

Reserved On : 17/06/2026**Pronounced On : 02/07/2026**

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/FIRST APPEAL NO. 5673 of 1999
With
R/FIRST APPEAL NO. 586 of 2000

FOR APPROVAL AND SIGNATURE:**HONOURABLE MR. JUSTICE J. C. DOSHI sd/-**

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Approved for Reporting	Yes	No
		no

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MUKESH CORPORATION
 Versus
 STATE OF GUJARAT & ANR.

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Appearance:

MR KG SUKHWANI(871) for the Appellant(s) No. 1

MS KINJAL VYAS ASSISTANT GOVERNMENT PLEADER for the
 Defendant(s) No. 1,2

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CORAM: HONOURABLE MR. JUSTICE J. C. DOSHI**CAV JUDGMENT**

1. The judgment and decree in Civil Suit No.955 of 1986 dated 19.07.1999 passed by the learned City Civil Judge, Court No.14, Ahmedabad has given rise to the aforesaid two appeals, one by the original plaintiff – M/s. Mukesh Corporation and another by the State of Gujarat and the Executive Engineer, the original defendants. Upon consent of learned Advocate appearing for both the parties, these appeals are decided by common judgment.

2. In Civil Suit No.955 of 1986 filed by the plaintiff – Mukesh Corporation, the learned City Civil Court passed following final order:

“I. The suit is partly allowed.

II. The plaintiff firm is entitled to recover the amount of Rs.46,234.34/- from the defendants along with the interest at the rate of 6% p.a. from the date of the suit till realization.

III. Decree to be drawn up accordingly.”

3. The aforesaid final order came to be passed in backdrop of the fact that the plaintiff – Mukesh Corporation is a registered partnership firm of engineers and contractors doing construction work on contract basis. The Execution Engineer, City (B & C) Division, Ahmedabad invited the tender for construction of Circuit House annexe Building at Ahmedabad in the year 1981. The plaintiff's tender was accepted for Rs.12,96,057.80/- as against the estimated cost of Rs.10,21,535.51/-. The work order was issued in favour of the plaintiff-firm on 29.12.1981 with a condition to complete the work within a period of 12 months i.e. on or before 28.12.1982. Pursuant to the issuance of work order, an agreement was also executed.

3.1 The plaintiff - firm did not complete the work within the stipulated time period and thus, the work was completed at the risk and cost of the plaintiff - firm. The plaintiff put the blame

upon the State Government with usual contention that the State Government failed to perform reciprocal, contractual obligation as much as they could not hand over the site along with the work order and did not supply the material, in as much as, item-wise program, as per clause (2) of the agreement. These dealings were contended for result of not completing the work within the stipulated time period. In addition thereto, the plaintiff pleaded that he had not received regular payment as agreed in contract.

3.2 Absolving itself from not completing the work within the stipulated time period, the plaintiff alleged fundamental breach of contract to the defendant – State, it is stated by the plaintiff that State has wrongly terminated contract on 09.12.1983 and imposed the penalty and levied the compensation. The levy of penalty of Rs.100/- per day commencing from 27.01.1983 to 31.08.1983 is also termed as illegal. It is contended that the plaintiff – firm was not awarded a reasonable opportunity of hearing, nor has been served with a show-cause-notice before imposing penalty and passing of order of termination and thereby the principle of *audi alteram partem* was not observed. It is further contended that, since time was not the essence of the contract nor it was made as per Section 55 of the Indian Contract Act, imposing of penalty thereof is always in terrorem. Validity of the authority who has passed the termination order is also questioned by the plaintiff on the ground that the competent authority has not received the sanctioned, who has sanctioned the tender, and therefore, in absence of valid termination of contract, the State Government cannot levy penalty.

3.3 In juxtaposition of aforesaid contention, the plaintiff came out with a case that plaintiff is entitled to recover the loss of profit at 20% of remaining un-executed work of Rs.11,00,000/- which would come to Rs.2,20,000/-. The plaintiff also pleaded to add some other amount and filed the suit to recover the amount of Rs.2,88,314.34/- with interest.

3.4 In the written statement filed at Exh.12, the State Government firstly contended that suit is time barred. Secondly, it contended that as per the terms and conditions of the tender agreement, the plaintiff was required to complete the work within 12 months. The time was essence of the contract as it was a work contract. The plaintiff had not completed the work within the stipulated time period and even in extended time period. It is further contended that the plaintiff had been paid regularly as per the work executed by them and accordingly, total amount paid in advance was Rs.58,950/- and the amount of work done for which the plaintiff was paid Rs.1,96,576/-. Thus, in total, amount of Rs.2,55,526/- has been paid. It is also contended that progress of the work was far below from the progress scheduled. It is further contended that plaintiff even had not completed 1/4th of the total work at the time when he was expected to complete 1/2th of the total work and it is further stated that plaintiff was, time and again, intimidated and informed to accelerate the progress of work, but plaintiff did not cope with the instructions.

3.5 Therefore, the R&P department has rightly terminated the contract and levied the penalty at the rate of Rs.100/- per day

from 21.01.1983 to 31.08.1983 and at the rate of Rs.150/- per day with effect from 01.09.1983 on-wards vide order dated 13.01.1984. It is further contended that in view of Clause 3(b) and 3(c) of the agreement, since plaintiff had abandoned the work, was informed vide letter dated 20.01.1984 that the work is being executed at risk and cost of the plaintiff and without prejudice to the rights of the State Government to recover the said amount from the plaintiff. It is further contended that since plaintiff did not adhere to the time limit stated in the agreement and abandoned the work, the plaintiff is not entitled to recover any of the amount including amount of the security deposit as the agreed work could not be completed on the fault of the plaintiff. It is also denied that penalty imposed upon the plaintiff is a terrorem. Ultimately, it was prayed to dismiss this suit.

4. Learned City Civil Court fixed the issues at Exh.19 and pleased to partly allow the suit after permitting both the parties to lead the evidence and ordered to return the amount of security deposit to the plaintiff with 6% yearly interest.

4.1 Being aggrieved, both plaintiff and defendant filed this appeal. The plaintiff was aggrieved for non-grant of other claim and State Government was aggrieved by grant of refund of security deposit amount.

5. Heard learned Advocate Mr. Paras Sukhwani appearing for the Mukesh Corporation and learned AGP Ms. Kinjal Vyas for the State of Gujarat and the Executive Engineer. Learned Advocates for both the sides have argued in the line of grounds stated in the appeal memo.

6. Having heard learned Advocates for both the sides, at the outset, let me refer the issue framed by the City Civil Court at Exh.19:

“1. Whether the plaintiff proves that the termination order of the contract between parties dated 09.12.1983 and the penalty order passed by the defendant is illegal, wrongful, malafide and without jurisdiction as contended in para 8(i) and 8(xviii) of the plaintiff.

2. Whether the plaintiff proves that the suit claim against the defendant?

3. Whether the plaintiff proves its claim of interest as prayed for?

4. Whether the defendant proves that the time was the essence of the contract as per clause 2 of the agreement of contract?

5. Whether this suit is barred by law of limitation?

6. To what reliefs, if any, the plaintiff is entitled to?

7. What order and what decree?”

7. Issue nos.1, 6 and 7 are decided as per final order whereas issue nos.2, 3, 4 and 5 are answered in negative.

8. At this juncture, it is relevant to refer the finding of the City Civil Court. Paras 15 and 16 are the heart of the entire judgment which reads as under:

...“15. In view of these resubmissions,

material and evidence on record, it is required to be considered whether the order levying the compensation was justified. Further whether the order of termination of the contract and getting the work executed departmentally at the risk and costs of the plaintiff was justified. It may be that as discussed above, though the time may not be the essence of the contract, the work has not been carried out within the stipulated time. The plaintiff had asked for the extension of time as per the letter at Exh.24. However, the extension has not been granted as stated by the Deputy Engineer. Therefore, the work which was to be completed within the stipulated period of 12 months on or before 28.01.1983 the fact remains that the plaintiff has not carried out the work. It transpires that the defendants have not given any notice making the time as essence of the contract calling upon the plaintiff to complete the work even thereafter within some specified time. It transpires from the evidence of the Deputy Executive Engineer Shri Naresh Israni at Exh.58 that the plaintiff has been supplied with the materials as required. Exh.61 which are receipts regarding supply of the material to the plaintiff clearly shows that the plaintiff has been supplied with the material in the month of March 1982 i.e. on 03.03.1982 and on 12.03.1982 and in April 1982 and December, 1982. These receipts have been signed and stamped on behalf of the plaintiff about the receipt of the materials and it clearly suggests in column mentioned regarding the quantity of the material that as per the requirement the quantity of the material that as per the requirement of the work it has been supplied to the plaintiff. Even assuming

for the sake of argument that there was some delay as stated by the plaintiff in the letter at Exh.74 and Exh.34 dated 02.06.1982 and 04.04.1983. The fact remains that the progress of the work was very slow and has not executed even 1/4th of the work. If there was some delay subsequently as it transpires from Exh.61 the material has been given to the plaintiff then the plaintiff could have expedited the progress of the work and could have made effort to complete the work. Thus if the complete work has not been carried out atleast substantial part of the work would have been completed. The statement at Exh.93 also makes it clear that considering the amount of work the material has been supplied. Therefore, even after some time, the plaintiff could have expedited the work even after expiry of the stipulated time limit admittedly the plaintiff has abandoned the work as stated in the letter at Exh.86 dated 09.12.1983 and also the letter at Exh.91 dated 20.01.1984. Therefore, it is required to be considered whether the defendants could invoke the clause 2 as well as clause 3(b) and (c) of the tender agreement for imposing the compensation and get the work executed at the risk and costs of the plaintiff and also terminated the work. It may be noted that clause 2 provides for compensation for delay and clause 3(a) and clause 3(b) provides for action to be taken for forfeiting the security deposit and terminating the contract. Clause 2 also has laid down the time limit for executing the work as to within what time 1/4th of the work and within what time 1/2nd of the work shall be executed. Clause 2 provides in the event of contractor failing to comply with this condition, he shall be liable to pay the

compensation and the amount equal to 1% or such similar amount as the S.E. (whose decision in writing shall be final) may decide of the said estimated cost of the work for every day for the due quantity of the work remains uncomplete provide always that the total amount of compensation to be paid under the provision of this clause shall not exceed 10% of the estimated cost of the work as shown in the tender. Similarly clause 3(a) for termination of the contract. The judgment of the Hon'ble High Court in F.A. No.1166 of 1981 referred to and relied upon by the learned Advocate for the plaintiff would have application to the facts of the present case. The observations have been made relying on the judgment of the Hon'ble Supreme Court reported in AIR 1963 SC p.10 and AIR 1970 SC p.1955 that the security deposit could not have been forfeited. Further it has been observed by the Hon'ble High Court specifically that "the Supreme Court has laid down that where under terms of contract party in breach has undertaken to pay the sum or which he has already paid as security for guaranteeing due performance of the contract to the party complaining of breach of contract, undertaking is the nature of penalty and the Hon'ble Supreme Court has then laid down that in such cases where the loss can be determined in terms of money party claiming the compensation must prove the loss suffered by him. In the facts of the present case, the defendants would have been entitled to a reasonable compensation on the proof of actual loss suffered by it because such loss would have been easily ascertainable in terms of money. There is total failure on the part of the defendant to prove exact loss occurred

to it as a result of the work having held to be executed departmentally. We, therefore, found that the plaintiff was wrongly deprived of the amount of Rs.4600/-.

In the facts of the present case, the compensation has been levied as per the terms of the tender agreement between the parties. Clause 2 itself the provision was made for levying and recovering the penalty/compensation from the plaintiff as specified rate during the period the work shall remain unfinished after expiry of the next date. This Clause 2 considered by the Hon'ble Supreme Court as pari materia with the clause of the present case. The Hon'ble Supreme Court has further observed that "it thus appears clear that though the time was not of essence of contract the respondent-defendant did not fix any further period making the time essence directing the appellant-plaintiff to complete the work within such period inserted it reasonable contract straight away by the letter August 27, 1956. The said action on the part of the respondent-defendant was clearly illegal and wrongful and thereby the defendant had committed the breach of the contract with the result that there could be no forfeiture of the security deposit. Therefore, in the facts of the present case also, admittedly the time has not been made the essence of the contract and the order has been passed levying the compensation and also for termination of the contract. The compensation has been levied as per the order dated 17.01.1984 at Exh.90 levying the compensation of Rs.100/- per day with effect from 27.01.1983 to 31.08.1983 and Rs.150/- per day with effect from 01.09.1983 and

onwards. Therefore, this decision would be illegal and the amount of compensation levied which has been adjusted against the security deposit would not be proper. Clause 3(a) which provides for termination of the contract and as stated above as per the communication at Exh.91 as well as Exh.86, the plaintiff had abandoned the work. When the progress of the work was so poor and even 1/4th of the work could not be completed, it cannot be said that the order of termination of the contract was illegal. Levying of compensation as per the clause in the contract is one thing and terminating the contract as per clause in the agreement is another thing. Therefore, though the security deposit could not have been adjusted in the facts of the present case, it cannot be said that the order terminating the contract was illegal.

16. Therefore, once the order levying the compensation has been declared to be illegal, the amount of security deposit of Rs.27,775/- is required to be refunded. Similarly, the amount of Rs.10,000/- regarding the work done but not paid and the amount of penalty to the extent of Rs.400/- and also the amount of Rs.8059.34/- on account of part rate deserves to be allowed. Further, the amount of Rs.22,080/- regarding material brought on site and could not be utilized for alleged termination of the contract cannot be accepted. It may be noted that the plaintiff has not proved that the material was lying and the same has not been utilized by any material on record. Similarly, though the plaintiff has claimed the amount of Rs.2,20,000/- by way of loss of profit at 20% on the remaining unexecuted work of Rs.11,00,000/- the

plaintiff cannot make such claim. It may be noted that the plaintiff himself was responsible for termination of the contract in as much as he could not even complete 1/4th of the work within the stipulated time. Though the time may not be the essence, the progress of the work was so poor and as discussed herein above even if it is assumed for the sake of argument that there was some lapse on the part of the defendant in providing the material even then the plaintiff could have executed the work. Further as discussed above from the receipts regarding material in unstamped register at Exh.61, the plaintiff has been supplied with the material as per the requirement. Therefore, even if there was some shortage it cannot be suggested that he could not execute the work at all or poor progress of the work as justified. Therefore, when the plaintiff himself is responsible which led for termination of the contract by the defendant, he cannot claim loss of profit. It would otherwise be amounting to give a premium. Therefore, such claim deserves to be rejected. Therefore, the plaintiff would not be entitled to claim the amount towards loss of profit for remaining unexecuted work. However, the plaintiff would be entitled to claim Rs.46,234.34/-. I, therefore, answer issue nos.1 and 2 accordingly that the order imposing the compensation/penalty was illegal. However, termination of the contract cannot be said to be illegal.”...

9. On perusal of the aforesaid finding, it appears to this Court that the learned City Civil Court on the clause of extending time to complete the work i.e extension clause in the agreement and grant of the extended time to complete the work by the R&P

department, led the learned City Civil Court to believe that time is not the essence of the contract, however, the learned City Civil Court believed that though plaintiff was granted an extended time to complete the work, nevertheless did not complete the work and rather, abandoned the work on his own, despite, he has been given reminder to accelerate the work and to complete it, therefore, according to learned City Civil Court, strictly time is not proved to be an essence of the contract, yet the underlying object of work contract was to complete the work within a stipulated time period.

9.1 Learned City Civil Court also observed that the termination order passed by the R&P department was in breach of principle of *audi alteram partem* and even by an officer not authorized to do so, and thus, no reason arise to levy compensation which adjusted the security deposit of Rs.27,775/- and Rs.10,000/- to be paid for work done but not paid and other peripheral amount of Rs.400/-, Rs.8059.34 and Rs.22,080/- regarding the material purchased and brought on site by the plaintiff. It is by these reasons, the learned City Civil Court passed the impugned judgment and decree.

9.2 Denial to forfeit the security deposit on terminating the contract is based upon the Hon'ble Supreme Court's observation in the judgment reported in ***1970 (0) AIR (SC) 1955 between Maula Bux vs. Union of India***, which propounds that the security deposit could not have been forfeited which the contractor has guaranteed for due performance of the contract with the party complaining breach of contract. It is further held by the Hon'ble Supreme Court that if loss can be determined in terms of money,

the party claiming the compensation must prove the loss suffered by him, but forfeiting the penalty to justify own cause is a penal action taken without being determined.

10. Having heard learned Advocate for both the sides and considering the submissions, the fact remains that learned Advocate Mr. Paras Sukhwani and learned AGP Ms. Kinjal Vyas failed to bring any substantive point of evidence or facts which would assist their case. In the impugned judgment, the learned City Civil Court in comprehensive reasoning addressed all the issues and did not allow the State Government to recover the security deposit as penalty and refunded the same to the plaintiff. At the same time, plaintiff failed to prove that he could not complete the work within the stipulated time period, even after being given extended time period, on failure to perform the reciprocal promises by the State Government. The plaintiff despite being given sufficient time, sufficient infrastructure and all the requisites, as per the terms and conditions of the agreement, could not progress to 1/4th of total work. Having failed to show and establish any reason, the plaintiff cannot claim that he has suffered the loss of profit or any other loss without bringing any actual and conclusive evidence. In the aforesaid reasons, this Court finds no reason to interfere with the impugned judgment and decree, as this Court concurred with the reasons assailed by the learned City Civil Court in reaching to the impugned judgment.

11. In para 13 of the judgment in case of *Laliteshwar Prasad Singh and Others vs S.P. Srivastava (Dead) Through Legal*

Representatives, reported in 2017 (2) SCC 415, the Hon'ble Supreme Court held that if appellate Court concurs with the finding of the learned trial Court, the learned trial Court does not require to re-write the reasons to confirm the impugned judgment. Para 13 is extracted as under:

*...“13. An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of first appellate court, in **Vinod Kumar v. Gangadhar (2015) 1 SCC 391**, it was held as under:-*

*“12. In **Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179**, this Court held as under: (SCC pp. 188-89, para 15)*

‘15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties

for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.'

*The above view has been followed by a three-Judge Bench decision of this Court in **Madhukar v. Sangram** (2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings."*

12. For the foregoing reasons, both the captioned appeals fails and stands rejected. Impugned judgment and decree is confirmed. Interim relief, if any, in the captioned appeals stands vacated. Record and proceeding is ordered to be sent back to the learned City Civil Court forthwith. Registry to maintain a copy of this order in both the appeals.

PARMAR KRISH

sd/-
(J. C. DOSHI,J)