IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AURANGABAD

FIRST APPEAL NO. 3502 OF 2011

DISTRICT : DHULE

1 Atul s/o Nemichand Dhadiwal, .. **Appellants.**
Age 36 years, Occ. Business,
R/o. 51/A, Shivajinagar, Ozar,
Tq. Niphad, District Nashik.

2 Micro Vision Technologies
Siddhivinayak Row Housing Society,
Shivaji Nagar, Ozar, Tq. Niphad,
District Nashik.
Through Proprietor,
Atul Nemichand Dhadiwal.

VERSUS

1 Dhule Municipal Corporation, .. **Respondents**
Dhule, Tq. & District Dhule,
Through it's Commissioner.

2 The Commissioner,
Dhule Municipal Corporation,
Tq. & District Dhule,

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Mr. Anand Bhandari with Mr. Mangesh Deshmukh,
Advocates, instructed by Mr. Abhijit C. Darandale,
Advocate for the Appellants.

Mr. Amol S. Sawant, Advocate, for respondents.

WITH

FIRST APPEAL NO. 3611 OF 2011

1 Dhule Municipal Corporation, Dhule. .. **Appellants.**

2 The Commissioner, Dhule Municipal Corporation, Dhule.

VERSUS

1 Atul s/o Nemichand Dhadiwal, Age 35 years, Occ. Business. .. **Respondents**

2 Micro Vision Technologies
Through its proprietor :
Atul s/o Nemichand Dhadiwal,
R/o. 10, Siddhivinyak Row Houses
Society, Shivaji Nagar, Ozar,
District Nashik.

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Mr. Amol S. Sawant, for the Appellant No. 2.

Mr. Anand Bhandari with Mr. Mangesh Deshmukh, Advocates, instructed by Mr. Abhijit C. Darandale, Advocate, for respondents.

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CORAM : K.L. WADANE, J.

RESERVED ON : 10.10.2017.
PRONOUNCEMENT ON : 08.12.2017.

COMMON JUDGMENT :-

1. Parties are referred to their original status.

2. The aforesaid appeals are arising out of the order passed below Exh. 1 by learned Civil Judge, Senior Division, Dhule, in Final Decree No. 02/2010 in Special Civil Suit No. 127/2008, on 22.07.2011, by which the defendants are directed to pay an amount of Rs. 84,15,444.06 to the plaintiffs out of which an amount of Rs. 16,94,484/- is directed to be directly pay to the Income Tax Department. The defendants are also directed to pay interest at the rate of 11 % per annum on the aforesaid amount till realization of the decreetal amount.

3. Being aggrieved with the first part of the decree i.e. about payment of an amount of Rs. 84,15,444.06, the defendants came into appeal (First Appeal No. 3611/2011), whereas; being aggrieved with the second part of the decree regarding payment of interest, the original plaintiffs have preferred an appeal (First Appeal No. 3502/2011), therefore, both appeals are taken together for its disposal.

3. I have heard the arguments of Mr. Bhandari,

learned counsel appearing for the plaintiffs and Mr. Sawant, learned counsel appearing for the defendants, at length.

4. Brief facts of the case are stated as follows;

Plaintiff No. 1 is the proprietor of the plaintiff no. 2. There was an agreement between the plaintiffs and defendants dated 11.10.2005 regarding installation of 89 energy saver units. According to plaintiffs as per the aforesaid agreement the plaintiffs have installed 89 energy saver units within the Municipal limits of Municipal Corporation Dhule. However, as per the agreed terms and conditions, the defendants failed to pay the share of the profits, more particularly mentioned in the agreement. Therefore, the plaintiffs have filed Special Civil Suit No. 127/2008 for the settlement of accounts.

5. On 03.04.2010 the suit filed by the plaintiffs was decreed with costs and it is ordered that, the accounts in respect of the profit earned due to installation of the Energy Saver Units by the plaintiffs, as per the work order allotted, be taken.

The Court Commissioner shall be appointed to take and settle the above accounts.

6. Pursuance to the above order the plaintiffs filed application for Final Decree bearing No. 02/2010. It is contended by the plaintiffs that the defendant No. 1 provides the service of the street lights in Dhule city and the defendant No. 1 pays the electricity bills. To save electricity and its charges the defendants entered into agreement with plaintiffs on 11.10.2005 for installation of energy savers. Accordingly as per the agreement plaintiffs installed 89 energy savers panels in Dhule city. As per the agreement the defendant No. 1 had taken resolution dated 28.02.2005 and in pursuance of the resolution the work order was issued in favour of the plaintiffs on 13.10.2005. It was agreed between the plaintiffs and defendants that from the profit earned from the installation of energy savers, plaintiffs have to share 48 % and the defendants have to share 52 % of the profits. The said agreement was for five years.

7. As per the agreement the plaintiff installed energy savers. As per the agreement the defendants availed the facility of energy savers. Plaintiffs have given bills to the defendants to the extent of his 48 % profit. However, defendants have intentionally avoided to pay the amount to plaintiffs.

8. The defendants appeared and filed their say at Exh. 15 and denied almost all the contents of the application. According to defendants, the plaintiffs have suppressed material facts from the Court. According to defendants they have paid an amount of Rs. 47,40,797/- to the plaintiffs. On 22.09.2009 defendants paid amount of Rs. 14,65,572/- to the plaintiffs. At that time the plaintiffs have agreed that they will withdraw all the matters from the Court.

9. It is further contended that, as per the condition No. 23 incorporated in the agreement the Civil Court has no jurisdiction to entertain the claim of the plaintiffs. If, the dispute arose between

the parties then the decision of Corporation i.e. defendant No. 1 will be final and binding upon the parties.

10. Alternatively, it is contended by the defendants that, if the court comes to conclusion that the Commissioner is to be appointed then Principal Government Polytechnic, Chief Accountant, Local Funds Accounts may be appointed. The defendants also prayed that if they have paid the excess amount to the plaintiffs then the same may be recovered from the plaintiffs.

11. After considering the rival contentions of both the sides, the learned Trial Court has appointed one Mr. Agrawal, Chartered Accountant, as a Court Commissioner, to take and settle the accounts as per the preliminary decree. Accordingly Mr. Agrawal submitted his report at Exh. 33 and reported that an amount of Rs. 84,15,444.06 is recoverable by the plaintiffs from the defendants. Out of above amount an amount of Rs. 16,94,484/- is directly payable to

the Income Tax Department. Hence, balance amount of Rs. 67,20,960.06 is actually recoverable from the defendants.

12. Learned Trial Court after accepting the report has directed the defendants to pay the amount as referred above along with interest @ 11 % per annum. According to plaintiffs, in view of section 16 and 17 of the Micro, Small and Medium Enterprises Development Act, 2006, the plaintiffs are entitled for interest at three times of the Prime Lending Rate of Reserve Bank of India.

13 During the course of arguments Mr. Sawant, learned counsel for defendants has argued that the defendants have basically objected the appointment of the Court Commissioner. Inspite of the objection the learned trial court has appointed one Mr. Agrawal to take and settle the accounts between the parties. According to Mr. Sawant, learned counsel, Mr. Agrawal, Chartered Accountant has not followed the proper procedure to take the accounts. He has wrongly observed that the bills/claims submitted by the

plaintiffs are admitted by the defendants. In fact, according to Mr. Sawant, learned counsel, these are the bills submitted by the plaintiffs. Mr. Sawant, further argued that the plaintiffs are not entitled to any amount, as the plaintiffs failed to abide the terms and conditions of the agreement. So also, plaintiffs failed to observe the undertaking given by the plaintiffs during the pendency of the claim. He failed to do the energy audit to know the actual saving of the electric energy. In spite of the undertaking the plaintiffs failed to do so. Therefore, plaintiffs are not entitled to claim any amount from the defendants.

14. Mr Sawant, learned counsel has also pointed out that the Municipal Corporation has repeatedly brought it to the notice of the plaintiffs that most of the saver panels were not working and there were so many complaints from the citizens of Dhule Municipal Corporation.

15. As against this, Mr. Bhandari, learned counsel

appearing for the plaintiffs submitted that as per the terms and conditions of the agreement the defendants are liable to pay the profit earned from energy saver units to the extent of 48% to the plaintiffs. The energy saving units and its cost is only a mater of arithmetical calculations and it is payable on the date on which the electricity bill was to be paid. Mr.Bhandari,learned counsel further submitted that the preliminary decree passed against the defendants has not been challenged, therefore, now the defendants cannot questioned the legality of the preliminary decree. The final decree is consequential upon the passing of preliminary decree. Therefore, the Civil Court has jurisdiction to entertain the claim of the plaintiffs.

16. Looking to the rival submissions of both the sides it is material to mention here that the claim of the plaintiffs is totally based upon the report of the Court Commissioner (Exh. 33), which has been specifically denied by the defendants. It is therefore necessary to consider whether the report of the Court Commissioner is duly proved or not, before going to

discuss the other facts involved in the present appeals.

17. At the outset it is material to note that the defendants in their say in paragraph No. 7 have specifically contended that if the Court comes to conclusion that the Court Commissioner needs to be appointed, the Court can appoint a person like Principal Government Polytechnic Dhule, Chief Accountant, or any other expert in the field. Considering the submissions by both the sides, the learned trial court has appointed one Mr. Agrawal by order passed below Exh. 1 on 18.12.2010. This order has not been challenged by the defendants, therefore attains finality.

18. Looking to the dispute between the parties and the assessment and calculation of the energy saving units and its cost, is a matter to be examined by a person who is expert in the field. I do not think, to examine such thing a person like Chartered Account is an expert in that field.

Chartered Accountant can be said to be expert in verifying the accounts etc. However, that question is out of consideration because the order of the appointment of the Court Commissioner has not been challenged by the defendants.

19. Looking to the next aspect of the matter i.e. whether the report of the Court Commissioner (Exh. 33) is duly proved or not and whether the contents of the report, without examination of the Court Commissioner, can be considered as evidence or not, is to be taken into consideration. To consider such material aspect it is material to mention here that after filing of the report before the trial court the defendants have specifically raised their objection by filing say/objection with affidavit. By way of say and affidavit specific objection is raised in respect of the findings of the report submitted by the Court Commissioner vide Exh. 33. It is specifically contended that the claim put forth by the plaintiffs is merely a figure play, that too without any base. No energy saver audit was done to know the actual

saving of the electric energy. The energy saver units installed by the plaintiffs were faulty. In para 10 of the say/objection it has been specifically stated that calculations/accounts mentioned by the Court Commissioner in the report are false and denied by the Corporation defendants. The affidavit to that effect is sworn by the officer of the Corporation and it has also been contended that Corporation has objection to the report of the Court Commissioner.

20. In such circumstances, I am of the opinion that, particularly when the report of the court Commissioner and its contents are specifically denied by the defendants, it is for the plaintiffs to examine the Court Commissioner to prove the contents of the report. Because, the entire claim of the plaintiffs is based upon the Commissioner's report. There is no other evidence to consider the claim of the plaintiffs.

21. Mr. Sawant, learned counsel for the defendants has argued that since the contents of the

Commissioner's report (Exh. 33) are not duly proved, therefore, the plaintiffs are not entitled to any relief claimed by them.

22. As against this, Mr. Bhandari, learned counsel for plaintiffs, has relied upon the provisions of Order XXVI Rule 10 sub-rule (2). On perusal of the provisions, it appears that, *the report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with permission of the Court, any of the parties to the suit may examine the Commissioner personally in open court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation*. So, relying upon the above provisions, Mr. Bhandhari, learned counsel, submitted that the report submitted by the Court Commissioner (Exh. 33) straight way goes in the form of evidence and shall be part of the record and shall be the evidence in the suit and shall be part of the record.

23. In this behalf, it is material to mention here that the report of the Court Commissioner (Exh. 33) and its contents are seriously disputed by the defendants. Therefore, Mr. Sawant has relied upon the observations of this Court reported in *2010 (6) Mh.L.J.*, wherein; in para No. 8, there is reference of the reported matter in case of *Vadda Rajeswaramma's case* wherein it is observed as follows :

> "According to sub-rule (2) to Rule 10 of Order XXVI, the report of the commissioner and the evidence taken by him during the inspection shall be evidence in the suit and shall form part of the record. Therefore, there is no controversy with regard to admissibility of the report as evidence during the trial and making the report of the Commissioner part of record. However, before the report is made part of the record and taken as piece of evidence, it is open for the Court to examine the Commissioner on matters referred to him in his report or as to the manner in which he had made the investigation. It is open for the

parties also to examine the Commissioner or on the manner in which he had conducted the investigation. This is the only interpretation which can be placed upon sub-rule (2) of Rule 10. There is no other interpretation possible of this sub-rule. It is a different matter if neither the Court nor any of the parties takes any objection to the report. In such a situation the report becomes final and becomes part of the record and also can be taken as piece of evidence. But once a party objects to it specifically wants that the Commissioner be examined, the Court has no option but to examine the Commissioner. Unless that is done, the Commissioner's report can neither form part of the record nor it can become a piece of evidence which could be relied upon at the stage of disposal of suit."

24. This Court in the above said case has observed in para No. 9 as follows :

"The legal position cannot be disputed as stated in the rulings cited above that a Court Commissioner's report can be made a part of the record and exhibited if report is not objected to by the parties to the suit, but when question is regarding correctness of the contents of report, correctness of contents of the report can only be proved by examining writer/author of document, as held in *Bishwanath Rai vs. Sachhidanand Singh, reported in AIR 1971 SC 1949*."

25. So relying to the observations of the above cases it appears that when the defendants have specifically objected to the report of the Commissioner, then it is for the plaintiff to examine the Court Commissioner and to prove the contents of the report. It is different matter if neither the Court nor any party of the litigation have objected the report, in such situation, the report becomes final and become part of the record and also can be taken as piece of evidence. But once the party object to it specifically, in that event, the Court has no

option but to examine the Commissioner. Unless that is done, the Commissioner's report neither form part of record nor it become piece of evidence.

26. As referred earlier the entire claim of the plaintiffs is based upon the report of Court Commissioner and the plaintiffs have failed to prove the contents of the Commissioner's report (Exh. 33).

27. Looking to the nature of the litigations and huge claim made by the parties against each other, I am of the opinion, matter needs to be remanded to the Trial Court to establish the rival claims of the parties to the proceedings. In such situation, I am of the opinion, the impugned order passed by the learned Trial Court needs to be set aside and matter needs to be remanded for its disposal in accordance with law. Hence, following order is passed.

ORDER

1. Order passed below Exh. 1 by learned Civil Judge, Senior Division, Dhule, in Final Decree No. 02/2010 in Special Civil Suit No. 127/2008,

on 22.07.2011, is set aside, and matter is remanded to the Trial Court for its disposal in accordance with law.

2. The Trial Court shall dispose of the Final Decree No. 02/2010 (in Special Civil Suit No. 127/2008) in accordance with law, as early as possible, preferably within a period of six months.

3. The Trial Court shall give opportunity to both the sides to lead their evidence in support of their rival claims.

4. Parties are directed to appear before the Trial Court on 10.01.2018.

5. Record and proceedings be sent to the Trial Court forthwith.

6. First Appeal No. 3502/2011 and 3611/2017 are disposed of accordingly.

7. As the matter is remanded to the Trial Court, Civil Application No. 1800/2016 in First Appeal No. 3611/2011, is disposed of.

(K.L. WADANE, J.)

After pronouncement of judgment learned counsel submit that certain amount is lying in this Court. Hence, the amount lying in this court, if any, be remitted to the Trial Court forthwith.

(K.L. WADANE, J.)

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