RESERVED ON 08TH JULY 2026

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF JULY, 2026

PRESENT

THE HON'BLE MR. VIBHU BAKHRU, CHIEF JUSTICE

AND

THE HON'BLE MRS. JUSTICE K.S. HEMALEKHA

COMMERCIAL APPEAL NO.182 OF 2025

BETWEEN:

M/S. BSR INFRATECH INDIA LTD.,
A COMPANY INCORPORATED UNDER
THE COMPANIES ACT 1956,
REPRESENTED BY MR. SHACHINDRA S.
HAVING ITS REGISTERED OFFICE AT:
#10-27, YEDITHA, MANDAPETA (M),
EAST GODAVARI (DIST.),
ANDHRA PRADESH – 533 234
AND HAVING ITS CORPORATE
OFFICE AT: #851, D BLOCK,
15TH CROSS, SAHAKARNAGAR,
BENGALURU-560092.

…APPELLANT

(BY SRI. PRADEEP NAYAK, ADVOCATE)

AND:

INDIAN OIL CORPORATION LTD.,
HAVING ITS REGISTERED OFFICE AT:
INDIAN OIL BHAVAN,
G-9, ALI YAVAR JUNG MARG,
BANDRA (EAST), MUMBAI-400051
AND HAVING ITS STATE OFFICE AT:
INDIAN OIL BHAVAN,
NO.29, KALINGA RAO ROAD,
(MISSION ROAD),
BENGALURU-560027

REPRESENTED BY
R. GANAPATHI SUBRAMANIAN.

…RESPONDENT

(BY SRI. DHANANJAY V. JOSHI, SENIOR ADVOCATE A/W
MS. KAVITHA DAMODARAN, ADVOCATE FOR C/R)

THIS COMAP IS FILED UNDER SECTION 13(1-A) OF THE COMMERCIAL COURTS ACT, 2015 PRAYING TO SET ASIDE THE IMPUGNED JUDGMENT AND DECREE DATED 24.01.2025 PASSED BY THE LEARNED LXXXVI ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, COMMERCIAL COURT, BENGALURU AND CONSEQUENTLY ALLOW THE SUIT IN COM.O.S.NO.1490/2022 FILED BY THE APPELLANT BEFORE THE LEARNED LXXXVI ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, COMMERCIAL COURT, BENGALURU.

THIS COMAP HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT THIS DAY, JUDGMENT WAS PRONOUNCED AS UNDER:

CORAM: HON'BLE MR. VIBHU BAKHRU ,CHIEF JUSTICE
and
HON'BLE MRS. JUSTICE K.S. HEMALEKHA

C.A.V. JUDGMENT

(PER: HON'BLE MRS. JUSTICE K.S. HEMALEKHA)

1. This Commercial Appeal, preferred against the judgment and decree dated 24.01.2025 [**impugned judgment**] passed in Com. O.S. No. 1490/2022 by the LXXXVI Additional City Civil and Sessions Judge, Bengaluru [**Commercial Court**], whereby the suit instituted by the appellant for recovery of ₹ 36,64,474 – being the balance security deposit withheld by the respondent – together with interest, came to be dismissed. Aggrieved by the dismissal of the suit, the appellant has preferred the present appeal.

BRIEF FACTS

2. The appellant, M/s BSR Infratech India Limited (the plaintiff) is a company engaged in execution of infrastructure and construction projects. The respondent, Indian Oil Corporation Limited (the defendant), is a Public Sector Undertaking engaged in the energy sector. Pursuant to Tender No. LPG/ENG/PT-281/12 floated by the respondent for civil work, pre-engineered buildings/sheds, structural and other allied works at its LPG Bottling Plant at Mysuru, the appellant's bid was accepted. A Letter of Intent dated 01.08.2012 was issued, followed by Work Order dated 06.08.2012, of a total contract value of ₹ 9,08,22,617.25. The General Conditions of Contract, the Special Conditions of Contract and the Particular Conditions of Contract, which formed part of the work order. The appellant commenced work on 11.08.2012 and completed the contractual work on 30.10.2013, and the respondent accepted the completed work.

3. During the execution of the contract, the respondent retained 10% of each running account bill towards security deposit aggregating to ₹ 97,07,341 in accordance with the agreement. As stipulated under the Particular Conditions of Contract, on the appellant's requests dated 15.11.2014 (Ex.P6) and 29.11.2014

(Ex.P7), the respondent released 50% of the security deposit, namely ₹ 48,53,670, on 21.01.2015. Since no performance bank guarantee was furnished by the appellant, the balance was retained. After the expiry of the five-year period on 30.10.2018, and on the appellant's request dated 05.11.2018, the respondent released a further sum of ₹ 11,89,196 on 06.12.2018, withholding the balance of ₹ 36,64,474. However, after expiry of the contractual warranty period, the respondent continued to withhold a sum of ₹ 36,64,474 from the security deposit. Undisputedly, the appellant had completed the contractual work on 30.10.2013. It claims that since it has fulfilled all its contractual obligations and submitted the invoice documents, it is entitled to the refund of the security deposit. However, despite repeated requests for refund, the respondent did not remit the same; it withheld the balance amount on the ground that it had been unable to avail the Input Tax Credit (ITC) under the Karnataka Value Added Tax Act, 2003 [**the Act**] on account of defective tax invoices furnished by the appellant and therefore is entitled to recover the same. The appellant disputes the said claim. It's case is that the respondent is not entitled to the said claim as it had accepted the invoices, processed the running account bills, deducted VAT at source, issued Form VAT 156, and never raised any contemporaneous objections regarding the invoices. It is stated that the alleged loss of ITC was neither attributable to the appellant nor recoverable under the contract and that clause 1.9 of the Particular Conditions of Contract did not authorise the deduction of security deposit towards such alleged statutory loss.

4. The respondent contended that the appellant failed to furnish tax invoices in the prescribed format under Rule 29(2) of the Karnataka Value Added Tax Rules, 2005 [**the Rules**], read with Section 10(4) and 29 of the Act, thereby depriving it of the benefit of Input Tax Credit (ITC) to an extent of ₹ 36,64,474. According to the respondent, the said loss is directly attributable to the appellant's default and was therefore liable to be adjusted against the security deposit in terms of the contract. It was further submitted that by e-mail dated 02.06.2015 (Ex. D-8) the respondent had called upon the appellant to issue tax invoices in the prescribed format, and by e-mail dated 21.04.2016 (Ex. P-18) had put the appellant on notice that the loss of Input Tax Credit (ITC) would be adjusted against payments due.

5. The appellant, having obtained a non-starter report in PIM No. 558/2022 from the District Legal Services Authority, Bengaluru,

instituted Com. O.S. No. 1490/2022. In the said case, the Commercial Court framed the following issues:

> "1. Whether the plaintiff proves that defendant is liable to pay an amount of Rs.36,64,474/- withhold by the defendant inspite of plaintiff had provided all requisite documentation pertaining to VAT as requested by the defendant and thereby he is liable to pay the same along with interest @ 18% per annum from due date till realization of the amount?
> 2. What order or decree?"

6. The Commercial Court answered Issue No.1 in the negative. It held that the burden lay throughout upon the appellant to prove that it had paid the tax and had submitted proper tax invoices. Accordingly, it was held that the appellant had failed to establish the submission of valid tax invoices in accordance with law, and concluded that the respondent's version was the more probable one and that the withholding of part of the security deposit was proper. The suit was accordingly dismissed with costs.

SUBMISSIONS

Submissions on behalf of the appellant

7. Learned counsel appearing for the appellant submits that the Commercial Court failed to appreciate the significance of Form VAT 156, issued by the respondent itself. Such a certificate is issued only upon deduction of VAT at source from the contractor's bill. Its issuance therefore demonstrates that the respondent had

accepted the tax invoices submitted by the appellant, processed the running account bills on their basis, deducted VAT and certified that deduction. It is submitted that while the respondent relied upon Ex. D1 and Ex. D2 to contend that the applicable Works Contract Tax [**WCT**] was 4%, its own internal calculation sheet, marked as Ex. D3, reflected the applicable rate as 5.5%, which corresponds with the rate shown in the appellant's invoices. Thus, Ex. D3 substantially corroborates the appellant's case and the respondent's allegation that the appellant had furnished incorrect or fabricated invoices is merely an allegation. It is contended that the respondent's own witness admitted in cross-examination that the respondent was required to file monthly KVAT returns. Therefore, if the invoices were defective or not in conformity with Rule 29(2) of the Rules, the respondent would necessarily have become aware of such defects immediately while filing the monthly returns. In such circumstances, the respondent could have called upon the appellant to furnish revised invoices within the statutory period. Instead the respondent accepted the invoices, released the payments under the running bills, deducted VAT, issued Form VAT 156 and remained silent for years. The respondent raised the objection only subsequently. Even thereafter, when the appellant approached the respondent to furnish the prescribed format for revised invoices, no such format was supplied. It is submitted that the respondent's witness asserted that the revised invoice formats have been provided. However, no documentary evidence whatsoever was produced in support of that assertion.

8. Learned counsel submits that in Ex. P15, the respondent itself admitted that the amount had been withheld on account of tax invoices pertaining to financial years 2012-13 and 2013-14 and not on account of any payment relating to the execution of the work. It is further contended that clause 1.9 of the Particular Conditions of the Contract authorises deduction only of compensation or other sums payable by the contractor under the contract. The alleged loss of ITC is not a contractual liability payable by the contractor, but merely a statutory consequence claimed by the respondent. Therefore, the respondent has no contractual authority to appropriate the security deposit towards such alleged loss. It is contended that although the respondent asserted that it had suffered a monetary loss of ₹ 36,64,474, it did not file any counter claim seeking recovery of the said amount. The respondent merely raised the plea by way of a defence without seeking adjudication of its alleged claim. In the absence of a counter claim, conjoint evidence establishing actual loss and proof of contractual

entitlement to recover the same from the security deposit, the respondent could not lawfully retain the plaintiff's money.

Submissions on behalf of the respondent

9. The learned Senior Counsel appearing for the respondent submits that the appellant failed to discharge the burden of proof cast upon it under Section 101 of the Indian Evidence Act, 1872 [**the Evidence Act**] (corresponding to Section 104 of the Bharatiya Sakshya Adhiniyam, 2023). It was submitted that the appellant sought recovery of ₹ 36,64,474 and therefore it was incumbent upon the appellant to establish by cogent evidence that it had complied with all the contractual and statutory requirements entitling it to the refund of the security deposit. It is submitted that the appellant failed to furnish tax invoices in the prescribed format as required under Rule 29 of the Rules read with the provisions of the Act.

10. According to the respondent, the invoices produced by the appellant did not contain the mandatory particulars prescribed under the Rules, including the TIN of the dealer and also reflected an incorrect rate of WCT. It is asserted that, the appellant being a regular dealer ought to have reflected the applicable rate of tax in its invoices. However, the invoices did not comply with the

statutory requirements. It is submitted that under the KVAT regime, ITC could be claimed only after commissioning of the project, which in the present case took place on 07.11.2014. Under Section 35 (4) of the Act, a revised return could be filed only within the prescribed period of six months namely, up to May 2015 and the last date of claiming the benefit expired on 20.06.2015. Since the appellant allegedly failed to furnish the proper tax invoices within the statutory period, the respondent permanently lost the benefit of ITC to the extent of ₹ 36,64,474. It is contended that the respondent suffered a direct financial loss solely because of the appellant's failure to furnish valid tax invoices and consequently the respondent was entitled to recover the said amount by adjusting it against the security deposit retained under the contract.

11. Relying upon clauses 1.3, 1.8 and 1.9 of the Particular Conditions of Contract, the learned Senior Counsel contends that the Corporation was entitled to deduct from the security deposit any loss, damage, compensation or other sums recoverable from the contractor and that the loss of ITC constituted a financial loss directly attributable to the appellant's contractual default and was, therefore, recoverable by the way of adjustment from the security deposit.

12. Referring to the evidence of PW1, it is submitted that during the cross-examination, the appellant admitted that there was no material to show that invoices marked as Ex. P22 series had actually been delivered to the respondent and that PW1 also admitted that the revised invoices had subsequently been prepared and forwarded to the respondent, but the said revised invoices were not produced before the court and that these admissions, according to the respondent, substantially discredit the appellant's case.

13. Further, it is contended that the comparison between Ex. P-22 series and Ex. D-1 and Ex. D-2 materially differ. The discrepancy in WCT rates and other statutory particulars clearly demonstrated that the appellant had failed to produce genuine and valid tax invoices. It is argued that the burden of proof never shifted to the respondent because the appellant had failed to establish the foundational facts necessary to make out its claim.

14. Reliance is placed on the decisions of the Supreme Court in **Anil Rishi vs Gurbaksh Singh**[1], **Smriti Debbarma (Dead) through L.R vs Prabha Ranjan Debbarma**[2] and **Mohd.**

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[1] (2006) 5 SCC 558
[2] (2023) 19 SCC 782

Abdullah Azam Khan vs Nawab Kazim Ali Khan[3] to contend that the initial burden under Section 101 of the Evidence Act always rests upon the plaintiff and that onus shifts to the defendant only after the plaintiff establishes a *prima facie case*.

REASONS AND CONCLUSION

15. The relationship between the parties is contractual and is governed by the General Conditions of Contract and Particular Conditions of Contract. There is no dispute regarding the award of contract, execution of the agreement, completion of the work by the appellant on 30.10.2013, acceptance of the completed work by the respondent, or deduction of 10% of their running account bills towards security deposit. It is equally undisputed that substantial portion of the security deposit was released by the respondent and that only ₹ 36,64,474 continues to remain withheld.

16. The principal question that arises is, whether the respondent has established a lawful contractual right to retain the said amount on the ground that it allegedly suffered loss of ITC under the Act on account of defective tax invoices furnished by the appellant.

17. The Commercial Court proceeded on the footing that entire burden of proof remained upon the appellant under Section 101 of

[3] (2022) 20 SCC 233

the Evidence Act throughout the trial. Such an approach is legally unsustainable. It is settled law that initial burden rests upon the plaintiff to establish its entitlement to refund the security deposit. However, once the plaintiff proved the foundational facts – execution of the contract, completion of the work, expiry of the warranty period and repeated demands for refund – the onus shifted to the defendant to justify its continued withholding of the balance amount. The Supreme Court in **Anil Rishi** (supra) has held that while the legal burden remains on the plaintiff, the evidentiary onus shifts once the plaintiff establishes a *prima facie* case and observed at para Nos. 8, 9 and 19 as under :

> "8. The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:
>
> > "101. *Burden of proof.*—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
> >
> > When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."
>
> 9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be an exception thereto. The learned trial court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written

> statement denied and disputed the said averments made in the plaint.
>
> x x x
>
> 19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (*i*) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (*ii*) to make that of establishing a proposition as against all counter-evidence; and (*iii*) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same."

18. According to the respondent, the appellant has not discharged the initial burden that rested upon it and thus the onus did not shift upon the respondent. This contention is unacceptable. Once the appellant established its contractual entitlement, it became incumbent upon the respondent to prove that the amount had been lawfully withheld under the contract.

19. The defence of the respondent is founded entirely upon the allegation that the appellant had failed to furnish tax invoices in conformity with Rule 29 of the Rules, thereby resulting in loss of ITC. The respondent was required to establish not merely that

there were defects in the invoices, but also that such defects directly resulted in denial of ITC and that such loss was contractually recoverable from the appellant. The evidence when perused does not establish this essential chain of causation. The appellant pleaded in its plaint at para Nos. 23 and 24 as below :

> "23. However, it is submitted that such grounds are untenable in fact as well as in law, and that the Defendant has no right whatsoever to withhold the amounts rightfully due to the Plaintiff. The Plaintiff had provided all of the requisite documentation pertaining to VAT as requested by the Defendant at every juncture. The Plaintiff had submitted the tax invoices to the Defendant during the period in question itself, and the same has been acknowledged by the Defendant. As such, it is not open for the Defendant to now contend that the Plaintiff has failed to do so. True copies of the Tax Invoices issued by the Plaintiff to the Defendant, and the challans raised by the Defendant pertaining to the same, are produced together as **Document No. 24 series.**
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> 24. Further, when the Defendant had raised the issue of deduction of security deposit on account of VAT calculations with the Plaintiff in the parties' correspondence in 2019 and 2020, the Plaintiff had provided multiple sets of the relevant documents for the relevant time period to the Defendant. Thus, despite the delayed communications from the Defendant, the Plaintiff provided the Defendant with all the documents required by it, each time the Plaintiff was called upon to do so. As such, it is submitted that the Defendant cannot now withhold amounts lawfully due to the Plaintiff on the frivolous grounds detailed above."

20. The appellant specifically pleaded that all tax invoices and VAT-related documents had been furnished to the respondent during the execution of the contract and that, whenever further documents were sought during 2019 and 2020, the same was

furnished again. PW-1, in his examination-in-chief deposed as such:

> "6. During the execution of the tender works, it is pertinent to note that the Plaintiff raised several invoices on the Defendant, per the format prescribed under the Karnataka Value Added Tax Act, 2003 ('KVAT Act') in as much as the invoices contained a consecutive serial number, the date of issue, details of the seller (the Plaintiff), name and address of the buyer (the Defendant), the description and value of the goods, the rate and amount of tax charged, total value, and signature of selling dealer. Each of these invoices was accepted by the Defendant at the time of submission.
>
> ***** ***** *****
>
> 18. In response to this email, the Plaintiff issued letter dated 10 November 2020 and denied that the Plaintiff had received any such communication from the Defendant. The Plaintiff also clarified that as per the process followed by the Defendant itself, the Plaintiff was to submit monthly bills along with the VAT invoices to the Defendant; the Defendant would then recover the VAT from each of the bills; and would issue a Form 156 to the Plaintiff. In fact, and as stated above, the Defendant has accepted the tax invoices issued by the Plaintiff, and had made payments to the Plaintiff only upon accepting these invoices.
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> ***** ***** *****
>
> 26. It is re-iterated that the Plaintiff duly provided all documentation sought by the Defendant to it multiple times. Copies of the documentation as provided to the Defendant (bearing the Defendant's acknowledgment of receipt) has been produced with the Plaint, and the Defendant has admitted to the same by way of its statement of admission and denial. Hence, I pray that the same may be marked as evidence."

21. Therefore, the finding of the Commercial Court that the appellant introduced the case regarding submission of invoices

only during the examination-in-chief is factually incorrect and contrary to the pleadings on record. The documentary evidence produced by the appellant substantially corroborates the pleadings. The correspondence from Ex. P-10 to Ex. P-16, consistently demonstrates that the appellant repeatedly requested release of the balance security deposit and simultaneously furnished all VAT-related documents demanded by the respondent. Significantly nowhere in the contemporaneous correspondence did the respondent establish that the invoices were rejected for non-compliance with Rule 29(2) of the Rules during the statutory period.

22. On the contrary, it is not in dispute (DW-1's admission in the cross-examination), that the respondent admittedly received the appellant's invoices, processed and cleared the appellant's running account bills, deducted VAT at source and issued certificates in Form VAT 156 (Ex. P-22 series).

23. The relevant portion is extracted below:

> "It is true to suggest that Ex.P.4 is the work order issued by the defendant to the plaintiff. It is true to suggest that the said document regulates the terms and condition of contract. The attention of the witness drawn to clauses No. 6.2.1 & 6.4.1 of Ex.P.4 and asked him whether the form prescribed in the said clauses have been furnished to the plaintiff. Witness answers that such forms have been furnished by the defendant to the plaintiff. We have sent the

> said format through the email. The said email is not the part of the record. I do not know the fact that whether we have responded to Ex.D.4 email. I do not know whether we have provided the format prescribed in clauses 6.2.1 and 6.4.1 to the plaintiff or not. I am not aware that when the defendant has made payments to the plaintiff as per Ex.D.3. The defendant regularly submitted monthly returns through K-VAT. Within 20th day of succeeding month we have submitted K-VAT returns to the payments shown in Ex.D.3. The defendant can produce the said VAT returns to the court. Witness again states that the defendant has not filed K-VAT returns to the payments shown in the Ex.D.3. The plaintiff had submitted wrong invoices therefore we could not able to file K-VAT returns and could not able to get the Input Tax Credit. I do not know that the defendant asked for the revised invoice from the plaintiff as per Ex.D.4 for the first time. <u>It is true to suggest that the plaintiff has raised invoices and sent the same to the defendant, the defendant without raising any objections has cleared all the invoices</u>. It is not true to suggest that for the first time the defendant intimated the plaintiff with regard to adjustment of Rs. 36,64,473.64 through Ex.D.6. I do not know on which day for the first time we intimated the plaintiff with regard to adjustment of Rs. 36,64,473.64. It is not true to suggest that the defendant suffered loss due to its own delay and negligence."

(emphasis supplied)

24. The significance of Form VAT 156 – the certificate of tax deduction prescribed under Rule 44(3) of the Rules, issued in respect of deduction at source under Section 9-A of the Act – cannot be ignored. The issuance of Form VAT 156 necessarily presupposes that the respondent accepted the invoices for the purposes of deducting tax at source. If the invoices were fundamentally defective or not in conformity with the statutory

requirements, nothing prevented the respondent from rejecting the invoices, refusing to process the bills or calling upon the appellant to furnish corrected invoices before making payment. Having accepted the invoices, deducted VAT and issued statutory certificates, the respondent cannot, after lapse of several years, contend that the very invoices acted upon by it were invalid.

25. Equally significant is the evidence of DW-1 examined by the respondent, who admitted that respondent was filing monthly KVAT returns. If that be so, any discrepancies in the invoices would necessarily have come to the respondent's notice immediately at the time of filing those returns. The respondent could then have promptly required the appellant to issue revised invoices within the statutory period prescribed under the Act, instead the respondent remained silent. The appellant has consistently asserted that it even requested the respondent to furnish the prescribed format or revised invoices. Though the respondent witnesses claim that such formats have been supplied, no documentary evidence whatsoever has been produced to substantiate that assertion. An adverse inference must therefore be drawn against the respondent.

26. The Supreme Court In **Smriti Debbarma** (supra), has held at para No. 37 as under :

> "37. The burden of proof to establish a title in the present case lies upon the plaintiff as this burden lies on the party who asserts the existence of a particular state of things on the basis of which she claims relief. This is mandated in terms of Section 101 of the Evidence Act, which states that burden of proving the fact rests with party who substantially asserts in the affirmative and not on the party which is denying it. This rule may not be universal and has exceptions, but in the factual background of the present case, the general principle is applicable. In terms of Section 102 of the Evidence Act, if both parties fail to adduce evidence, the suit must fail. Onus of proof, no doubt shifts and the shifting is a continuous process in the evaluation of evidence, but this happens when in a suit for title and possession, the plaintiff has been able to create a high degree of probability to shift the onus on the defendant. In the absence of such evidence, the burden of proof lies on the plaintiff and can be discharged only when he is able to prove title. The weakness of the defence cannot be a justification to decree the suit."

27. In **Mohd. Abdullah Azam Khan** (supra), it is held :

> "77. It is also to be noted at this juncture that there is an essential distinction between burden of proof and onus of proof. Burden of proof lies upon a person who has to prove the fact and it never shifts, onus of proof on the other hand, shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. For instance, in a suit for possession based on title, once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant, it is for the defendant to discharge his onus and in the absence thereof, the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title, vide *R.V.E. Venkatachala Gounder* v. *Arulmigu Viswesaraswami & V.P. Temple* [(2003) 8 SCC 752] , SCC at p. 768, para 29.
>
> 78. In terms of Section 102 of the Evidence Act, the initial burden to prove its claim is always on the plaintiff and if he discharges that burden and makes out a case

> which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff of the same."

28. In the present facts, the onus to prove that the respondent suffered loss due to the appellant not furnishing tax invoices is on the respondent. However, the respondent has failed to establish by independent evidence that the Commercial Tax Department had actually rejected the claim for ITC solely because of the appellant's invoices. No assessment order, audit report, communication from the tax authority, rejection order, or a computation explaining how the alleged loss of ₹ 36,64,474 was quantified has been placed on record. Mere assertion of financial loss cannot substitute legal proof. In the absence of such evidence, the alleged loss remains unsubstantiated. The Commercial Court has also overlooked a material inconsistency in the respondent's evidence. While reliance was placed upon Ex. D1 and Ex. D2 to contend that the applicable WCT was 4%, the respondent's own internal calculation sheet marked as Ex. D3 reflects the rate as 5.5% which corresponds to the rate reflected in the appellant's invoices (Ex. P22). This inconsistency materially weakens the respondent's allegation that the appellant has produced fabricated or incorrect invoices. There is no reasoning accorded by the Commercial Court for ignoring Ex.

D3. The respondent has sought to justify the deduction by relying upon clauses 1.3, 1.8 and 1.9 of the Particular Conditions of Contract. Those clauses are set out as below :

> "1.3 No claim shall lie against the Corporation in respect of interest on cash deposit or depreciation thereof. The Corporation shall be entitled to deduct from the deposit any loss or damage which the Corporation may be put to by reason of any act or default recoverable by the Corporation from the Vendor and to call upon the Vendor to maintain the deposit at the original limit by making further deposits.
>
> 1.8 The refund of security deposit: The security deposit will be released after 12 months from the work completion date and receipt of performance bank guarantee valid for five years as per contract terms & conditions.
>
> 1.9 Forfeiture of SD: - All sums of compensation or other sums of money payable by the vendor may be deducted from SD. In the event of SD being reduced from the original quantum due to recoveries as aforesaid the vendor shall with in 15 days of recoveries, make good deficiency in SD either by cash or by way of Demand Draft."

29. These clauses require careful interpretation. Clause 1.3 authorises deduction only of loss or damage suffered by the Corporation by reason of any act or default of the vendor. Clause 1.8 states the refund of security deposit shall be released after 12 months from the work completion date on receipt of performance bank guarantee valid for five years as per the contract terms and

conditions. Clause 1.9 permits deduction only of compensation or other sums payable by the contractor. Neither clause confers an unrestricted right upon the respondent to appropriate the security deposit towards every financial consequence allegedly suffered by it. Before invoking those clauses, the respondent was required to establish that the appellant committed a contractual default, that such default caused the alleged loss and that the amount became contractually recoverable from the appellant. None of these essential ingredients have been established.

30. The very object of the security deposit is to secure due performance of the contract during execution and the defect liability period. It is not intended to function as a reserve fund for adjustment of every statutory liability or fiscal consequence that may subsequently arise. The respondent's own communication (Ex. P15) states that the dispute pertains to tax invoices relating to the financial years 2012-2013 and 2013-2014 and not to payments relating to the work. This admission completely undermines the contractual justification to retain the security deposit as withholding it is admittedly not on account of deficiency in execution of the work.

31. Another important circumstance which was ignored by the Commercial Court is that although the respondent alleges that it had suffered a quantified loss of ₹ 36,64,474, it did not institute an independent proceedings or file a counter claim under Order VIII Rule 6A of the Code of Civil Procedure, 1908 [**CPC**] seeking recovery of the said amount. The respondent merely raised the plea by way of defence. If according to the respondent, the appellant had become liable to compensate for the alleged tax loss, nothing prevented the respondent from seeking an adjudication of that claim. The absence of a counter claim, though not by itself a decisive, reinforces the conclusion that the alleged liability was never independently established before the court.

32. The Commercial Court also failed to apply the equitable principle embodied in the maxim ‘*nullus commodum capere potest de injuria sua propria’,* meaning that no person can take advantage of his own wrong. If the respondent had indeed been filing monthly VAT Returns and had accepted the invoices, issued Form VAT 156 and processed the payment without objections, any failure to avail the statutory benefit within the prescribed period cannot automatically be attributed to the appellant. A party cannot remain silent during the statutory period, fail to rectify the alleged defect

and thereafter shift the consequences of its own omission upon the other contracting party.

33. The evidence on record establishes that the appellant completed the contractual work, fulfilled its statutory contractual obligation, furnished the documents demanded by the respondent and repeatedly sought refund of the balance security deposit after expiry of the warranty period. While the respondent has failed to establish the contractual default, actual loss, causal connection and contractual authority necessary to justify withholding the amount, the Commercial Court was not justified in holding that the respondent was entitled to deduct ₹ 36,64,474 from the security deposit. The impugned judgment is unsustainable and liable to be set aside. The appellant has established its entitlement to refund of the balance security deposit of ₹ 36,64,474 and the suit deserves to be decreed with interest.

34. The appellant has claimed 18% per annum. However, awarding 18% is not sustainable as there is no contractual stipulation providing for that rate. The contract itself (clause 1.3 stated supra) specifically states that no interest shall be payable on the security deposit while it is retained. Therefore, the appellant cannot claim interest during the period for which the respondent

was contractually entitled to retain the security deposit. However, the position changes after the respondent became bound to refund the amount. The work was completed on 30.10.2013. The defect liability period expired thereafter and in any event the 5-year performance guarantee period expired on 30.10.2018. After that date, the very purpose of retaining the security deposit came to an end and the retention of ₹ 36,64,474 beyond 30.10.2018 became wrongful. Having regard to the commercial nature, the interest at 9% per annum from 31.10.2018 till date of realisation is just, reasonable and equitable and accordingly the appellant is entitled for the principal amount of ₹ 36,64,474 with interest at the rate of 9% per annum from 31.10.2018 till the date of realization. The appeal is allowed accordingly.

Sd/-
(VIBHU BAKHRU)
CHIEF JUSTICE

Sd/-
(K.S. HEMALEKHA)
JUDGE

CKL