

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
COMMERCIAL APPEAL NO.6 OF 2021
WITH CA/8014/2021 IN COMAP/6/2021**

HULE CONSTRUCTION PVT LTD THR ITS MANAGING
DIRECTOR VISHWANATH DAGDOBA HULE
VERSUS
THE STATE OF MAHARASHTRA WATER RESOURCES
DEPARTMENT THR ITS PRINCIPAL SECRETARY
MANTRALAYA AND ORS

...

Mr. J. N. Singh, Advocate for the Appellant.

Mr. A. R. Kale, AGP for Respondent No.1.

Mr. S. G. Sangle, Advocate for Respondent No5.

...

**CORAM : NITIN W. SAMBRE AND
S. G. CHAPALGAONKAR, JJ.**

DATE : 23rd MARCH, 2023.

P.C:-

1. This is an appeal pursuant to the provisions of sub-Section (1-A) of Section 13 of the Commercial Courts and Commercial Appellate Division of High Courts Act, 2015 (for short 'Act of 2015'). In view of the mandate under Section 14 of the said Act of 2015, which provides for expeditious disposal of the appeals within a period of six months from the date of filing, the appeal is being taken up for final disposal at the admission stage.

2. The challenge in the appeal is to the judgment dated March 18, 2020 delivered by the District Judge-2 and Commercial Court, Bhoom in Special Civil Suit No.2 of 2019 which is of commercial in nature.

3. The said suit came to be dismissed with costs on March 18, 2020, as such, this appeal by the original plaintiff. The facts necessary for deciding the appeal are as under:

The suit was initiated for recovery of an amount of Rs.2399.79 lakhs with interest @ 15% per annum, which was lodged with the Court of Civil Judge, Senior Division, Osmanabad. However, after the Commercial Courts Act came into force, the suit was transferred to the designated Court i.e. Commercial Court presided over by the District Judge-1.

The appellant/plaintiff, a company incorporated under the Companies Act is a registered Class-I contractor. It is claimed that pursuant to they being successful bidder in the tender process, work of construction of structure of canal came to be awarded to them at an estimated cost of Rs.4356.65 lakhs which was 4.96% above the estimated cost. The work was to be completed within a period of 36 months from the date of work order i.e. 26th May, 2011. Alleging delay on the part of the respondents in handing over the site, as a result of which the machinery of the appellant being required to be kept idle, it is claimed that he has suffered loss of earning, profit etc. and failure to clear the running bills as prompted the initiation of the aforesaid suit.

The suit claim was resisted by the respondent/defendant through written statement (Exhibit-29). The said Exhibit-29 placed on record by defendant nos.2 to 5 whereas defendant no.1 has adopted the very same written statement vide pursis (Exhibit-47). The backdrop of the rival claims, the Commercial Court has framed issues at Exhibit-44, which reads thus:

<u>Points</u>	<u>Findings</u>
1. Whether Plaintiff proves that it has executed : work to the tune of Rs.5,50,70,850?	In the negative

2. Whether defendants prove that in view of the : In the
undertaking plaintiff abandoned itself from affirmative
claiming funds in case of delay in this
payment?
3. Whether plaintiff in view of the undertaking is : In the
entitled to claim relief as mentioned in para negative
No.20 of the plaint except actual work executed
by it?
4. Whether plaintiff is entitled to claim interest @ : In the
15% on entire amount i.e. 2218.37 lacs? negative
5. What order and decree? : As pr final
order

In support of the claim, the appellant examined his Managing Director (Exhibit-49) whereas the respondents/defendants have examined DW-1 Dashrath, Sub Divisional Engineer, Minor Irrigation at Exhibit-91, DW-2 Bharat, Executive Engineer, Lift Irrigation Division, Osmanabad (Exhibit-97) and has placed on record the documents (Exhibits-84 and 85).

4. The Commercial Court having regard to the statutory mandate to decide the suit expeditiously has proceeded to evaluate the rivals claims in absence of learned counsel for the appellant/plaintiff, as inspite of opportunities being availed, the learned counsel for the appellant/plaintiff remained absent.

5. The Commercial Court, as such, upon evaluating the claim dismissed the suit. As such, this appeal by the appellant/plaintiff.

6. The contention of the learned counsel for the appellant Mr. Singh are work order came to be issued on 26th

May, 2011 to the appellant being a successful tenderer and work was to be completed within 36 months. According to him not only the site where the work was to be executed was handed over at much belated stage, but the running bills which were agreed to be paid as per the tender conditions were not honoured for want of funds. According to him the suit even if is dismissed, the fact remains that the respondent has taken out proceedings for execution for recovery the Court fees. That being so the appeal claim needs to be atleast allowed to that extent. His one of the contention is the nature of the contract awarded was contingent one and only in case if the running bills are cleared, the appellant was to execute further work. As such, he would claim that not only the appeal warrants consideration, but also the judgment delivered by the Commercial Court needs to be quashed and set aside.

7. Learned counsel for the respondent Mr. Kale, in-charge Government Pleader so also Mr. Sangle, learned counsel for respondent no.5 would opposing the prayers. According to Mr. Sangle the very conduct of the appellant/plaintiff is taken note of by the Judge of the Commercial Court and has jotted down in the form of reasons in the judgment impugned which voluminously speaks about the conduct of the appellant/plaintiff. According to him the appellant has failed to prove the case and that being so the appeal is liable to be dismissed.

8. We have appreciated the aforesaid submissions.

9. In the aforesaid backdrop the points which warrants consideration in our opinion is, “whether the judgment under challenge is required to be interfered with?”

10. The issuance of the work order dated 26th May, 2011 and the time period to complete the work within 36 months from the date of work order are the facts which are not in dispute. Even today also the work in question remained incomplete. In the cross-examination PW-1 has admitted that he has written a letter to the Executive Engineer that he would withdraw the suit in case principal amount is paid to him and accordingly, he has admitted to have executed a Bond (Exhibit-85) on May 25, 2011.

11. The appellant has also admitted that so as to substantiate the claim made in the suit the measurement book of the work executed is not produced on record. He has also admitted that the part of the work which was executed by the appellant was valued at Rs.3,72,85,691/- as per the valuation given by the Executive Engineer.

12. As such, what can be noticed is the burden is on the appellant to prove his claim that he is entitled for the amount claimed in the suit under the various heads as has been alleged by him. Rather the appellant has admitted that out of the amount due and receivable as per the measurement taken by the Executive Engineer i.e. Rs.3,72,85,691/-, he has received payment of Rs.3,41,83,000/-. It has to be inferred that, during the pendency of the suit the appellant has received an amount of Rs.3,41,83,000/- from the respondents/defendants as against his claim of Rs.5,50,70,850/-.

13. It is reflected that the plaintiff has moved an application (Exhibit-167) with a request to refer the suit proceedings for mediation for the purpose of withdrawal of the suit so that it will facilitate him to claim refund of the Court fees. It appears that, such request of the appellant was already turned down by the Court below.

14. As such, it was open for the appellant to withdraw the suit on merit, however, he appears to have chosen to remain absent in the suit proceedings and refused to extend cooperation to the Commercial Court in expeditious disposal of the suit.

15. As a sequel of above, the Commercial Court was justified in appreciating the contentions/arguments of the learned counsel for the respondents/defendants in the matter for deciding the suit in question.

16. Apart from the above, in the tender document, a specific condition is incorporated as regards the bills and payments. The said condition mandates the appellant to submit his bills every months and the payment of bills shall be subject to the availability of the funds. In case, if there is any omission by the Engineer to pay the amount due upon the measurement or otherwise, the appellant has agreed to the term that he will not be entitled to any interest on the arrears or on balance amount due and payable during the final settlement of the account. In view of the aforesaid tender condition, the Commercial Court was justified in recording of finding that the appellant/plaintiff in law is not entitled to claim the interest, damages etc. for delayed payment. As far as his claim that the machinery and manpower

employed by him remained idle for non-handing over of the clear site is concerned, the fact remains that he has already agreed vide aforesaid tender condition that he will not be claiming any interest, damages etc.. In the aforesaid background, it has to be held that the appellant has not only failed to prove his claim, but by his conduct established that he is not entitled for the claim as has been canvassed he having been received the amount as has been admitted during his cross-examination.

17. In that view of the matter, the appeal sans merit and is dismissed with costs.

18. In view of dismissal of the Commercial Appeal, the present Civil Application is also disposed of.

(S. G. CHAPALGAONKAR)
JUDGE

(NITIN W. SAMBRE)
JUDGE