

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****ARBITRATION APPEAL NO. 8 OF 2013****WITH****CIVIL APPLICATION NO.10 OF 2013****IN****ARBITRATION APPEAL NO. 8 OF 2013**

Mr Sudhir Burgaonkar and Anr.

... Appellant

VS.

M/s Amar Bharat Construction

... Respondent

....

Mr.A.A.Garge for Appellant.

Mr.Atul Damle, Senior Counsel i/b. Mr.R.D.Suryavanshi
for Respondent.

....

CORAM : K.K. TATED, J.**DATE : 20THNOVEMBER, 2015****P.C.:**

1. Heard learned counsel for parties.
2. By consent of both the counsels matter is taken up for final hearing.
3. Appellant challenges order dated 1st November, 2012 passed by Ld. Additional District Judge, Kalyan below Ex.15 in Civil M.A. No 37/2012 rejecting Appellants application under section 9 of Arbitration and Conciliation Act, 1966 (hereinafter referred as "said Act") for interim injunction
4. The trial Court rejected Appellants application under section 9 of the said act. In that application the Appellants prayed as follows:

1. *(i) during the pendency and final disposal of the Petition, the Petitioners, their agents, servants, heirs, legal representatives who claim through them be restrained by granting temporary injunction from carrying out any construction on the third floor of the Borgaonkar Wadi Shopping Complex Building, situate, lying and being at Shivaji Path, Opposite Kalyan Railway Station, within the limits of Kalyan Dombivli Municipal Corporation, Kalyan Division, Kalyan, Dist-Thane.*

5. The learned counsel for the appellant submits that in the petition filed by respondent under section 34 of the said act challenging the award dated 8th January 2012 passed by the learned Sole Arbitrator, they preferred application for interim relief restraining respondent from carrying out any further construction on 3rd floor of the suit property.

6. The learned counsel for the appellant submits that learned District Judge without assigning any reason dismissed their application. He submits that the learned District Judge held that the appellant has not made out a case for interim injunction. He submits that if the construction is completed by the respondent during the pendency of petition under section 34 of the said Act it would be very difficult for the appellant to remove the same. He submits that though the respondent filed affidavit dated 23rd January 2015 and made a statement in para 9 of that affidavit that they have already completed construction of more than 90% and relied on the certificate dated 20th January 2015 issued by the Architect, is not correct. He submits that the appellant also appointed an architect Mr. M. K Kapote to submit the site visit report. The said reports shows that respondent started construction of third floor but same is not completed by them. He particularly relies on following para from the said report :

"It is found that only some Flats has cement plaster without Neeru finish, and some flats has only cement

blocks wall without any plaster. No internal walls such as Kitchen Units walls, Toilets units constructed on site.

There is no tiles flooring (Finishing) in all Flats and there is also no floor-in common passage. No other essential services such as electricity fittings water supply fittings, toilet fittings, Kitchen platforms are provided in flats and also no door frames are not provided each flats. No light fitting is provided in common passage and also no colouring walls in each Flats.

Thus in my opinion all the 19(Nineteen) Flats marked "A" (shown in RED LINES) on plan are in unfinished condition to large extent.

This CERTIFICATE is issue personal request of Mr.Sudhir G. Borgaonkar"

On the basis of this submission the learned counsel for appellant submits that this Honourable Court be pleased is to set aside the order passed by Ld.Additional District Judge, Kalyan dated 1st November, 2012 and allow the appellant's application under section 9 of the said act issuing injunction against respondent from carrying out any further construction in the suit property.

7. On the other hand the learned Senior Counsel Mr.Damle appearing on behalf of respondent vehemently opposed the present appeal. He submits that in the present case the appellant filed a claim before the arbitrator for declaration that development agreement dated 6th December, 2004 entered into between party be cancelled. The Appellant also claimed sum of Rs.2,83,69,000/- with 18% interest. and injunction restraining Respondents from creating any third party rights in respect of disputed property being 3rd floor, admeasuring 13,948 sq.ft of the Borgaonkar Wadi Shopping Complex, near Kalyan railway Station, Kalyan (W) (hereinafter referred as "said property").

8. The learned Senior Counsel for Respondent submits that in the said proceeding the sole Arbitrator vide award dated 8th January, 2012 directed respondent to pay Rs. 5,00,000/- to the Appellant. He submits that the said award was challenged by the respondent preferring petition under section 34 of the said Act. He submits that in the petition the appellant preferred application under section 9 of the said act. He submits that application filed by the appellant under section 9 of the said act was itself not mentionable in law. He submits that appellant has not challenged the award passed by the Sole Arbitrator. Appellant accepted the said award. Hence there is no question on the part of appellant to file application under section 9 of the said Act.

9. The Learned Senior Counsel for respondent submits that they already completed more than 90% construction work of 3rd floor of the said property. To that fact respondent made statement in their affidavit dated 23rd January 2015 in para 9. He submits that these facts are stated by their architect in certificate dated 20 January 2015. He submitted that if at this stage any order is passed in the present appeal restraining the respondent from carrying out further construction on the said property, irreparable loss and injury will be caused to them. Hence there is no substance in the present appeal and same to be dismissed.

10. Heard both the parties. The issue involved in the present appeal is whether the appellant is entitled any relief of injunction as claimed by them under section 9 of the said act.

11. In the present proceeding the Sole Arbitrator passed an award and awarded sum of Rs 5,00,000/- in favour of appellant by way of compensation. Said award was not challenged by appellant. Same was challenged by respondent under section 34 of the said act. Therefore there is no question to entertain any application, on behalf of the appellant. Apart from that, the respondent already completed construction of more than 90% as stated in the certificate of Architect. Considering these facts I do not find any substance in the present appeal.

12. Arbitration Appeal No.8 of 2013 and Civil application No.10 of 2013 stands rejected.

(K.K. TATED, J.)