IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.3680 OF 2019
IN
FIRST APPEAL NO.235 OF 2019

Shree Pravin Mammal Kothari .. Applicant

vs.

The State of Maharashtra (Thru the Joint Secretary) And Ors. .. Respondents

Mr.Swaraj S. Jadhav for the applicant

Mr.Vijay Patil, Special Counsel a/w Mr.Y.Y.Dabke, A.G.P. for the respondent nos.1 and 2

CORAM: K.K.TATED & SARANG V. KOTWAL, JJ.
DATED : JANUARY 30, 2020

P.C.

1 Heard.

2 By this Civil Application, applicant original plaintiff is seeking permission to withdraw the amount deposited by the respondent original defendant pursuant to the order dated 26.02.2019 passed by this court in Civil Application No.800 of 2019.

3 The learned counsel for the applicant submits that in the present proceeding, they filed Special Civil Suit No.859 of 2013 before the 10th Joint Civil Judge, Senior Division,

Pune for recovery of amount of amount of Rs.3,50,93,956/- on the basis of Government Resolution dated 29.03.2001 Exhibit – 48. He submits that, Respondent State appointed Applicants as transport contractor for Pune district for transportation of food grains from FCI godowns to Government godowns under Public Distribution System since 1988. He further submits that before the Trial Court they relied on the letter dated 08.05.2006 Exhibit 125 issued by the Deputy Secretary of Food, Civil Supply and Consumer Protection, Mantralaya. He submits that Trial Court after considering the evidence on record, held that they are entitled to sum of Rs.39,32,64,692/- as principal amount with interest @ 12% p.a. He submits that being money decree, they are entitled to withdraw the said 50% amount of decree subject to outcome of the First Appeal. He submits that if the present Civil Application is not allowed, irreparable loss will be caused to them. He submits that applicant is ready and willing to file undertaking before this court that if First Appeal goes against them, he will bring entire amount with interest within stipulated time as per direction of this court.

4 On the other hand, the learned counsel for the appellant original defendant vehemently opposed the present Civil Application. He submits that if entire amount is withdrawn by the original plaintiff without furnishing bank guarantee and or solvent security, then it will be very difficult for them to recover the said amount, in case they succeed before this court. He submits that in any case, at the time of declaring the judgment and decree dated

04.06.2018, Trial Court failed to consider the point about limitation, though the same was not framed. He submits that entire claim of the plaintiff was barred by limitation. Therefore, there is no question of allowing the plaintiff to withdraw the said amount without furnishing any security, only on personal bond.

5 Heard both the sides at length.

6 It is to be noted that in the present proceeding, Trial Court passed money decree against the appellant original defendant. Pursuant to the order dated 26.02.2019 passed by this court in Civil Application No.800 of 2019, original defendant deposited 50% amount and it is lying with the Registry of this court.

7 It is to be noted that Trial Court in paragraph 21 and 30 of impugned judgment specifically recorded that even officers of the defendant admitted claim of the plaintiff. The said paragraphs read thus:

> *“21. Learned APP Mr.S.N.Jagtap has pointed Government Resolution dated 29/3/2001. On the basis of said resolution, Deputy Secretary of Food, Civil supply and consumer protection Matntralaya has issued letter (Exh.125) dated 8/5/2006 and thereby it was informed to District Collector Pune that plaintiff and other contractors are entitled for only 5% increase in rate. Government resolution dated 29/3/2001 (Exh.48) is however contrary to the letter (Exh.125). Most important aspect is that letter (Exh.125) dated 8/5/2006 is unilateral*

change in contract and same is not permissible. The learned counsel Mr.Kothari for plaintiff argued that defendants cannot unilaterally change the conditions of the contract. In support of his argument learned counsel has placed his reliance in the case of Delhi Development Authority, N.D. & Anr. Vs. Joint Action Committee, Allottee of SFS Flats and Ors., AIR 2008 Supreme Court 1343, The Hon'ble Supreme Court has observed as under:-

> *"A party to the contract cannot at a later stage, while the contract was being performed, impose terms and conditions which were not part of the offer and which were based upon unilateral issuance of officer orders, but not communicated to the other party to the contract and which were not even the subject matter of a public notice."*
>
> *"The stand taken by DDA itself is that the relationship between the parties arises out of the contract. The terms and conditions therefor were, therefore, required to be complied with by both the parties. Terms and conditions of the contract can indisputably be altered or modified. They cannot, however, be done unilaterally unless there exists any provision either in contract itself or in law. Novation of contract in terms of S.60 of the Contract Act must precede the contract making process. The parties thereto must be ad idem so far as the terms and conditions are concerned."*
>
> *"30. So far as amount claimed under the head of payment as per average increase of other 24 districts amounting to*

> *Rs.3,50,93,956/- is concern, plaintiff has filed letter (Exh.56), chart A, B, C (Exh.57). After perusing letter (Exh.56) and charts (Exh.57) it reveals that Deputy Secretary has given opinion how to calculate amount in respect of payment as per the average increase of other 24 districts. Considering the opinion given by Financial Advisor and Deputy Secretary to Deputy Secretary Civil Supply Maharashtra State approved charts A and proposed changes which are mentioned in chart C, plaintiff has rightly claimed Rs. 35,09,08,956/- I have already mentioned supra that during cross examination calculations in respect of amount as per average increase of other 24 districts or amount in respect of hike in diesel rates are not specifically denied or same are not challenged. In other words defendants have no objection in respect of calculation in respect of these two amounts i.e. amount as per average increase of other 24 districts and amount in respect of hike in diesel rates. Therefore, plaintiff is succeeded to prove that he is entitled to claim Rs. 35,09,08,956/- and Rs. 4,23,55,736/-.*

8 Considering these facts and in any case, present application is only to withdraw 50% amount of the decree passed by Trial Court, we are of the opinion that applicant original plaintiff can be permitted to withdraw the said amount by giving personal undertaking that, if First Appeal goes against them, they have to bring entire amount with interest within stipulated time as per direction of the court,

at that time. Hence, following order:

a. Applicant is permitted to withdraw the amount deposited by the Respondent in the Registry of this court as per order dated 26.02.2019 with accrued interest on furnishing personal undertaking stating that if First Appeal goes against them, they have to bring entire amount with accrued interest within particular time.

b. Civil Application stands disposed of accordingly.

c. No order as to costs.

d. At this stage, the learned A.G.P. for the respondent applied for stay of this order. Considering the fact that Trial Court has passed money decree, oral application is rejected.

(SARANG V. KOTWAL, J.) **(K.K.TATED, J.)**