IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

APPEAL AGAINST ORDER NO.14/2023

M/s Indo Rama Synthetics (I) Ltd.,
A Company incorporated within the meaning
Companies Act, 1956 and having its office at
A-31, MIDC Industrial Area Butibori, Nagpur
441122 through its Authorized Signatory
Manager (Legal)
Aman Shrivastava,
Aged about 30 years,
Occupation : Service,
R/o Plot No. 46 Kushi Nagar, Nagpur

... APPELLANT

...VERSUS...

1. Maharashtra Industrial Development Corporation
having it's Office at Udyog Bhavan, Civil
Lines, Nagpur through it's Chairman
(Ori. Respondent No.1)

2. Butibori CETP Pvt. Ltd.,
having it's registered office at
P-31, M.I.D.C. Industrial Area, Butibori,
Nagpur – 441122 through its Director
(Ori. Respondent No.2)

3. Butibori Manufacturers Association,
Having it's Office at Udyam, P-5 MIDC
Industrial Area, Near Fire Station,
Butibori, Nagpur through its President
Mr. Nitin Lonker
(Ori. Respondent No.3)

...RESPONDENTS

Shri Sham Dewani, Advocate for appellant
Shri A.C. Jaltare, Advocate for respondent No.1
Shri S.C. Mehadia, Advocate for respondent No.2
Shri R.M. Bhangde, Advocate for respondent No.3

CORAM : SMT. M.S. JAWALKAR, J.

DATE OF RESERVING THE JUDGMENT : 28/04/2023
DATE OF PRONOUNCING THE JUDGMENT : 05/06/2023

JUDGMENT

At the request and by consent of parties matter is taken up for final hearing at the stage of admission.

2. Brief facts which emerges from the record before me are as under :

Appellant is a company incorporated under Companies Act having production unit in Butibori. The company is engaged in manufacturing of synthetic filament yarn and synthetic staple fibre. Respondent No.1- Maharashtra Industrial Development Corporation Limited established by virtue of Section 3 of the Maharashtra Industrial Development

Act to secure the orderly establishment of industrial area and industrial estate of industries in the State of Maharashtra and to assist generally in the organization thereof and to provide facilities at the lowest costs to the industries. Respondent No.3 is Butibori Manufacturers Association, is an association of industries which have their manufactories in the MIDC industrial estate, Butibori, Nagpur representing around 300 manufacturers. The Common Effluent Treatment Plant (for the sake of brevity CETP), respondent No.2 were formed to help the small scale industries to get their effluent treated through such, at lower costs to reduce their capital. This effluent treatment plant was to be installed as per direction of Hon'ble Supreme Court Monetary Committee.

3. It is the case of the appellant that on 18/07/2007, there was tripartite agreement exchange between the parties for using common effluent treatment plant at Butibori. In this tripartite agreement respondent/defendant Nos. 1 to 3 were

parties. MIDC communicated to Butibori CETP approving the agreement between the parties. Accordingly, 19/12/2007 tripartite agreement was executed. As per resolution dated 25/03/2008, it was decided that notice be issued to the concerned indigent industries who have not signed and appropriate action will be taken in respect of the same and appropriate charges will be collected. It is further contention that in view of the stringent norms by Maharashtra Pollution Control Board (MPCB), the appellant had undergone various changes and decision was taken by the Manager to recycle and reuse the water and also to make mechanism to reutilize treated effluent.

4. It is further contended by the appellant/plaintiff that in view of the directions of the Hon'ble Supreme Court the concept of polluters to pay was evolved. The CEPT is a state agency and established with the help of subsidy given by State Government as well as Central Government, therefore it

should not act as profit making company. The plaintiff and defendant No.3/Association of Manufacturers along with defendant Nos. 1 and 2 entered into an agreement and in view of that agreement, the charges for treating the effluent by defendant No.2 was agreed to be paid on the basis of water intake. In the year 2014, plaintiff made report to amend this method of charging and the effluent treatment charges should be applied on the basis of actual discharge of effluent from the said industries. It is claimed by the plaintiff that defendant No.1/MIDC who is the controlling authority of other defendants has permitted the plaintiff to install the meter at the outlet of the plaintiff company.

5. It is contended by the appellant that in spite of resolution passed to that effect, the defendant No.2 CEPT is illegally charging effluent treatment charges on the plaintiff on the basis of water intake. Even illegally hike the charges. Therefore, plaintiff filed suit and sought declaration against

the defendant No.2, that defendant No.2 cannot recover effluent treatment charges on the basis of water intake, but they should charge effluent charges on the basis of actual quantity of the effluent discharge by the plaintiff. Plaintiff has sought injunction against the defendant No.2 with prayer for direction to them to charge on the basis of actual quantity of effluent discharged by the plaintiff and not on the basis of water intake, and recovery of excess amount charged by the defendant No.2.

6. Learned Counsel for the appellant submitted that to the communication dated 18/07/2007, wherein MIDC, approved in principle tripartite agreement need some corrections therefore requested to obtain signature of the 1st party and 4th party in token of agreeing to the terms and conditions of the tripartite agreement and return the said agreement for obtaining final approval of the CEO, MIDC. The learned Counsel for appellant further drawn my attention to

letter dated 30/11/2007 issued by executive engineer to CETP, by which the CETP was informed that Deputy CEO, MIDC, Mumbai approved tripartite agreement to be entered into by BCPL(Butibory Common Effluent Treatment Plant Private Limited), MIDC and BMA (Butibori Manufacturers Association). Thereafter, the draft was sent to legal department and referred to General Manager (Law), to grant his legal consent to enter into an agreement as per the terms and conditions. Learned Counsel also drawn my attention to the minutes of meeting dated 27/03/2008. In the said meeting, it was decided that a final notice was to be issued to sign the tripartite party agreement by the end of March 2008 and shall be served on the concerned individual industry. Those who will again failed to sign billing of CETP charges shall be levied with effect from April, 2008 through water bill irrespective of whether agreement is signed or not by the concerned industries.

7. Learned Counsel also drawn my attention to letter dated 13/11/2013, by which executive engineer, MIDC approved request of appellant for rebate in drainage charges applicable to the appellant company. However, by this letter appellants were requested to give detailed plan of companies effluent, recycle and reuse system. It is further requested that suitable flow meter at the effluent outlet be duly calibrated at any Government lab, duly tested at site by authentic agency in the presence of MIDC representative, so as to enable Executive Engineer, MIDC to levy charges on the meter quantum of effluent release. Accordingly, the meter was sent to the Deputy Engineer for testing and water testing report have also received.

8. It is contended that in spite of these communication and granted approval to plaintiff to install the meter at the outlet of plaintiff's company, the defendant No.2 is illegally charging effluent treatment charges to the plaintiff

on the basis of water intake. The contention of the plaintiff/appellant is that the defendant No.2 has illegally recovered excess charges from the plaintiff towards the effluent treatment charges and illegally charging the plaintiff on the basis of water intake. Therefore, plaintiff has sought injunction against the defendant No.2 directing them to charge on the basis of actual quantity of the effluent discharged by the plaintiff. Plaintiff has also claimed the recovery of amount of Rs.4,84,40,286/- alleged to have been excessively charged by the defendant No.2.

9. Learned Counsel for the appellants relied on following judgments :

1. Tarsem Singh Vs. Sukhminder Singh, (1998) 3 SCC 471.

2. K.S. Satyanarayana Vs. V.R. Narayana Rao, (1999) 6 SCC 104.

3. Deoraj Vs. State of Maharashtra and others, (2004) 4 SCC 697.

4. Andheri Bridge View Co-op. Hsg. Society Ltd. Vs. Krishnakant Anandrao Deo and others, 1990 SCC OnLine Bom 305.

5. Mukul Sharma Vs. Orion India Private Limited though its Managing Director, (2016) 12 SCC 623.

6. Chrisomar Corporation Vs. MJR Steels Private Limited and another, (2008) 16 SCC 117.

7. Suman Jindal and another Vs. Adarsh Developers, (2019) 16 SCC 806.

10. As against this, learned Senior Counsel Shri Mehadia for CETP, respondent No.2, vehemently argued that water is being supplied by MIDC to all industries. When it is used by industries, water get contaminated to the common effluent treatment plant which is joint plant by MIDC, Butibori Manufacturing Association and CETP. The contention of the defendant/respondent No.2, is that there was an agreement executed between the plaintiff and defendants and the

defendant No.2 which is charging effluent treatment charges on the basis of that agreement. There was meeting on 17/02/2014, wherein it is categorically mentioned in the last that " At the outset, Shri Hemant Ambaselkar expressed that this Memorandum of Meeting (MOM) shall be treated as base for drafting next tripartite agreement between the member, CETP and BMA. Draft tripartite Agreement shall be sent for approval to MIDC legal department. This MOM shall also be referred to Maharashtra Pollution Control Board (MPCB) in case of dispute in future. There was no decision that charging should be done as per meter installed by the plaintiff.

11. Learned Counsel also drawn my attention to the minutes of meeting dated 17/02/2014, that Indorama itself raised point that "Indorama had installed the effluent meter at the outlet and this meter has been sealed in presence of MIDC. If all the polluting units provide such meters then the total flow to CETP shall be monitered and billing can be made on

the basis of effluent discharged by every member" The principle of polluter to pay should hold good. Non polluters can be made free of payments to CETP. tripartite agreement should be made with each and every unit who wants to avail of CETP facility.

12. Indorama Synthetic Limited also shall see that the tripartite agreement is approved through MIDC legal Cell. The learned Senior Counsel vehemently argued that in view of this position, it is clear that there was no concluded contract between the parties that charging should be done as per the meter installed by plaintiff. It is submitted that learned Counsel for the appellant heavily relied on the letter dated 20/02/2014, which was written by Butibori Manufacturers Association, respondent No.3 to Indorama Synthetic. There is no date in agreement that from 01/04/2014, the appellant/plaintiff to be charged on the basis of meter installed by the appellant. As there was no modification or

new tripartite agreement executed the billing would be as per earlier agreement in existence.

13. Learned Counsel drawn my attention to the minutes of meeting dated 01/09/2018, wherein issue of levying effluent treatment charges was discussed at length and representative from M/s Indorama Synthetic was present. It is submitted that “by virtue of proposal from Executive X-Engineer (ENV) MIDC dated 22/10/2013 and of letter from EE (E & M) MIDC, Nagpur dated 30/01/2014 a suitable mechanism has to be devised for levying treatment charges on the basis of effluent quantity. The said representative of Indorama also suggested modified clause – 3 of tripartite agreement. Thus, it is contended that till meeting dated 04/09/2018, there was no new tripartite agreement. So, without there being any attempt by plaintiff to get modified tripartite agreement suit was filed in 2019. There was no cause after period of five years from 01/04/2014 to grant

injunction. Moreover, relief claimed is similar to the relief prayed in the main suit.

14. Learned Counsel for MIDC vehemently submitted that charges paid for the consumption of pure water on pro rate basis. It is submitted that the plaintiff claiming rent to be charged for effluent at the rate of water consumption. There is no full proof system devised to measure the pollution. The effluent charge can not be decided on the basis of the effluent coming out from the factory. It is contended that Maharashtra Pollution Board, found that the plaintiff company has let the polluted water to release into the side by Nala by which there was fish killing. Moreover, quantity of effluent coming out of the factory will not decide the quality of effluent discharge. As such, there has to be a system accepted to all to be installed. Granting permission to the plaintiff to install a meter at the outlet is only on the experimental basis. As such, there was no

tripartite agreement as alleged came into force. Therefore, no interim relief can be granted.

15. Learned Counsel for respondent No.3 Butibori Manufacturers Association vehemently submitted that though common effluent treatment plant was decided to be set up the important question was how the industries will be charged. Mr. N.K. Agrawal who was active member decided to go by the billing on the basis of intake of water, there would not be any incident of pilfrage or incident of death, on the contrary it will promote recycling and reuse of water.

16. If it is allowed to charge on release of effluent, the factories may release somewhere else and will raise pollution. It is contended that the plaintiff suppress many documents from the Court. It was pointed out that Shri N.K. Agrawal was nominated by company for the sub committee pertaining to CETP in August, 1999. In the said MOU of CETP, Butibori

between Shantikumar Sancheti and Butibori Manufacturers Association, MIDC, consenting party dated 10/06/2005, it was agreed that the treatment charges shall be recovered from the industry by way of water bill in the same proportion as effluent bears to the water consumed. It is pointed out that though the nominee of the plaintiff was present in sub committee in CEPT while executing above referred MOU plaintiff in paragraph No.11 of the plaint boldly made false statement that copy of the said MOU was not supplied to the plaintiff. This document nominating Shri N.K. Agrawal as a member of CEPT was not placed on record. Learned Counsel also drawn my attention to the show cause notice issued by Maharashtra Pollution Control Board (MPCB), as it was reported that company is releasing it's effluent to nearby Nala causing death of many fishes. To prevent all these illegal activities method to charge as on intake of water chose instead to charge on discharge. It is submitted that by recycling nothing change or help in reduction in discharge. There is no

mechanism to charge discharge of each industry which may with a reason for industries to discharge uncontrolled effluent. Industries cannot control intake. Even if, such resolution were passed, it was not incorporated by amending the agreement. So unless and until that agreement is amended accordingly and signed by parties, parties cannot be compelled to execute the terms.

17. Learned Counsel for the respondent No.3, Shri Bhangde relied on following judgments :

1. Best Sellers Retail (India) Private Limited, (2012) 6 SCC 792.

2. LIC of India and another Vs. S. Sindhu, (2006) 5 SCC 258.

3. Shree Ambica Medical Stores and others Vs. Surat People's Co-operative Bank Limited and others, (2020) 13 SCC 564.

18. It is contended by the learned Counsel for the appellant that defendant be restrained from charging on the basis of water intake as he installed meter reading discharge of effluent as per directions issued by the defendants and defendants should charge on the basis of effluent release. Learned Counsel for the appellant relied on ***Tarsem Singh (supra)***, in support of his contention that in absence of prohibition in the contract, parties with mutual agreement can vary terms and conditions of agreement, such mutual decision binds the parties. In the cited judgment Hon'ble Apex Court held that "Mutual consent, which is also be a free consent as defined in Section 13 and 14 of the Act, is the sine qua non of a valid agreement. One of the essential elements which go to constitute a free consent is that a thing is understood in the same sense by a party as is understood by the other party." However, in the present matter there is no question of any mutual agreement to vary terms of agreement. If the letters, communications and resolutions passed in the meeting of

Butibori Manufacturers Association (BMA) if perused, there is no final decision on installing meters for measuring of effluent quantity. Though permission was granted to appellant to install the meter to the outlet to measure the discharge, as per resolution the plaintiff itself suggested that if all the polluting units provided with such meters then the total flow to CETP shall be monitored and billing can be made on the basis of effluent discharge by every member. It also assured that the plaintiff shall help all members to procure and install the meter. The plaintiff will see that tripartite agreement is approved through legal cell. As such, there was no question of any variation by consent of the parties in the terms of agreement in existence.

19. The learned Counsel also relied on ***K.S. Satyanarayana (supra)***, in support of his contention that there is undue enrichment by CEPT. It is the case of the plaintiff that as R.O. plants are installed and plaintiff is having machinery

to treat the effluent and plaintiff is reusing the recycled water, as such, there would be less intake of water and accordingly intake water will be charged. In absence of any modification to the agreement in existence, the plaintiff cannot say that the CEPT is charging excess and getting undue enrichment.

20. Learned Counsel for appellant placed reliance on ***Deoraj (supra)***, however it would not be applicable in the present set of facts. In the matter before the Hon'ble Apex Court "there was only one nomination filed which was found to be in order and was not withdrawn. The time prescribed for filing nominations, scrutiny and withdrawal was over. There was no contest. Nothing had remained to be done at the meeting of the Committee which was to be convened only for the purpose of declaring the result. The petitioner was submitting that election was for the period of one year and out of which a little less than half of the time has already elapsed and in the absence of interim relief being granted to him there

is nothing which would survive for being given to him by way of relief at the end of the final hearing." In view of this situation Hon'ble Apex Court held that "where withholding the interim relief would amount to dismissal of the main petition itself, as by the time the main matter comes up for hearing, nothing would remain to be allowed as relief, Court may, having regard to a strong prima facie case, balance of convenience and irreparable injury, issued an interim writ even though it would amount to granting final relief. In the present matter this is not the situation that if injunction is not granted would amount to dismissal of suit. If at the time of conclusion of trial plaintiff succeeds and it was concluded that the plaintiff company ought to have been charged on the basis of actual effluent discharge, the plaintiff is having remedy to recover the said amount.

21. Learned Counsel for appellant also relied on ***Andheri Bridge View (supra)***, the Bombay High Court in view

of the letters held that “the period for commencement of the work is different from that of the earlier agreement. The rate is also different form the earlier agreement. There is a different term regarding member of liability of one Prakash Joshi. Thus, the correspondence by the plaintiff to defendants held in constitutes of proposal for an entirely new agreement. When defendant gave reply to the plaintiffs stating “ I do hereby confirm all the points mentioned in paragraph Nos. 1 to 6 and accord hearby my approval of the same in it’s acceptance of a new agreement between the parties. It is the new agreement deducible from the correspondence has to be considered.

22. It is the contention of the plaintiff that MIDC approved the installation of meter. As such, inference has to be drawn as there was renovation of contract. However, if communication issued by MIDC is perused, installation of meter by the plaintiff is approved subject to conditions

mentioned in a letter. However, at any rate there was no acceptance by all the parties of the tripartite agreement. As such approval by MIDC to install meter would never means that there was acceptance by other members of tripartite agreement to charge as per discharge of effluent. As rightly pointed out, there will be many factors needs to be taken into account while charging on discharge of effluent only quantity will not serve the purpose but it requires quality of the effluent discharged by each unit, in view of polluters to pay principle.

23. Learned Counsel also relied on ***Mukul Sharma (supra)***, however it is not applicable in the present set of facts, wherein Hon'ble Apex Court held that "settling the meaning of a express word in contract not defined or not clear, subsequently, held, not novation of contract or attempt to resile therefrom, particularly when parties had come to an agreement as to meaning to be assigned to words concerned." In the said matter there was case where plaintiff resigned from

agreement but respondent himself subsequently accepted the dispute raised by the plaintiff that “built-up area” does not include common area. As expression “built up area” was not defined in sale deed, it is to be deciphered from conduct of the parties. In the present matter there is no modification in the existing agreement and billing, which was on the basis of water intake was to be substituted by meter reading of effluent discharge. As such, in my considered opinion, the citation relied on is of no help.

24. Learned Counsel for appellant also relied on ***Chrisomar Corporation (supra)***, wherein Hon’ble Apex Court held that “In order that a contract that is altered in material particulars fall under Section 62, it must be clear that the alteration must go to the very root of the original contract and change is essential character, so that the modified contract must be read as doing away with the original contract. If the modified contract has no independent contractual force, in

that case it has no meaning and content separately from and independently of the original contract, it is clear that there is no new contract which comes into being. The original terms continues to be a part of the modified contract except to the extent that they are inconsistent with the modifications made." As said earlier, prima facie there is no modified agreement by a consent of all the parties that billing should be as per discharge of effluent. In view thereof, the citation relied on is not applicable.

25. Learned Counsel for appellant also relied on ***Suman Jindal (supra)***, wherein novation of contract by exchange of emails held permissible. However, in the present matter, prima facie there is nothing on record to show that all the parties agreed and accordingly modified the terms of agreement in existence.

26. As against this, learned Counsel for respondent No.3, Shri Bhangde relied on ***Shree Ambica Medical Stores***

and others(supra), wherein the Hon'ble Apex Court held as under :

> *"while interpreting the contract of insurance one must interpret the words of the contract by giving effect to the meaning and intent which emerges from the terms of the agreement. The Court through his interpretative process cannot rewrite or create a new contract between the parties. The Court has to simply apply the terms and conditions of the agreement as agreed between the parties."*

27. Similar is the view taken in the citation relied on i.e. ***LIC of India and another (supra)***, wherein Hon'ble Apex Court held that

> *"the courts and tribunals cannot rewrite contract, and direct payment contrary to the terms of the contract that too to the defaulting party."*

28. It is vehemently submitted that the plaintiff is not going to suffer any irreparable loss. If any excess amount is paid by the plaintiff that can be recovered by the order of this Court. However, at this interim stage, no prima facie case is

made out, nor plaintiff succeeded in showing that it will suffer irreparable loss.

29. The learned counsel for the respondent No.3 relied on ***Best Sellers Retail (India)Private Limited (supra)***, wherein Hon'ble Apex Court while discussing what would be the factors to be considered while passing order of interim injunction held that "Prima facie case in favour of party seeking relief is not enough, it must be shown prima facie that injury suffered by plaintiff on refusal of temporary injunction would be irreparable. The Hon'ble Apex Court quoted words of Alderson, B. in ***Attorney General Vs. Hellett*** which are as under:

> *"I take the meaning irreparable injury to be that which, if not prevented by injunction, cannot be afterwords compensated by any decree which the Court can pronounce in the result of the cause."*

30. Admittedly, in view of the terms of agreement the effluent charges were to be applied on the basis of the water

intake and not on the basis of actual quantity of effluent discharged by the concerned industries. Though there were minutes of meetings showing that the members were agreed to install such meters to measure discharge of effluent, however, it was not installed by all the industries nor there was any amendment/modification to the earlier agreement. As such, for want of amendment or modification in the existing contract parties cannot be compelled to execute the terms, as directed by MIDC to CETP to device mechanism to charge on the basis of effluent quantity only. To protect the environment, the Hon'ble Apex Court directed to install common effluent treatment plant. The learned Trial Court rightly appreciated the provisions to exercise its discretion judiciously. As held by the Trial Court that prima facie there is an agreement on record by which the parties are covered. It is held that considering the facts of the case provision of Order 39, Rule 1 will not apply. As such, no prima facie case made out by the plaintiff, even balance of convenience does not lie

in favour of plaintiff. Even there is no loss which can be said to be irreparable. The plaintiff can recover the amount in case plaintiff succeed. In view of this position, I do not see any perversity in the impugned order. The order passed by learned Trial Court is perfectly justified in the facts and circumstances of the matter. There is no prima facie case made out by the plaintiff nor any balance of convenience in its favour. The plaintiff would not suffer any irreparable loss as the suit is for recovery of amount. After final adjudication, if plaintiff succeeds, it will get his amount recovered. Hence appeal stands dismissed.

(Smt. M.S. Jawalkar, J.)

Jayashree..