

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 1768 of 2002

Sanjay M. Pawar
Aged major, Occupation: Business,
R/o. Near Aroma Theatre,
Soygaon, At Malegaon,
District Nashik.

...Appellant
(Orig.
Defendant
No.1)

Versus

1 Malegaon Municipal Council (as it
existed on the date of filing of the
suit) now : Malegaon Mun.
Corporation, through The Municipal
Commissioner Malegaon Municipal
Corporation, Malegaon, Dist. Nashik.
(Orig. Plaintiff)

...Respondents

2 Shri. Ramdas Chindha Pagare,
Age Adult, Occupation : Editor,
R/o. Ekata Printing Press,
Sangameshwar, Malegaon,
District Nashik.
(Orig. Defendant No.2)

Mr. M. M. Sathaye, for the Appellant.

Mr. S. M. Gorwadkar a/w Mr. S. M. Sabrad, for the Respondent
No.1.

CORAM : B.R. GAVAI AND
RIYAZ I. CHAGLA, JJ.

RESERVED ON: 17 July 2017
PRONOUNCED ON: 14 August 2017

JUDGMENT : (Per Riyaz I. Chagla, J.)

1. The Appellant has challenged the Judgment and Decree dated 27th February 2002, passed by the learned Civil Judge, Senior Division, Malegaon at Malegaon in Special Civil Suit No.129/1995, filed by the Respondent No.1 (Orig. Plaintiff).

2. The facts in brief are as under:

Respondent No.1 had invited tenders for awarding of contract for collection of octroi duty for the period from 16th April 1994 to 31st March 1995. Two tenders were submitted, one by the Appellant and the other by M/s. Mehanat Sales Services Private Limited (Mehanat). The tenders submitted by the Appellant was accepted despite the tender submitted by Mehanat being of a higher value. Mehanat being unresponsive and not giving commitment to furnish a bank guarantee which was a pre-condition of the contract, their tender was not accepted. The Appellant entered into a contract with Respondent No.1 on 13th April 1994. The Appellant started collecting octroi duty in terms of the contract with effect from

16th April 1994.

3. Respondent No.2, a citizen / social worker of Malegaon filed a Suit being Suit No.160 of 1994, challenging the award of the contract in favour of the Appellant and obtained ex-parte order of injunction on 27th April 1994 which was served upon the Appellant on 28th April 1994. The Appellant having been served with the injunction order, stopped the collection of octroi duty and gave charge of collection to Respondent No.1. The Appellant had filed Suit No.164 of 1994 against Respondent No.1 for damages to the tune of Rs.1.10 crores for failure on the part of Respondent No.1 to take steps to vacate the injunction order. On 16th May 1995, the injunction order was vacated by the Civil Judge, Senior Division, Malegaon, Nashik. Respondent No.1 called upon the Appellant to resume collection of octroi duty under the contract. However, the Appellant did not resume the octroi collection.

4. The Suit was filed by the Respondent No.1 on 19th October 1995, being Special Civil Suit No.125 of 1995 in the court of Civil Judge, Senior Division, Malegaon, Nashik. The Suit was

filed for damages on account of breach of contract by the Appellant. The Suit was also filed against Respondent No.2, who had obtained the injunction order in the Malegaon Court. Respondent No.1 in the Suit claimed that the injunction order was obtained by Respondent No.2 in collusion with the Appellant. The Suit has claimed damage in the sum of Rs.3,11,09,808/- against the Appellant and Rs.1,09,79,842.60/- against both the Appellant and Respondent No.2, with interest on both the amounts at 20% p.a. from the date of the Suit till realisation. In the plaint filed in the Suit on 9th October 1995, Respondent No.1 has claimed damages under three headings:

(i) The Appellant under the contract was to deposit a sum of Rs.23,35,650/- every week. The Appellant had defaulted in depositing the said amount and had deposited a total amount of Rs.23,45,991.75/- upto 20th April 1994, whilst the obligation of the Appellant was to deposit Rs.43,37,636/- upto that period. The Appellant had thus deposited a shortfall of Rs.19,92,044.25/- with the Respondent No.1. The Appellant is liable to pay interest at 20% p.a. on the said amount which

came to Rs.5,35,941.76/- upto 31st August 1994 and thus Respondent No.1 has claimed total sum of Rs.25,27,986.01/- towards that claim.

(ii) The Appellant had committed a breach of his promise to furnish a bank guarantee for Rs.1.76 crores. Respondent No.1 has claimed a sum of Rs.49,88,889/- due to the non-acceptance of the high tender offer of Mehanat which Respondent No.1 would have accepted had it been aware of the Appellant not honoring his promise to furnish the bank guarantee. The Appellant is liable to pay the said amount together with interest at 20% p.a. and a total sum of Rs.63,63,908/- towards this claim.

(iii) Respondent No.1 has made a claim for an amount equivalent to the bank guarantee of Rs.1.76 crores which the Appellant had failed to furnish. Respondent No.1 has claimed that had the Appellant furnished the bank guarantee as promised by him, the Respondent No.1 would have encashed the said bank guarantee upon the Appellant's failure to collect octroi duty from 28th April 1994. Respondent No.1 has claimed

the sum of Rs.1.76 crores together with interest at 20% p.a. which sum came to Rs.2,23,06,191.78/-.

The above three sums claimed by Respondent No.1 comes to a total of Rs.3,11,98,085/-. In addition, Respondent No.1 has claimed the sum of Rs.1,09,79,842.60 jointly and severally from the Appellant and Respondent No.2. This claim was for the joint and several liability of the Appellant and Respondent No.2 to pay the electricity and telephone charges and 50% of the salaries of the employees of Respondent No.1 engaged in collection of octroi during the contract period. Respondent No.1 had to incur this amount on the failure of the Appellant to perform the said contract owing to the injunction order obtained by Respondent No.2. Respondent No.1 has claimed interest at 20% p.a. on this decretal amount from the date of Suit till realisation.

5. The Appellant had filed a written statement in the said Suit on 20th November 1996. The Appellant had claimed that the Suit of Respondent No.1 is barred by the doctrine of estoppel and has also submitted that the claim made by

Respondent No.1 in the said Suit is untenable and grossly inflated. The Appellant has also claimed that they were served with an injunction order granted by the Malegaon Court in the Suit No.160 of 1994 filed by the Respondent No.2 and the injunction order was served on the Appellant on 28th April 1994. The Appellant had therefore to immediately surrender his right to collect octroi and gave charge to Respondent No.1 council. The Respondent No.1 had not raised any of the contentions as now raised in the Suit but had taken upon itself the work of collecting octroi. The Appellant has denied the claims made by the Respondent No.1 in the said Suit and has prayed for the Suit filed by Respondent No.1 be dismissed with costs. The Appellant has also filed an additional written statement which has dealt with the amendment carried out by Respondent No.1 in the said Suit and has claimed that by the amendment in the Plaint, the figure of Rs.5,35,947.76/- has been replaced by the figure of Rs.25,27,986.01/- which is an afterthought and illegal. The additional written statement was filed on 20th December 2001.

6. The Respondent No.1 led the evidence of one Digamber Anant Palshikar, Senior Clerk, working with Respondent No.1. The witness claimed to have knowledge of the present Suit. He claimed to have worked with the octroi department of Malegaon Nagar Palika from 1975 till 1999. He has deposed at paragraph No.15 of cross-examination at page no.198 of the Appeal paper book that "There was collusion in the Defendant Nos.1 and 2, I came to know that fact in 1994. I came to know from the discussion from the people. Some of the people had come in our office, there was discussion, so we came to know about the collusion. Now I can not tell their names. I had disclosed this fact to the C.O. and Octroi Superintendent what I heard from the people. But not in writing. In spite of they did not take any cognizance." The witness has also deposed to the issue of non-furnishing of bank guarantee and in that context at paragraph no.16 of his cross-examination at page no.200 has sated that "It is true when furnishing the guarantee was under consideration, Court order was served on the Municipality". Palshikar has further deposed to the claim of

Respondent No.1 for the higher tender amount which Respondent No.1 would have received had tender of Mehanat been accepted. In that context Palshikar at paragraph no.16 of his cross-examination at page 200 of the Appeal paper book has deposed that "It is true it was necessary for Mahanat Sales to submit four guarantees for Rs.One Crores Seventy Six Lacs at a time. It is true for submitting the tender it was important condition for furnish Bank Guarantee as a security. It is true as Mehanat Sales did not shown willingness to submit bank guarantee for like amount it was not necessary to consider it's tender and it's tender was not valid." Palshikar has also deposed to the claim of Respondent No.1 for the unpaid electricity, telephone, salaries of workers and as in examination-in-chief at paragraph no.8 stated that "I am ready to produce record regarding electricity bill, telephone bill and salaries of workers provided to the Defendant No.1 for the work of collection of octroi because due to year ending record is not available." The witness of Respondent No.1, Palshikar in the context of the non-collection of octroi duty after vacation of the interim injunction

has deposed paragraph no.9 of his cross-examination page 192 of the Appeal paper book deposed that “Then the Plaintiff informed to the Defendant No.1 as order of injunction has been vacated, you should proceed with the work of recovery of octroi and informed by way of telegram. I have produced certified copy of the issue of telegram from the post office. It is at Exhibit No.135. But the Defendant refused to accept the telegram. Then it was sent through post. Post informed that he refused to accept the same. That letter of the post office has been produced. It is at Exhibit No.136. In spite of vacating the injunction order, the Defendant No.1 failed to proceed with the work of octroi.”

7. The Appellant produced himself as witness. In the context of the non-furnishing of the bank guarantee, the Appellant has deposed in examination-in-chief at paragraph 3 at page no.215 of the Appeal paper book that “When order of injunction was served on me, at that time bank guarantee period was in existence. Whatever bank guarantee was to be given by me that was to be given as per agreement. I have not deposited the

amount of bank guarantee.” He has also deposed in context of the allegation that the Suit filed by Respondent No.2 was a Collusive Suit with the Appellant at paragraph no.2 of his examination-in-chief that “The contentions of the Defendant No.2 that I engaged Mr. R. U. Agarwal, Advocate for him is not correct. Exhibit 145 which is pursis of the Defendant No.2 is false. If I would not have served with the injunction order, I would not have left the work of collection of octroi. The Plaintiff has filed the present Suit against me on the ground, I should withdraw the Suit filed by me against them which is for damage.” The Appellant has also deposed in cross-examination to the allegation made by Respondent No.1 against the Appellant that the copy of the contract between the Appellant and Respondent No.1 had been forwarded by the Appellant to Respondent No.2. He has deposed in cross-examination at paragraph no.6 at page 222 of the Appeal paper book that “It is not true as I was sustaining losses during the course of recovery of octroi and, therefore, I supplied copy of agreement to Ramdas Chindha and managed to get injunction.”

8. Respondent No.2 has not led any evidence and/or presented himself for cross-examination. The Respondent No.2 has only filed a written statement to the said Suit. The Respondent No.2 has in the written statement opposed the Suit and stated that the Suit should be dismissed against him with costs.

9. The impugned judgment dated 27th February 2002 was passed by the Learned Judge of the Court of Civil Judge, Senior Division, Malegaon, Nashik, after considering the pleadings and evidence on record and answers the issues at paragraph no.14 in following manner:-

Sr.No.	ISSUES	FINDINGS
(1)	Does the Plaintiff prove that the Defendant No.1 filed Suit bearing Regular Civil Suit No.160 of 1994 with the help of the Defendant No.2 and there was collusion in the Defendant Nos.1 and 2 and obtained ex-parte injunction and caused damage to it?	Yes.
(2)	Does the Plaintiff further prove that the Defendant No.1 committed breach of promise by not giving pro-forma guarantee in the shape of bank guarantee to the tune of Rs.1.76 crores?	Yes.
(3)	Does the Plaintiff further prove that the Defendant No.1 committed breach of contract	Yes.

by not making weekly payment as alleged?

- | | | |
|------|--|---------------------|
| (4) | Does the Defendant No.1 prove that the Suit filed by the Plaintiff is not tenable in the eye of law? | No. |
| (4A) | Does the Defendant No.2 prove that as he is citizen of Malegaon and social worker, he has right to file the Suit Regular Civil Suit No.160 of 1994 as contended? | No. |
| (4B) | Does he further prove that the Suit of the Plaintiff bad in law due to non joinder of necessary party as contended in the Written Statement? | No. |
| (5) | Does the Defendant No.1 further prove that he abandoned the contract as performance of it became impossible? | No. |
| (6) | Does the Defendant No.1 prove that Suit filed by the Plaintiff is barred by the principles of estoppel? | No. |
| (7) | Whether the Plaintiff is entitled to partly the decree for damages as contended entitled in the plaint? | Partly entitled. |
| (8) | What order and decree? | As per final order. |

10. The impugned judgment and decree dated 27th February 2002 partially decreed the Suit in favour of Respondent No.1 for the sum of Rs.88,91,894.82/- as damages together with interest at 20% p.a. on that amount from the date of filing of Suit i.e.

11th October 1995 till realisation. The impugned judgment has

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also decreed the Suit in favour of Respondent No.1 against the Appellant and Respondent No.2, jointly and severally for the sum of Rs.1,09,79,842.60/- as damages together with the interest at rate on 20% p.a. i.e. from 11th October 1995 till realisation.

11. The Appellant being aggrieved by the impugned judgment has filed the present First Appeal on 2nd May 2002.

12. Shri. Sathaye, learned counsel for the Appellant has dealt with each of the claims of Respondent No.1 as well as the findings in the impugned judgment. Shri. Sathaye has submitted that the claims of Respondent No.1 are erroneous. Shri. Sathaye pointed out that the impugned judgment has rejected the claim of Respondent No.1 in the Suit to an amount of Rs.2,23,06,191.78/- against the Appellant for the failure on the part of the Appellant to furnish a bank guarantee for a sum of Rs.1.76 crores. Respondent No.1 had claimed that loss had been caused to it by non-furnishing of the bank guarantee and depriving Respondent No.1 from encashment of the bank guarantee on account of a breach of contract committed by the

Appellant. The impugned judgment has held that the bank guarantee was only security and could not have been encashed by Respondent No.1. Shri. Sathaye has submitted that the impugned judgment has erroneously granted the higher tender amount which would have been received from the Mehanat had the tender been accepted by Respondent No.1. This claim could not have been granted by the impugned judgment in the light of the evidence of the 1st Respondent's witness Palshikar at paragraph 16 of his cross-examination at page 200 of the Appeal paper book which has been reproduced above. Shri. Sathaye has submitted that the impugned judgment has also erroneously granted the claim of Respondent No.1 of an amount of Rs.1,09,79,842/- in respect of electricity and telephone charges and 50% of salaries of the employees which Respondent No.1 has alleged that it had to incur in the collection of octroi duty upon charge being given by the Appellant. Shri. Sathaye has submitted that this claim could not have been granted and has relied on the evidence of 1st Respondent witness Palshikar at paragraph 8, page no.192 of the Appeal paper book which has

been reproduced above. Shri. Sathaye has contended that there was no material to support this claim. Shri. Sathaye has submitted that the claim of Respondent No.1 to shortfall in octroi duty collected of the sum of Rs.25,27,986/- who has been granted by the impugned judgment by failing to take into consideration the admission on the part of the Respondent No.1 at paragraph 14 of the plaint where it is admitted that Respondent No.1 had itself collected octroi for the said period. Respondent No.1 has stated that they had collected a sum of Rs.10,89,03,174.96 towards octroi for the contractual period i.e. 16th April 1994 to 31st March 1995 and had the Appellant carried out collection of octroi duty during that period it would have received a sum of Rs.11,21,11,111/- from the Appellant. Shri. Sathaye has submitted that the Respondent No.1, had also received a sum of Rs.23,45,991/- which had been deposited by the Appellant upto 28th April 1994. Shri. Sathaye had thus submitted that an amount of Rs.8,61,946/- was the only amount which Respondent No.1 could have claimed from the Appellant in the Suit. Shri. Sathaye has relied upon the judgment of the

Apex Court in the **M/s. Murlidhar Chiranjilal V/s. M/s. Harishchandra Dwarkadas**, reported in AIR 1962 SCC 366 at paragraph 9. Shri. Sathaye has contended that the impugned judgment be set aside and decree cancelled, particularly since the injunction order was operative against the Appellant and due to which the Appellant could not perform his contractual duty of collection of octroi. He has relied on the well settled principal of law that an “act of court prejudices no one” i.e. “actus curiae neminem gravabit”. Reference can be made to the judgment of the Apex Court in **Chitra V/s. State of Kerala**, reported in (2016) 1 SCC 685.

13. Shri. Gorwadkar, learned senior counsel appearing for the Respondent No.1 has opposed the Appeal and attempted to justify the amounts claimed as and by way of damages by Respondent No.1 in the Suit. Shri. Gorwadkar has contended that Respondent No.1 is entitled to receive compensation equivalent to the bank guarantee amount i.e. Rs.1.76 crores. Shri. Gorwadkar has relied on Clause 5M of the Procedure, Forms and Terms and Conditions for appointment of agent

prescribed in Government order dated 28th February 1994. Shri. Gorwadkar has contended that the Government Order being issued in exercise of power under Section 143-A of the Maharashtra Municipal Council Act, 1965 is statutory in nature and the recovery of octroi was a statutory process with legislative sanction. Shri. Gorwadkar has submitted that an agent is obliged to give a bank guarantee upto 16% of the agreed offered amount in advance to the Municipal Council and this amount could be recovered by the Municipal Council in the event of default by the agent of the Terms and Conditions of the said contract. Shri. Gorwadkar has also sought to justify the amount claimed by Respondent No.1 being the higher tender amount which Respondent No.1 would have received had the offer of the Mehanat being accepted. Shri. Gorwadkar has contended that this amount would be in addition to the shortfall in collection of octroi duty contractually agreed upon. Shri. Gorwadkar has submitted that the Suit filed by Respondent No.2 in the Malegaon Court being Suit No.160 of 1994 was a Collusive Suit with the Appellant. Shri. Gorwadkar has

contended that Respondent No.2 had secured ex-parte injunction in collusion with the Appellant thereby relieving the Appellant from collecting octroi duty. Shri. Gorwadkar has contended that Respondent No.1 is entitled to its claims in the said Suit and that although the impugned judgment had not granted the claim of Respondent No.1 for the compensation equivalent to the bank guarantee amount i.e. Rs.1.76 crores together with interest, Respondent No.1 is still entitled to claim this amount. Shri. Gorwadkar has submitted that Respondent No.1 is not required to file cross-objection and has relied upon authorities in support of the same. Shri. Gorwadkar has also relied upon provisions of II part of Section 73 and explanation of Section 74 of the Contract Act in support of this claim. Shri. Gorwadkar has also relied upon judgments of the Apex Court in support of his contention that liquidated damages of an amount equivalent to the bank guarantee viz. Rs.1.76 crores had been agreed upon and that Respondent No.1 had a right to recover the same. Shri. Gorwadkar has also contended that the impugned judgment has justifiably upheld the rest of the claims

of Respondent No.1 including the claim to the expenses incurred by Respondent No.1 for use of their own staff for recovery of octroi till 31st March 1995 and expenses on the said machinery with interest.

14. Issues which arises for our determination and finding are as under:-

Sr.No.	ISSUES	FINDINGS
(1)	Whether Respondent No.1 is entitled to a decree for damages as claimed?	Partially entitled
(2)	Whether the impugned judgment is upheld	No.
(3)	What order and decree?	As per final order.

15. We are of the considered view that under the said contract, the Appellant was obliged to collect octroi duty of the sum of Rs.23,35,650/- and deposit the same with Respondent No.1 on a weekly basis. A failure to do so would entitle Respondent No.1 to recover the said amount with interest at the rate of 20% p.a. on the defaulted amount. It is an admitted fact

that the Appellant only deposited an amount of Rs.23,46,991.75/- with Respondent No.1, till the date of the injunction order i.e. 28th April 1994. It was the duty of the Appellant under a contract to deposit a sum of Rs.43,47,636/- over the said period and hence the Appellant paid an amount less than the contractual amount by Rs.19,90,042.25/-. This amount was recoverable by Respondent No.1 with interest at 20% p.a. as observed in the impugned judgment which has upheld this claim.

16. We are of the considered view that upon the injunction order being passed by Malegaon Court and served on the Appellant on 28th April 1994, and till the injunction order was in operation, the Respondent No.1 are not entitled to claim any loss. We are of the considered view that the above findings is not in any way affected by the contentions of Shri. Gorwadkar that the Suit No.160 of 1994 filed by Respondent No.2 is a Collusive Suit, filed in collusion with the Appellant. We are of this view that Respondent No.1 was very much a party to that Suit and still refrained from taking steps to have the injunction

order vacated. We have taken into consideration the deposition of the Respondent No.1's witness Shri. Palshikar in his cross-examination at paragraph no.15, at page 198 of the Appeal paper book which we reproduce:

“There was collusion in the Defendant Nos.1 and 2, I came to know that fact in 1994. I came to know from the discussion from the people. Some of the people had come in our office, there was discussion, so we came to know about the collusion. Now I can not tell their names. I had disclosed this fact to the C.O. and Octroi Superintendent what I heard from the people. But not in writing. In spite of they did not take any cognizance”

Respondent No.1, despite being aware of the injunction order, had acquiesced in the injunction order continuing and knowing fully well that this prevented the Appellant from collecting octroi duty under the said contract. The impugned judgment has not considered this material evidence in arriving at its conclusion that Respondent No.1 is entitled to the damages claimed for the non-performance of the said contract by the Appellant during the operation of the injunction order.

We also observe that the Appellant had himself filed a Suit, being Suit No.164 of 1994 against Respondent No.1 for damages to the tune of Rs.1.10 crores for failure on the part of Respondent No.1 to take steps to vacate the injunction order. Respondent No.1 has suppressed this material fact in the Suit filed in the Malegaon Court. We are of the considered view that had Respondent No.1 taken steps to vacate the injunction order, the Appellant would have continued with collection of octroi duty and the losses claimed by Respondent No.1 would have been avoided. We are of the view that the impugned judgment in arriving at the finding that Suit No.160 of 1994 was a Collusive Suit has failed to take into consideration the material evidence on record including the evidence of the witness of the Appellant who had deposed in paragraph no.6 of his cross-examination at page 222 of the Appeal paper book that he had not supplied the copy of the agreement to Respondent No.2 and/or managed to get the injunction. However, we are not going into the issue as to whether the said Suit was a Collusive Suit, as we are of the considered view that had Respondent No.1

taken steps to vacate the injunction order, the Appellant would have collected octroi duty and the loss claimed by Respondent No.1 would have avoided.

17. We are also of the view that it is not open for Respondent No.1 to raise its claim to compensation for the amount equivalent to the bank guarantee not furnished by the Appellant. This claim has been rejected in the impugned judgment and Respondent No.1 has accepted this claim by not challenging the impugned judgment. The witness of Respondent No.1, Palshikar has also deposed that the bank guarantee has been extended by Respondent No.1 and during its extension the injunction order came to be served. Reference is made to paragraph no.16 of his cross-examination at page 200 of the Appeal paper book. The Appellant is not liable for the loss caused to Respondent No.1 on account of the bank guarantee not being furnished as the injunction order was in operation and Respondent No.1 has not taken any steps to vacate the injunction order and/or cancel the agreement for non-furnishing of the bank guarantee from the Appellant. The

impugned judgment has also observed that the bank guarantee was towards security and has rejected the claim of Respondent No.1 that they have sustained loss of the amount equivalent to the bank guarantee. We are of the considered view that the contention of Shri. Gorwadkar by placing reliance on the Government Order dated 28th February 1994 and Section 143-A of the Maharashtra Municipal Council Act, 1965 and the reliance on the judgments of the Apex Court are misconceived as Respondent No.1 has by its own conduct given up this claim apart from the material fact that the bank guarantee was given as security as held in the impugned judgment.

18. We are of the considered view that Respondent No.1 has not suffered any losses in relation to their claim for amounts which it has alleged would have been received had it accepted the higher tender offer of Mehanat and/or that by accepting the tender of the Appellant, it has been deprived of this amounts. We are of the view that the tender of Mehanat was not accepted since Mehanat was unresponsive and failed to furnish bank guarantee under the contract. There was no loss caused to

Respondent No.1 as it had not accepted the tender offer of Mehanat. We place reliance upon the deposition of the witness Shri. Palshikar of Respondent No.1 at paragraph 16 of his cross-examination at page 200 of the Appeal paper book reproduced above. The witness has deposed that as Mehanat did not show willingness to submit bank guarantee, it was not necessary for Respondent No.1 to consider its tender and its tender was not valid.

19. We are also of the considered view that the claim of Respondent No.1 for expenses incurred by it towards electricity and telephone charges and 50% of salaries of employees in the collection of octroi duty and which was payable by the Appellant to it as the Appellant had committed breach of the said contract is also unsustainable. Particularly since there are no supporting documents to substantiate this claim as deposed by the witness of Respondent No.1 in examination-in-chief at paragraph no.8, page 192 of the Appeal paper book.

20. We are of the considered view that the only claim which Respondent No.1 would have been entitled to is for the

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shortfall in collection of octroi duty contractually agreed upon and the octroi duty payable by the Appellant to Respondent No.1 subsequent to the injunction order having been vacated on 16th March 1994. The latter amount has not even been claimed in the Suit. However, this claim of Respondent No.1 for non-deposit of the contractually agreed amount of octroi duty would also be subject to Respondent No.1 not having mitigated their losses. We accept the contention of Shri. Sathaye and the reliance placed upon the judgment of the Apex Court in **M/s. Murlidhar Chiranjilal V/s. M/s. Harishchandra Dwarkadas, reported in AIR 1962 SCC 366** at paragraph 9 on the issue of mitigation of damages. We are of the considered view that the contract in Clause 19 also contemplated mitigation of loss and Respondent No.1 has admitted in paragraph 14 of the Suit that it had collected octroi duty of the sum of Rs.1,89,03,174.96/- for the contractual period i.e. 16th April 1994 to 31st March 1995 and it would have received Rs.11,21,11,111/- had the Appellant had performed his contractual duty of collection of octroi duty. We are of the considered view that Respondent

No.1 would be entitled to the difference between these two amounts after taking into account the sum of Rs.23,45,991/- which had already been deposited by the Appellant with Respondent No.1. This would amount to a sum of Rs.8,61,946/-, which in our view would be the sum which Respondent No.1 is entitled to. We are of the considered view that the principle of law laid down in the judgment of the Apex Court in **Chitra V/s. State of Kerala (Supra)** would squarely apply to the facts of the case viz. that “act of Court prejudices no one.” We are of the considered view that the injunction order cannot prejudice the Appellant and the Appellant is not liable to Respondent No.1 for any loss allegedly suffered by Respondent No.1 due to the non-collection of octroi duty during the period when the injunction order was in operation. In addition to the sum of Rs.8,61,946/-, Respondent No.1 will also be entitled to the octroi duty which the Appellant ought to have collected upon intimation by Respondent No.1, subsequent to the vacation of the injunction order on 15th March 1995. This has been deposed to by the witness of Respondent No.1, Palshikar in

paragraph 9 at page 192 of the Appeal paper book which has been reproduced above.

21. We are of the considered view that Respondent No.1 is entitled to the octroi duty for the period 15th March 1995 till 31st March 1995 of the contractually agreed amount of deposit of Rs.23,35,650/- per week together with interest at the rate of 20% p.a. This would come to a sum of Rs.46,71,300/- for the two week period together with interest at 20% p.a. on the said amount from the date of filing of the Suit i.e. 11th October 1995 till realisation. We are of the considered view that the Appellant has been unable to give any reason as to why he had not collected the octroi duty for the period when the injunction order was no longer in operation.

22. For the reasons stated above, we allow the First Appeal and set aside the impugned judgment. The decree of the impugned judgment is substituted by the following decree:-

- (i) Appellant / Defendant No. 1 is directed to pay a sum of Rs.8,61,946/- as damages in addition to interest at the rate of 20% p.a. on that amount

from the date of filing of this Suit i.e. from 11th October 1995 till realisation.

(ii) Defendant No.1 is directed to pay a sum of Rs.46,71,300/- as non-deposit of octroi duty, in addition to interest at the rate of 20% p.a. on that amount from the date of filing of this Suit i.e. 11th October 1995 till realisation.

(iii) The rest of the claim of the Plaintiff/ Respondent No. 1 is dismissed.

(iv) Decree to be drawn up accordingly.

[RIYAZ I. CHAGLA J.]

[B.R. GAVAI, J.]