



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

COMMERCIAL APPEAL NO.1 OF 2023

M/s. Ambarwadikar and Company
Through its Partner
Mr. Suryakant V. Ambarwadikar,
Age 52 yrs., Occ. Business,
Office at : “Ambarwadikar Complex”,
Surya Lawns Complex, Gat No.103,
Near Datta Mandir,
Beed Bypass Road, Deolai, Aurangabad.

... Appellant

... **Versus** ...

- 1 The State of Maharashtra
Through Secretary,
Water Resources Department,
Having office at : Mantralaya,
Mumbai – 400 032.
- 2 Executive Engineer,
Minor Irrigation Division No.1,
Having office at : Sinchan Bhavan,
Jalna Road, Aurangabad.
- 3 Godavari Marathwada Irrigation Development
Corporation, Through its Executive Director,
Office at : Sinchan Bhavan,
Jalna Road, Aurangabad.
- 4 Executive Engineer,
Godavari Marathwada Irrigation Development
Corporation, Office at : Sinchan Bhavan,
Jalna Road, Aurangabad.
- 5 Chief Engineer,
Water Resources Department,
Office at : Sinchan Bhavan,

Jalna Road, Aurangabad.

- 6 Superintendent Engineer,
Minor Irrigation Division No.1,
Office at : Sinchan Bhavan,
Jalna Road, Aurangabad.
- 7 Assistant Executive Engineer,
Shivna Takali Canal Sub Division No.2,
Office at : Sinchan Bhavan, Jalna Road,
Aurangabad.
- 8 Assistant Chief Engineer,
Aurangabad Irrigation Department,
Office at : Sinchan Bhavan,
Jalna Road, Aurangabad.
- 9 Superintendent Engineer,
Aurangabad Irrigation Division,
Office at : Sinchan Bhavan,
Jalna Road, Aurangabad.
- 10 Sub Divisional Engineer,
Shivna Takali Canal-II,
Aurangabad.
- 11 Sub Divisional Engineer,
Minor Irrigation Department,
Kumbhar Pimplegaon, Post Jalna.
- 12 The Branch Manager,
Janata Sahakari Bank Limited, Pune,
Opposite Gomtesh Market,
Dalalwadi, Durangabad – 431 001.

... Respondents

...

WITH

CIVIL APPLICATION NO.13953 OF 2023 IN COMAP/1/2023

WITH
CIVIL APPLICATION NO.13954 OF 2023 IN COMAP/1/2023
WITH
CIVIL APPLICATION NO.13955 OF 2023 IN COMAP/1/2023
WITH
CIVIL APPLICATION NO.14280 OF 2023 IN COMAP/1/2023
WITH
CIVIL APPLICATION NO.14803 OF 2023 IN COMAP/1/2023
WITH
CIVIL APPLICATION NO.677 OF 2024 IN COMAP/1/2023

...

Mr. R.F. Totala, Advocate h/f Mr. Ganesh Yadav and Swapnil Lohiya,
Advocates for appellant/applicant in COMAP/1/2023, CA/13953/2023,
CA/13954/2023, CA/13955/2023 and CA/14280/2023

Mr. K.T. Taur and Mr. V.A. Bagal Patil, Advocates for applicant in
CA/14803/2023

Mr. S.S. Nade, Advocate for applicant in CA/677/2024

Mr. Mr. N.S. Tekale, AGP for respondent No.1

Mr. S.V. Adwant, Advocate h/f Mr. A.A. Yadkikar and Mr. Akshay Kulkarni,
Advocates for respondent Nos.2 to 11

Mr. S.V. Natu, Advocate for respondent No.12

...

CORAM : SMT. VIBHA KANKANWADI &
S.G. CHAPALGAONKAR, JJ.

RESERVED ON : 24th JANUARY, 2024

PRONOUNCED ON : 08th FEBRUARY, 2024

JUDGMENT : (PER : SMT. VIBHA KANAKANWADI, J.)

1 Present appeal has been filed by original plaintiff to challenge common order below Exhs.5, 6 and 7 dated 01.11.2023 by Commercial Court/District Judge-2, Aurangabad in Commercial Suit No.1/2023, thereby rejecting all the applications. (Hereinafter parties are referred as they were before the trial Court, for the sake of convenience.)

2 The original plaintiff is a registered Partnership Firm engaged in business of infrastructure. The plaintiff has executed various Government projects. Defendant No.2 had floated a tender in 2010 for the work i.e. construction of Earthwork Lining and Structures of Canal No.1 and Distribution System of Brahmagavan Lift Irrigation Scheme Part-II, Tq. Paithan, Dist. Aurangabad for estimated costs of Rs.4,494.86 lakhs. Plaintiff participated in the tender process and its bid was accepted. The plaintiff had deposited an amount of Rs.30,00,000/- and also given bank guarantee of Rs.82,40,000/- of Janata Sahakari Bank Limited in pursuant to the tender contract. It is the contention of the plaintiff that it was the duty of the defendants to see that all the land is made available to the plaintiff for carrying out the work. Upon the measurement of the work done and its verification the defendant authorities released part payment of Rs.18.32

Crores to the plaintiff. Defendant No.2 had issued letter dated 31.10.2017 stating that the progress of the work is slow and levied fine/penalty on the plaintiff @ Rs.25,000/- per day till further orders. There was reference of the said penalty in letter 15.02.2020 issued by defendant No.2 and allegation that the plaintiff had sub-let the project work and informed that a meeting is scheduled on 18.02.2020 and asked it to remain present. The plaintiff had written a letter on 18.06.2019 that about 11 farmers are obstructing the progress of the work on the ground that their lands have not been acquired. According to the plaintiff, the possession of part of the land is not given by defendant No.2 to it and, therefore, the progress could not be made. Time and again, there was communication in respect of removal of the obstruction, however, there was no positive response. Approximately, 90% work is complete. Allegations have been levelled against the Engineers to misguide the higher authorities. Then it is stated that the plaintiff was shocked to see letter dated 15.05.2020 issued by defendant No.6 to defendant No.3 that the remaining work has been got completed through another contractor Mr. A.M. Ambhore from Jalna. Amount of Rs.3,25,14,000/- was demanded for making necessary payments. Plaintiff raised protest by letter dated 18.05.2020 stating that no such work has been done by the said contractor and, therefore, no bill is required to be raised. Legal notice was also issued by the plaintiff on 23.05.2020 and reminder on 12.06.2020. Plaintiff had then

requested to extend the time for completion up to 31.07.2022. The Superintendent Engineer and Executive Engineer by giving reference to the plaintiff's letter opined that it is appropriate to get the work done from the plaintiff. Action of imposing penalty should be reviewed, was the stand taken by them. By letter dated 14.08.2020 the Chief Engineer accepted that proposal in the name of other contractor has not been sanctioned. It is then stated that there were various communications between the plaintiff and the defendants and the defendant (Superintending Engineer) by letter dated 03.12.2020 asked the plaintiff to submit documents and papers in relation to sub-letting contract. In the meantime, letter for extension was submitted. Plaintiff undertook that he would complete the work within two years. Plaintiff had then issued letter to defendant No.5 on 22.04.2021 and submitted copy of registered deed of cancellation executed between him and Sahas Engineers and Contractors Private Limited. Plaintiff says that the defendants are unnecessarily harassing with mala fide intention. He had also approached this Court in Writ Petition No.7036 of 2021. This Court gave liberty to file suit to the plaintiff by order dated 26.07.2022 and disposed of the writ petition. The action of the defendants is illegal and threatening to terminate the contract. Therefore, for various reliefs the suit was filed.

3 Plaintiff filed application Exh.5 for temporary injunction for

various reliefs which will be dealt with at a later point of time. Thereafter, application Exh.6 was filed for mandatory injunction directing the defendants to make payment of Rs.3,00,75,900/-. An application Exh.7 was filed for stay of communication dated 06.01.2023, whereby it was informed that the contract in favour of plaintiff has been cancelled.

4 The defendants have filed their say. The say of defendant Nos.2 to 11 is at Exh.33. It has been mainly stated that the claim of the plaintiff was within the exception carved out under Section 41 of the Specific Relief Act and, therefore, it is thoroughly unsustainable at law. Final relief cannot be claimed by plaintiff in the nature of interim relief. The facts are disputed. Defendant Nos.2 to 11 are the officers of Godavari Marathwada Irrigation Development Corporation, which had granted the tender to the plaintiff. The plaintiff has not done the work within stipulated time and, therefore, it is their duty to get the remaining work done and to see that there is no breach of terms of contract. No prima facie case has been shown by the plaintiff nor irreparable loss.

5 After hearing both sides and perusing the documents on record the learned Judge of the Commercial Court at Aurangabad rejected all the applications. Hence, the present appeal.

6 Heard learned Advocate Mr. R.F. Totala holding for learned Advocates Mr. Ganesh Yadav and Swapnil Lohiya for appellant/applicant in Commercial Appeal No.1 of 2023, Civil Application Nos.13953 of 2023, 13954 of 2023, 13955 of 2023 and 14280 of 2023, learned Advocates Mr. K.T. Taur and Mr. V.A. Bagal Patil for applicant in Civil Application No.14803 of 2023, learned Advocate Mr. S.S. Nade for applicant in Civil Application No.677 of 2024, learned AGP Mr. N.S. Tekale for respondent No.1, learned Advocate Mr. S.V. Adwant holding for learned Advocates Mr. A.A. Yadkikar and Mr. Akshay Kulkarni for respondent Nos.2 to 11 and learned Advocate Mr. S.V. Natu for respondent No.12.

7 At the outset, without going into the details as to whether only one appeal can lie for a common order for three different exhibits/applications, we would like to deal with the matter as the main point that would be required to be considered would be – As to whether the plaintiff had shown prima facie case, irreparable loss would be caused to the plaintiff and balance of convenience lies in favour of plaintiff ? Any application under Order XXXIX Rule 1, 2 of the Code of Civil Procedure, 1908 requires these three factors to be considered by any Court. Suffice it to say that merely because a common order is passed, a party does not get a right to challenge it by way of filing only one appeal.

8 Learned Advocate for the plaintiff has taken us through the tender documents, the terms therein and the various communications between the plaintiff and defendant No.3. The fact is not in dispute that the plaintiff was given the said contract, as for the said tender i.e. construction of Earthwork Lining and structure of Canal No.1 and Distribution System of Brahmagavan Lift Irrigation Scheme Part-II, Tq. Paithan, Dist. Aurangabad, the project was to be completed within 36 months from 25.10.2010. According to the plaintiff, as the defendant has not given possession of part of the land due to the agitation by certain land owners, who had dispute in respect of land acquisition, he has got the extension to the said project. There is no dispute between both the parties that it is a commercial litigation, as it is in respect of infrastructure project. As regards the infrastructure projects are concerned, it is well settled that preference has to be given to such projects. At this stage, we are considering, whether the plaintiff is entitled to the interim relief and, therefore, to that extent only we are taking note of the submissions by the parties.

9 The plaintiff himself has now produced on record letter dated 06.01.2023 issued by Executive Engineer, thereby terminating the contract. The suit has been filed on 02.01.2023. Thereafter, it appears that amendment has been carried out in February, 2023. Therefore, as on today

we are required to consider what has been prayed in the suit. No fresh application under Order XXXIX Rule 1, 2 of the Code of Civil Procedure was filed, but the old application Exhs.5, 6 and 7 it appears to have been pressed into service.

10 In the light of those facts the learned Advocate for the plaintiff/appellant submits that the act of terminating the contract was illegal, as there was no breach of terms of contract by the plaintiff. Defendant No.3 had not handed over certain portion of the land and in spite of the communications no action was taken. Rather illegally, penalty of Rs.25,000/- per day was imposed by order dated 01.11.2017. The said letter/order imposing the penalty was by the Executive Engineer, who had no authority or power to impose the said penalty. The penalty even imposed by the Superintending Engineer, who is superior to the Executive Engineer. The defendants at one hand are saying that the remaining work has been got completed through another contractor; yet, in view of the latter communication between the defendants and the plaintiff it can be seen that the work has not been got completed. Therefore, the defendants cannot be allowed to terminate the contract and allotting the remaining work to any third person. Even the bank guarantee should not have been encashed. The bill of the work done by the plaintiff has been approved by the defendants,

but it has been unnecessarily and illegally withheld by the defendants. The plaintiff has apprehension that they would deduct the penalty amount from the said amount. All these facts have not been considered by the learned trial Judge. A cryptic order has been passed saying that in view of amendment the application has become infructuous. The appeal, therefore, deserves to be allowed.

11 Learned Advocate for the plaintiff has relied on following case laws :

- 1) **Katta Sujatha Reddy and another vs. Siddamsetty Infra Projects Private Limited and others** [(2023) 1 SCC 355] with companion matters,
- 2) **Narendra Hirawat and Co. vs. Sholay Media Entertainment Pvt. Ltd. and another** [2020 SCC OnLine Bom. 391],
- 3) **The Divisional Engineer (Highways), Construction and Maintenance Division, Kallakurichi and others vs. C. Saravanan Chandrasekaran** in A.S. No.83 of 2017 decided on 31.03.2021 by Single Bench of Madras High Court, and
- 4) Copy of order dated 15.01.2024 passed in **Contempt Petition No.955 of 2023** [Ambarwadikar and Company, Through its Partner Suryakant Vitthalrao Ambarwadikar vs. Secretary, Water Resources Department] by this Court.

12 Per contra, the learned Advocate Mr. S.V. Adwant holding for

learned Advocates Mr. A.A. Yadkikar and Mr. Akshay Kulkarni submitted that in the present case Section 39 and 41 of the Specific Relief Act are required to be read together as they supplement each other. When alternate efficacious remedy is available to the plaintiff, injunction cannot be granted. The contract that was entered into between the plaintiff and defendant No.3 was a determinable contract. The plaintiff can file a suit for specific performance, but not in the way the present suit is filed, wherein there is no relief is sought for specific performance. Section 20A of the Specific Relief Act ensures that infrastructure projects are not to be delayed on account of pendency of Court proceedings and, therefore, the learned trial Court had rightly refused the injunction. The plaintiff himself had breached the terms of contract when he had sub-let to get the work done from another contract. That contract itself was in derogation to a term which he agreed in the present tender contract, thereby the plaintiff has not come with a clean hands. With the termination of the contract the plaintiff cannot seek prevention of breach of a contract.

13 The learned Advocate for respondent Nos.2 to 11 has relied on following case laws :

- 1) **B. Santoshamma and another vs. D. Sarala and another**
[(2020) 19 SCC 80],

- 2) **Katta Sujatha Reddy and another vs. Siddamsetty Infra Projects Private Limited and others** [(2023) 1 SCC 355] with companion matters,
- 3) **Wander Limited and another vs. Antox India Private Limited** [1990 (Supp) SCC 727],
- 4) **Indian Oil Corporation Ltd. vs. Amritsar Gas Service and others** [(1991) 1 SCC 533],
- 5) **Channel Motors vs. Skoda Auto Volkswagen India Private Limited** in Arbitration Appeal (Stamp) No.23325 of 2020 decided on 09.12.2020 by Single Bench of this Court,
- 6) **Oil and Natural Gas Corporation Ltd., Mumbai vs. M/s. Streamline Shipping Co. Pvt. Ltd.** [2002 (3) Mh.L.J. 530],
- 7) **Rajasthan Breweries Limited vs. The Stroh Brewery Company** [2000 SCC OnLine Delhi page 481],
- 8) **Turnaround Logistics Pvt. Ltd. vs. Jet Airways (India) Ltd. and others** [2007 SCC OnLine Del 2085] and
- 9) **Inter Ads Exhibition Pvt. Ltd. vs. Busworld International Cooperative Vennootschap Met Beperkte Anasprakelijkheid** [2020 SCC OnLine Del 351].

14 As aforesaid, taking into consideration the rival contentions following points arise for determination, findings and reasons for the same are as follows.

Sr. Nos.	POINTS	FINDINGS
01	Whether the plaintiff had shown prima facie case ?	No.
02	To whom irreparable loss would be caused upon the grant of relief than refusing ?	Defendant No.3.
03	In whose favour the balance of convenience lies ?	Defendant No.3.

REASONS

Point Nos.1 to 3 :

15 To avoid the repetition all the points are taken up together. As aforesaid, though the suit has been amended after the alleged letter of termination of contract dated 06.01.2023, there was no amendment or fresh application Exh.5/Order XXXIX Rule 1, 2 of the Code of Civil Procedure application and, therefore, we have to consider what were the prayers in the earlier application Exh.5. We would like to deal with it one by one. The prayer clause 59-b) reads thus -

“b) Temporary injunction be granted, against the Defendants, their servants, agents or any person claiming through them, restraining them from terminating the contract dated 25.10.2010 and allotting the same to any third party till decision of the suit.”

16 As aforesaid, already the letter of terminating the contract has been issued on 06.01.2023. In view of the said letter following relief has been added in the main suit -

“61 – b) It be declared that office order no.337/2017 dated 31st October, 2017 imposing cost of Rs.25,000/- per day, is null and void and contrary to the tender conditions.

bb) That, it be declared that cancellation of tender communicated vide letter dated 06.01.2023 by Defendant No.2 is null and void and be quashed.”

A specific question was, therefore, asked to the learned Advocate for the plaintiff – As to whether the plaintiff is accepting that the tender is cancelled ? We certainly, at this prima facie stage, accept the contention on behalf of the respondent that the contract that was entered into on the basis of tender was determinable, of course, it was on conditions. If the cancellation of the contract is admitted, then the further reliefs can be moulded. But when the fact has come on record that there is termination of the contract dated 25.10.2010, no question of granting any temporary injunction as prayed aforesaid will arise.

17 Now, we will deal with prayer clause 59-c) which reads thus -

“c) Temporary injunction be granted against the Defendants, their servants, agents or any person claiming through them, restraining

them from invoking the bank guarantee of an amount of Rs.82,40,000/- of Janata Sahakari Bank Limited, Pune.”

In this respect what has come on record is, as common order below application Exhs.23 and 29 in the suit that defendant No.12 had filed pursis at Exh.27 and informed that as per letter dated 13.01.2023 the bank guarantee of Rs.82,40,000/- already honoured and the amount has been transferred to Executive Engineer and, therefore, it appears that the learned trial Judge has said that the said relief has become infructuous.

18 So far as prayer clause 59-d) is concerned, which reads thus -

“d) Temporary injunction be granted against the Defendants, their servants, agents or any person claiming through them, restraining them not to deduct an amount of Rs.25,000/- as per office order no.337/2017 dated 31st October, 2017 from the payment to be made to the plaintiff for the work done and approved by the defendants i.e. Rs.3,00,75,900/- (Rupees Three Crore Seventy Five Thousand Nine Hundred only).”

It is to be noted that impugned order is said to have been passed on 31.10.2017 or 01.11.2017 regarding imposing penalty of Rs.25,000/- per day. It can be seen that the said order was never challenged by the plaintiff and, therefore, the said prayer suffers from delay and laches.

19 The next prayer clause 59-e) reads thus -

“e) Temporary injunction be granted against the Defendants, their servants, agents or any person claiming through them, restraining them not to carry the measurement as alleged in letter dated 27.12.2022 as the measurement was already carried and its bill is also approved.”

Prayer clause e) cannot be granted on the ground that when the contract is terminated for raising final bill, measurement will have to be done. Therefore, it is then related to the letter dated 06.01.2023 and at the cost of repetition it is said that the plaintiff will have to accept the said cancellation and mould the prayers accordingly.

20 This can be considered from another angle also. The record shows that there was a specific condition that the plaintiff should not sub-let the contract and get the contract executed through another agency. Still the plaintiff accepts that he had engaged another agency, thereby sub-letting the contract. No doubt, thereafter he has cancelled the said contract when the inquiry was started. Therefore, certainly, at this prima facie stage, it can be said that the plaintiff has not come with clean hands.

21 The main objection now appears to be in respect of the fact that defendant has not made available the entire land on which the work was to be done and there was hurdle raised by the farmers. In this respect the answer can be found only after the full-fledged trial. Whether it was

sufficient for the plaintiff only to bring the said objection to the notice of the defendant authority, would be a question. Therefore, taking into consideration all these aspects, we hold that the plaintiff has failed to prove prima facie case. Plaintiff will not suffer irreparable loss. Rather defendant No.3 would suffer irreparable loss, if the injunction is granted as it is a commercial suit. The balance of convenience lies in favour of defendant No.3. We, therefore, do not find any illegality or error committed by the learned trial Judge in rejecting application Exh.5. As aforesaid, application Exh.6 was for mandatory injunction, which appears to be the relief in the main suit also and, therefore, it cannot be granted, which is in respect of recovery of money. In respect of application Exh.7 for stay to the communication dated 06.01.2023 also it is the main relief in the amended plaint and, therefore, it cannot be granted by way of back door entry.

22 The legal position in all the decisions relied by both the parties cannot be disputed, however, taking into consideration the facts those are required to be applied. Therefore, the appeal deserves to be dismissed. Civil Application No.13953 of 2023, Civil Application No.13954 of 2023 and Civil Application No.13955 of 2023 are for interim injunction and Civil Application No.14280 of 2023 is for stay. All deserves to be dismissed. Civil Application No.14803 of 2023 and Civil Application No.677 of 2024 are stated to be for

intervention by third party, who want to get themselves added as party respondents to the appeal. The first and the foremost fact to be noted is that it is a commercial appeal and the said applicants were not party respondents before the trial Court. They had not approached the trial Court under Order I Rule 10 of the Code of Civil Procedure. Therefore, their applications styled as “intervention application” cannot be allowed. These applications deserve to be rejected. Hence, the following order.

ORDER

1 The Commercial Appeal stands dismissed.

2 All the civil applications for injunction/stay, i.e. Civil Application Nos.13953 of 2023, 13954 of 2023, 13955 of 2023 and 14280 of 2023 stand dismissed.

3 Civil Application Nos.14803 of 2023 and 677 of 2024 for intervention also stand dismissed.

(S.G. CHAPALGAONKAR, J.)

(SMT. VIBHA KANKANWADI, J.)

Date : 08.02.2024

Later on :

23 After the pronouncement of the Judgment, learned Advocate for the plaintiff/appellant seeks extension of interim relief for four weeks which was in existence for more than one year.

24 We have concluded that the plaintiff had not shown the prima facie case nor the balance of convenience lies in favour of the plaintiff. Under such circumstance, no case is made out for extension of the interim relief. Hence, oral request is rejected.

(S.G. CHAPALGAONKAR, J.)

(SMT. VIBHA KANKANWADI, J.)

agd