IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 1536 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE DEVAN M. DESAI

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Approved for Reporting	Yes	No
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SHANTILAL R PATEL
Versus
GUJARAT HOUSING BOARD

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Appearance:
MR KG SUKHWANI(871) for the Appellant(s) No. 1
MR YN RAVANI(718) for the Defendant(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE DEVAN M. DESAI**

Date : 01/12/2025

ORAL JUDGMENT

1. The present First Appeal is filed under Section 96 of the Code of Civil Procedure, 1908 (For short 'the Code') by appellant-original plaintiff assailing the order dated 10.02.2005 passed by learned Second Joint Civil Judge (S.D.) Ahmedabad (Rural) in Special Civil Suit No.180 of 1993 (Order below Ex.34).

2. Heard learned advocate Mr.K.G.Sukhwani for appellant – original plaintiff and learned advocate Mr.Y.N.Ravani for respondent – original defendant.

3. Brief facts are as under:

3.1. The appellant – plaintiff filed a suit for recovery of Rs.5,62,000/- with interest at the rate of 18% per annum from respondent – defendant. Defendant appeared and filed Written Statement at Ex.12. When the matter was posted for recording the oral evidence of plaintiff, defendant moved an application at Ex.34 invoking the provisions of Order VII Rule 11(d) of the Code for rejection of the plaint on the ground that the suit is barred under Section 71 of the Gujarat Housing Board Act, 1961 (For short 'the Act'). After hearing the parties, learned Court below

allowed the application and rejected the plaint under the provisions of Section 71 of the Act.

3.2 Being aggrieved and dissatisfied with the impugned order, plaintiff – appellant is before this Court by way of present First Appeal.

4. Learned advocate for appellant, at the outset, contended that, plaintiff filed a suit for recovery of the value of work done, but not paid, refund of security deposit, excess establishment charges, and payment of agreed escalation price. The suit is essentially based upon the contract executed between the plaintiff and defendant. It is alleged by plaintiff in the plaint that the work could not be completed within the stipulated time as the defendant failed to complete its contractual obligation as mentioned in the plaint. It is contended

that the provisions of Section 71 of the Act are not applicable to the present set of facts as the suit is not based upon breach of any statutory obligation but is based upon breach of contractual obligation. It is further contended that the learned trial Court has gravely erred in interpreting Section 71 of the Act and rejected the plaint.

4.1 In support of his submissions, learned advocate for appellant has relied upon the decision of Hon'ble Division Bench of this Court passed in First Appeal No.3869 of 1985 and allied matters on 21.04.2022. Learned advocate for appellant has also relied upon the decision of Hon'ble Apex Court in the case of **Bombay Housing Board (Now the Maharashtra Housing Board) Vs. M/s. Karbhase Naik & Co. Sholapur**

reported in **AIR 1975 Supreme Court 763.** It is contended that while considering Section 64 of the Bombay Housing Board Act, 1948, which is *pari materia* with the provisions contemplated under Section 71 of the Act, the Hon'ble Apex Court has held that non-payment of money as damages for breach of contract is not an act done or purported to have been done in pursuance of the Act and therefore Section 64 of the Bombay Housing Board Act, 1948, (For Short 'the Act') is not applicable. Applying the same principle, learned advocate for the appellant contended that, in the present case, plaintiff has claimed non-payment of money as damages for breach of contract committed by defendant. Except above, no other submissions are made by learned advocate for appellant.

5. *Per contra*, learned advocate for respondent has supported the judgment and decree and contended that Section 71 of the Act contemplates that, before institution of the suit by any person, notice of two months in writing of the intended suit must be issued. In the present case, since no notice was issued prior to the institution of the suit, the provisions of Section 71 of the Act are attracted and therefore, learned trial Court has rightly interpreted Section 71 of the Act and rejected the plaint. It is further contended that Section 71 of the Act does not differentiate between the breach of contractual obligation or breach of statutory obligation.

5.1 In support of his contentions, learned advocate for respondent has relied upon a decision in

the case of **M.G.Patel and Co. Navsari Vs. Shri Alka Co-op Housing Society Ltd. Navsari** reported in **1980(2) GLR 498.**

6. I have considered the submissions canvassed by learned advocates for the parties and perused the record and proceedings. The issue raised in the present First Appeal is with regard to the scope under Order VII Rule 11(d) of the Code. In *catena* of decisions, law has been laid down by interpreting the Order VII Rule 11(d) of the Code. Order VII Rule 11 contemplates the contingencies under which the Court can exercise the power under clauses (a) to (f) of Rule 11 of Order VII. One such contingency for rejection of plaint as can be seen in clause (d) of Rule 11 of Order VII is that, when the suit appears from the statement made in the plaint, to be barred by any law, plaint shall be

rejected. While considering an application under Clause (d) of Rule 11 of Order VII, the Court shall only consider the averments made in the plaint. Any defence or documents supporting the defence cannot be considered at this stage.

In the present case, plaintiff has contended in the plaint that the defendant invited tender for construction of road, and plaintiff was a successful bidder. The defendant accepted the tender and issued a work order. The work was to be competed within 21 months i.e. on or before 19.07.1991. As per the allegation of plaintiff, the work could not be completed within the stipulated time because defendant failed to complete contractual obligation as mentioned in para 5 of the plaint. It is also stated in the plaint that, plaintiff had completed the work on 24.12.1991.

However, defendant did not make payment for the value of completed work and did not refund security deposit, excess establishment charges from 20.07.1991 to 24.07.1992 together with interest and payment of agreed escalation price. On a plain reading of averments made in the plaint, undisputedly, the suit is for a breach of contractual obligations. The learned trial Court has granted the application at Ex.34 and rejected the plaint by relying upon Section 71 of the Act. For ready reference, Section 71 of the Act is reproduced hereunder:-

> *"No person shall commence any suit against the board or against any officer or servant of the board or any person acting under the orders of the board,for anything done or purporting to have been done in pursuance of this act without giving to the board, officer or servant or person as the case may be, two months previous notice in writing of the intended suit and of the cause thereof nor after 6 months from the date of the act complained of."*

Learned advocate for respondent has tried to

interpret Section 71 in a manner as suits the case of defendant. The interpretation which learned advocate for the respondent has tried to make before this Court by submitting that Section 71 of the Act is applicable because the language of Section is silent with regard to the suit arising out of the breaches of contractual obligations.

7. On plain reading of Section 71 of the Act, it transpires that a person shall not commence any suit against the board or against any officer or servant of the board or any person acting under the orders of the board, for anything done or purporting to have been done in pursuance of this act without giving to the board, officer or servant or person as the case may be, two months previous notice in writing of the intended

suit and of the cause thereof nor after 6 months from the date of the act complained of.

For invoking the provisions of Section 71 of the Act, the commencement of suit shall be against the officer or servant of the Board acting under the orders of the Board for anything done or purporting to have been done in pursuance of the Act.

8. As observed hereinabove, the statements made in the plaint, nowhere states that the suit is filed against the defendant for any act done by the Board or any officers in pursuance of the Act. Learned advocate for respondent has also contended that the suit is for the alleged breach of the terms and conditions of the contract. The claim for damages requires a full-fledged trial, and unless the parties are put to strict proof, the

plaint cannot be rejected by invoking the provisions of Order VII, Rule 11(d) of the Code.

Learned trial Court while considering the application, has lost sight of the scope of Order VII Rule 11(d) and has miserably failed to interpret the provisions of Section 71 of the Act. The contention that the suit is barred under Section 71 of the Act touches the maintainability of the suit. However, the maintainability of the suit falls outside the scope of order VII Rule 11 of the Code. In my opinion, therefore, the contention of applicability of Section 71 of the Act, is misconceived and Order VII Rule 11(d) of the Code is not applicable in the present set of facts. The maintainability question can be determined after trial in the present set of facts.

9 The claim for damages require a full fledge trial and unless parties are put to strict proof, the plaint cannot be rejected by invoking the provisions of Order VII Rule 11(d) of the Code. In the case of **Bombay Housing Board (supra),** in paragraph No. 23, Section 64 of the Act has been reproduced which is reproduced hereunder:-

> *"No person shall commence any suit against the Board or against any officer or servant of the Board or any person acting under the orders of the Board, for anything done or purporting to have been done in pursuance of this Act, with- out giving the Board, officer, or servant or person two months' previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act Complained of."*
> *"And in the case of any such suit for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amounts so tendered and shall pay all costs incurred by the defendant after such tender.*

In paragraph Nos.26 and 27, in the case of **Bombay Housing Board (supra),** the Hon'ble Apex Court has observed as under:-

> *"26.There can be no doubt that the act complained of by the respondent was the non-payment of money as damages or compensation resulting from an alleged breach of contract.*

> *27. In Municipal Borough of Ahmedabad v. Jayantilal Chhotalal Patel, ILR (1947) Bom 841 = (**AIR 1948 Bom 98**) (FB) the Court held that when a municipality has power to enter into a contract under the Municipal Boroughs Act and the municipality purports to exercise its power to enforce such contract, any act done in the exercise of its power to enforce the contract is not in pursuance of the Act but in pursuance to the contract and, therefore, a suit brought against the municipality for return of deposit under a contract to clean the streets was not a suit of the type described in s. 206 of the Bombay Municipal Boroughs Act, 1925 which is in pari materia with Section 64 of the Act. In the course of the judgment, Chagla, J. (as he then was) observed that what the plaintiff sought to enforce was, the right which came into existence as a result of the contract entered into between the plaintiff and the municipality and not a public duty cast upon the municipality by the statute, that in forfeiting the deposit, the municipality was not acting in pursuance to the power given to 'it under statute but was doing so in pursuance of a power given to it under the contract and, therefore, the suit to enforce rights under the contract entered into with the municipality which the municipality was not under any obligation to enter into, cannot fall with the ambit of the section. We think that the decision lays down the law correctly ,and that the principle deducible from it is applicable to the facts here.*

10. Decision in the case of **M.G.Patel (*supra*)** relied upon by learned advocate for respondent is not applicable to the present set of fact.

11. As discussed above, the case is pertaining to the recovery of damages and non-payment of bills together with the refund of security deposit. Therefore, the present First Appeal deserves to be allowed and

the same is allowed accordingly. The order dated 10.02.2005 passed by learned Second Joint Civil Judge (S.D.) Ahmedabad (Rural) in Special Civil Suit No.180 of 1993 (Order below Ex.34), is hereby quashed and set aside. Accordingly, suit is remanded back to the learned trial Court for expeditious hearing on merits. The suit is restored to its original file.

12. After filing of the Written Statement at Ex.12 in the year 1993, defendant did not move any application for rejection of plaint and allowed the suit to proceed. Exhibit-34 application is filed on 06.03.2003. It is noteworthy that, upon perusal of the record and proceedings, plaintiff has equally remained grossly negligent in not proceeding with the suit since 1993 and has sought adjournments after adjournments.

Rojkam reveals that on several occasions, plaintiff has remained absent and adjournment applications have been granted.

13. It appears that the suit is of the year 1993. Therefore, the parties are put to the following directions:-

(i) The learned trial Court shall frame issues, if not framed, within a period of three days from the receipt of the copy of this order;

(ii) Upon framing of issues, plaintiff shall submit documents and an Affidavit in lieu of Examination-in-chief within a period of seven days thereof. The Cross-examination of plaintiff shall be completed thereafter within a period of three days;

(iii) If the plaintiff wishes to examine any witnesses, plaintiff shall strictly comply with

the provisions of Order XVI Rule 1 of the Code. The said exercise shall be completed before the plaintiff enters in the witness box. After plaintiff closes his side, defendant shall file an Affidavit in lieu of Examination-in-chief within a period of three days from the date of closure of evidence of plaintiff and shall also strictly comply with the provisions of Order XVI Rule 1 of the Code. Once the defendant closes its side of leading evidence, plaintiff and defendant shall conclude their submissions within a period of four days from the date of closure of evidence of defendant.

13.1 After completion of oral submissions, learned trial Court shall conclude the case within a period of seven days from the conclusion of the oral submissions.

13.2 The parties are hereby directed to give full

co-operation to the learned trial Court for speedy disposal of the matter within the aforesaid time bound limit without asking for unnecessary adjournments.

13.3 The learned trial Court shall decide the controversy strictly by adhere to the evidence adduced on record and without being influenced by the observations made by this Court.

14. With these observations and directions, the present First Appeal stands disposed of. Record and proceedings, if any, be sent back to the concerned Court immediately.

(D. M. DESAI,J)

MANOJ

Original copy of this order has been signed by the Hon'ble Judge.
Digitally signed by: MANOJKUMAR(HC01092), PRIVATE SECRETARY, at High Court of Gujarat on 05/12/2025 11:29:11