

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

WRIT PETITION NO. 12399 OF 2018

- 1] Dhule Municipal Corporation,
Dhule, Taluka and District Dhule
Through its Commissioner
- 2] The Commissioner,
Dhule Municipal Corporation,
Dhule, Taluka and District Dhule. **...PETITIONERS**
[Orig. Applicants/Defts]

VERSUS

- 1] Atul s/o Nemichand Dhadiwal,
Age 46 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. **..RESPONDENTS**
[Orig. Plaintiffs]

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Advocate for the Petitioners : Shri A. S. Sawant
Advocate for Respondent Nos. 1 and 2 : Shri V. D. Sapkal

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 5th FEBRUARY, 2019.

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ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner – original defendant Municipal Corporation is aggrieved by an interlocutory order dated 18/08/2018, by which, the applications filed by it for seeking production of documents, has been rejected. The petitioners are the original defendants in Final Decree No. 2/2010.

3. The learned Advocates for the respective sides have extensively canvassed their submissions over two days on 04/02/2019 and 05/02/2019.

4. Considering the conspectus of the matter and keeping in view that the proceedings in Final Decree No. 2/2010 are pending adjudication, I am not required to advert to their entire submissions. Suffice it to say that the issue to be decided is as to whether, the petitioner – Corporation should be permitted to place on record an energy audit report privately prepared after this Court delivered its judgment in

two first Appeal Nos. 3502/2011 and 3611/2011 decided by judgment dated 08/12/2017.

5. The facts of the case put forth by the rival parties have been appreciated and assessed by the First Appellate Court when the judgment on 08/12/2017 was pronounced. In view of the said judgment, the said proceedings were remitted to the executing Court by making specific observations found in paragraph Nos. 20, 25 and 27 and the operative part of the order, which read as under :-

"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.

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.

27. *Looking to the nature of the litigation 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."

6. It is, therefore, apparent that the First Appellate Court expressed a view that as the report of the court commissioner has been denied by the defendants, it is for the plaintiffs to examine the court commissioner to prove the contents of the report. It was further observed that plaintiff No.1 can examine the court commissioner which, needless to state, gives an opportunity to the petitioners – defendants to cross examine him.

7. There is no dispute that the controversy between the parties emanates from an agreement between them, by which, the original plaintiffs were required to install 89 energy saver units. The consumption of electricity prior to the installation of such units was to be compared with the quantum of consumption of electricity after such installation. The net saving was to be taken into account as a basis for profit sharing and 48 % of such saving was to be paid to the plaintiff and 52% was to be retained by the Corporation.

8. After the First Appellate Court remanded the proceedings in Final Decree No. 02/2010, six months time was granted to the said Court to adjudicate upon the matter. The Trial Court was expected to give an opportunity to the litigating sides to lead their evidence. The original plaintiffs approached the Honourable Apex Court in Petitions for Special Leave to Appeal (C) Nos. 5231-5232/2018 which were dismissed by the Honourable Apex Court by order dated 05-03-2018 holding that the plaintiff(s) shall examine the Commissioner and the Trial Court shall proceed with the matter expeditiously. It is not in dispute that these parties had

earlier led evidence. It is equally undisputed that a court commissioner was appointed under the orders of the Court, who was a Chartered Accountant.

9. The plaintiffs had moved the said Court with an application praying that the litigating sides should be restricted in leading evidence only in connection with the court commissioner and after the examination of the court commissioner is concluded, the matter be closed for final arguments. The concerned Court passed an order on 17/04/2018 concluding that when the order of the High Court, as well as, the Honourable Supreme Court was before the said Court as guidelines, it would abide by the said order and proceed to decide the proceedings expeditiously. Witness summons was, therefore, issued to the court commissioner.

10. The plaintiffs contend that they have appeared before the court commissioner in deference to the orders of the Court and have produced such material on which it desires to place reliance upon. It is the contention of the plaintiffs that the Corporation did not choose to place such material before the

court commissioner which it could have for the purpose of opposing the claim of the plaintiffs. The court commissioner is now to be cross-examined on the report that he has submitted which contains calculations of the amounts which need to be taken into consideration for the fulfillment of the decree.

11. The controversy in this matter has arisen in view of the Corporation having placed before the Court an energy audit report alongwith its application Exhibit 67 dated 18/09/2018. It is contended that a team of three persons comprising of the Principal of the SSVPS BSD College of Engineering, Dhule, a Professor, who was the Head of the Department of Electronics and another Professor, who was the Head of the Department of Mechanical Engineering, have conducted an energy audit of the energy saver panels provided by the plaintiff. It is not in dispute that the said report has been prepared privately by the Corporation without an opportunity of participation to the original plaintiffs. I find the said report to be in great details. However, the issue is as to who authorized the Corporation to resort to an energy audit privately and by keeping the plaintiffs

in dark, away from such audit.

12. The learned Advocate for the Corporation has strenuously canvassed that it was consistently requesting the court commissioner to refer the matter for an energy audit by experts since the court commissioner was a Chartered Accountant and did not have the expertise of conducting such an energy audit which would reflect the true picture. It is, however, conceded that the executing Court had directed the appointment of the court commissioner and the Corporation never raised a grievance about a Chartered Accountant being appointed as a court commissioner.

13. The learned Advocate for the plaintiffs submits that once a Court appoints a court commissioner and empowers him to perform a particular task, the court commissioner cannot travel beyond the scope of the order, by which, he has been appointed. The Corporation was not precluded from moving the executing Court for a clarificatory direction that the court commissioner may take the assistance of a specialized agency for carrying out the energy audit.

14. I find from the record and in the backdrop of the submissions of the learned Advocates that the Corporation had approached the energy cell of the College of Engineering, Dhule and requested the said cell to conduct such an audit. The Corporation now prays that this audit report be permitted to be placed on record before the executing Court as a piece of evidence which can be relied upon for the purposes of assessing the claim made by the plaintiffs.

15. I find that this report has to be treated as a document which is prepared after the matter was remanded to the executing Court by the First Appellate Court. When the court commissioner was appointed, the Corporation should have been alert in praying for engaging the said energy cell of the Engineering College. On the one hand, the Corporation has proceeded with the matter and have appeared before the court commissioner. On the other hand, a private report is prepared and which is now sought to be placed on record to prove that the court commissioner's report is unreliable and undependable. I do not find that the report of the court commissioner could be proved to be unreliable by the

Corporation by relying upon material which it has manufactured with the aid of an energy cell of an engineering college and by keeping the plaintiffs in the dark.

16. The Corporation has also canvassed that out of the 89 energy saver panels installed by the plaintiffs, several saver panels are dis-functional. The plaintiffs contradict the said contention by submitting that the contract between the plaintiffs and the Corporation for utilizing the energy saver panels, was for the period April 2006 to March 2011. An audit report prepared in 2018 by out-sourcing the activity to an energy cell in which it is stated in 2018 that few panels are dis-functional, cannot be a basis for alleging that such panels installed in April 2006 were dis-functional.

17. It could have been appreciated if the Corporation had taken a stand that the bills of electricity consumption in areas where such energy saver panels have been installed in between April 2006 to March 2011, can be compared with the bills of energy consumption prior to April 2006. In fact, this is how the business terms between the plaintiffs and the Corporation

have been arrived at. If the Corporation contends that such documentation has not been maintained by the plaintiffs or that it was the sole responsibility of the plaintiffs to maintain such record, this aspect could have been considered when the claim suit was decided. The energy audit after the suit has been decided and after the Final Decree proceeding were initiated in 2010, cannot be a basis of attempting to prove a new case in the Final Decree proceeding.

18. Even otherwise, it is open to the Corporation to cross examine the court commissioner and prove that his report is not reliable and deserves to be discarded. In this situation, the executing Court would then assess the merits of the claims of the parties within its limited jurisdiction. The executing Court can consider the material before it and draw its conclusions in view of the decree dated 03/04/2010 passed by the Trial Court in the claim suit.

19. The learned Advocate for the Corporation has vehemently submitted that the energy audit report would expose the plaintiffs as they have raised an exorbitant claim

without providing service. It is sought to be canvassed that several energy panels were non functional. In my view, this aspect was to be considered by the Trial Court which decided the claim suit of the plaintiffs.

20. Reliance is then placed upon the judgment of the Honourable Apex Court in ***Kunhayammed and others Vs. State of Kerala and another, (2000) 6 SCC 359*** to contend that after the Apex Court has dismissed the special leave to appeal preferred by the plaintiffs, the litigating sides are at liberty to lead evidence before the executing Court in the light of the observations of the Honourable Apex Court in paragraph 44 which read as under :-

"44. To sum up, our conclusions are :

(i) *Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.*

(ii) *The jurisdiction conferred by Article 136 of the*

Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject- matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) *If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.*

(vi) *Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.*

(vii) *On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC."*

21. I am not required to deal with the said aspect since the executing Court is competent to adjudicate upon the proceedings before it and there is no necessity, as on date, to monitor the proceedings before the executing Court. The issue in this petition is as to whether, the Corporation should be permitted to produce its energy audit report which is prepared in 2018 and on the basis of which the Corporation desires to make an assessment of the performance of the energy saver panels installed by the plaintiffs in 2006.

22. The learned Advocate for the Corporation submits that the document at page 160 is just a presentation of a bill that was raised by the plaintiffs and it was only placed before the court commissioner by the Corporation since it had received that bill from the plaintiffs.

23. In view of the above, I do not find that the impugned order declining permission to the Corporation to produce the 2018 energy audit report, could be termed as being perverse or erroneous. The Corporation is at liberty to cross-examine the

court commissioner and endeavour to prove that his report is not reliable on the basis of the material available on record.

24. Needless to state, it is open to the litigating sides to produce the energy bills prior to April 2006 over the period of three months so as to compare them with the energy bills after April 2006 since they would reflect the consumption of energy at the relevant time.

25. With these observations, this petition is disposed off. Needless to state, the Trial Court would decide the said proceedings within the time frame, if any.

26. Rule is discharged.

(RAVINDRA V. GHUGE, J.)

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