

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

SECOND APPEAL NO. 498 OF 2019

The Zilla Parishad, Ahmednagar,
through its Chief Executive Officer

.... Appellant
[Ori. defendant]

Versus

Ashok s/o. Baburao Salunke,
Age Major ,Occ. Contractor,
R/o. Salunke Mala, Burudgaon Road,
Ahmednagar.

.... Respondent
[Ori. Plaintiff]

Advocate for Appellant : Mr. S.T. Shelke
APP for Respondent : Mrs. P.V. Langhe

**RESERVED ON : 17th October, 2022
PRONOUNCED ON : 21st October, 2022**

CORAM : RAJESH S. PATIL,J.

JUDGMENT :-

1] Heard both the parties in Second Appeal.

2] This second appeal is filed in the year 2019 by the original defendant Zilla Parishad and is pending for admission since then without any relief of stay order being granted by this Court, to the concurrent findings recorded to the effect that the plaintiff is entitled to receive the security deposit amount, testing charges, penalty charges, balance amount of construction site and cement bag charges.

3] The learned Advocate for the appellant stated that his client has deposited the entire decretal amount in the Executing Court. However, the Advocate for the respondent/original plaintiff stated that some amounts are deposited but the entire decretal amount is not deposited by the appellant.

4] Parties are hereinafter referred to, as per their original status in the suit. The plaintiff is a successful contractor, who was given work order by the defendant Zilla Parishad dated 26.2.1996 for a tender to construct Health Center at Undirgaon taluka Shrirampur, Dist. Ahmednagar.

5] As per the tender conditions, the work was to be completed within 10 months. The plaintiff's case is that the RCC design which was to be submitted from the defendant Zilla Parishad side was submitted late. So also, the plaintiff was not given the line-out of the work and further extra items which were part of the tender were also asked to be done by the plaintiff like excavation work. So also, the Junior Engineers of the defendant went on strike. There was also shortage of funds. All this resulted into delay, which was not due to any lapse on the part of the plaintiff. Hence, the defendants themselves kept on extending the time to complete the work.

6] However, the defendants themselves, after a long gap invoked clause 3(1) of the contract and issued an order dated 1st August, 2001, thereby withdrawing the work from the plaintiff. So also, the name of the plaintiff was black-listed and further an amount of Rs. 2,17,261/- was recovered from the plaintiff.

7] The plaintiff, therefore, filed a suit before the Joint Civil Judge (Senior Division) bearing R.C.S. No. 580 of 2001 for various reliefs, thereby seeking a settlement of his account and payment thereof, so also, for a declaration that the order dated 1st August, 2001 is bad in law and to remove/set aside his name from the black list and to receive back the security deposit deposit, amount of testing charges, payment amount, cement bags amount and the balance amount of construction.

8] The defendant opposed the suit of the plaintiff by filing the written statement and denied all the contentions of the plaintiff stated in the plaint. The defendant further stated that for want of notice under Section 280 of the Zilla Parishad Act, the suit is bad in law. The defendant further stated that the work was delayed due to fault of the plaintiff. The officers of the defendant were repeatedly asking the plaintiff to submit a sheet of the work to be done but the plaintiff avoided to give any programme. The defendant time and again informed the plaintiff that his work is not satisfactory and up to the mark. As per the requirement of the plaintiff cement bags were given to the representatives of the plaintiff. It was the duty of the plaintiff to utilize the cement bags as per the scheduled time, but the plaintiff failed to utilize the cement bags. Hence, the cement bags were wasted for which the plaintiff is supposed to pay the damages. Hence, the defendant has invoked clause 3(c) and withdrew the work given to the plaintiff.

9] At the trial, the plaintiff examined 3 witnesses and defendants examined only one witness to prove their case. The learned trial court, after considering the evidence led by the parties came to a finding that the suit was maintainable even though the notice under Section 280 of the Zilla Parishad Act was not issued by the plaintiff. The

Court further considered that the Court Commissioner was appointed who had carried out the inspection of the construction work and a report to that effect was submitted. The Court Commissioner was examined by the plaintiff. The Court commissioner had inspected the disputed site in presence of both the parties. The defendant had produced the measurement book and bills for completion of Commissioner's work. The work done in the measurement book and contractor who had completed the work on the spot were correct. Therefore, the report of the Court Commissioner supported the plaintiff's claim. The said report of the Commissioner was not challenged by the defendant by examining any independent expert witness. Hence, the suit was decreed and it was directed that the plaintiff is entitled to security deposit, cost of extra work done, recovery of cement bags deducted from the plaintiff's account.

10] Even the Appellate Court confirmed the findings of the trial court mainly on the basis of Commissioner's report. Aggrieved thereby, the defendant Zilla Parishad has filed second appeal eight years back and there is no stay granted to the concurrent findings of both the courts below. The plaintiff had left the site on 21.7.1998 and the impugned notice invoking clause 3(1) of the tender was issued only on 1.8.2001 i.e. after a gap of more than 3 years.

11] Advocate for the plaintiff has relied upon the judgment of the learned Single Judge of this Court in the matter of ***Deoram Tulshiram Patil vs. Zilla Parishad, Nasik and others, reported in 1994(2) Bom. C.R. 525***. This Court, in para. 4 of the said judgment held as under :-

“After hearing the parties, I am satisfied that the judgment and decree passed in Appeal cannot stand legal scrutiny. In the first place, there was no justification for raising this point

for the first time in Appeal. Non payment of undisputed claim for the actual work done on the basis of the contract could not be said to be “anything done or purporting to have been done in pursuance of this Act” as contemplated under Section 280. Every action of the Zilla Parishad, though made and done for the purposes of Zilla Parishad, cannot be said to have been done or purporting to have been done in pursuance of the Act. Such expression in some form or the other finds place in several enactments. Section 87 of the Bombay Port Trusts Act, 1879 is on such provision. In case of (Trustees of Port of Bombay vs. The Premier Automobiles Ltd) AIR 1974 SC 923, the Supreme Court has held that the suit for damages for breach of contract would not attract this section. Other provision is Section 64 of Bombay Housing Board Act, 1948. In case of (Bombay Housing Board vs. Karbhase Naik & Co.), AIR 1975 SC 763, the Supreme Court has held that non payment of money as damages for breach of contract is not an act done or purporting to have been done in pursuance of the Act and hence the said provision was not attracted.”

The ratio in the matter cited supra, clearly applies to the case in hand. Therefore, in my view, even if there is no notice under Section 280 issued by plaintiff, the suit for damages for non payment of dues under the Zilla Parishad and Panchayat Samitis Act, is maintainable.

12] After having perused the impugned judgments and orders of both the courts below, I find no error in the view taken by both the courts below. No substantial question of law arises for determination in this second appeal. Hence, the second appeal stands dismissed. There shall be no orders as to costs. Civil application No. 6452 of 2014 stands disposed of.

[RAJESH S. PATIL]
JUDGE.

grt/-