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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.1635 OF 2016
IN
WRIT PETITION NO.404 OF 2013**

Kokan Irrigation Development Corporation and Ors. ... Petitioners

Versus

E.A. Enterprises and others ... Respondents

Mr. N.V. Walawalkar, Senior Advocate a/w Mr. D.B. Khaire i/by Mr. Avinash B. Avhad for the Petitioners.

Mr. Arif Bookwala, Senior Advocate a/w Mr. Shyam Dewani, Ms. Heena Kapur and Mr. Pratik Thakkar for the Respondent Nos.1 and 2 (Orig Petitioners).

Mr. Manish M. Pabale, AGP for the Respondent Nos.3 to 5.

Mr. Pradeep M. Patil a/w Mr. Sachin D. Bagal for KIDC.

CORAM : A.S. OKA & R.D. DHANUKA, JJ.

DATE ON WHICH SUBMISSIONS WERE HEARD : 02.05.2017

DATE ON WHICH ORDER IS PRONOUNCED : 07.06.2017

ORDER (PER A.S. OKA, J.):

1 This Civil Application is filed by the first to fourth respondents in the Writ Petition filed by the first and second respondents in this application. The Writ Petition was filed by the first

and second respondents praying for substantive reliefs in terms of prayer clauses (a) and (b) which read thus :-

“(a) that this Hon'ble Court be pleased to issue a writ of certiorari or any other writ, direction or order calling for the records pertaining to the contract and work order dated 22nd July 2011, Notices dated 11th April 2012, 12th July 2012 and orders dated 21st May 2012 29th December, 2012 and after going into the legality thereof quash and set aside the Notices 11th April 2012, 12th July 2012 and orders dated 21st May, 2012 and 29th December 2012 issued by the Respondents;

(b) that this Hon'ble Court be pleased to issue writ of mandamus or any other appropriate writ, direction or order of this Hon'ble Court directing the Respondents to allow the Petitioners to carry out execution of the remaining works as per the contract.”

2 According to the case of the first and second respondents, the first applicant, on the basis of the bid offered by the first and second respondents, granted contract to the first and second respondents for the construction of Kondhane Minor Irrigation Project. According to the case of the first and second respondents, the fourth applicant certified the work done by them and issued a certificate dated 10th April, 2012 inter alia certifying that the work to the tune of Rs.114.43 Crores has been carried out by the first and second respondents as per the

specifications. The certificate records that the quality of work carried out by the applicants was found to be as per the norms and to the satisfaction of first to fourth respondents. We may note here that the first applicant is a statutory corporation duly incorporated under the provisions of the Konkan Irrigation Development Corporation Act, 1997. The first applicant is a body corporate having perpetual succession and common seal. The second to fourth applicants are the officers of the first applicant.

3 When Writ Petition came up before this Court on 18th April, 2013, Rule was issued. Paragraph 3 of the said order reads thus :-

“3. The learned counsel for respondent nos.1 to 4 on instructions states that the said respondents will clear all the pending bills of the petitioners in terms of the contract within a period of three months from today. We accept the statement made on instructions.”

4 The present application is filed seeking review of the aforesaid part of the order dated 18th February, 2013 and seeking deletion of the aforesaid portion which records the statement of the learned counsel appearing for the applicants on instructions.

5 At the outset, we may record here that when a query was made by this Court to the learned Senior Counsel appearing for the applicants whether there is any resolution passed by the Board of Directors of the first applicant authorizing the filing of the present application, the learned Senior Counsel submitted that the draft of the application has been approved by the concerned department of the State Government as indicated by the letter dated 7th July, 2016 which is annexed to affidavit of Shri Dhananjay Maruti Godase, the Executive Engineer (fourth applicant) which is affirmed on 20th February, 2017. He invited our attention to the averments made in the application and in various affidavits filed in support of the application. He submitted that unless and until budgetary allocation of the funds is made for the Kondhane Project by the State Government, the pending bills cannot be released to the first and second respondents. He pointed out that the Kondhane Project was administratively approved by the Government of Maharashtra on 19th May, 2011, on condition that for the present, the said project will be kept on shelf. He invited our attention to the affidavit-in-reply filed by the State Government to the main Writ Petition clarifying that funds cannot be allocated for the Kondhane Project for which the first and second respondents were appointed as the Contractors as the project was directed to be kept on shelf. He submitted that the present application has been made to relieve the

applicants from the statement recorded in the order dated 18th February, 2013. He submitted that such a statement ought not to have been made by the officer of the first applicant who was instructing the counsel of the applicants on 18th February, 2013. He pointed out that a departmental enquiry has been initiated against certain officers of the first applicant and some of the officers have been suspended on account of irregularities committed in Kondhane Project. He pointed out the averments that the first applicant does not have its own funds and the funds come to the said Corporation only from the State Government.

6 The learned Senior Counsel appearing for the first and second respondents opposed the application by pointing out that the application has been belatedly made after a Contempt Petition was filed by the first to fourth respondents.

7 At earlier stage, the learned counsel who appeared on 18th February, 2013 on behalf of the applicants tried to come out with a shocking case by filing an affidavit dated 23rd February, 2017 that he never made any such statement which is recorded in the order dated 18th February, 2013. He contended that one Mr. Rajendra Baburao Mahajan was instructing him on behalf of the applicants. The said affidavit was filed on 23rd February, 2017. Thus, a stand was taken by

the learned counsel after a lapse of more than four years that on 18th February, 2013 he did not make any such statement which is recorded in paragraph 3 of the order dated 18th February, 2013 which is quoted above. In normal course, such conduct on the part of a member of the Bar would have been taken very seriously by this Court. However, on 2nd May, 2017, Shri Bagal has filed an additional affidavit and tendered an unconditional apology to the Court and has withdrawn his affidavit on 23rd February, 2017. Shri Bagal has put in about five years in practice who is working as a Junior colleague of Shri Pradeep M. Patil, Advocate. In fact, Shri Pradeep M. Patil appeared on 2nd May, 2017 and stated that Shri Bagal being a Junior and inexperienced Advocate should be pardoned as he has unconditionally withdrawn his affidavit of 23rd February, 2017. We, therefore, allow the matter to rest here by accepting the statements made by Shri Bagal in his additional affidavit. We also accept apology tendered by him.

8 However, we may note here that it is not the case made out by the applicants in this application that no such statement was made by them on 18th February, 2013. In fact, in the present application which is affirmed by Shri Subhash Shankar Waghmare, Superintending Engineer, Thane Irrigation Circle of the first applicant, the fact that such a statement was made before this Court has been admitted. Paragraphs

7 and 8 of the application read thus :-

“7. The aforesaid matter was heard by this Hon'ble court on 18th February, 2013 (Coram – A.S. Oka & R.D. Dhanuka J J). On the basis of the statement made in para 12 of the reply, this Honble Court was pleased to reject the prayer for grant of interim relief, however, a liberty was granted to the Petitioners to apply for the interim relief in the event fresh tenders are invited. This Hon'ble court was further pleased to record in para 3 of the order that the Ld. Counsel for the Respondent No.1 to 4 on instructions states that the said Respondents will clear all the pending bills of the Petitioners in terms of the contract within a period of 3 months from today. Thus this Hon'ble court accepted the statement made on instructions. Hereto annexed and marked as **Exhibit “A”** is the copy of the said Order Dated 18th February, 2013.

8. The Applicants No.1 to 4 submit that on 18/3/2013 an officer of the rank of sectional engineer was present in the court to give instructions to Ld. Advocate for KIDC. The said officer is the Junior most officer in the hierarchy and hence he had no authority to make such statement on behalf of the KIDC stating as to when the bills will be cleared. The Applicants No.1 to 4 submit that as stated in the forgoing paras unless and until the Budgetary allocations of funds is made for the said project by the Government, the pending bills could not have been paid to the contractor. Moreover, the

Government releases the funds in a periodical way throughout the year in instalments for various projects. Therefore under such circumstance it was difficult to commit about the period within which the pending bills of the Petitioners could be cleared.”

(Underlines supplied)

9 In paragraph 11, the applicants have stated that in fact, the present application is made to relieve them from the statement recorded in the order dated 18th February, 2013. Paragraph 11 contends the specific stand of the applicant, which reads thus :-

“11. The Applicants submit with regret that such statement ought not to have been made by the officer who was instructing the Ld. Counsel on 18/2/2013.

10 Perhaps the letter of 26th June, 2013 addressed by Shri Rajendra B. Mahajan to the Executive Engineer of the first applicant was forwarded to Shri Bagal in which Shri Rajendra B. Mahajan has stated that no such statement was made as recorded in paragraph 3. The affidavit of Shri Bagal is in terms of the stand taken by Shri Mahajan.

11 Thus, the present application proceeds on the footing that on 18th February, 2013, a statement was made on behalf of the

applicants before this Court that the applicants will clear all the pending bills of the first and second respondents in terms of the contract within a period of three months from the said date. We may note here that the present application has been filed on 4th July, 2016. The application has been filed after lapse of three years and nearly 4½ months.

12 For the first time, after lapse of 4 years, the applicants have come out with a case that the officer who instructed their Advocate to make the statement ought not to have made such a statement and that he had no authority to make such a statement. In the affidavit in reply filed by the first and second respondents, it is pointed out that Contempt Petition No.334 of 2013 was filed by them before this Court alleging breach of the aforesaid statement recorded in the order dated 18th February, 2013. On 27th August, 2013, an affidavit in reply was filed therein by the Executive Engineer of the first applicant stating that various steps have been taken to comply with the statement recorded in the order. Reliance is also placed on affidavit in reply dated 26th November, 2013 filed by Shri Eknath B. Patil, Principal Secretary, Water Resources Department in the said Contempt Petition. In paragraph 8 of the said affidavit, he has stated thus :-

“8. I further say that clearing of bills of M/s. F.A. Enterprises in respect of Kondhane Dam Project is

absolutely within the jurisdiction of the Konkan Irrigation Development Corporation and respondent No.5 has no role to play in clearing such bills in terms of the said contract.”

13 Another affidavit was filed by Shri R.D. Shinde, Respondent No.3 in the Contempt Petition on 19th January, 2014 in which in paragraph 3, he stated that the present applicants were adhering to the statement recorded in the order dated 18th February, 2013.

14 We may note here that Shri Namdeo Shankar Chavhan, Executive Engineer of the first applicant (fourth respondent in Writ Petition No.404 of 2013) had filed an affidavit dated 1st February, 2013 in the said Writ Petition. In paragraph 10 of the affidavit, he has stated thus :-

“10. Thereafter, the Respondent No.4 vide his notice bearing No.IRD/AB II/7767/2012 dated the 29th December, 2012 has rescinded the contract under the Clause 15(1) having been executed with the Petitioner No.1. The rescinding of the contract has taken place to avoid unsustainable financial liability. However, I state and submit that my office is ready and willing to clear all the pending bills as per the terms of the contract.

(Underline added)

15 Thus, the statement made on 18th February, 2013 which is recorded in the order of this Court was consistent with the stand taken on oath by the applicants in the affidavit of Shri Namdeo Shankar Chavhan affirmed on 1st February, 2013. Shri Namdeo Chavhan was the Executive Engineer of the first applicant at the relevant time. Thus, the stand belatedly taken in this application that the concerned officer who was present in the Court on 18th February, 2013 had no authority to make the statement is clearly an afterthought and thus, cannot be accepted.

16 Thus, the scenario which emerges is that admittedly on instructions of the applicants, a statement was made on 18th February, 2013 before this Court that the pending bills of the first and second respondents will be cleared within a period of three months from that date. The applicants adhered to the said statement in the affidavits filed in Contempt Petition filed in the year 2013. Admittedly, the first applicant which is a body corporate having common seal and perpetual succession has not passed any resolution authorizing filing of this application for review/ recall of the order dated 18th February, 2013. In fact, on this ground itself the application is liable to be dismissed as the present application is purportedly filed on behalf of the first applicant though its Board of Directors has not authorized the second to fourth

applicants to file such an application.

17 Perhaps, the real ground which is sought to be agitated in this application for review is that the first applicant does not have its own funds. In the application, steps taken by the applicant to procure funds from the State Government have not been set out. Even in the additional affidavit dated 20th February, 2017 filed by Shri Dhananjay Maruti Godase, no such attempt has been made to set out the efforts made to procure the funds.

18 There is an affidavit made by Shri Khalil Harun Ansari on 17th February, 2017 in which it is contended that the Contempt Petition has been filed by the first and second respondents demanding huge amount. He has stated that when the matter was discussed at Government Level, a query was made as to why Review Petition has not been filed. This query prompted Shri Subhash Shankar Waghmare, the Superintending Engineer of the first applicant to take a decision to draft appropriate application and send the same for the approval of the Government. Reliance is placed on a letter dated 7th July, 2016 addressed by Dr. Sanjay Belsare, Deputy Secretary to the Water Resources Department of the State Government. We may reiterate here that in the affidavit of Shri Eknath B. Patil, Principal Secretary of the

Water Resources Department, he has taken a stand that the matter of clearing of the bills of the first to fourth respondents is absolutely within jurisdiction of the first applicant.

19 We must note here that the learned Senior Counsel appearing for the applicants tried to argue that the very fact that the draft of the application was approved by the State Government shows that a direction was issued under Section 25 of the said Act of 1974 to the first applicant to file Review Application. Even assuming that such a direction could have been issued under Section 25, we find that no such direction issued by the State Government has been placed on record. The letter dated 7th July, 2016 issued by Dr. Sanjay Belsare merely forwards the modified draft of Civil Application and directs the Managing Director of the first applicant to take necessary action. The letter of Dr. Sanjay Belsare cannot be treated as the exercise of plenary power of the State Government under Section 25 of the said Act of 1974.

20 The learned Senior Counsel appearing for the applicants lastly tried to submit that the application for review is made on the basis of subsequent events. Except for stating that funds have not been allocated to the first applicant, there is no ground of any substance

made out in the application. We do not find any pleading in the application that there were major subsequent events warranting passing of an order of relieving the applicants from their statement recorded in the order dated 18th February, 2017.

21 Moreover, there is a gross and unexplained delay of more than three years in filing the present application. As stated earlier, a Contempt Petition was filed alleging breach of the order dated 18th February, 2013 in which the present applicants appeared and filed a reply in the year 2013 itself.

22 We find that there is absolutely no merit in the application. Apart from the fact that the application is not maintainable, even on merits also the same cannot be entertained. Accordingly, application is rejected.

(R.D. DHANUKA, J)

(A.S. OKA, J)