

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1093 OF 2004
WITH
CIVIL APPLICATION NO. 27 OF 2010

Pune Municipal Corporation,
Shivajinagar, Pune-411005.

....Appellant
(Original Defendant)

Versus.

Prudent Polyconsultants Pvt. Ltd.
Having its Registered office at
Ganeshkrupa Apartments,
274/A, Shaniwar Peth,
Pune : 411 030.
Through its President,
Mr. S.C. Inamdar
Age : 41 yrs, Occ : Business,
R/at : 'KALPATARU', 434,
Shaniwar Peth,
Pune

....Respondent
(Original Plaintiff)

* * * *

Mr. A.A. Kumbhakoni, Advocate General i/by. Mr. R.S. Khadapkar, Advocate for the appellant.

Mr. R.S. Apte, Senior Counsel i/by. Mr. S.N. Chandrachud, Advocate for the respondent.

CORAM : K.K. TATED, &

SANDEEP K. SHINDE, JJ.

CLOSED FOR
JUDGMENTON : 23RD AUGUST, 2018.

JUDGMENT DECLARED ON : 6TH SEPTEMBER, 2018.

JUDGMENT (PER : SANDEEP K. SHINDE, J) :

1. The Pune Municipal Corporation has preferred this First Appeal against the money decree in the sum of Rs.7,08,50,000/- with interest dated 9th July, 2004 passed by the 4th Additional Judge, Small Causes Court, Pune in Special Civil Suit No. 453 of 2001.

2. Heard Learned Counsel for the appellant and Learned Counsel for the respondent.

3. The facts in brief are as under :

. Plaintiffs became aware through a public notice that the Corporation was contemplating the water distribution and sewage treatment project and for the same were in the need of finance. The plaintiffs approached the Corporation and offered their services to procure finance for their project upon certain terms and conditions. Besides the other terms, the plaintiff agreed to render the services against the professional fees at the rate of 2% of the "sanctioned loan" amount

(emphasis supplied). In response thereto, the Corporation through the Additional Commissioner forwarded the proposal dated 28th February, 2000 to the Standing Committee through Nagar Sachiv for its consideration. Proposal would contain that, plaintiffs have agreed to make finance available and sanction the term loan for 10-15 years at the rate of 6-8% against the bank guarantee, and, professional fees is payable upon “sanction of loan”.

4. The proposal of the Corporation dated 28th February, 2000 was placed before the Standing Committee on 11th April, 2000 for its consideration and vide Resolution-98, the plaintiffs were appointed as Consultants to procure the loan for the said project with a rider that, Corporation would execute the required agreement with the plaintiffs.

5. That Corporation vide communication dated 28th April, 2000 informed the plaintiff that the Standing Committee in its meeting held on 11th April, 2000 passed Resolution-98 for assigning the work of procuring the required loan for its project, alongwith a copy of Resolution-98 and a mandate dated 28th April, 2000. Records and proceedings,

however, shows that copy of the Resolution was not forwarded. Be that as it may, vide mandate dated 28th April, 2000, the Corporation irrevocably appointed the plaintiffs for the following purposes :

(i) to negotiate on behalf of the Corporation with the funding organisations in any country as may be deemed fit in their absolute discretion with the object of obtaining Rs.250 crores (minimum) to Rs.300 crores (maximum) repayable over a period of 20 years for the subject sewage project.

(ii) that the Corporation would not authorise any other individual company or organisation for the same object, without first obtaining NOC from the plaintiffs.

6. The plaintiffs in terms of the mandate, approached M/s. Daycorp Enterprises Limited, a foreign financier from USA (hereinafter referred to as 'the said Finance Company' for short). It appears, the said Finance Company addressed a letter of approval dated 1st July, 2000 to the plaintiffs whereby it agreed to sanction and disburse the loan in the sum of Rs.354.2 crores approximately to the Corporation

upon certain terms and conditions. The relevant terms were as under :

(i) the loan amount would be Rs.354.2 crores approximately.

(ii) repayment period shall be 10 years.

(iii) the interest shall be payable at the rate of 8%.

(iv) one-time fees of 2% of the loan amount is payable at the time of loan disbursement.

(v) Corporation shall furnish, bank guarantee for US\$120 million in a format attached of Barclays Bank or any other western European Global Bank of equal standing.

(vi) The Corporation shall organise all necessary approvals, permissions, sanctions etc. in India from the concerned authorities and forward the copies of the same to the said Finance Company.

. The last para of the said approval reads;

“PMC shall furnish immediately a letter on its letter-head confirming the acceptance of these terms and conditions, receipt of this letter, we shall proceed to make the necessary

arrangements for loan fund disbursement. The loan processing will start from the date we receive the facts of the bank guarantee.”

7. The Corporation vide letter dated 1st July, 2000 addressed to the said Finance Company accepted the said offer subject to certain terms. Thus, the acceptance by the Corporation was conditional. The vital terms of the conditions put forth by the Corporation were as under :

(i) acceptance is subject to approval of the concerned authorities like the Standing Committee and the General Body of the BMC, approval of the Ministry, Government of India, RBI and such other approvals, sanctions as may be applicable to proposal.

(ii) the final letter of acceptance would be issued on obtaining approval of the Standing Committee in its meeting.

. The other conditions are not relevant and hence not reproduced.

8. It is the plaintiff's case that, the correspondence between the parties as detailed hereinabove constitutes

concluded contract. The plaintiffs would therefore assert that a letter of approval of the said Finance Committee and Corporation's response thereto dated 1st July, 2000, if read with Mandate and Resolution of the Standing Committee leads to no other inference but to hold that there was an offer and acceptance of offer whereby the plaintiffs were appointed to make available finance for the sewage project. On this premise, the plaintiffs would claim, Finance Company had agreed to sanction loan of Rs.354.2 crores. It is plaintiff's claim that, since Corporation had accepted the offer of the plaintiffs vide letter of acceptance dated 1st July, 2000 the plaintiffs are entitled to professional fees @ 2% of the 'sanctioned loan' (emphasis supplied). The plaintiffs would therefore claim that once the loan was sanctioned by the Finance Company, whether disbursed or not, it is entitled to claim the professional fees. With these assertions, when the Corporation refused to pay the professional fees, the subject suit was filed to recover professional fees in the sum of Rs.7,08,50,000/- with interest as claimed in the plaint. The suit was filed on 1st January, 2001.

9. The Corporation resisted the plaintiff's claim on the

following counts :

- (i)that there was no concluded contract between the plaintiffs and the Corporation,
- (ii)there was no absolute acceptance of the offer.
- (iii)letter dated 1st July, 2000 does not amount to “acceptance” of offer.
- (iv)the acceptance of the offer was conditional, much less, subject to certain terms.
- (v)the acceptance of the offer was conditional, much less, subject to certain terms.
- (vi)the acceptance was subject to approval of the authorities like the Standing Committee, RBI, Government of India etc.
- (vii)that the professional charges were payable on the “loan sanctioned” and “not against making the loan available”.
- (viii)that letter dated 1st July, 2000 addressed by the Corporation to the said Finance Committee and/or Standing Committee Resolution-98 and/or a Mandate dated 28th April, 2000 would not constitute any acceptance and acceptance of the offer either individual or collectively.

(xi) such a correspondence was just exchanging terms and conditions, without finality.

10. The plaintiffs in support of its claim, examined S.C. Inamdar, President of the Plaintiff Company, Arvind Chitale, Liaisoning Officer and Director of the Company and Gaikwad, Consultant Officer of the Union Bank of India. The defendants also examined its witnesses. Besides, the oral evidence, the offer letter dated 2nd February, 2000, letter dated 28th April, 2000 addressed by the plaintiff to the Corporation, Mandate dated 28th April, 2000, letter of approval addressed by the Finance Company to the plaintiff and the letter dated 1st July, 2000 addressed by the Corporation to the said Finance Company were placed on record.

11. It appears from the proceedings, that the witnesses of the plaintiffs were not cross-examined by the defendants. The Learned Trial Judge, by the impugned judgment has held that the plaintiffs have proved their suit claim, having found that there was a concluded contract between the parties. The learned Trial judge held the Corporation is bound to compensate the plaintiffs by paying professional fees even

thought the money has not reached to the Corporation and as such decree was drawn whereby the defendants were held liable to pay a sum of Rs.7,08,50,000/- towards professional charges alongwith future interest.

12. That when this appeal came up for consideration before the Division Bench of this Court on 26th March, 2015, a grievance was made by the Corporation, that the trial Court vide order dated 8th July, 2004 refused to permit the Corporation to cross-examine the plaintiffs witness. The Division Bench thus, by order dated 26th March, 2015 set aside the order dated 8th June, 2004 passed by the Learned trial Judge below Exhibit-81 and directed the Learned Civil Judge to recall the first, second and fourth witness examined by the plaintiff and afforded fair opportunity to the Corporation to cross-examine the said witness.

13. The said cross-examination was directed to be completed on/or before 14th September, 2015 without recording any finding on the basis of such additional evidence that would be forthcoming on record.

14. The trial Judge thereupon forwarded the notes of evidence to this Court for consideration. Such notes of evidence is now part of the record and proceedings before this Court.

15. That upon hearing the learned Counsel for the parties and after perusing the evidence on record, the following points do arise for our consideration :

(i) whether the correspondence/letters exchanged between the plaintiffs and the Corporation AND between the Corporation and M/s. Daycorp Enterprises Limited constitute a concluded contract, between the plaintiffs and the respondents ? **No.**

(ii) whether the plaintiffs were appointed as agency to arrange/obtain sanction, the finance for the sewage project of the Corporation ? **No.**

(iii) Does, Standing Committee's Resolution No.98 read with Mandate dated 23rd April, 2000 would constitute Contract in terms of Section 74 of the Maharashtra Municipal Corporation Act, 1949 ? **No.**

(iv) whether the judgment and decree passed by the trial Court is legal, valid and proper ? **No.**

16. Mr. Kumbhakoni, Learned Senior Counsel appearing for the appellant would submit, that even assuming but without admitting, that the correspondence exchanged between the plaintiffs and the Corporation AND between the Corporation AND M/s. Daycorp Enterprises Limited constitutes a contract, nevertheless, the said contract was not enforceable in law. He would submit that, all acts of the Corporation are subject to the provisions of the Maharashtra Municipal Corporation Act. He would further submit, Resolution No.98 dated 11th April, 2000 Standing Committee only granted approval to appoint the plaintiffs, to explore available resources at its disposal to make the loan available required for sewage project. He would further submit that the appointment of the plaintiffs was subject to agreement. In view of this, Mr. Kumbhakoni would submit that, the Resolution of the Standing Committee followed by a Mandate dated 28th April, 2000 does not further the case of the plaintiff, in as much as, the appointment of the plaintiff as a Consultant was subject to agreement. He would further submit that, no agreement was executed by the Corporation as required under Section 74 of the Maharashtra Municipal

Corporation Act. He would further submit that, the provisions of Section 74(2) are mandatory, in the sense, contract which is not made in accordance with the provisions of the said Act and the Rules is not enforceable and not binding on the Corporation.

17. Mr. Apte, has raised an objection contending that, the provisions of the said Act were not brought to the notice of the trial Court and hence this point may be kept out of consideration while deciding this Appeal.

18. The objection raised by Mr. Apte carries no force, in as much as, it is to be presumed that when the plaintiff ventured to offer its services to the Corporation, it is to be presumed that he would know such contracts are subject to the said Act. Be that as it may, the fact remains that, Section 74 of the said Act, deals with the contract and it reads as under :

“74. Mode of executing contracts.

(1) The mode of executing contracts under this Act shall be as prescribed by rules.

(2) No contract which is not made in accordance with the provisions of this Act, and the rules shall be binding on the Corporation.”

19. Thus, the provisions of Section 74 of the Act regulates the mode and manner to execute contracts; including its format as could be seen from Chapter-V, Schedule-D appended to the said Act. Rule 1 of Chapter-V reads as under :

“1. Mode of executing contracts.

(1) Every contract entered into by the Commissioner on behalf of the Corporation shall be entered into in such manner and form as would bind the commissioner if such contract were on his own behalf, and may in the like manner and form be varied or discharged.”

. It is settled position of law that, where a Statute requires that a thing shall be done in a prescribed manner or format but does not set out any consequences of non-compliance, the question whether provision was mandatory or directory has to be adjudged in the light of the intention of the Legislature as disclosed by the object, purpose and the scope of the Statute. If the Statute is mandatory, the thing done not in the manner of the format prescribed could have no effect or validity, but if it is directory, penalty may be incurred for non-compliance but the Act or a thing done is recorded as a go. It appears, intention in enacting the provisions contained in

Section 74 of the said Act is that, the Corporation should not be saddled with liability for unauthorised contracts and with that object provided that, contracts are executed on behalf of the Corporation, in the manner prescribed by authorised person.

20. The Rules contained in Chapter-V Schedule-'D' appended to the Act and sub-section 2 of Section 74 makes it amply clear as it opens with “no contract.....” shall bind the Corporation if not made in accordance with the provisions of this Act, that the said provisions are mandatory.

. In the case in hand, admittedly no contract was executed between the plaintiffs and the Corporation either in the prescribed form or otherwise. The Committee was well conscious of this fact even before granting approval to appoint the plaintiffs for procuring the loan and thus directed the Corporation to execute Agreement with the plaintiffs. Thus, taking into consideration the evidence on record, we hold and conclude that in absence of the contract as required under Section 74 of the said Act, as well as, in terms of the Standing Committee Resolution, all further Acts even including the Mandate would not further the case of the plaintiff. Thus,

point no.(iii) is answered in the negative.

21. Mr. Kumbhakoni, in the alternative, would submit that even otherwise, the correspondence on record and particularly letters, viz; the offer letter dated 2nd February, 2000, Resolution of the Standing Committee dated 11th April, 2000, Mandate dated 28th April, 2000, Approval dated 1st July, 2000 upon reading together do not constitute a Contract between the parties. Mr. Kumbhakoni, would submit that, the plaintiff was appointed to explore its resources to find out the financier for its sewage project and nothing more than this. He would submit that, the letter dated 1st July, 2000 addressed by the Corporation which is at Exhibit-47 does not amount to acceptance of the offer. It just authorises plaintiff to search for financier. He would submit that, vide Clause-4 of the said letter, Corporation in clear terms communicated to the Finance Company that, there would be a, final letter of acceptance, once approval was obtained by the Standing Committee in its ensuing meeting. Mr. Kumbhakoni, would also invite our attention to Clause-1 of the letter dated 1st July, 2000. He would further submit that, the letter dated 1st July, 2000 was not an acceptance of the offer of the plaintiffs

dated 2nd February, 2000 and no contract had come into existence.

22. Mr. Kumbhakoni, would also submit that vide Mandate dated 28th April, 2000 the plaintiff was authorized to obtain Rs.252 to Rs.300 crores repayable over a period of 20 years for development project. He would submit that, the letter of approval issued by M/s. Daycorp Enterprises Private Limited (which was not addressed to the Corporation but to the plaintiffs) clearly exceeds the Mandate in as much as, M/s. Prudent Polytechnic Consultant Private Limited agreed to disburse the loan amount of Rs.354.2 crores repayable within 10 years. Mr. Kumbhakoni, would therefore submit, even assuming but without admitting that, there was any contract between the parties, however, the plaintiffs having exceeded the authority contained in the Mandate in terms of the quantum of loan and its terms of repayment, it would further require the sanction of the Standing Committee and sanction is absent. He would therefore say also on this count, the plaintiffs were not entitled to sue the Corporation. He would submit that, the trial Court has not properly appreciated the evidence and therefore the Appeal may be

allowed and the decree passed by the trial Court be quashed and set aside.

23. On the other hand, Mr. Apte, strenuously submits that, offer letter dated 2nd February, 2000 followed by the Resolution of the Standing Committee and the Recommendation by the then Municipal Commissioner, if read together, clearly spells out a fact that, there was an approval granted by the Standing Committee of the Corporation to appoint the plaintiffs as an Agency to explore the possibility and obtain the loan for its project. Mr. Apte, has taken us through the correspondence and would submit that the letter dated 1st July, 2000 addressed by the Corporation to the Finance Committee is acceptance of the offer made by the plaintiff and thus it constitutes a Contract. He would submit that the Standing Committee Resolution has been acted upon by the Corporation by issuing Mandate dated 28th April, 2000 and further by accepting the offer vide letter dated 1st July, 2000 not only a contract but a concluded contract came into being.

24. Mr. Apte, would also submit that, the Corporation

vide letter dated 28th April, 2000 at Exhibit-44 communicated and informed the plaintiff that the Committee had passed a Resolution and assigned the work of procuring the required loan. He would therefore submit that, the Standing Committee by passing the Resolution and then communicating the same to the plaintiff amounts to acceptance of the plaintiff's offer. He would submit that, M/s. Daycorp Enterprises Limited vide letter dated 1st July, 2000 sanctioned the loan in the sum of Rs.354 crores. He would therefore submit that the plaintiff has acted in terms of the Mandate issued to him dated 28th April, 2000 and made the funds available for the sewage project and as such entitled to recover the professional fees. Mr. Apte, supported the impugned judgment and decree.

25. We have gone through the documentary, as well as, oral evidence placed on record by the parties, and hold that, the correspondence exchanged between the plaintiff and the Corporation AND between the Corporation and the Finance Company does not disclose any finality of contract between the parties. The Resolution of the Standing Committee merely approves appointment of the plaintiffs to explore its resource,

to obtain loan for Corporation's project. There is nothing in the Resolution to even indicate that the Standing Committee conclusively accepted the offer of the plaintiffs and authorized the Commissioner to execute the contract. A letter of approval issued by the Finance Company to the plaintiffs in terms says that it had agreed to sanction and disburse the loan subject to terms and conditions. The said letter stipulates several conditions like amount of loan, repayment period, rate of interest, one time fees, equated monthly installments, the rate of exchange of currency i.e. Indian Currency to U.S. Dollars and also called upon the Corporation to furnish bank guarantee in the format of Barclays Bank or any other western European Global Bank of equal standing. This letter would further call upon the Corporation to organise all necessary approvals, sanctions, permissions in India from the concerned authorities and to submit such sanctions to it and the disbursement would be within 25 days of the receipt of such sanctions, agreements, bank guarantees since Finance Company is a Foreign Company from USA. Thus, the plain reading of this letter only indicates that the Finance Company had agreed to sanction and disburse the loan (not actually sanctioned) upon certain terms and conditions as stated

hereinabove. This letter of approval thus cannot be equated with the “loan sanctioned”, but clearly establishes a fact that the parties were negotiating the terms and did not reach any finality.

. Infact, letter dated 1st July, 2000 was conditional whereby Corporation communicated to the Finance Company that, it shall not be obliged to pay fees and if any of the said approvals could not be obtained for any reason beyond the control of the PMC. Further, the Corporation informed the Finance Company that the final letter of acceptance shall be issued on obtaining approval of the Standing Committee in its ensuing meeting.

26. Thus, after reading these two letters i.e. letter of approval dated 1st July, 2000 and the letter issued by the Corporation to the said Finance Company leads us to hold that there was no finality of the terms and conditions between the parties because what was exchanged under the said letters were the terms and conditions upon which the Finance Company was willing to sanction and disburse the loan. The negotiations thus neither culminated into finality of terms not resulted into 'sanction of loan' (emphasis supplied) as claimed

by the plaintiffs. The letter of approval cannot be interpreted to mean “sanction of loan” as contended by the plaintiff. As held by us, vide the said letter dated 1st July, 2000, the Finance Company had merely agreed to sanction and disburse the loan subject to certain terms and conditions and therefore the plaintiffs assertion that it amounts to sanction of loan is without any foundation. That even on the touchstone of preponderance of probabilities, the correspondence placed on the record, does not lead us to hold that there was a concluded contract between the parties. Thus point no.(i) is answered in the negative.

. So far as point no.(ii) is concerned, we hold that the plaintiffs were appointed to arrange loan, but was subject to agreement. Admittedly, no agreement was executed. Point is answered accordingly.

27. Thus pending appeal, vide order dated 24th January, 2005, the Respondent-Corporation was directed to deposit a sum of Rs.3,00,000/- towards approximate cost incurred by the plaintiff for making loan available. We have gone through the oral evidence. The witnesses of the plaintiffs in the cross-examination admitted that they had no occasion

either to hold meetings in-person with the officials of the said Finance Company either in India or in USA. There is neither pleadings on this count by the plaintiff nor the plaintiffs evidence spells out anything about such expenses incurred by it. The witnesses admitted, they had no occasion to visit USA or hold meeting with officials of the Finance Company. Mr. Kumbhakoni, thus, has rightly urged that the amount deposited by the plaintiffs in this Court be refunded to the Corporation. We do not see any reason to refuse such request. We could not find any material on record either in pleadings or otherwise which would suggest that the plaintiffs expended anything for making the finance available through M/s. Daycorp Enterprises Limited. That in the circumstances, we direct the Registry to refund Rs.3,00,000/- to the Corporation with interest accrued thereon.

28. In view of the above and for the reasons stated,

(a) the Appeal is allowed and the decree of the trial Court dated 9th July, 2004 in Special Civil Suit No. 453 of 2001 is hereby quashed and set aside.

(b) The decree be drawn accordingly with no order as to costs.

(c) First Appeal is disposed off.

(d) That in view of the observations and the reasons given in para-27 hereinabove, the Registry is directed to refund Rs.3,00,000/- to the Corporation deposited with it with interest accrued thereon till date.

(d). In view of disposal of the First Appeal, the above Civil Application becomes infructuous and does not survive. The same is accordingly disposed off.

(SANDEEP K. SHINDE, J)

(K.K. TATED, J)

Digitally
signed by
Neeta
Shailesh
Sawant
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