IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.327 OF 2018
WITH
CIVIL APPLICATION NO1523 OF 2019

SHARADA RANGNATH WAHULE

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Date: 2023.12.23 14:27:24 +0530

Zilla Parishad Ratnagiri (Thr.)
Chief Executive Officer,
Ratnagiri Parshad Bhavan, Ratnagiri & Ors … Appellants

V/s.

Dada Yamaji Jadhav … Respondent

WITH
CIVIL APPLICATION NO1523 OF 2019
IN
SECOND APPEAL NO.327 OF 2018

Dada Yamaji Jadhav … Applicant

IN THE MATTER OF

Zilla Parishad Ratnagiri (Thr.)
Chief Executive Officer,
Ratnagiri Parshad Bhavan, Ratnagiri & Ors ... Appellants

V/s.

Dada Yamaji Jadhav … Respondent

Mr. Shashank C. Mangle, a/w Ms. Reena Prajapati & Mr. Abdul Azim Shaikh, Advocate for the Appellants.
Ms. Vijaylaxmi S. Nikam, Advocate for Respondent & Applicant in CAS/1523 of 2019.

CORAM : RAJESH S. PATIL, J.

DATED : 5 DECEMBER 2023

P.C.:

1. This Second Appeal filed under Section 100 of the Civil Procedure Code challenges the judgment and order passed on 10th February, 2017 by the District Judge, Khed, in Regular Civil Appeal No.58 of 2012.

2. The Appellants herein are the Original Defendants Nos.1 to 3, and the Respondent herein is the original Plaintiff/ Contractor.

3. The Appellants herein being the Zilla Parishad Ratnagiri floated a tender for the purpose of construction of a well, stand post, pipeline connecting to the same and two tanks at village Phanasu Patilwadi, Dapoli District Ratnagiri. The tender agreement was dated 25 January, 1997. The work order for the said purpose issued in the favour of Respondent / Plaintiff was dated 1 October, 1997. The work was to be completed within a period of two years, excluding four months of rainy season. The tender amount was for a sum of Rs.6,21,691/-.

4. The work was started by the Respondent / Plaintiff however due to some differences between the parties by an order dated 17 March, 1999 the contract itself was rescinded.

5. It is the further case of the Appellants / Defendants thereafter the balance work was completed through another contractor namely, Mr. Deou Chavan.

6. The Respondent / Plaintiff thereafter made their claim before

the Appellants / Zilla Parishad. However, as the Zilla Parishad was desirous of completing the work through a new contractor, the Respondent / Plaintiff had no option but to file a suit for injunction.

7. In the meantime, the Zilla Parishad appointed a new contractor Mr. Deou Chavan to complete the balance work, hence the Respondent / Plaintiff amended a suit and sought a claim of the entire amount along with interest including the amount which was forfeited.

8. The Appellants / Zilla Parishad after appointing their lawyer filed their written statement and denied the claim of the Respondent / Plaintiff. After the issues were framed Respondent examined in all three witnesses including the Respondent himself and two guards, who were meant for the purpose of protecting the suit premises.

9. The Appellants examined their section engineer to prove their case.

10. After the evidence was recorded and parties having argued their matter the Civil Judge, Senior Division Ratnagiri by his judgment an order dated 8 August, 2002 dismissed the suit of the Respondent / Plaintiff.

11. Being aggrieved by the judgment and order dated 8 August, 2002, passed by Civil Judge, Senior Division Ratnagiri, the Respondent / Plaintiff filed an appeal before this Court being First Appeal No.643 of 2006.

12. After there was a change in the pecuniary jurisdiction of this Court the First Appeal filed by the Respondent / Plaintiff was transferred to District Court at Khed, Ratnagiri.

13. The District Court Khed thereafter heard the parties in the First Appeal and by a judgment and order dated 10 February, 2017 partly allowed the Appeal, thereby setting aside the judgment and decree passed by the Trial Court. It was further directed to the defendants Zilla Parishad to pay an amount of Rs.4,78,708/-, with interest thereon a rate of 6% per annum from the date of the suit till realization of entire amount. Rest of the claims of the plaintiff were dismissed.

14. Being aggrieved by the Judgment an order dated 10 February, 2017, the Zilla Parishad, Ratnagiri, filed the present Second Appeal.

15. By an order dated 14 January, 2020 passed in this Second Appeal, the Second Appeal was admitted on the following question of law.

> "Whether lower Appellate Court committed an error apparent on the face on record in casting burden on the Appellants / Defendants to demonstrate compliance of conditions of contract at Exhibit-75 ?"

16. So also on the same date i.e on 14 January, 2020 in Civil Application No.1621 of 2017 this Court directed the Zilla Parishad Ratnagiri to deposit the entire decreetal amount in this Court, the same being a money decree.

17. Subject to the deposit of the said amount within eight weeks,

this Court directed that there will be stay to the execution and implementation of judgment and order dated 10 February, 2017 passed by the District Court, Khed Ratnagiri.

18. There is no dispute between the parties that the Zilla Parishad Ratnagiri has already deposited the entire decreetal amount in this Court excluding a sum of Rs.3,00,000/- which was deposited by the Appellants Zilla Parishad at executing Court / Ratnagiri. Therefore a sum of Rs.3,00,000/- is deposited at Court of Senior Division at Ratnagiri and the balance amount of Rs.7,81,880/- by way of cheque No.165902, dated 26 February, 2020, drawn on Bank of India in this Court.

19. It has been argued before me by Mr. Mangle the counsel representing the Zilla Parishad Ratnagiri that as per clause 10 of the tender document bills were submitted every month after measurement. So also he argued before me that as per clause 3(a), the contract could be rescinded by engineer, and also the security deposit could be forfeited. It was further submitted that once an action under clause 3 is taken up, clause 3(c) would follow. It is further submitted that the notice dated 17 March, 1999 was wrongly worded as notice under clause 3(c), but in the real sense the notice should be read as notice under clause 3(a) which follows 3(c). It is also submitted by Mr. Mangle that it was the duty of the contractor to carry out measurement of the work completed by him. It is also further submitted by Mr. Mangle that there is error in the judgment of the Appellate Court when the burden was cast upon the defendant and in default of defendants proving his case the plaintiff would be set to have establish the suit claim.

20. Mrs. Nikam who appeared for the Respondent (Original Claimant) submitted that the impugned notice dated 17 March, 1999 is infact not termed as a notice it has been termed as an order. Therefore she submitted that their could never be an order without giving any kind of hearing to a party against whom such an order is passed. Mrs. Nikam further submitted that the said impugned order dated 17 March, 1999 is specifically issued under clause 3(c). She further submitted that there is no mention of clause 3(a) in the impugned order dated 17 March, 1999. She further submits that even the written statement of the Zilla Parishad records that the impugned communication dated 17 March, 1999 is under clause 3(c). She submitted that today while arguing the matter the Zilla Parishad can't change their stand and take a defence that the impugned communication is under clause 3(a). She further submitted that the right to rescind the contract is only under clause 3(a). So also forfeiture of security deposit is under clause 3(a). She therefore submitted that the impugned notice is issued terming it as an order issued under clause 3(c), is itself bad in law and therefore the same was challenged by way of a suit hence the burden shifted on the defendant Zilla Parishad to prove that they had infact not issued an order, and it was a notice under clause 3(a) of the contract, therefore the findings recorded by the Appellate Court were correct finding and there is no fault in the said findings. She further submitted that the measurement was to be done as per clause 3(c) and the same was not done by the Zilla Parishad. She further submitted that the plaintiff had infact constructed a road for which he has spend a sum of Rs.80,000/-for

which he has not raised any claim.

21. I have heard both the sides and I have considered submission of both the sides. The tender which was issued on 25 January, 1997 was for the purpose of a Well stand post, pipeline connecting the same and for two tanks. The work was to be completed within a period of two years, excluding four months rainy season. The Zilla Parishad Ratnagiri was supposed to provide cement to the plaintiff for construction of the Well and for other construction to be made by the plaintiff. Which according to the Zilla Parishad was to be supplied only if there was a demand. It is the case of the Plaintiff / Contractor that he had demanded the cement from the Zilla Parishad Ratnagiri, however the same was never supplied. According to Plaintiff Clause No.3(c) of the tender does not allowed the Zilla Parishad Ratnagiri to rescind the contract. The only clause which allows the Zilla Parishad Ratnagiri to rescind the contract, is clause no.3(a). The said act of rescinding the contract can be done only by an engineer of the Zilla Parishad Ratnagiri.

22. Admittedly the contract has been rescinded not by the Engineer, but by CEO of the Zilla Parishad Ratnagiri and the same is done under the powers of clause 3(c). So also it is not termed as a notice of rescinding a contract, it is termed as an order passed under clause 3(c).

23. Taking into consideration the fact that the power to rescind the contract was only in clause 3(a) and to be executed only by an Engineer, in the present case the same being done by a CEO that also under clause 3(c), therefore the communication dated 17

March, 1999 termed as an order is bad in law and void. I am hereby of the opinion that as far as that part is concern the plaintiff succeeded in proving that the said communication dated 17 March, 1999 is void and bad in law.

24. **It is necessary to reproduce Section 103 of Indian Evidence Act**

> The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

25. In the present Case it is the defendant who have come with a case that they had issued an order under clause 3(c) for rescinding the contract and forfeiting the security deposit. Therefore, I am of the opinion that the burden would lie on the defendants to prove that they had legally issued a Order / Notice of rescinding the contract.

26. In order to discharge the burden the Zilla Parishad Ratnagiri / defendants did examine their engineer to prove their case as per their written statement. The case however of the Zilla Parishad Ratnagiri that even though the communication dated 17 March, 1999 mentioned clause 3(c), infact clause 3(c) follows clause 3(a) of the contract. There was no answer from the Zilla Parishad Ratnagiri as regards to the power in CEO to issue a notice of rescinding the contract, when the contract specifically stated that the power to rescind the contract is only with the Engineer. Such power being issued to a CEO has not been brought on record. Therefore, in my opinion the defendants have failed to prove any

such power to the CEO.

27. Admittedly no hearing was granted to the plaintiff before issuing the order dated 17 March, 1999.

28. The defendants as per clause 3(c) was supposed to take measurement, in order to give the balance work to a new contractor. In order to give balance work to a new contractor what is expected of the Zilla Parishad Ratnagiri was that they will go ahead an measure the completed work by old Contrator. Admittedly no such step were taken by Zilla Parishad Ratnagiri. It is argued before me that the Zilla Parishad Ratnagiri infact took steps to measure the work completed by the old Contractor however they did not bring the evidence to that effect before the Trial Court.

29. Admittedly since no such document has been brought on record, the Appellate Court was right in rejecting such submission made on behalf of the Zilla Parishad Ratnagiri and has correctly decreed the suit of the plaintiff.

30. DW-1 in his cross-examination admitted that "we sent proposal to terminate the contract by letter dated 14 October, 1998 vide Exhibit-110, we had not measured the work on site before sending proposal at Exhibit-110". The certificate of the Executive Engineer as to the cost of work and other expenses incurred in getting the unexecuted work done by a new contractor and as to the value of the work so done was not brought on record.

31. The Zilla Parishad Ratnagiri infact went ahead and black listed the Plaintiff, allegedly as per condition no.3(c) of the tender

agreement. The Zilla Parishad Ratnagiri was not able to show any provision under which black listing was done.

32. The Trial Court did not consider the correct position in law and did not appreciate the clause of the tender documents. The Trial Court relied upon the panchanama. However, no panchas were examined by the Zilla Parishad Ratnagiri to prove the case of Zilla Parishad Ratnagiri about the panchanama. There is no mention of this panchanama in the written statement. Therefore the panchanama is not been proved and doubt has created about the execution of the panchanama.

33. It was the case of the of the Zilla Parishad Ratnagiri that the Plaintiff / Contractor had completed only 10% of the work assigned to him. Admittedly, even the payment of 10% was not made to the Plaintiff. The Zilla Parishad Ratnagiri has not even brought any documents on record to prove that only 10% of the work was completed by the Plaintiff / Contractor.

34. Mr. Mangle also submitted that presuming the burden was shifted on Zilla Parishad Ratnagiri of legally rescinding the contract. Even then the plaintiff had to prove that 75% of the work was completed by him. The plaintiff has examined himself in evidence and was subject to cross-examination by the Advocate of the Zilla Parishad Ratnagiri. The plaintiff has specifically come with a case that he had completed 75% of the work and it was further his case that it was the Zilla Parishad Ratnagiri as per clause 3(c) to examine and certify the work completed. As they rescinded the contract and gave the contract of the balance work

to a new contractor. This itself shows that at least some part of the contract work was completed by the plaintiff. On what basis the Zilla Parishad Ratnagiri, which is the government body gave a fresh tender work for the balance work to a new party has not been brought on record neither they have brought on record how much part of the work was balance, in order to float a new tender for the balance work. Clause 3(c) puts this burden on the Zilla Parishad Ratnagiri to measure the work before floating the new contract for the balance work. Since, the Zilla Parishad Ratnagiri even though they had measured the work, nothing has been brought on record to prove the said fact in their evidence, neither they have stated anything on that lines in their written statement. Hence, for Zilla Parishad Ratnagiri not been able to prove the said fact, there is no fault in the statement made by the Plaintiff in evidence that 75% of the work has been completed by him. The plaintiff has also specifically in para no.5 of the Plaint specially stated that he has completed 75% of the tender work. Para No.5 reads as under:

> अशा प्रकारे सदरहु फणसु –पाटील वाडी नळपाणी योजनेचे बांधकाम चालु असून सुमारे ७५ टकके वादीने पूर्ण केले आहे. या कामाकरिता वादीने बॅक ऑफ इंडिया–शाखा आकले यांचेकडून तिन लाख रुपये कर्ज काढले आहे. अन्य कोणाचेही कर्ज घेतले नाही. वादी सदरहू काम स्वत: अंगमेहनत करुन तसेच अन्य माणसाकडून करीत आहे. वादीने बॅकेकडून घेतलेला कर्जावर आज भितीस सुमाने एक लाख रुपये व्याज झाले आहे. वादीने प्रतिवादीकडून आज भितीस या कामापोटी काहीही उचल घेतलेले नाही.

35. The plaintiff has also brought on record in the Trial Court that he had taken a loan of Rs.3,00,000/- from Bank of India for executing the subject work. As the work could not proceed further he suffered lost due to which he ultimately had to stop his activity

of taking contract of Zilla Parishad Ratnagiri. The plaintiff is now 67 years of age, who was already suffered brain stroke. Taking into consideration the over all view of the matter and the reasons recorded above. According to me the, Appellate Court has not committed an error in casting burden on the Defendants to demonstrate compliance of conditions of contract at Exhibit-75, and the question of law framed is answered in negative. Hence, the Second Appeal is dismissed. No cost.

36. The sum of Rs.3,00,000/- deposited by the Zilla Parishad Ratnagiri before the Executing Court, Ratnagiri should be transferred in the bank account of the Respondent along with accrued interest thereon.

> (i) The sum of Rs.7,81,880/- deposited by the Zilla Parishad Ratnagiri in this Court should also be transferred in the bank account of the Respondent along with accrued interest thereon.
>
> (ii) The details of the bank account of the Respondent is as under.
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> Bank of India, Akale Branch Ratnagiri. Bank A/C 144310100005132.

37. All the parties to act on an authenticated copy of this order.

38. Civil Application pending or also accordingly disposed of.

(RAJESH S. PATIL, J.)