

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

WRIT PETITION NO.6309 OF 2021

M/s Anand Constructions,
through its Partner -
Mr.Ashish Rajendra Anand,
Aurangabad

Petitioner

Versus

The State of Maharashtra
and others

Respondents

Mr.G.K.Naik Thigle, advocate for the petitioner.
Mrs.V.N.Patil Jadhav, AGP for Respondents.

CORAM : AVINASH G. GHAROTE, J.

DATE : 16th July, 2021.

PC :

1 Heard Mr.Thigle, learned Counsel for the petitioner, who takes an exception to the order passed by the Commercial Appellate Court, on 01.04.2021, in Commercial Appeal No.01 of 2021, whereby, though the defendants were prevented from taking any action against the plaintiff as a consequence of termination of the contract, however the rest of the reliefs claimed were declined.

2 Mr.Thigle, learned Counsel for the petitioner, submits that the contract has been terminated for a wrong reason, as the

responsibility to secure permission from defendant no.2 for excavation, was of defendant no.5, in which, he had failed, as is indicated from the answers to the interrogatories, for which he invites my attention to record page 420 and the answer to questions no.49 and 50. Learned Counsel submits that, therefore, for the fault on the part of the respondents, the plaintiff cannot be permitted to suffer and be branded as a defaulter.

3 He further submits that conducting of a joint measurement was of the utmost importance, as that is the act alone, which would demonstrate what is the extent of the work done and what was remaining so as to enable the fresh tendering of balance of the work and since this has not been done, according to him, fresh tender could not be issued as the entire scenario consequent to the re-measurement would change, otherwise the position would lead to creating more complexity in the matter. He submits that the plaintiff is being victimised, which is indicative from the answers to the interrogatories and the Court has all powers to stay the ongoing tender process, so that the rule of law prevails. He, therefore, submits that the application at Exhibit-5, before the Commercial Court in Commercial Suit No.01 of 2021, needs to be allowed in toto.

4 The learned AGP, appearing for the respondents, supports the impugned order, and submits that consequent to the termination, a fresh tender has already been issued, which has been accepted, for which she relies upon the communication dated 11.06.2021, at record page 365. She, therefore, contends that at any rate, the clock now cannot be set back nor can the petitioner be granted the relief, which is being sought herein.

5 It is not disputed that the petitioner was granted the work in question, as detailed in para 7 of the petition and had deposited the EMD and Performance Security Deposit as well as deposit for liquidated damages under the four contracts awarded to him. The contracts were, for upgradation of roads in Jalna district under the *Mukhya Mantri Gram Sadak Yojana* and four packets, as listed at Sr.Nos.1 to 4 in para 3 of the petition were awarded. As the dispute arose between the parties, the petitioner was constrained to approach the Commercial Court, by way of Commercial Suit No.01 of 2021, claiming following reliefs.

(A) Suit may kindly be decreed with costs.

(B) Effect and operation of the termination

notices of the contracts in suit, namely Package no.RDJLN-06; JLN-46; JLN-77; JLN-49, being illegal and unauthorised, be perpetually stayed and defendants or their agents or servants be restrained from obstructing plaintiff in doing the above said Contractual works.

(C) Defendants be directed to pay to plaintiff an amount of Rs.12,48,706/- to plaintiff with further interest @ 18% p.a. from date of suit till recovery of amount.

(D) As a consequential relief, defendants be directed to give extension of time for completion of suit contracts with escalation in price as on date of execution of work by considering the then DSR rates as per clauses of contract.

(E) Defendants be directed to refund the Bank Guarantee to Bank of plaintiff where it is encashed or said bank guarantee may kindly be ordered to be kept with defendant as term deposit with interest at Bank rate till completion of contract as per rules.

(F) Defendants be directed to pay costs under Section 35, as amended in view of Commercial Courts Act, 2015, of the present suit.

(G) Any other just and proper relief as may be deemed fit may kindly be granted in favour of plaintiff.

6 Mr.Thigle, learned Counsel for the petitioner, submits that subsequently the Suit, before the Commercial Court, has been amended to seek the relief of declaration *qua* the termination.

6 An application for interim relief was also filed claiming the following reliefs:

(A) Application of the plaintiff may kindly be allowed.

(B) Defendants be prevented from acting upon the order of termination of suit contracts of RDJLN-06; JLN-46; JLN-77; JLN-79, as informed to plaintiff on 22/1/2021 and in taking any action in consequences thereof, which can be taken on termination of contract including encashment of Bank Guarantee, etc.

(C) Defendant no.5 be directed by temporary mandatory injunction to furnish the information called by Hon. Collector in letter dated 22/9/2019 bearing no.2019/गौ.ख./खनिकर्म/कावी within 7 days from the date of order of this Court to prevent further losses of Government.

(D) Hon. Collector, Jalna, by temporary mandatory injunction may kindly be directed to pass necessary orders on submission of said information within reasonable time of about a week

or as may be directed by Court so that plaintiff may start the work of excavation and transport and do the needful for continuation of the contractual works to prevent loss of Government.

(E) Defendants be ordered to do the needful for grant of permission of excavation of minerals within minimum possible time to commence the suit contract works by excavation and transport of minerals as per permission of Collector.

(F) Defendants also may kindly be ordered to do needful for removal of difficulties like that of objection of Forest Department and Land Acquisition of parts of roads under contract as are mentioned in corresponding letters.

(G) Defendants be prevented by temporary injunction, from recovering of any amount from plaintiff in respect of suit contracts in any manner till decision of this suit.

(H) Any other relief as may be deemed proper may kindly be granted in favour of plaintiff.

7 The learned Commercial Court, by an order dated 17.02.2021, found that the work under the various contracts was to be completed within a particular period of time, which time had already lapsed as indicated in para 33 of his order. The learned Commercial Court also considered that the plaintiff, who has

raised an objection, regarding its liability to pay royalty, however, in view of Section 4 Part II special conditions of contract clause 6, same was included in Scheduled rates. He also found that the plaintiff/petitioner himself had paid the royalty of Rs.16,36,210/- on 18.07.2019 by a challan and after reference to certain communications, negated the submissions made by the plaintiff *vis-a-vis* payment of royalty. After referring to the communications regarding delay in the work, the Court found, that under clause 52 (1) to 52(4) of the Standard Bidding document, the contract was a terminable one, which came to be so terminated and in the light of the mandate of Section 14(1) of the Specific Relief Act, declined to grant interim relief. It also found that under clause 24 of the General Conditions of Contract, there was a dispute redressal system which provides that in case of any dispute, it is to be referred for settlement to the competent authority within a period of 45 days, so also a provision for appeal, which also weighed with him in declining interim relief.

8 In appeal by the petitioner, the appellate Court, found that the responsibility to secure the permission for excavation was that of the defendant no.5, and since the same was not done, partly allowed the appeal and restrained the defendants from

taking any action against the plaintiff as consequences of termination of contract.

9 It cannot be disputed that the contracts in question are relating to upgradation of roads, which is clearly a work in public interest. The fact also remains that for reasons which the authorities felt germane, the contract has been terminated. Whether the reasons for termination were correct or not, would be decided by the Court during the decision of the Commercial Suit No.01 of 2021 before it. However, by way of an interim order, the status of the petitioner, cannot be restored, nor can the further progress in the matter be halted by stopping the tender process as that is in the larger public interest. The law is well settled that where there is conflict between a larger public interest and an individual interest, the larger public interest shall always prevail. In case it is found that the contract of the petitioner was unlawfully terminated, the petitioner would always be entitled to claim damages for wrongful loss caused to him. By no stretch of imagination, for whatsoever reason, the petitioner can be put back into the saddle and allowed to work out the contract.

10 The apprehension of the petitioner that the

measurement has not been done, is denied by the respondents in the affidavit dated 01st July, 2021 wherein in para 22, record page 347, it has been specifically averred, that the joint measurement of the work has been carried out as per the procedure and all the events were intimated to the plaintiff, however, the plaintiff and his representative intentionally were absent. This indicates that measurement of the work has been done, though may be in the absence of the petitioner or his representative.

11 It is further material to note that the Commercial Court, on an application filed by the plaintiff for joint measurement, by an order dated 29.06.2021, below Exhibit-39, has directed the defendants to carry out joint measurement work as per rules/norms and the GR dated 30.10.2003 in the presence of the plaintiff or his duly authorized representative. At the same time, prayer of the plaintiff, that the defendants be restrained from allowing any subsequent contractor to do any further work, has been rejected.

12 It also is a position on record, as reflected from the communication dated 11.06.2021 at record pages 365-372 that the work in question was already re-tendered and the offer of the

lowest bidders have been accepted and the matter is in the process of issuance of the work order/s after obtaining necessary approvals. The work, therefore, as allotted to the bidders, has to commence at the earliest and completed within the stipulated time, and as already indicated, it is in the public interest to get the same done at the earliest.

13 For all these reasons stated above, the petition fails and is accordingly dismissed. In the circumstances, there shall be no order as to costs.

14 It is made clear that the Commercial Court shall decide the suit, pending before it, on its own merits, being uninfluenced by any observations made above, which have been made on consideration of an interim application. So also the petitioner or his representative shall remain present for the joint measurement, as directed by the learned Commercial Court vide its order dated 29.06.2021, below Exhibit-39, as and when called upon.

15 Needless to say that the Commercial Court shall have

due regards to the observations made in the order dated
23.09.2019, in Commercial Appeal No.01 of 2018.

(AVINASH G. GHAROTE)
JUDGE

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