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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

1 COMMERCIAL APPEAL NO.1 OF 2018
WITH CA/14749/2018 IN COMAP/1/2018

M/S. SHINDE & SONS, THROUGH ITS PARTNER
- SITARAM BUDHAJIRAO SHINDE

VERSUS

EXECUTIVE DIRECTOR, GODAWARI MINOR IRRIGATION DEVELOPMENT
CORPORATION, THROUGH EXECUTIVE ENGINEER AND OTHERS

...

Advocate for Appellant : Shri Thigale Girish K. (Naik)

Advocate for Respondent nos.1 to 4 : Shri S.P. Brahme h/f
Shri S.G. Bhalerao

**CORAM: PRADEEP NANDRAJOG, CJ &
R.G. AVACHAT, J.**

DATE: 23.09.2019

PER COURT :

- 1] Heard learned counsel for the parties.
- 2] Challenge is to an order dated 13.11.2018 dismissing appellant's application filed under Order 39 Rules 1 & 2 of the Code of Civil Procedure. Claim of the appellant in the Commercial Suit No.1/2018 was that its offer to execute the tendered works was accepted at 8.60% above the estimated cost of tender, which was Rs.2371.97 lakhs. Work order was issued on 31.12.2012. Eighteen months was the stipulated period within which the work had to be executed. Laying a grievance that the drawings were not made available within time to it as also entire site not being made

available, delay resulted and all of a sudden and out of the blue, another notice inviting tender was issued inviting offers to complete the balance work pertaining to the works, which were allotted to the appellant. Pleading further that the quantity of work executed by the appellant was not measured, grievance laid was to the fact that the possibility of work executed by the appellant not being properly accounted would cause serious prejudice and on this aspect of the pleading, an interim measure was sought to restrain the execution of the balance work as per the second tender floated.

3] Declining relief as prayed for vide impugned order dated 13.11.2018, we note that the order does not even endeavour to list the tendered works to be executed by the appellant and what fell within the scope of the second tender.

4] Apart therefrom, the serious infirmity in the impugned order is not to have directed joint measurement to be executed *qua* the works completed by the appellant. If no injunction had to be granted to the appellant, at least the works executed by the appellant ought to have been got measured.

5] Unfortunately for the appellant, in the absence of any interim

order passed in the instant appeal, works have been awarded pursuant to the second tender and learned counsel for the respondents states that the same have been completed. Thus, today it would be futile to direct joint measurements to be carried out.

6] Thus, we are constrained to dismiss the instant appeal, but would simultaneously observe that at the trial the Court would endeavour to ensure that evidence surfaces concerning the works which were awarded to the appellant and the works which became the subject matter of the second tender. The measurement books and the field books maintained would also be ensured to be brought on record and proved.

7] The last Mantra. We have not expressed any opinion on the merits of the controversy between the parties. The claim in the suit would be decided on the basis of the pleadings of the parties and the evidence led. Costs made easy.

8] In view dismissal of appeal, Civil Application No.14749/2018 is disposed of.