

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

ARBITRATION APPEAL NO. 12 OF 2016
WITH
CIVIL APPLICATION NO. 14220 OF 2016
WITH
CIVIL APPLICATION NO. 12942 OF 2016

Aurangabad City Water Utility Co. Ltd.,
a Company incorporated under the
Companies Act, 1956, having its registered
Office at 206 Marathanda Building, Above
Canara Bank, Dr. Annie Besant Road,
Worli, Mumbai 400 018
Through its Authorised Signatory
Mr. Nitin Wangikar

....Appellant.

Versus

Aurangabad Municipal Corporation
Through its Commissioner
a Statutory Corporation incorporated
under the Maharashtra Municipal
Corporation Act, 1949, having its
Office at Town Hall, Aurangabad.
Aurangabad - 431 001.

....Respondent.

Mr. R.F. Totala, Advocate for appellant.

Mr. A.S. Bajaj, Advocate for respondent.

WITH
ARBITRATION APPEAL NO. 13 OF 2016
WITH
CIVIL APPLICATION NO. 14221 OF 2016
WITH
CIVIL APPLICATION NO. 14156 OF 2016
WITH
CIVIL APPLICATION NO. 14155 OF 2016

Aurangabad Municipal Corporation,
Through its Commissioner,
Town Hall, Aurangabad.

...Appellant.

Versus

Aurangabad City Water Utility Company Ltd.,
[A Company incorporated under the
Companies Act, 1952], having its
Registered Office at 206,
Marathanda Building, Above Canara Bank,
Dr. Annie Besant Road, Worli,
Mumbai 0 400 018.
Through its Authorised Signatory
Mr. Nitin Purushottamrao Wangikar

... Respondent.

Mr. A.S. Bajaj, Advocate for appellant.

Mr. R.F. Totla, Advocate for respondent.

CORAM : T.V. NALAWADE, J.

DATED : 24th October, 2016.

JUDGMENT :

1) Both the appeals are **admitted**. Notice after admission is made returnable forthwith. By consent, heard both the sides for final disposal.

2) Arbitration Appeal No. 12/2016 is filed against the decision given by the learned District Judge of the District Court, Aurangabad in MARJI No. 214/2016, which was filed under section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' for short). The application

was filed by Aurangabad City Water Utility Company Limited (hereinafter referred as 'contractor' for short) against Aurangabad Municipal Corporation (hereinafter referred to as 'employer' for short). In the application, no relief, as such was given by the District Court in favour of the contractor and so, Arbitration Appeal No. 12/2016 is filed by the contractor. When Arbitration Appeal No. 12/2016 was pending before this Court, the contractor filed another application under section 9 of the Act bearing MARJI No. 326/2016 in District Court and in this application, interim relief is granted by the District Court in favour of the contractor. The same relief was claimed in the previous application which was rejected in the past. So, the decision given in MARJI No. 326/2016 is challenged by the employer by filing Arbitration Appeal No. 13/2016. In both the appeals the same agreement between employer and contractor is involved and the dispute involved is also the same. Considering the reliefs claimed in both the applications, which were filed under section 9 of the Act, this Court has heard both these appeals together.

3) In MARJI No. 214/2016, which was filed in the District Court following reliefs were claimed by the contractor.

"a) That pending the Arbitration Proceeding, this Hon'ble Court may be pleased to restrain the Respondent, their servants, agents, and subordinate officers by an Order and Injunction of this Hon'ble Court in any manner from taking any coercive action against the petitioner in respect of the Water Supply Project without following the due process as provided under the Concession Agreement dated 22/09/2011;

b) That pending the hearing and final disposal of the above Petition and pending the Arbitration Proceeding, it is just, necessary and convenient that this Hon'ble Court may be pleased to restrain the Respondent, their servants, agents and subordinate officers by an Order and Injunction of this Hon'ble Court in any manner in taking over the Project from the petitioner without following the due process as provided under the Concession Agreement dated 22/09/2011;

c) That pending the hearing and final disposal of the above petition and pending the Arbitration Proceeding, it is just, necessary and convenient that this Hon'ble court may be pleased to restrain the respondent, their servants, agents and subordinate officers by an Order and Injunction of this Hon'ble Court from invoking and/or encashing the Bank Guarantee for Rs.79.22 crores given by the petitioner through Ratnakar Bank Limited dated 30/08/2014;

- d) That pending the hearing and final disposal of the above petition, and pending the Arbitration Proceeding, it is just, necessary and convenient that this Hon'ble Court may be pleased to restrain the Respondent, their servants, agents and subordinate offices by an Order Injunction of this Hon'ble Court in any manner from obstructing, preventing and carrying out the Project of Water Supply to Aurangabad city;
- e) for ad-interim relief in terms of prayer clauses (b), (c) and (d) hereinabove;
- f) for cost of this petition;
- g) for such other or further reliefs as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case."

The District Judge made following order while disposing of the aforesaid application :-

- "1. The application is partly allowed.
- 2. Pending the arbitration proceeding, the respondent, their servants, agents and subordinate officers are restrained from taking any action against the petitioner in respect of water supply project without following the due process, as provided under the Concession Agreement, dated 22-09-2011."

- 4) In MARJI No. 326/2016, the contractor claimed

following reliefs.

- "a) The Application of the petitioner be kindly allowed with cost
- b) That pending the Arbitration Proceedings, this Hon'ble Court may be pleased to restrain the Respondent, their servants, agents and subordinate officers by way of interim major from disturbing from operation of the water project and taking illegal possession of the same, implementing and/or enforcing and taking any threatened action against the petitioners pursuant to the Termination Notice dated 01/10/2016 in respect of the Watter Supply Project at Aurangabad.
- c) That pending the hearing and final disposal of the present Application this Hon'ble Court kindly restrain, the Respondent, their servants, agents and subordinate officers from disturbing the operation/ implementation of the water supply project of Aurangabad as per the terms and conditions of the Concession Agreement.
- d) For such other or further relief as this Hon'ble Court may deem fit and proper in the circumstances of the case."

The learned District Judge has made following order :-

- "1. Application is allowed with costs.
- 2. Respondent, their servants, agents and

subordinate officers by way of interim measures are hereby restrained from disturbing from operation of the water project and taking illegal possession of the same, implementing and/or enforcing and taking any threatened action against the petitioner pursuant to the Termination Notice dated 01/10/2016 in respect of Water Supply Project Aurangabad.”

5) In Appeal No. 12/2016 filed by the contractor, the contractor has given reason for filing appeal in para No. 1 of the appeal and it is as under :

“1. Being aggrieved by the Judgment and Order dated 08/09/2016, passed by District Judge – 1 Aurangabad S.L. Pathan in M.A.R.J.I. No. 214 of 2016 filed by the Appellants u/s. 9 of the Arbitration & Conciliation Act, 1996 thereby partly allowing the Application and refusing to grant relief in terms of prayer Clauses (b), (c) and (d), the Appellant files this Appeal on the following amongst other grounds of objection which are made in alternative and without prejudice to each other:”

6) The reliefs claimed in MARJI Nos. 214/2016 and 326/2016 which were filed under section 9 of the Act in the District Court and which are already quoted show that on both

the occasions the contractor wanted to prevent the employer from taking over the project of the laying of parallel pipeline and water supply. In the first proceeding bearing No. 214/2016, the relief was refused. The observations made by the District Court that the employer was expected to follow the procedure were bound to be there as contract was not terminated, but it can be said that the relief itself was refused. The appeal against the said order of District Court was pending in this Court. In view of the aforesaid portions of the prayers made in the two applications and the nature of order made by the District Court in the first proceeding, it was not proper for the contractor to file one more proceeding like MARJI No. 326/2016 in the District Court. The contractor was claiming the same relief from this Court and the relevant portion of the appeal memo of the Arbitration Appeal No. 12/2016 is also quoted. The learned counsel for employer submitted that filing of another application under section 9 of the Act was nothing but, forum shopping as the learned Judge, who had rejected the previous application was not there and other Judge was available. This submission and the aforesaid circumstances need to be kept in mind while deciding the present matters as making of the order under section 9 of the Act involves use of discretionary power. On this

point, the learned counsel for contractor submitted that the termination of contract itself gave new cause of action to the contractor and so, the second application was tenable. Though after rejection of the previous application, the contract was terminated by the employer, whether the termination gave rise to fresh cause of action for section 9 application also needs to be decided in the present proceedings. From the nature of reliefs and the terms and conditions of the contract, it can be said that there is not much force in this submission made for the contractor. The agreement, correspondence and the position of law are being quoted and discussed hereinafter.

7) The contractor is claiming relief of injunction under section 9 of the Act. For such relief, the principles which are applicable under the provision of section 38 of the Specific Relief Act, 1963 are applicable. Similarly, the limitations given in sections 14 and 41 of the Specific Relief Act need to be kept in mind. For consideration of such applications, the procedure given in Order 39 of the Civil Procedure Code needs to be used.

8) In the present matters, granting of relief of injunction would amount to enable the contractor to see that

only the contractor is allowed to execute the work of the project and this work is not withdrawn from the contractor. Such order will also allow the contractor atleast till the decision of arbitration proceeding to enjoy the fruits of the work, which may be executed by him in future and also to collect the user charges in respect of the present water supply system as provided in the contract. Thus, indirectly such order will amount to give the relief of specific performance of contract. In view of these circumstances, the provision of section 14 of the Specific Relief Act, 1963 needs to be kept in mind and the relevant portion of said section, which is 14 (1), is as under :-

"14. Contracts not specifically enforceable.-

(1) The following contracts cannot be specifically enforced, namely:-

- (a) a contract for the non-performance of which compensation in money is an adequate relief;
- (b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;
- (c) a contract which is in its nature determinable;
- (d) a contract the performance of which involves the performance of a continuous duty which the

Court cannot supervise."

9) The nature of work needs to be considered for the use of the aforesaid provision of section 14 of the Specific Relief Act. Even if the nature of work may not be such as mentioned in sub-section (1) (b) and (d), the contract cannot be specifically enforced, if it falls under section 14 (1) (a), which says that for the non performance of which compensation is adequate relief. In view of nature of relief, for the present purpose, the provision of section 41 (h) of the Specific Relief Act Act also needs to be kept in mind and it runs as under :-

"41. Injunction when refused.- An injunction cannot be granted-

(a)

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;"

10) For deciding the application under section 9 of the Act, the golden principles governing grant or refusal of temporary injunction, interim relief, which are laid down while interpreting the provisions of Order 39 Rule 1 of Civil Procedure Code need to be kept in mind. They are (i) the contractor needs to make out prima facie case, (ii) the contractor needs to show

that balance of convenience lies in favour of contractor and (iii) the contractor needs to show that irreparable loss will be caused to the contractor, if interim relief is not granted in favour of contractor. For getting the relief, it is necessary for contractor to prove all these three requirements.

11) The aforesaid provisions of the Specific Relief Act and Civil Procedure Code show that the grant of relief of temporary injunction is discretionary power of the Court. Such discretion must be exercised sparingly and only in appropriate cases. On the line of the aforesaid provisions, it can be said that in the proceeding like present one, the relief can be granted only if the arbitral proceeding itself will be frustrated if the relief is not granted. This Court has no hesitation to observe that the arbitration proceeding will not get frustrated if there is a remedy of compensation and that remedy is adequate relief under the provisions. Thus, it becomes necessary for the Courts to keep in mind that if there is adequate relief like getting compensation, there will be bar of aforesaid provisions to grant interim relief of injunction.

12) Section 28 of the Act also shows that the dispute

needs to be decided by the Arbitrator in accordance with the provisions of substantive law. Thus, the provisions of the Specific Relief Act and the Contract Act cannot be ignored while deciding the proceeding filed under section 9 of the Act. On this point reliance can be placed on the case reported as **(2007) 7 SCC 125 (Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals (P) Ltd.)** which was cited by the learned counsel for employer. The relevant observations are at paragraph No. 23 and it is as under :-

"23. The question here is whether in the circumstances, an order of injunction could be granted restraining OMM Private Limited from interfering with Adhunik Steels' working of the contract which OMM Private Limited has sought to terminate. Whatever might be its reasons for termination, it is clear that a notice had been issued by the OMM Private Limited terminating the arrangement entered into between itself and Adhunik Steels. In terms of Order 39 Rule 2 of the Code of Civil Procedure, an interim injunction could be granted restraining the breach of a contract and to that extent Adhunik Steels may claim that it has a prima facie case for restraining OMM Private Limited from breaching the contract and from preventing it from carrying on its work in terms of the contract. It is in that context that

the High Court has held that this was not a case where the damages that may be suffered by Adhunik Steels by the alleged breach of contract by OMM Private Limited could not be quantified at a future point of time in terms of money. There is only a mention of the minimum quantity of ore that Adhunik Steels is to lift and there is also uncertainty about the other minerals that may be available for being lifted on the mining operations being carried on. These are impoundables to some extent but at the same time it cannot be said that at the end of it, it will not be possible to assess the compensation that might be payable to Adhunik Steels in case the claim of Adhunik Steels is upheld by the arbitrator while passing the award."

13) One more ancillary relief is claimed by the contractor and that is the injunction to prevent the employer from invoking the bank guarantee. It is of Rs.79.22 crores. The law is well settled on this point and the Courts are not expected to lightly interfere in the right given to a party under the contract to invoke the bank guarantee. Some cases reported like **AIR 2007 SUPREME COURT 2716 [Mahatma Gandhi Sahakara Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. and Anr.]** and **AIR 1997 SUPREME COURT 1644 [U.P. State**

Sugar Corporation Vs. M/s. Sumae International Ltd.] can be cited. Law is laid down by the Apex Court that Court should be very slow in granting injunction to prevent the invoking of bank guarantee. In such cases, even if the dispute is raised about the liability of the contractor and it is the case of contractor that it is the employer who has committed the breach of contract, the right of the employer to invoke the bank guarantee remains unaffected. Thus, the law with regard to invoking of the bank guarantee weighs heavily in favour of the employer. So, there is no possibility to prevent employer from invoking Bank guarantee.

14) Let us see the relevant facts and circumstances of the present matters. Agreement involves the employer viz. Aurangabad Municipal Corporation and the agency, the contractor, appointed to discharge the duty of water supply of this Local Body. The beneficiaries of the agreement if at all it is there are the people, who are and who would be residents of Aurangabad city. However, it can be said that the project would be for the benefit of the citizens and that is the dire need of the city. This city is already having one water supply scheme and the scheme has plants and machinery for lifting the raw water

from Jaikwadi Dam situated at the distance of around 40 k.m. from the city. The water lifted from the dam is taken to the treatment plant of the present system and from there, after treatment, the water is distributed to the city by using the distribution system which is already in existence for most parts of the city.

15) By using the present system, which has the capacity of 156 MLD (Million Liters Per Day), the Corporation was supplying potable water to around one lakh legal connections. This supply is not sufficient and many more connections are required to be given. Further, there were around one lakh illegal connections which were required to be regularized to see that the user charges are collected from those persons. In view of these circumstances, the Corporation decided to use the scheme of Urban Development Department of the Government and to create one more system called as 'parallel pipeline'. So, the Corporation entered in to an agreement with the present contractor and following were the two purposes of this agreement.

- (i) To build the new bulk water pipeline with water treatment plant, and

(ii) To refurbish the existing system in the manner and to the extent set forth in the agreement.

16) Section 66-A of the Maharashtra Municipal Corporations Act, 1949 shows that it is the duty of the Local Body like Corporation to supply drinking water to the residents of the city. This duty can be discharged through any agency. Section 74 of this Act shows that the contract, if any, made by the Local Body in this regard must be in accordance with the Local Body Act and the Rules framed under it. The duty is mentioned in section 63 (20) of the Local Body Act quoted above and so, this duty was to be discharged by the contractor under the agreement in dispute. Clause 1.4 of the agreement provides that mandatory project requirements will prevail over DPR (Detail Project Report). While ascertaining the intentions of both the sides, the Court is expected to keep in mind provisions of Corporation Act also as ultimately the sufferers are the residents of this Local Body.

17) On the date of agreement, the staff of the Corporation which was around 360 was assigned for discharging aforesaid duty by using the present water supply system. This

staff was doing capital work, regular operation, maintenance of system and supplying water to the city. Under the agreement, this staff is given to the contractor on deputation. Even the tankers of the Corporation were handed over to the contractor for supplying water where there were no connections.

18) The project as described in clause 2 of the agreement has two parts viz.

- (i) Construction and rehabilitation activities - The construction was to be of the new project and the rehabilitation was to be of old system and
- (ii) Operation and maintenance period - This period was to end on the last day of concession period.

19) The concession period was of 20 years starting from appointed date viz. 1.9.2014. The period of 20 years was available in respect of the present system. The work of construction and rehabilitation activities mentioned above was to be completed within three years from the appointed date and so, the period of 17 years was available as concession period in respect of new system.

20) The agreement was entered in to on 22.9.2011. The period between the date of agreement and the appointed date was to be used as preparatory period. During this period the contractor, who is also called as concessionaire in the agreement, was expected to collect all necessary permissions (clause 5.2). During preparatory period, the contractor was also to show to the employer that he had necessary funds available to undertake the project whether by taking debt or equity. Clause 5 of the agreement shows as to which clause would take effect on the date of agreement i.e. on 22.9.2011. This clause shows that the performance security mentioned in this clause of Rs. 79.22 crores was to be given by the contractor in the form of irrevocable bank guarantee. From the clause of bank guarantee, it can be said that the bank guarantee was to be used in different ways, in different situation like (i) when work was continued, and (ii) when the contract was terminated. Here only, it needs to be observed that in the present matters the employer has terminated the contract and so, the clauses which prescribed the procedure for invoking the bank guarantee in a particular way and to a particular extent during contract period cannot be used.

21) Clause 9 of the agreement is in respect of the representations and warranties of the parties. This clause shows that there was representation from contractor that the contractor had financial standing, had capacity to undertake the project as per the terms and conditions of the agreement. Clause 13 provides as under :-

"13. BUSINESS RISKS

The Concessionaire will bear all business risks that are inherent in the financing, development, construction, operation and maintenance of the Project Facilities and maintenance of the Project Assets/Project Facility. For the avoidance of doubt such business risks include but are not limited to any risks in relation to foreign exchange borrowing and non-recovery of User Fees from End Users. It is clarified that AMC will not provide any revenue guarantee to the Concessionaire."

Clause 31 of the agreement is also relevant and it shows that economic hardship could not have been ground to suspend the work. In spite of these clauses, the contractor had suspended the work for some time on the ground that appointed day was not fixed for some time.

22) Clause 15.2 of the agreement shows as to how preparatory period already mentioned was to be used by the contractor. The relevant portion is quoted at proper place and this clause and clause 15.3 are also relevant in this regard.

23) If all the clauses of the agreement are read together, it can be said that clauses 31, 32, 33 and 34 give the circumstances and events which give rise to the cause of action and which say about the rights given to the parties when the cause of action arises. In clause 32, some events of 'material breach' are given, but they are not all such events and that can be seen from the definition of 'material breach' given in schedule

I. The definition is as under :-

"Material Breach means a breach of the obligations terms and conditions of this Agreement or covenants by a party, which materially and substantially affects or is likely to affect the Project or the performance of the transactions contemplated by this Agreement and has or is likely to have a Material Adverse Effect, including those events specifically identified as Material Breaches in the Agreement and including a breach of the Parties' material obligations under the Water Payment Reserve Account Agreement as detailed in Clause 8.2 of the Water Payment

Reserve Account Agreement; "

24) In clause 33, grounds for termination of contract are given. One such ground is material breach. The learned counsel for employer drew the attention of this Court to clause 33.1 (b). This clause runs as under :-

"33.1 Concessionaire Event of Default

The following events or circumstance will constitute Events of Default of the Concessionaire (**"Concessionaire Events of Default"**)

(a)

(b) breach of any express representation or warranty by Concessionaire where such breach is not remedied within 90 (ninety) days of receipt of written notice from AMC specifying such breach and requiring the Concessionaire to remedy the same or, if such breach is incapable of cure and such express representation and warranty is material, immediately upon being given written notice by AMC;

(c)"

Other clauses in this regard are clauses 9, 9.1 (c), 9.1 (d) and 13. These clauses are important as it is the case of employer that the contractor has no financial capacity to execute the work and due to this circumstance, the work is not executed and the

contractor may not be able to execute the work within given time. On the other hand, it is the case of contractor that the funds are not released by the employer as per the agreement and due to that, the progress of execution of work of new system and rehabilitation of old system is slow. The aforesaid clauses prima facie show that it is not open to the contractor to say that he needs to be given funds and grants first. In any case, the correspondence which this Court is quoting would prima facie show that contractor has not invested a single pie from its own funds created either by taking debt or equity.

25) In clause 34 of the agreement, the procedure for termination is given. The procedure involves giving of notice of intention by either party to terminate the contract. The period of 30 days is required to be given in this notice and during this period, the parties are expected to consult each other. During the consultation, the parties are at liberty to agree on the steps to be taken either to renegotiate or to prevent termination. If such steps are not taken during 30 days, there is right to terminate the contract. This clause (clause 34) has no relation to any other clause like clause 37.1. In the present matter, admittedly, the contractor refused to consult the employer for

achieving the aforesaid things and the contractor wanted to refer this dispute to independent engineer or independent auditor. It is already observed that prima facie clause 37.1 has no relation to clause 34. But the contractor avoided to take such steps. Clause 37.1 shows that attempt can be made by using the mode given in this clause to settle the dispute. But, for that also, the dispute needs to be notified for taking it under clause 37. No such step was taken. There is one more circumstance. Already notice was given by the contractor for appointment of Board of Arbitrator as provided under clause 37.2. Thus, the contractor was also interested in constitution of Board of Arbitrator and not referring the matter to independent engineer or independent auditor. These circumstances show that there is no force in the contention made for the contractor that the dispute could have been taken to independent engineer or independent auditor appointed under the agreement.

26) It is the case of employer that after termination of the contract, it has taken over the project facility. But, the contractor is disputing that the project facility is taken over by employer. Clause 34.6 of the agreement is relevant in this regard. The correspondence made by the contractor, the

contentions made in the application and also the submissions show that the contractor apprehended the use of this clause against the contractor. Clauses 34.6 and 34.7 need to be read together.

27) Clause 34.7 (a) runs as under :-

"34.7 Common terms relating to the transfer of the Project Site

(a) On the expiration of the Concession Period or earlier termination, all the Project Assets, Project Facilities will be, at the discretion of AMC, handed over to AMC or its nominee on an **"as is where is"** basis and free from any encumbrances and each Party will execute the documents, if any, required to effect the same."

This clause shows that there is absolute right to the employer to take over the project facility on an 'as is where is' basis. Thus, if the contractor does not cooperate and does not follow the procedure, the employer can take over the project facility by using discretion mentioned in clause 34.7 (a). Clause 35.1 of the agreement which is 'Step-in' clause also shows that if the contractor refuses to cooperate, the employer can take over the project facility unilaterally. For this purpose, this Court has already quoted the relevant provisions of Local Body Act

showing the duty of the Corporation. Step-in clause is as under :-

"35. STEP-IN RIGHTS OF AMC

35.1 AMC Step-In Event

The provisions of this Clause 35.1 will apply in the following circumstances ("**AMC Step-In Events**)-

- (a) the Concessionaire is in breach of this Agreement and AMC acting reasonably, considers that such breach may create an immediate and serious threat to the health or safety of the End Users (or any other person), or may result in a material interruption in the supply of Potable Grade Water; or
- (b) notwithstanding that the Concessionaire has complied with all its obligations under this Agreement, AMC acting reasonably considers that circumstances exist which constitute a public emergency, or scarcity, or that it is in the public interest for AMC (or its agent) to operate or take control of the Project or part thereof.

35.2 Notice and steps to be taken by the Concessionaire

- (a) On the occurrence of an AMC Step-In Event, AMC acting reasonably may, by written notice, require the Concessionaire to take such steps as AMC considers necessary or expedient to mitigate or remedy such AMC

Step-In Event. Such steps would include requiring the Concessionaire to take suitable actions in addition to the Concessionaire's obligations under this Agreement. For the avoidance of a doubt it is expressly clarified that in acting reasonably in accordance with this Clause 35.2 (a), AMC will have due regard as to whether the Concessionaire has the ability and sufficient time to comply with any such request.

(b) Following receipt of such notice referred to in Clause 35.2 (a) above, the Concessionaire will confirm receipt of such notice and use its best endeavours to comply with AMC's requirements as soon as reasonably practicable.

(c) Any request made by AMC in accordance with this Clause 35.2 will be without prejudice to AMC's rights under Clause 33.1 or any other express right that it has under this Agreement."

28) Let us see as to how the steps were taken by either side to raise grievance/dispute. The correspondence shows that it is the employer, who took the steps as there were grievances that contractor was not making progress in executing the work of new pipeline and also the rehabilitation of the present

system. There were grievances of citizens. Virtually no concrete work was done in respect of parallel pipeline, of the new project, even after 18 months from appointed date. In view of these circumstances and the correspondence which were already made by the employer with the contractor, the notice of intention to terminate was given.

29) The termination notice by employer was given on 22.9.2016. In this notice previous references are given like letter of Corporation dated 11.12.2015, reply of contractor dated 22.12.2015, letter of Corporation dated 3.4.2016, reply by contractor dated 20.4.2016, Report of Inquiry Committee of State Government, Audit Objections of AG Nagpur of 2016, General Body resolution dated 30.6.2016, notice of intention to terminate dated 4.7.2016, reply given by the contractor dated 1.8.2016, notice given under clause 34 (1) (b) dated 12.8.2016 and other correspondence dated 23.8.2016.

30) In the termination notice, the employer contended that employer had already called upon the contractor to renegotiate the contract. The employer contended that reply given by the contractor was not satisfactory and no steps were

taken to prevent termination of agreement on the grounds mentioned in notice of intention to terminate dated 4.7.2016. The employer had informed that due to the aforesaid correspondence and lack of interest on the part of the contractor to take steps, the agreement was terminated with immediate effect.

31) After giving notice of termination, the employer sent another letter dated 3.10.2016 and informed the contractor that the project facilities were taken over and the system was being operated by employer. In this letter, request was made by the employer to the contractor to transfer the assets and facilities as provided in clause No. 34.6 and 34.7 to the employer. These clauses are already quoted.

32) To understand the nature of dispute, some correspondence of both the sides needs to be quoted. In the letter dated 11.12.2015 addressed to the contractor, it was informed by the employer that as many as 12 letters were sent by employer to the contractor from 1.9.2014 to 30.11.2015. The contractor was requested to refer the meeting held on 9.12.2015 also. In this letter, the employer had informed that

many times requests were made to the contractor and even warnings were given both by employer and independent engineer to the contractor as contractor had not fulfilled conditions precedents for contract, Pre-Commercial Operation Date (COD) requirements and had completely failed on following things.

(i) To either improve the availability of treated water to citizens or to improve water supply distribution system of the city from appointed date viz. 1.9.2014. The period of 15 months was over till the date of letter 11.12.2015, but nothing was done in respect of laying down the parallel pipeline.

(ii) Even the present system was not utilized to its potential by the contractor and the service had deteriorated over this period. It was informed that when the capacity of existing system was 156 MLD, the contractor was using this facility to the extent of only 135 MLD.

(iii) When before the appointed date, the employer was able to supply water either daily or on alternate day to the majority of the areas within the city, after appointed date, contractor was supplying water once in

three days in most parts of the city.

(iv) No corrective measures were taken by contractor in this regard even after repeated correspondence and warnings.

(v) The contractor had failed to achieve quarterly project milestones. For first quarterly project milestone, project grant of 21.14 crore was released by the employer only due to assurance given by the contractor that even if there was no sanction of bank loan, the contractor will make other arrangement of funds. But after the release of the funds by the employer, the contractor invested only Rs. 11 crore in the project in first quarterly milestone. That amount was not of loan or equity but it was the money collected from the present system. As the contractor was not in a position to make arrangement of funds, the work was not making progress. It was specifically informed by employer that as the work was not executed as per the first quarterly milestone, this conduct could have been treated as default under clause 18.5 of the agreement.

33) In the letter dated 11.12.2015 specific instances were quoted like even 10% consumers were not given meters in the first year of concession period, before 31.8.2015 and the milestone in that regard was not achieved. It was contended by the employer that the installation of meters was done in some cases, but it was done without having plan for maintenance of meters and due to that there were many grievances of the citizens and those grievances showed that the conduct of the contractor had created negative image for metering of water connections. It was informed that due to the grievances and the approach of the contractor, the metering work was required to be halted.

34) In the letter dated 11.12.2015, the employer had raised grievance that no steps were taken by the contractor to legalize more than 1.16 lakh illegal water connections. It was informed that this conduct can be treated as default under clause 2.1 (1) and clause 17.5 of the agreement.

35) In the same letter, it was informed by the employer to the contractor that approval of employer and also independent engineer in respect of material procurement for

most of the parts was not taken and already three letters were sent in that regard. It was informed that this conduct was also in breach of provisions of agreement.

36) It was informed by the employer that the contractor had laid distribution network of around 25 k.m., but that was not done without taking prior approval of employer and independent engineer. It was informed that it was serious irregularity.

37) In the same letter, the employer had informed that MOU with MS pipe manufacturer was not supplied to the employer and adequate quantity of MS pipes were not procured by the contractor and that had affected the progress of the work. It was informed that this can be treated as default under clause 2.1 (c) of the agreement.

38) In the same letter, it was informed to the contractor by the employer that no copy of final agreement with Jal Supply Solution India Private Limited was sent to the employer for approval and it can be treated as default under clause 21.5 of the agreement. It was informed that copy of final agreement

with Tata Projects Limited was also not supplied and there was breach of clause 21.5 (e) of the agreement.

39) In the same letter, employer had informed that expenditure on operation and maintenance of contractor was more than the expenditure which the employer was incurring in the past, prior to appointed date and no explanation was given by the contractor in that regard. According to the employer, this expenditure was excessive and it cannot be accepted.

40) It was informed by the employer to the contractor that the contractor was using only the money of the employer given under heads like AOSG of Rs. 26.60 crore, user charges of Rs. 20.08 crore, but he was not making own investment in laying down new pipeline and refurbishment of existing system. It was informed that the contractor had not supplied financial information and it was in breach of clause 21.5 (c) and (a) (ii) of the agreement.

41) It was informed by the employer to the contractor that in many cases contractor had made demand of user charges from the citizens without verifying whether there was

water connection and that had created unrest amongst the citizens. It was informed that the contractor had failed in public relation activities and in defending negative publicity and that had defamed the employer.

42) It was informed by the employer that the contractor was unnecessarily changing the team members involved in implementation of the project and due to that, work was not making progress. In this letter, contractor was asked as to why the notice of intention to terminate under clause 34.1 (a) should not be issued against the contractor.

43) On 11.3.2016 the employer sent another notice to contractor and asked the contractor as to how the contractor would complete the project work within three years given in the agreement when the period of 18 months was already over and no visible work was done by the contractor. In this letter also following specific allegations were made against the contractor.

(i) When the work of laying main lines to draw raw water was to be done of the 47 k.m., the work of only 3.66 k.m. was done.

(ii) When the work of water treatment plant of 192

DML was to be done at Farola and the lay out etc. were already approved by the employer, this work was not yet started.

(iii) When at Nakshatrawadi storage tank of 10 DML was to be constructed, no work of this tank was started.

(iv) When at 29 sites the space was handed over for construction of overhead tanks for distribution, the work of only two such tanks was started.

(v) When for distribution, pipeline of length of 1290 k.m. was to be laid, the work of only 60 k.m. was completed and it was around 3% of the work which was to be executed.

(vi) No work of transmission mains was started. Not even proposal was given by the contractor.

(vii) No proper attention was paid to the maintenance and repairs of existing system. Similarly, the work of repairs of roads where digging was done for laying the pipeline was not done.

(viii) When promise was given that atleast to two localities like Shahagunj and Delhi-Gate water supply will be done after every two days, the supply to only

few wards of these two areas was done after two days and this milestone was also not achieved.

(ix) No steps were taken immediately to install bulk water meters and due to that, it was not possible to measure the supply and use of the water by using the present system.

(x) No steps were taken to legalize the illegal water connections.

(xi) Even when the amount of more than Rs. 137.81 crore was given under different heads by the employer, the expenditure by the contractor was meager.

(xii) Excessive expenditure was done on repairs of the existing system by the contractor.

In this letter, the employer had asked the contractor to submit the detail work plan as to how the contractor was expecting and intending to complete the remaining work in remaining period of 18 months.

44) In letter dated 17.3.2016, the employer had pointed out the irregularities noticed by it in the activity like collection of user charges and depositing of the charges in the bank by the

contractor. When as per the agreement, the amount was to be deposited as per the instructions of the employer, the amount was deposited in own account by the contractor. It was the grievance of the employer that separate collection of arrears was not mentioned and there was discrepancy in the amount of Rs. 1.20 crore. Only the employer was entitled to get the arrears amount and collection charges were to be given to the contractor. The employer had informed that under the agreement, it was not possible to pay separate collection charges in respect of post appointed date and that too, in favour of third agency.

45) In notice dated 5.4.2016, the employer again reiterated that progress of the work was very slow. It was expressed that even after the aforesaid correspondence nothing substantial was done by the contractor. It was expressed that even basic work of new parallel pipeline was not done after expiry of 19 months from the appointed dated. It was expressed that most of the investment shown by the contractor was on office and building construction and not for the project. It was also expressed that the figures shown by the contractor at different times were different. These discrepancies were pointed

out by the employer to the contractor. It was specifically informed to the contractor that it was not open to contractor to say that contractor was not aware of the requirement of 12 meter water pressure at consumer connection as it was a mandatory condition. It was again informed that at 132 sites, the land was made available, but the contractor had not started work at those points. It was again informed that contractor had not supplied financial information and budget to the employer as provided in clause 21.5 of the agreement and so, the contractor had committed default. In this letter, it was again informed that there was possibility that employer would give notice of intention to terminate.

46) The employer issued notice of intention to terminate on 4.7.2016. The aforesaid contentions were quoted in this notice. Through Advocate, the contractor gave notice dated 20.8.2016 and informed that he had appointed one arbitrator to constitute the Board of Arbitrators and he asked the employer to appoint other arbitrator. Immediately after this notice, the contractor approached the District Court and expressed apprehension that the Corporation may use the clause of 'Step-in' and would take over the project.

47) The correspondence made by the contractor shows that he tried to reply the contentions made by the employer in notice by sending replies on 11.12.2015 and 22.12.2015. The contractor contended that there was no ground for sending notice of intention to terminate. The contractor denied that contractor had failed to achieve the first quarterly milestone. The contractor contended that water supply had not deteriorated. The contractor denied that contractor had committed defaults as contended by the employer.

48) The contractor contended that in the past, employer was also supplying water once in three days and that kind of supply was continued by the contractor after the appointed date. The contractor contended that contractor was trying to utilize the maximum capacity of present plant of 154 MLD. The contractor contended that only after the laying of the new parallel pipeline and completion of new project, it would become possible to supply water on daily basis.

49) The contractor admitted some defaults and he gave promise like (i) to establish computerized management system

by the end of second year, (ii) to establish computerized billing and collection by the end of second year. The contractor blamed the employer for not taking some steps like fixing appointed date for about three years from the date of agreement. The contractor contended that due to this conduct of employer, he had suffered heavy loss over manpower and overheads. The contractor denied that contractor had invested only amount of Rs. 11 crore for achieving first milestone. The contractor contended that the representatives of contractor had refused to sign on minutes of the meeting held to discuss the achievements of first milestone as the minutes were not acceptable to the contractor. Thus, even when no work was done as per the first quarterly milestone, the contractor refused to sign the minutes of the meeting.

50) The contractor contended that contractor had invested amount of around Rs. 149 crores. However, it can be said that this amount was mostly in respect of the maintenance and operation of the present system. The contractor contended that he was attempting to take loan from IDBI Bank, but the employer had not cooperated and so, the contractor could not get loan. The contractor contended that there were gaps

between employer and Government and it was necessary to create credible mechanism to appraise bank in respect of finance. Thus, the contractor was not able to raise loan and even when there are clauses of aforesaid nature in the agreement, the contractor was expecting promise from the employer with regard to the grant, release of funds.

51) In the correspondence, the contractor informed that laying down of the pipeline was started, but the approval with regard to the pipeline was pending with the employer and so, the entire procurement was held up. The contractor admitted that the work of first quarterly milestone was not achieved, but contractor blamed the employer by contending that it was due to inaction on the part of the employer. The contractor contended that approval in respect of main pipeline was given after notice dated 14.12.2015.

52) The employer had contended that contractor had not supplied drawings and designs for proposed water supply system. It was informed by the contractor that most economic design of hydraulic engine for distribution was supplied, but independent engineer and employer had emphasized the need of

mandatory condition in that regard and so, that work was delayed. According to the contractor, due to this mandatory requirement, other things like transmission main lengths and lengths of distribution system were required to be changed and it was going to change the value of the project and so, more time was necessary. Here only it needs to be observed that the mandatory condition with regard to hydraulic engine and the requirements were already informed to the contractor, but the contractor wanted to use other design. This approach of the contractor needs to be kept in mind. The mandatory condition with regard to water pressure at consumer end is already mentioned and contractor had problem with that condition.

53) The correspondence made by the contractor by replies shows that he was informing time and again that the price of the project would increase due to few changes and for that also approval was necessary. The contractor contended that he had started installation of meters, but this activity was halted due to instructions issued by the employer. The contractor contended that the work of installing bulk water meters was pending as 'shut down' was required and for that approval of employer was necessary. Thus, the measuring of the water

collected and supplied was not possible.

54) The contractor admitted that more than one lakh connections were illegal and contended that contractor could regularized four thousand such connections. The contractor contended that he had suggested the employer to take action against them like filing criminal cases and contractor had blamed the employer for not taking such action. Thus, it was contention of the contractor that legalization was not possible.

55) The contractor had contended that it was necessary for employer to take following steps.

- (i) Factory permission for WTP,
- (ii) WBCB permission for WTP, and
- (iii) Forest permission for Headworks etc.

The contractor had contended that necessary documents were not supplied by the employer and such permissions were pending due to want of record. In this regard, it needs to be mentioned that in preparatory period, it was the contractor who was expected to take such steps, but no such steps were taken during preparatory period.

56) In subsequent correspondence, the contractor contended that bulk water meters were also installed, but they were not working due to non supply of electricity. This circumstance shows that it was virtually impossible for the Corporation to measure the water supplied by using the present system. The contractor tried to give excuse that site clearances were not given even when the sites were already handed over by the employer. The contractor claimed that he was entitled to get Rs. 27.7 crores in respect of desilting work in respect of existing wells. Thus, the contractor was raising claims in respect of works. Whether such work was extra item, needs to be ascertained by the Arbitrator. Further, from the correspondence made by the contractor, it can be gathered that contractor was not specific about the exact work done in respect of new pipeline, parallel pipeline. His so called investment was only on maintenance and operation of present system and the contractor was collecting the charges from the users of the present system.

57) In respect of the new project, the sum and substance of the case of the employer is as follows :-

- (i) No work at all is done by the contractor when by spending Rs. 18.33 crores pure water pumping

machinery was to be installed (work done 0%).

(ii) The work of Rs. 11.49 crore of pure water raising main is done when the total work which is to be done is of Rs. 106.39 crores and over 12.16 k.m. (work of around 10% done till the expiry of 19 months of appointed date).

(iii) Approach channel work of Rs. 74.92 lakh is to be done, but no work at all is done (0% work done).

(iv) Jackwell and pump house work of Rs. 61.16 Crore is to be done, but no work at all is done (0% work done).

(v) Approach bridge, bund retaining wall work of around Rs. 5.76 crore is to be done, but no work at all is done (0% work done).

(vi) Work of raw water pump machinery worth Rs. 18.62 Crore is to be done, but no work done (0% work done).

(vii) When work of raw water raising main of 27 k.m. length is to be done, the work done is of only 20.81 crore as against the total work of 191.52 crores (work of 11% done).

(viii) When work of water treatment plant of Rs. 25.89

crore is to be done, no work at all is done (0% work done).

(ix) When work of transmission mains/feeder of Rs. 57.89 crore is to be done, no work at all is done.

(x) When work of distribution system of 330.76 crores is to be done, the work of only 11.58 crore is done, which is less than 5%.

(xi) When work of master balancing reservoir worth Rs. 3.38 crores is to be done, no work at all is done.

(xii) When work of MS pipes of worth Rs. 1.92 Crores is to be done, no work at all is done.

(xiii) When work of elevated service reservoir worth Rs. 7.57 crore is to be done, no work at all is done.

(xiv) When the work of house service connection worth Rs. 23.62 crores is to be done, the work of only Rs.59 lakh is done, which is less than 4% and

(xv) When work of metering worth Rs. 71.48 crore was to be done, only work of 3.15 Crores is done which is around 5%.

58) There is apparently no satisfactory explanation of the contractor in respect of aforesaid circumstances. Thus,

apparently no visible work as such in respect of the new project, new pipeline is done by the contractor even after 19 months from appointed date. When there was the preparatory period available to the contractor, the work which was to be done by the contractor was not done by the contractor even after appointed date. The contractor paid attention only to existing system and that too, for the collection of user charges. Thus, when around 50% time is over, even 5% work is not executed by the contractor. Due to this, the employer is feeling that the contractor may not be able to execute the work and the contractor is not capable of doing that work. If the employer is feeling that due to such approach of the contractor the completion of the parallel pipeline project is not possible within fixed period and the contractor will not do it even if further period is given, for the present purpose, it can be said that there were grounds for employer to take action like termination of the contract. However, it will be the job of the arbitrator to decide as to who was at fault. For the present purpose, it was necessary for the contractor to make out prima facie case and it can be said that the contractor has failed to make out prima facie case. When it is the statutory duty of the employer to supply drinking water to the citizens, the Court is not expected to intervene

when the employer is feeling that the sufferers will be citizens if the present contract is continued.

59) Much can be said about many terms and conditions of the agreement. They apparently appear to be one sided, in favour of the contractor. Only due to such terms and conditions, it became possible for the contractor to collect money both from user and from employer. It can be said that the contractor did the business by using the public money. This Court has no hesitation to observe that it was not proper to give work of maintenance and operation of present system to the same contractor to whom the work of new project was to be given. Apparently, all the aforesaid problems are created due to mixing of the two works and apparently, the contractor has used this circumstance for his benefit. The balance of convenience is certainly not in favour of the contractor. As everything can be ascertained due to the nature of work, it cannot be said that irreparable loss would be caused to the contractor if injunction is not granted in favour of contractor. Injunction relief in favour of contractor will create more complications and that will cause more problems to public at large.

60) In view of the nature of work, it can be said that it will not be practicable to Board of Arbitrators to supervise the execution of work and make orders from time to time. Further, the satisfaction about the execution of the work of the employer is involved while ascertaining the proper execution of the work and so, on such disputed matters even the arbitrator is not expected to take decisions.

61) In view of the clauses of the agreement, which are already quoted, it needs to be presumed that the project facility is already taken over by the employer. In such cases, injunction is not appropriate relief and such relief cannot be granted as interim measure.

62) The learned counsel for the contractor then placed reliance on the case reported as **1990 (Supp) Supreme Court Cases 727 [Wander Ltd. and Anr. Vs. Antox India P. Ltd.]**. The learned counsel argued on the nature and extent of powers of Appellate Court. There cannot be any dispute over the proposition made by the Apex Court in this regard. The same proposition can be used as against the contractor as initially no relief was given in favour of the contractor, but the contractor

preferred to make another application when new Judge came in District Court and the contractor could get virtually the same relief which was refused by the previous learned District Judge. The appeal filed by the contractor against that order of District Court was pending in this Court. The observations made by the Apex Court in this regard in reported case can not help the contractor. Reliance was placed by the learned counsel for contractor on another case reported as **AIR 2004 ORISSA 63 [The Industrial Development Corporation of Orissa Ltd. and Anr. Vs. M/s. Utkal Moulders Ltd.]**. The facts of this reported case show that the agreement was in respect of the plant of coke. The facts were totally different. In the present matter, terms and conditions of the agreement show that in no case agreement is to be treated as one of the partnership. This circumstance cannot be ignored. This Court holds that the observations made in the reported case are not at all applicable in the present matter.

63) This Court is deciding the application filed under section 11 of the Act by the contractor today itself. After making such order, two arbitrators will be available and they can appoint the third arbitrator for constitution of Board of Arbitrators. Thus,

there is no possibility of interference in the first order made by the District Court by which relief was refused in favour of the contractor. However, there is need to interfere in the second order made by the District Court in favour of the contractor by which the employer is virtually prevented from doing anything even when the contract is terminated. That order was immediately stayed by this Court. It is already observed that it is only the Arbitral Tribunal, the Board of Arbitrators, who can decide as to who was at fault and as to who is entitled to get compensation. In the result, following order is made.

ORDER

- I) Arbitration Appeal No. 12/2016 is dismissed.
- II) Arbitration Appeal No.13/2016 is allowed. The order made by the learned Judge of the District Court Aurangabad in MARJI No.326/2016 is hereby quashed and set aside. That application filed by the Contractor stands rejected. Other applications, if any, are disposed of accordingly.
- III) Learned counsel for the contractor requested for grant of stay to the possibility of invoking bank guarantee. It is refused.

[T.V. NALAWADE, J.]

ssc/