesser quantity of load on the empty trucks staring from October, 2010 without entering into any negotiation with the transporters including the plaintiff-contractor and instead invoking Clause-X(c) to appoint an *ad hoc* contractor for execution of the remaining part of the work under the agreement at a much higher rate of 159% is *ex facie*, arbitrary, and unreasonable. Therefore, we find that the findings on issue No.(vii) rendered by the learned trial Court are not correct on facts.

[32] However, forfeiture of earnest money deposit and security deposit by the appellant-Corporation is not justified as such consequential action flows only from termination of the contract conceived under Clause-X(b) and Clause-XI(c) referred to hereinabove. A conjoint construction of Clause-X(b) and Clause-X(c) indicate that in the event of termination of the contract envisaged under Clause-X(b), the employer/General Manager shall have the right to forfeit the entire or part of the amount of security deposit towards the satisfaction of any sum due to be claimed for any damages, losses etc. suffered by the Corporation. Admittedly, the Corporation has not invoked Clause-X(b) the consequences of which are provided for in Clause-XI(c).Therefore, upon invocation of Clause-X(c) i.e. engagement of an *ad hoc* contractor <u>without terminating the original contract</u> with the original contractor/plaintiff herein, forfeiture of the earnest money and security deposit by the Corporation was not proper in the eye of law and that too for a period when there was no complain about proper discharge of transportation work. Plaintiff would be entitled to

refund of the earnest money and security deposit as also allowed by the learned trial Court with interest. However, plaintiff would not be entitled to loss of profit on inability to execute the remaining part of the contract on appointment of an *ad hoc* contractor for executing the remaining work in two parts i.e. January, 2011 to June, 2011, July 2011 to January, 2012 as there is no tangible proof of such loss of profit on the part of plaintiff-contractor for that period. The learned trial Court had taken a hypothetical loss said to be sustained by plaintiff at the rate of 156% allotted to the ad hoc contractor as compared to 49.49% as per agreement between the FCI and the plaintiff. We may in this regard usefully rely upon the opinion expressed by this Court on invocation of Clause-X(c) and the decision rendered by this Court in case of ***The Food Corporation of India and another versus Smt. Namita Paul*** dated 19.10.2023 in RFA No.25 of 2022 and RFA No.26 of 2022. The Special Leave Petition No.27419-27420/2023 preferred by the appellant-FCI against the above judgment has been dismissed by the Apex Court on 04.01.2024.

[33] In view of the findings referred to hereinabove, the award of difference of value of the remaining work at the rate of 49.49% and the actual work done at the rate of 159% to the tune of Rs.22,30,036/- calculated from January, 2011 along with interest at the rate of 9% per annum cannot be upheld. On the other hand, retention of earnest money and security deposit cannot be permissible even if invocation of Clause-X(c) of the agreement by the Corporation is assumingly held to be justified though we have held it otherwise, for the reason that retention of security deposit can only result upon termination of the agreement in terms of Clause-X(b) read with Clause-XI(c). Therefore, as

held in the foregoing paragraphs, plaintiff would be entitled to the following amounts:

(i) Plaintiff would be entitled to refund of the earnest and security money as per Schedule-A of the plaint i.e. Rs.79,55,241/- and balance security deposit as per Schedule-B i.e. Rs.13,82,557/- along with interest at the rate of 9% per annum as also awarded by the learned trial Court *with effect from* 24-11-2010 i.e. the date of invocation of Clause-X(c) of the agreement in respect of the work by the Corporation till its realization. In this regard, we may observe here that the direction to pay the aforesaid amount *with effect from* 11.11.2009 till its realization is not correct since these amount became due only after invocation of Clause-X(c) by the Corporation by letter dated 24.11.2010 and appointment of an *ad hoc* contractor to execute the remaining part of the work.

(ii) It is also held that if 60% of the demurrage charges have been waived by the railways and reimbursed to the appellant-Corporation, the plaintiff would also be entitled to get refund of the railway demurrage charges to the tune of Rs.39,474/- along with interest at the rate of 9% calculated from the date of the claim letter dated 18.08.2011 till its realization as per Schedule-D instead of the month of May, 2010 as ordered by the learned trial Court.

[34] Plaintiff will not be entitled to get a sum of Rs.22,30,036/- along with interest towards difference of the value of the remaining work at the rate

of 49.49% and the actual work done at the rate of 159% as claimed under schedule-C of the plaint.

[35] Therefore, the findings of the learned trial Court so far as it relates to answer to issue No.(vii) is held to be incorrect. The award of claims under paragraph 47 and 48 of the impugned judgment towards refund of earnest & security money and balance security deposit for the periods in question shall carry interest @ 9% *with effect from* 24th November, 2010. The award of Rs.22,30,036/- towards difference of the value of remaining work under paragraph 49 of the impugned judgment is set aside. Award of claim towards demurrage charge under paragraph 50 of the impugned judgment to the tune of Rs.39,474/- along with interest @ 9% shall be due from 18th August, 2011 i.e. the date of claim letter instead of May, 2010 as ordered by the learned trial Court.

[36] Thus, the appeal stands partly allowed and partly dismissed in the manner and to the extent indicated hereinabove. Pending application(s), if any, also stands disposed of. LCRs be sent to the Court concerned.

I=N=D=E=X
PART-B (RFA No.04 of 2020)
Introduction
Impugned judgment dated 30.09.2019 and decree dated 03.10.2019 arising out of Commercial Suit No.01 of 2016
Written statement of the defendant-contractor
Materials exhibited by the plaintiff-Corporation
Issues framed by the learned Trial Court
Findings given by the learned Trial Court
Grounds assailed by the appellant-Corporation
Submission of learned counsel for the appellant
Submission of learned counsel for the respondent
Findings rendered by this Court
Conclusion

PART-B (RFA No.04 of 2020)

This appeal arises out of the impugned judgment dated 30.09.2019 and decree dated 03.10.2019 passed in Commercial Suit No.01 of 2016 by the learned Commercial Court, North Tripura, Dharmanagar whereby the suit preferred by the plaintiff/appellant-Corporation for recovery of cost for breach of the same contract i.e. in RFA No.03 of 2016, (for transportation of food grains from railway siding/FSD Churaibari to FSD Nandannagar & Railway siding Churaibari to FSD Churaibari) and for realization of Rs.1,77,59,585/- as loss suffered by the Corporation has been dismissed on contest.

[2] The instant Commercial Suit was first instituted on 08.07.2013 as Money Suit No.03 of 2013 before the Court of learned Civil Judge, (Sr. Division), West Tripura, Agartala, Court No.1. However, pursuant to the order

dated 23.04.2015 passed in TRP(C) No.05 of 2015 by this Court, the case was transferred to the Court of learned Judge (Sr. Division), Dharmanagar, North Tripura. The case was transferred to the Commercial Court, Dharmanagar on 19.07.2016 and registered as Commercial Suit No.01 of 2016. That is how the instant suit was tried and decided by the learned Commercial Court, Dharmanagar.

[3] The plaintiff-Corporation pleaded through its plaint that pursuant to the NIT dated 12.08.2009 (the same NIT as in RFA No.03 of 2016) arising out of M.S. No.03 of 2013, the Corporation entered into an agreement with the defendant-contractor at the quoted rate of 49.49% above the schedule rate which worked to Rs.895.92 paisa per metric ton. Consequently, letter of acceptance and appointment was conveyed on 10.11.2009 and contractor was advised to start work from 16.11.2009. According to the plaintiff, contractor agreed to deposit the security deposit of Rs.20,45,000/- out of which, he deposited Rs.2,04,500/- by demand draft and Rs.8,18,000/- by conversion of earnest money to security deposit. The balance amount of Rs.10,22,500/- being 50% of the total security deposit was to be recovered from the admitted bills of the defendant-contractor. The plaintiff was allowed the defendant-contractor to start the transportation work of carrying food grains from railway siding/FSD Churaibari to FSD Nandannagar *with effect from* 16.11.2009. Accordingly, as per work order dated 11.11.2009, it is alleged that the contractor suspended the work after 26.12.2010 i.e. after 12 months. Since October, 2010, the contractor had started violating the terms and conditions of the agreement though the contract was for a period of two years. As a result of its unanticipated action,

the supply of food grains stored in go-down complex of the plaintiff-Corporation got sharply reduced resulting in disruption of public distribution system. The defendant-contractor was repeatedly requested to restore the transportation work and adhere to the contractual obligations but he failed to respond despite persuasions. He was disinterested in continuing the contract work and neither did he make any intimation to the Corporation for its callous action.

[4] The Corporation issued letters dated 18.10.2010, 19.10.2010, 20.10.2010, 06.11.2010, 09.11.2010 and 12.11.2010 upon the contractor that on his failure to perform the contract, he would be liable to make good the loss caused to the plaintiff and pay the cost value for performance of the unperformed work under the contract agreement. Thereafter, the Corporation was constrained to invoke Clause-X(c) of the agreement vide letter dated 24.11.2010. It invited limited spot tender notice on 03.12.2010 and appointed M/S Maa Stone Crusher, Tarapur, Shibbari Road, Silchar as *ad hoc* contractor for transportation of food grains from railway siding/FSD Churaibari to FSD Nandannagar and railway siding Churaibari to FSD, Churaibari for 6(six) months *with effect from* 27.12.2010 vide letter of the same date. The rate quoted by the *ad hoc* contractor was 153% above schedule rate which was a higher rate than the existing regular contract but had to be accepted to save the public distribution system and for lifting the accumulated food grains from FSD Churaibari. The plaintiff asserted that the former regular contract with the defendant was still in existence and he was free to continue with the work and improve his performance. The plaintiff-Corporation extended the period of

regular contract vide letter dated 02.11.2011 and intimated him to continue with the work but he paid no heed to it. As a result, the *ad hoc* contractor transported the food grains on their own approved rate till expiry of 6 months on 26.06.2011.

[5] Thereafter, another *ad hoc* contractor M/S Sreema Stone Crusher, Tarapur, Silchar was appointed to carry on the transportation work at the risk and cost of the regular contractor-defendant from 27.06.2011 to 26.12.2011 which was further extended by 3 (three) months on the same terms vide letter dated 02.11.2011. The Corporation was constrained to appoint *ad hoc* contractors to continue the work up to 26.03.2012 on account of the fact that the defendant-contractor did not carry on the transportation work. The plaintiff had to pay an amount of Rs.74,48,640/- to the *ad hoc* contractor engaged between 28.06.2011 to 15.02.2012 and the total loss incurred by the corporation as a result of breach of contract and also an amount of Rs.1,03,10,945/- totaling Rs.1,77,59,585/- for the period in which the *ad hoc* contractors transported the goods from 27.12.2010 to 27.06.2011 and from 28.06.2011 to 15.02.2012 at the enhanced rate. Therefore, the Corporation is entitled to realization of the loss of Rs.1,77,59,585/- from the defendant-contractor which remained unpaid despite several demand notices upon the defendant-contractor.

[6] Under the contract agreement, the defendant was obliged to pay the cost of the risk undertaken by the plaintiff by appointment of *ad hoc* contractor upon invocation of Clause-X(c) of the agreement against the defendant. The cause of action for institution of the plaint arose on 18.10.2010, 19.10.2010, 20.10.2010, 06.11.2010, 09.11.2010 and 12.11.2010 when the

plaintiff informed the defendant that for his failure to perform the contract, he was liable to make good the loss caused to the plaintiff for breach of contractual obligations under the contract agreement. The cause of action also arose on 24.11.2010 when Clause-X(c) of the agreement was imposed for non-performance and violation of the tender agreement and on the dates on which the demand notices were sent to the defendant and finally the cause of action arose on 11.05.2012 when the last demand notice was sent to the contractor.

[7] The defendant upon notice appeared and filed their written statement. The execution of the agreement for transportation of work, the date of commencement of work i.e. 16.11.2009 was not disputed. However, the defendant denied that he had suspended the work after 26.12.2010 and thereby violated the terms and conditions of the agreement. As per the defendant, he was the regular transport contractor appointed for a period of 2(two) years and as per the prevailing procedure and indent issued by the FCI, he had been supplying empty trucks for transportation and carrying of food grains to the Corporation. For carrying smooth transportation, he had made request to the Area Manager, FCI, Agartala to issue more number of indents to increase the number of trucks considering the placement of wagons by the railway and at the same time also stated that sufficient number of empty trucks were waiting for loading but could not be engaged for want of indents. The trucks waiting for unloading at Nandannagar were unnecessarily detained by the Corporation for several days sometimes in empty condition sometimes with loads which was not the fault of the defendant.

[8] These matters were intimated to the Corporation vide letters dated 07.12.2009, 03.03.2010 and 02.11.2010 but no steps were not taken by the FCI authority. The defendant performed his work satisfactorily as per terms of the agreement. FCI also appreciated the work of the defendant by issuing certificate dated 01.12.2010. But suddenly it imposed a restriction over the quantum of load in empty trucks on and from October, 2010 in respect of which a joint representation was made by the defendant and other transporters to the Area Manager, FCI, Agartala with a copy to the General Manager FCI, North East Frontier Region, Shillong for acceleration of rate to 60% from the existing rate of 49.49% due to changed circumstances and inevitable financial losses. However, instead of considering its representation, the plaintiff by letter dated 24.11.2010 imposed Clause-X(c) and appointed *ad hoc* contractor at the rate of 159% above the scheduled rate for undertaking the same work. This was detrimental to the interest and rights of the defendant-contractor and a misuse upon the exchequer of the Corporation.

[9] The Corporation allowed execution of the remaining part of the contract work to the *ad hoc* contractor at the rate of 159% ASOR from January, 2011 to June, 2011 and subsequently from July, 2011 to November, 2011 at the rate of 156% and thereby paid an excess amount of Rs.56,99,182/-. It also took the plea that the security money and earnest deposit of the defendant were lying with the Corporation which despite demand were not being paid whereas the contractor was asked to make the payment of extra expenses incurred for transportation of cost by the new contractor. Further, the Corporation disqualified the defendant from contesting the fresh tender called where the *ad*

hoc contractors were appointed. The defendant claimed realization of security money and earnest money amounting to Rs.79,55,241/- and also to remove invocation of Clause-X(c).

[10] The defendant also took the plea of wrongful deduction of Rs.65,790/- from the bill of the defendant from May, 2010 to December, 2010 on the ground of demurrage charges paid to the railway whereas the railway authority had waived 60% of the demurrage which was not reimbursed to the contractor. The defendant also contended that he suffered huge financial loss and for recovery thereof he filed a Title Suit No.15 of 2012 in which the learned Civil Judge (Sr. Division), Dharmanagar, North Tripura had allowed relief vide judgment dated 01.03.2014. However, it was pointed out that the Corporation had preferred an appeal [RFA No.03 of 2014] before the High Court of Tripura and the matter related in this case are same, parties are the same and as such instant suit is barred by principles of *res judicata* and also under Order-II Rule 2 of CPC.

[11] On behalf of the plaintiff-Corporation, one Shishir Lakra was examined as P.W.1 who exhibited several documents which were marked as exhibit M.O.1 and are extracted hereunder:

> "To prove the case the plaintiffs adduced the examination-in-chief of himself as PW1 (Shishir Lakra) and PW.1 proved Exhibit MO.1 (payment register in respect of work order No. Contd.9/NEFR/TC/CBZ-NDN/Ad-hoc/11 and it contains page No.01 to 66 and prior to that three other sheets without having any certificate of the opening authority (subject to objection by defendant),
>
> Exhibit-MO. II (certified true copy made by Manager, FCI, District Officer, Agartala in respect of contract price bid agreement relating to FCI and Sreema Stone Crusher), Exhibit-A (From Exhibit-MO.1 the contents incorporated in page No.2 to 15 which were not entered by PW.1 and he has no signature on these pages) (subject to objection by defendants),

Exhibit-B (contents of the agreement),
Exhibit-C (copy of the tender inviting form dated 07.12.2010),
Exhibit-D (another certified copy in respect of a letter addressed to one Sri Ratan Bardha, Transport Contractor, Tarapur, Shibbari Road, Silchar, dated 06.02.2011 written by B. Prakashan, General Manager (R) (subject to objection by the defendant)
Exhibit-E, Exhibit-E/I, Exhibit-E/II Exhibit/III, Exhibit-E/IV

Exhibit-E/V (documents dated 18-10-2010, 19.10.2010, 20.10.2010, 12.11.2010, 24.11.2010 and 03.12.2010 respectively) (subject to objection by defendant) and defendant has adduced the examination-in-chief of himself as DW1. DW.1 proved Exhibit-1 to 5 (firisti Sl. No.01 to 5) and Exhibit 6 to 14 (first Sl. No.7 to 15),

Exhibit-15 to 20 (firisti dated 26.02.2018 Sl. No.15 to 20) (subject to objection of the plaintiff)."

[12] Based upon the pleadings of both the parties and relevant documents, the following issues were framed for consideration by the learned Commercial Court in Commercial Suit No.01 of 2016 from which RFA No.04 of 2020 arises:

"(1) Whether the suit is maintainable?

(2) Whether the suit is barred by law of Limitation and Rule of res-judicata?

(3) Whether the Clause X(C) of the tender agreement was imposed upon defendant by plaintiffs after giving him adequate scope for improvement of the work?

(4) Whether the appointment of the ad-hoc contractor by the plaintiffs at the cost and risk of defendant was illegal and void?

(5) Whether plaintiffs made payment to the ad-hoc contractors for completing the works of tender? If so, what quantum of money was paid by the plaintiff?

(6) Whether plaintiffs sustained any loss at the tune of Rs.1,77,59,585/- (one crore seventy seven lakhs fifty nine thousand and five hundred and eighty five) for breach of obligation of defendant to bear the risk and cost of work?

(7) Whether there is any cause of action in this suit?

(8) Whether the plaintiffs are entitled to get the recovery of Rs.1,77,59,585/- along with interest @ 12% of p.a from defendant including the cost of the suit?"

[13] The learned trial Court took up issue No.3 first and came to the finding that the plaintiff is not entitled to get the decree in respect of the suit

against the defendant as it has failed to prove breach of contract by the defendant.

[14] Issue No.4 was answered in the following manner :

> "The rate quoted by the defendant contractor was 49.49% above the schedule rate prescribed by the plaintiffs Corporation and which worked to Rs.895.92 per MT for the entire distance and the said rate having been accepted by plaintiff No.1. Thereafter, one joint representation dated 26-11-2010 signed by carrying contractors to the Area Manager, FCI with a request for escalation of the rate of work to at least 60% from the existing rate of 49.49% due to change situation and to avoid financial loss of contractors but the plaintiffs declined their representation and without any reason Deputy General Manager, FCI by Fax dated 24-11-2010 imposed the clause X(C) of the tender contract on the defendant at his risk and cost and engaged one Sreema Stone Crusher on 27-12-2010 vide appointment letter No. Cont.9/DO-AGT/TC/CBZ-NDN/FSD/CBZ/ad-hoc/2010 dated 27-12-2010 @159% for the work of rest contract period and also that subsequently plaintiff No.2 vide his letter dated 25-06-2011 enhanced the rate of work at 156% ASOR by exercising his discretion power to the detriment of the interest of defendant and also exercised the exchequer of FCI such steps of the plaintiffs against the defendant and that this enhancement of rate of work was not allowed by the plaintiffs against defendant and due to such escalation of the rate of work in favour of the new contractor namely Sreema Stone Crusher, there was difference of Rs.56,99,182/- as the excess amount in comparison to the existing rate of work of 49.49% in respect of defendant. The relevant clause speaks about the engagement of trucks/ scales/ carts but not of any fresh tender agreement. Since there was also other contractors working under the defendants at the same time they could have been engaged to complete the remaining or the deficient work, if any under the original contract so as to avoid the provision of risk and cost of original contractor but instead of that plaintiffs had chosen to engage fresh contractor at a rate of 159% which was 110% more than the original rate of contract made with the defendant. Plaintiffs also did not clearly explain in their plaint or oral evidence the reason about awarding such huge quantum of rate of 159% ASOR to complete the remaining work under the contract which was excessively higher and unreasonable rate of work. So, it is also not clearly justified in the evidence by plaintiffs as to why they opted to accept excessive and unusual rate of 159% to the Sreema Stone Crusher though the original rate of the work was only 49.49%. It is also revealed in the evidence that defendant and other contractors applied to the plaintiffs for enhancement of the rate of work at least 60% from the existing rate of 49.49% which is also referred in the evidence of defendant but was not accepted by plaintiffs and in spite of that the approach of plaintiffs in awarding the rate of 159% for the same type of work and under the circumstances of the suit was in view of this Court is unjust, irrational and not inconsonance with the terms of the tender agreement and detrimental to the rights and interest of defendant under the contract. Therefore, this court is of the considered opinion that it was necessary for the plaintiffs to give prior notice to the defendant before imposing the clause X(C) of the tender agreement to regularize the placement of the vehicle as per indent and terms of contract. It is

therefore, concluded that the invoking of clause X(C) imposing the risk and cost upon defendant by issuing the letter dated 24-11-2010 was arbitrary, illegal and violative of the principle of natural justice. Hence, issue No.4 is answered in negative and decided against plaintiffs.

It is also come to the notice of this Court during argument advanced by both the Ld. Counsels of this suit that plaintiffs did not issue indent for carrying the goods and the defendant suffered a huge financial loss and for recovery of the said loss the defendant filed a money suit and got a decree against the plaintiffs vide case No.TS.15/2012 in the Court of Civil Judge (Sr. Division), Dharmanager, North Tripura, by a judgment dated 01-03-2014 and the plaintiffs made an appeal vide No. R.F.A.3/2014 before the Hon'ble High Court of Tripura against the said judgment dated 01-03-2014 and the matters related in this case are same, parties are same as was in case No. TS 15/2012 of Civil Judge (Sr. Div), Dharmanagar and the case R.F.A.3 of 2014 of the Hon'ble High Court of Tripura and as such barred by principles of Res-judicata and also under Order 2, Rule-2 of civil Procedure Code. For ready reference Ld. Counsel for the defendant Mr. Das filed copy of judgment of TS 15 of 2012. Perused the said judgment and it also came to notice that the subject matter of this suit and the suit T.S.15 of 2012 it is filed as a counter of former T.S.15 of 2012 and as an appeal was filed against the judgment and decree of T.S. 15 of 2012 the plaintiffs filed the instant suit seeking relief from the defendant of the instant case.

I would like to observe the Section 11 of Civil Procedure of Code as follows:

"Res-judicata – *No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."*

In view of that it is found that the former case was filed by defendant of instant suit as plaintiff which was registered as T.S. 15 of 2012 and subsequently decreed in favour of plaintiff of that case which was appeal by the defendant (FCI) for that case i.e. FCI before the Hon'ble High Court of Tripura and registered as RFA No.03 of 2014 and subsequently this suit was filed by the FCI for redress. It is observed that the instant case is nothing but the counter of the fact of the former case T.S. 15 of 2012.

Hence, in view of this if it is not considered as barred by res-judicata, it should be treated as counter case of the former suit of T.S. No.15 of 2012."

The learned Court treated the instant suit as a counter of the former T.S. No.15 of 2012 instituted by the contractor against the plaintiffs arising out of the same contract and invocation of Clause-X(c) vide letter dated

24.11.2010. The Court was of the opinion that the plaintiffs had failed to give prior notice to the defendant before imposing Clause-X(c) and appointment of an *ad hoc* contractor. Therefore, letter dated 24.11.2010 was arbitrary, illegal and violative of the principles of natural justice. The learned trial Court referred to Section 11 of CPC and found that the former case was filed by the defendant of the instant suit as plaintiff i.e. T.S. 15 of 2012 which was decreed in favour of the plaintiff-contractor of that case against which an appeal was preferred by the FCI bearing RFA No.03 of 2014. Subsequently, this suit was filed by the FCI for redress. It went on to observe that the instant case is nothing but counter of the fact of the former case T.S. 15 of 2012. Hence, in view of this, if it is not considered as barred by *res judicata*, it should be treated as "counter case of the former suit of T.S. No.15 of 2012". This is how the learned Commercial Court proceeded to answer Issue No.4.

[15] Issue Nos. 5 and 6 were also answered against the plaintiff-Corporation. It was held that the plaintiffs could not clearly explain the basis for awarding such high rate of 159% ASOR to the *ad hoc* contractor to complete the remaining work whereas there were other contractors working under the defendant at the same time who could have been engaged to complete the remaining or deficient work.

[16] While deciding issue Nos.1 and 2 together, the learned trial Court held that the plaintiffs had arbitrarily and illegally imposed Clause-X(c) of the tender agreement which was not exhibited. Therefore, its contents were also not in force. The learned Court also held that the cause of action arose firstly on 24.11.2010 when Clause-X(c) of the tender agreement was unjustifiably

invoked by the plaintiffs and subsequently on several dates when plaintiffs made demand to the defendant to make good the extra expenditure incurred due to engagement of *ad hoc* contractor at the risk and cost of defendant as well as on those dates when defendant requested the plaintiff for immediate withdrawal of the Clause-X(c) and stoppage of transportation work at the risk and cost of defendant. It also observed that defendant had expressed his grievance about imposition of Clause-X(c) and escalation of rate to the *ad hoc* contractor and had claimed release of his security and earnest money and other dues but the plaintiff-Corporation did not pay any heed to it. Thus, the suit was maintainable. However, issue Nos.1 and 2 were decided in negative against the plaintiff.

[17] Further, the learned Court also answered the issue Nos.7 and 8 against the plaintiff in view of the discussion made earlier in answer to the other issues.

[18] Being aggrieved, the Corporation approached this Court in RFA No.04 of 2020 under Section 13(1A) of the Commercial Courts Act, 2015 and *inter alia* raised the following grounds:

> (a) That the impugned judgment and decree suffer from the vice of error of law as well as on facts and deserved to be set aside.
>
> (b) The learned Court failed to appreciate the facts and evidence adduced by the plaintiff in proper perspective. It failed to appreciate the respondent-contractor had suspended its work after 26th December, 2010 for unknown reasons though the agreement was not terminated. This resulted in breach of terms and conditions of the contract and disrupted the public distribution system resulting into public loss.
>
> (c) The appellant-Corporation had also issued letters from 18th October, 2010 till 12th November, 2010 intimating the respondent-contractor that it would be liable for breach of contractual obligation on failure to supply the trucks. Therefore, the Corporation was constrained to impose

Clause-X(c) of the agreement vide letter dated 24th November, 2010 and appointed an ad hoc contractor through limited spot tender notice in the interest of public distribution system of food grains.

(d) The learned Commercial Court, however, failed to appreciate that the engagement of ad hoc contractor on account of failure of the defendant-contractor to supply the indented trucks resulted in performance of the remaining work at a much higher rate than the schedule rate due to the emergency for ensuring smooth transportation of food grains to the go-downs.

(e) The learned trial Court failed to examine this issue in the correct perspective. It wrongly held that invocation of Clause-X(c) of the agreement was illegal and arbitrary and without proper notice.

(f) The learned trial Court also failed to consider that the Xerox copy of the agreement was placed on record and therefore the learned trial Court had been able to discuss about Clause-X(c) of the agreement which is pivotal for adjudication of the case. Entering of the agreement was not disputed by the contractor and therefore exhibiting original agreement was only a mere formality. The original copy of the agreement dated 15th September, 2009 was exhibited in T.S.15 of 2012.

(g) The claim for enhancement of agreed rate to 60% from existing rate of 49.49% was impermissible under the terms of the concluded contract between the parties. As such, the findings of the learned trial Court that the Corporation ought to have allotted the remaining part of the work to other contractor instead of appointing ad hoc contractor at a higher rate is not correct. Appellant denied that the suit is barred by principle of res judicata.

(h) The appellant denies that he suit is barred by principles of res judicata. The onus to prove that was on the defendant-respondents which they failed to discharge. Only a copy of the judgment passed in T.S. No.15 of 2012 was placed before the learned trial Court but the said judgment was not exhibited. The party raising such plea had to exhibit the former judgment and prove that the issues in the subsequent suit were directly and subsequently the same as the issue in the former suit and had been adjudicated by the Court in the former suit.

(i) That the issue involved in the earlier suit was whether the respondent-contractor was entitled to get a decree of refund of his security deposit, earnest money etc. It was never an issue that in view of Clause-X(c) of the agreement, the appellant-Corporation was entitled to engage ad hoc contractors when the original contractor had failed to discharge his duties and that the original contractor had to bear the cost for such engagement to the Corporation.

(j) The appellant took a plea at ground No. P that learned trial Court most erroneously came to the finding that the present suit is not barred by principles of res judicata or operation of Order-II Rule, 2 of CPC.

[19] On these grounds the appellant has questioned the impugned judgment and decree as being unsustainable on facts and in law in view of the evidence on record. The suit is required to be decreed by directing the respondent-contractor to pay the loss suffered by the Corporation to the tune of Rs.1,77,59,585/-.

[20] Mr. Ratan Datta, learned counsel for the appellant-Corporation submits that the findings of the learned trial Court are erroneous on facts and in law. The instant suit was not barred by the principles of *res judicata* or constructive *res judicata*. Since the respondent-contractor despite sufficient notice failed to carry out the contracted work, invocation of Clause-X(c) and appointment of *ad hoc* contractor at the risk and cost of the defendant-contractor was proper and legal. Therefore, the losses suffered by the Corporation due to engagement of *ad hoc* contractor at a much higher rate is required to be compensated by the contractor by payment of Rs.1,77,59,585/- along with interest @ 12% per annum.

[21] Mr. Indrajit Chakraborty, learned counsel for the respondent-contractor has strongly objected to the maintainability of the suit. He submitted that the subsequent suit of the same cause of action was hit both by *res judicata* and constructive *res judicata*. The respondents have participated in the proceedings of T.S. No.15 of 2012 and filed its written statement where neither the agreement nor execution of the work by the contractor was in dispute. The Corporation had defended its invocation of Clause-X(c) of the agreement for appointment of an *ad hoc* contractor on the same grounds. The plaintiff Corporation herein instead of filing a counter claim in T.S. No.15 of 2012

suffered the adjudication of the suit against it vide judgment dated 28th November, 2015. Since on the same subject matter and cause of action a judgment had already been delivered in favour of the contractor by the same Commercial Court earlier, the proceedings of the instant commercial suit were not maintainable as barred by *res judicata*. Though the learned trial Court did hold that the instant case is nothing but the counter of the facts of the former case T.S. 15 of 2012 but it erroneously held that it was not barred by *res judicata* and should be treated as counter case of the former suit of T.S. No.15 of 2012. It is the case of the respondent-contractor that in such circumstances the instant suit should be held to be barred by principles of *res judicata* otherwise such a course may lead to conflicting judgments.

[22] We have considered the submissions of learned counsel for the parties. We have also taken note of the pleadings and the materials placed by the parties before the learned trial Court and we have also perused the impugned judgment. We may observe herein that both the appeals being RFA No.03 of 2016 and RFA No.04 of 2020 have been tagged together for the only reason that they both arise out of the same agreement between the parties dated 15th September, 2009 relating to transportation of work from railway siding/FSD Churaibari to FSD Nandannagar and railway siding Churaibari to FSD, Churaibari. The date of issuance of work order, commencement of work from 16th November, 2009 and its alleged disruption since October, 2010 are also the same in both the suits. The cause of action is based upon the invocation of Clause-X(c) of the agreement by the Corporation on 24.11.2010. The contractor as plaintiff in T.S. No.15 of 2012 also relied upon the same bundle

of facts for raising the cause of action to maintain the suit for refund of earnest money and security deposit and also for realization of business loss due to engagement of an *ad hoc* contractor upon invocation of Clause-X(c) of the agreement.

[23] The defendant corporation/appellant filed written statement and defended the invocation of Clause-X(c) vide letter dated 24th November, 2010 as a result of which it had to appoint *ad hoc* contractor at the risk and cost of the existing contractor i.e. the plaintiff therein. It also stated that award of contract to M/S Sreema Stone Crusher was at the risk and cost of the plaintiff as per the terms and conditions of the agreement after providing sufficient scope to accelerate contractual agreement in view of imposition of Clause-X(c) of the agreement. It also stated that several notices were sent to the contractor to reimburse the extra cost and expenditure for transportation paid to the contractor appointed on *ad hoc* basis for getting the remaining works done at the risk and cost of the original contractor i.e. the plaintiff therein but he failed to pay any heed and paid no amount even after receipt of demand notices which are the dues or outstanding dues receivable by the answering defendant-Corporation empowered to set up the claim under the common law in vogue. It therefore, objected to release of the security money in favour of the plaintiff. It also objected to release the waiver part of money in the form of demurrage waived by the railway authority as it would be released after final fixation of responsibility of demurrage charges upon the plaintiff and subject to settlement of relevant dues between the parties. At paragraph 17 of the written statement, it also submitted that the cause of action shown in the plaint is relevant for

institution of any suit against the answering defendant. Based on these rival pleadings, the learned trial Court had framed the following issues which have been elaborately discussed in the first part of the judgment under RFA No.03 of 2016 arising out of T.S. No.15 of 2012.

> "(i) Is the suit maintainable in its present form?
>
> (ii) Is there any cause of action in the suit?
>
> (iii) Whether the public distribution system was disturbed in Tripura State for want of delivery of food grains from FCI to State food go-down?
>
> (iv) Whether the imposition of Clause X(c) with penalty of 159% risk and cost of the tender agreement in respect of work order No. NEER/TC/ CBZ/NGR/11915, dated, 11-11-2009 was illegal, arbitrary and against natural justice?
>
> (v) Whether the plaintiff is entitled to get the decree to realize the sum of rupees 2,03,21,634/- from the defendants and decree of declaration that clause-X(c) of the tender agreement was illegal?
>
> Additional Issues
>
> (vi) Whether there was any failure on the part of plaintiff in the placement of vehicle for carrying of food grains as per the indent and requisition?
>
> (vii) Whether any prior notice was given by the defendants to the plaintiff to regularize the placement of vehicle as per indent and terms of contract before imposing clause-X(c) of the tender agreement?"

[24] The said suit was allowed on contest in favour of the plaintiff contractor therein/respondent herein by directing refund of security deposit and earnest money with interest; payment of losses alleged by the contractor and certain other demurrage charges. Upon analysis of the case of the parties and after close scrutiny of the findings rendered by the learned trial Court in T.S. No.15 of 2012, this Court has upheld the impugned judgment so far as it relates to refund of security money and refund of demurrage part to the extent of 60% as was waived by the railways but this Court has held that the plaintiff-contractor was not entitled to claim payment of losses as alleged as no work was executed by him after 26th December, 2010 since the remaining part of the work was completed by the *ad hoc* contractors. We have copiously referred to

the pleadings of the instant Commercial Suit No.01 of 2016 from which RFA No.04 of 2020 arises. We have also extracted the issues framed by the learned Commercial Court on the basis of the pleadings from record in the foregoing paragraphs under Part-B of the judgment. The instant suit, the plaintiff-Corporation/appellant herein has based his cause of action upon the same letter dated 24th November, 2010 whereby it had invoked Clause-X(c) against the contractor on failure to supply the required number of trucks for transportation of goods as per the original agreement dated 15th September, 2009. Paragraph-18 of the plaint which refers to the cause of action for the plaintiff-corporation is being extracted hereunder:

> "That, the cause of action for the suit first arose on letter nos. 18.10.2010, 19.10.2010, 20.10.2010, 06.11.2010, 09.11.2010 and 12.11.2010 under reference letter Nos.F.9/NEFR/HTC/Misc-corres/2008-09 when the plaintiffs informed the defendant that for his failure to perform the contract, he was liable to make good the loss caused by the plaintiffs for breach of the contractual obligations pay the risk and cost value for performance of the unperformed work under the contract agreement, and on 24.11.2010 when Clause-X(c) of the tender agreement was imposed for non-performance and violation of the tender agreement, and on the dates on which the demand notices were sent to the defendant and finally the cause of action arose on 11.05.2012 when the last demand notice was sent to the defendant vide letter reference No.F.9/DO-AGT/R&C/Demand Notice/2012 and the said amount still remains unpaid."

[25] Plaintiff-Corporation instituted the instant suit on the same cause of action for realization of loss of Rs.1,77,59,585/- due to non-performance of the work by the contractor/respondent herein in violation of the terms of the agreement on 15th September, 2009. Though the instant suit was instituted at Agartala but by virtue of the order passed by this Court in TRP(C) No.05 of 2015 it was transferred to the competent court of learned Civil Judge (Sr. Division), Dharmanagar for trial where the earlier suit (T.S. No.15 of 2012) was being tried. Later on, the instant suit was transferred to the court of

Commercial Court in view of coming into force of the Commercial Courts Act, 2015. The judgment in T.S. No.15 of 2012 was delivered on 28th November, 2015 during pendency of the instant suit whereas the judgment in the instant suit (Commercial Suit No.01 of 2016) was delivered on 30th September, 2019.

[26] It is not in dispute that though the cause of action in both the suits were the same for seeking the rival reliefs i.e. imposition of Clause-X(c) of the agreement by the Corporation upon the contractor and that the Corporation in its written statement had duly defended the invocation of Clause-X(c) in T.S. No.15 of 2012 and also taken the plea that the plaintiff-contractor was liable to reimburse the extra cost incurred in appointment of *ad hoc* contractor for completion of the remaining work but surprisingly no counter claim was filed by the defendant in the same suit. Instead, the Corporation chose to institute a separate suit i.e. M.S. No.03 of 2013 before the learned Civil Judge (Sr. Division), West Tripura, Agartala for realization of the loss of Rs.1,77,59,585/- from the contractor on account of the extra cost incurred by the Corporation towards payment to the *ad hoc* contractor upon invocation of Clause-X(c) of the agreement due to failure of the defendant-contractor herein to supply the trucks as per the agreement. All the relevant letters starting from 18th October, 2010 till invocation of Clause-X(c) by letter dated 24th November, 2010 have also been relied upon by the Corporation in the instant suit to justify the invocation of Clause-X(c) of the agreement and appointment of *ad hoc* contractor to complete the remaining part of the work which led to extra cost realizable from the original contractor/defendant/respondent herein. The learned trial Court proceeded to frame 8(eight) issues including the issue No.1

relating to maintainability of the suit and issue No.2 as to whether the suit was barred by law of limitation and Rule of *res judicata*.

[27] The learned trial Court has answered the issues against the plaintiff-Corporation/appellant herein and while answering issue No.4 it has also held that the instant case is nothing but a counter of the former T.S. No.15 of 2012 but it is not barred by *res judicata* and should be treated as counter case of the former suit. The issue Nos.1 and 2, however, when answered in negative against the plaintiff means that the suit was not maintainable and is barred by Rule of *res judicata*. Thus, there are conflicting findings by the learned trial Court in answer to issue No.4 and issue Nos.1 and 2.

[28] The appellant-Corporation is in appeal against the impugned judgment and decree. The appeal is a continuation of the suit. As per Section 107(2) of CPC conditions enumerated in sub-section (1), the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein. Issue Nos.1 and 2 in the instant suit have been decided against the plaintiff. The appellant-Corporation has in its ground number N on the one hand denied that the present suit is barred by principles of *res judicata* but in ground number P it has also taken a plea that in the earlier suit such an issue whether the appellant-Corporation was entitled to engage *ad hoc* contractors, was never the subject matter of the earlier T.S. No.15 of 2012 and as such, the learned trial Court most erroneously came to a finding that the present suit is not barred by principles of *res judicata* or operation of Order II, Rule 2 of CPC. Apparently, both the grounds taken at

ground number N and P are contradictory to each other. However, since the question of maintainability of the suit and whether it was hit by *res judicata* goes to the root of the entire adjudication proceedings, we deem it proper to test the findings of the learned trial Court since they have been assailed by the appellant-Corporation.

[29] In this regard, we may refer to Section 10 of CPC which is extracted hereunder:

> "10. Stay of suit.- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in [India] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of [India] established or continued by the [Central Government] and having like jurisdiction, or before the [Supreme Court]."

[30] Having regard to the fact that the matter in issue in the instant suit is also directly and substantially in issue in the previously instituted suit between the same parties and that such suit was pending in the same Court of learned Civil Judge (Sr. Division), Dharmanagar when it received the case records on 6th May, 2015 from the Court of learned Civil Judge (Sr. Division), West Tripura, Agartala upon directions by this Court passed in TRP(C) No.05 of 2015 vide order dated 23rd April, 2015, either of the learned Court should have kept in abeyance the proceedings of the instant suit on the principles of *res sub-judice*. It needs to be indicated herein that the judgment in T.S. No.15 of 2012 was delivered by the same Court of Civil Judge (Sr. Division), Dharmanagar on 28th November, 2015. The object underlying Section 10 of CPC is to avoid two parallel trials on the same issue by two Courts of

concurrent jurisdiction and to avoid recording of conflicting findings on issues which are directly and substantially in issue in a previously instituted suit. The instant suit could have been tried together with T.S. No.15 of 2012 since the parties were the same, the cause of action was also the same and the issues were directly and substantially in issue as in the previously instituted suit. Both the parties and the learned Court failed to take resort to this provision to either club both the suits for being decided together in order to avoid conflicting judgments or to keep this proceeding of the instant suit in abeyance in view of the pendency of the previous suit on issues which were directly and substantially the same.

[31] Though the reliefs sought by the plaintiff-contractor in T.S. No.15 of 2012 and the plaintiff-FCI in M.S. No.03 of 2013 were different but the proceedings of both the suits were not of different nature or instituted under different statutes. The Court of learned Civil Judge (Sr. Division), West Tripura, Agartala was competent to grant the relief framed in both the suits. The use of negative expression in Section 10 of CPC "no court shall proceed with the trial of any suit" makes the provision mandatory and the court in which the subsequent suit has been filed is prohibited from proceedings with the trial of that suit if the conditions laid down in Section 10 of CPC are satisfied. [*See Aspi Jal and another versus Khushroo Rustom Dadyburjor*, *(2013) 4 SCC 333]*. Paragraph 9 of the judgment is extracted hereunder :

> "9. Section 10 of the Code which is relevant for the purpose reads as follows:
>
> "**10. Stay of suit**.- No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom

> they or any of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief claimed, or in any court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.
>
> Explanation.- The pendency of a suit in a foreign court does not preclude the courts in India from trying a suit founded on the same cause of action."
>
> From a plaint reading of the aforesaid provision, it is evident that where a suit is instituted in a court to which provisions of the Code apply, it shall not proceed with the trial of another suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. For application of the provisions of Section 10 of the Code, it is further required that the Court in which the previous suit is pending is competent to grant the relief claimed. The use of negative expression in Section 10 i.e. "no Court shall proceed with the trial of any suit" makes the provision mandatory and the court in which the subsequent suit has been filed is prohibited from proceeding with the trial of that suit if the conditions laid down in Section 10 of the Code are satisfied. The basic purpose and the underlying object of Section 10 of the Code is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject-matter and the same relief. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to protect the defendant from multiplicity of proceeding."

[32] The key words in Section 10 of CPC are "the matter in issue is directly and substantially in issue in the previously instituted suit". The test for applicability of Section 10 of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res judicata* in the subsequent suit. Though Section 10 of CPC is merely a rule of procedure and a decree passed in contravention thereof is not a nullity but if the issues have been decided by the Court in the previously instituted suit and are directly and substantially the same in the second suit, the principles of *res judicata* or constructive *res judicata* come into play while deciding the subsequent suit. This has been the position in the instant case.

[33] In order to appreciate whether the instant suit suffered on grounds of *res judicata*, we may also extract Section 11 of CPC which reads as under :

> "Res judicata.- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

The object of the principles of *res judicata* as contained in Section 11 of CPC is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. The doctrine of *res judicata* is conceived not only in larger public interest which requires that all litigation must, sooner than later come to an end but is also founded on equity, justice and good conscience [*See Swamy Atmananda versus Sri Ramakrishna Tapovanam*, *(2005) 10 SCC 51*]. Paragraphs 26 to 28 of the said judgment are extracted hereunder:

> "26. The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment.
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> 27. The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment.
>
> 28. The doctrine of res judicata is conceived not only in larger public interest which requires that all litigation must, sooner than later, come to an end but is also founded on equity justice and good conscience."

[34] The principles of *res judicata* envisages that a judgment of court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment. Issues of fact finally determined between the parties by a court of competent jurisdiction operate as *res judicata* when the same issue comes directly in question in subsequent proceedings between the same parties. Principles of *res judicata* apply in different stages of the same proceedings as between two stages in the same litigation so that if an issue has been decided at an earlier stage against a party, it cannot be allowed to be re-agitated by him at a subsequent stage in the same suit or proceeding. [*See Bhanu Kumar Jain versus Archana Kumar*, *(2005) 1 SCC 787*] Paragraphs 18, 19, 30 to 32 of the same are extracted hereunder:

> "18. It is now well settled that principles of res judicata apply in different stages of the same proceedings. (See Satyadhyan Ghosal v. Deorajin Debi [AIR 1960 SC 941 : (1960) 3 SCR 590] and Prahlad Singh v. Col. Sukhdev Singh [(1987) 1 SCC 727] .)
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> 19. In Y.B. Patil [(1976) 4 SCC 66] it was held: (SCC p. 68, para 4)
> "4. … It is well settled that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding at the subsequent stage of that proceeding.
>
> 30. Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by accord.
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> 31. In a case of this nature, however, the doctrine of "issue estoppel" as also "cause of action estoppel" may arise. In Thoday Lord Diplock held: (All ER p. 352 B-D)
> "…….. 'cause of action estoppel', is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist i.e. judgment was given on it, it is said to be merged in the judgment…….. If it

> was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam."
>
> 32. The said dicta was followed in Barber v. Staffordshire County Council (1996) 2 All ER 748 (CA). A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. [See C.(A Minor) v. Hackney London Borough Council, (1996) 1 All ER 973 : (1996) 1 WLR 789 (CA)."

[35] The doctrine of *res judicata* differs from the principle underlying Order 2, Rule 2 in that the former places emphasis on the plaintiff's duty to exhaust all available grounds in support of his claim, while the latter requires the plaintiff to claim all reliefs emanating from the same cause of action. [*See Kunjan Nair Sivaraman Nair versus Narayanan Nair, (2004) 3 SCC 277*]. Paragraphs 10 to 13 of the judgment are extracted hereunder"

> "10. Order 2 Rule 2 sub-rule (3) requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based. Therefore, there must be identical cause of action in both the suits, to attract the bar of Order 2 sub-rule (3). The illustrations given under the rule clearly brings out this position. Above is the ambit and scope of the provision as highlighted in Gurbux Singh case [AIR 1964 SC 1810 : (1964) 7 SCR 831] by the Constitution Bench and in Bengal Waterproof Ltd. [(1997) 1 SCC 99] The salutary principle behind Order 2 Rule 2 is that a defendant or defendants should not be vexed time and again for the same cause by splitting the claim and the reliefs for being indicted in successive litigations. It is, therefore, provided that the plaintiff must not abandon any part of the claim without the leave of the court and must claim the whole relief or entire bundle of reliefs available to him in respect of that very same cause of action. He will thereafter be precluded from so doing in any subsequent litigation that he may commence if he has not obtained the prior permission of the court.
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> 11. Rule of res judicata is contained in Section 11 of the Code. Bereft of all its explanations, namely, Explanations I to VIII, Section 11 is quoted below:
> "11. Res judicata.—No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."
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> 12. "Res judicata pro veritate accipitur" is the full maxim which has, over the years, shrunk to mere "res judicata".
>
> 13. Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence "*interest reipublicae ut sit finis litium*" (it concerns the State that there be an end to law suits) and partly on the maxim "*nemo debet bis vexari pro una et eadem causa*" (no man should be vexed twice over for the same cause). The section does not affect the jurisdiction of the

> court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised."

[36] Therefore, Section 11 of CPC provides that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. Explanation-IV of Section 11 is relevant for the purposes of testing whether the subsequent suit by the plaintiff-FCI in M.S. No.03 of 2013 was hit by the principles of *res judicata* or constructive *res judicata*. Explanation-IV provides that any matter which might and ought to have been made grounds of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. Explanation-III also provides that the matter referred to in Section 11 must be in the former suit alleged by one party and either denied or admitted, expressly or impliedly by the other. Constructive *res judicata* which flows out of this explanation deals with grounds of attack and defence which ought to have been raised but not raised.

[37] In the instant case, we find that the Corporation had in its written statement defended the imposition of Clause-X(c) to deny the claim of the plaintiff in T.S. No.15 of 2012. It had also contended that the plaintiff-contractor in T.S. No.15 of 2012 was required to pay the extra cost incurred by the Corporation on appointment of *ad hoc* contractor. However, no counter

claim was filed by the Corporation for realization of the extra cost incurred by it by appointment of *ad hoc* contractor for completion of the remaining part of the work upon failure of the plaintiff-contractor to undertake the transportation work in terms of the original agreement for the period after 26th December, 2010. The learned trial Court in T.S. No.15 of 2012 had framed issue No.(iv) regarding whether the imposition of Clause-X(c) was illegal, arbitrary and against natural justice and answered it against the Corporation. In the instant suit also, based on the rival pleadings of the parties, the learned trial Court had proceeded to frame issue Nos.(iii) and (iv) to the effect that whether Clause-X(c) of the agreement was imposed upon the defendant after giving him adequate scope for improvement of work and whether the appointment of *ad hoc* contractor by the plaintiff at the risk and cost of defendant was illegal and void. Further issues on merits in the instant suit related to the claim of the plaintiff-Corporation for compensation of the loss caused to the tune of Rs.1,77,59,585/- incurred by it for breach of obligation of defendant i.e. the contractor to bear the risk and cost of the remaining work executed by the *ad hoc* contractor. As such, the issues were directly and substantially the same in the subsequent suit which came to be decided after about 4 years on 30th September, 2019 by the learned Commercial Court, North Tripura, Dharmanagar where M.S. No.03 of 2013 was transferred on 19th July, 2016 and received on 22nd July, 2016 upon coming into force of the Commercial Courts Act, 2015.

[38] Having regard to the discussion made hereinabove, we are of the firm view that the subsequent suit i.e. M.S. No.03 of 2013/Commercial Suit

No.01 of 2016 was hit by the principles of *res judicata* and constructive *res judicata*. Though the learned Court has also answered the issue Nos.1 and 2 in the negative against the plaintiff-corporation but it has rendered conflicting findings in regard to the application of doctrine of *res judicata* in answer to issue No.4 which is not proper in the eye of law. As such, we hold and declare that the subsequent suit instituted by the Corporation being hit by principles of *res judicata* and constructive *res judicata* in view of a authoritative judgment by the competent Court in T.S. No.15 of 2012 on 28th November, 2015 on issues which were directly and substantially the same, the relief claimed for by the plaintiff-Corporation in the instant suit could not have been granted. We are unable to understand as to why the Corporation failed to file a counter claim in T.S. No.15 of 2012 whereby it had not only defended the invocation of Clause-X(c) of the agreement against the plaintiff-contractor but also raised the plea of payment of extra cost incurred by the defendant-Corporation in engaging *ad hoc* contractor for completion of the remaining part of the work in terms of Clause-X(c) of the agreement in question. Be that as it may, on account of the reasons recorded hereinabove, the instant appeal deserves to be dismissed which is accordingly dismissed.

[39] Pending application(s), if any, also stands disposed of. Lower court records be sent to the court concerned.

(ARINDAM LODH), J **(APARESH KUMAR SINGH), CJ**

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