

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.9377 OF 2018

M/s.G.K. Solutions Pvt. Ltd.	.. Petitioner
Vs.	
M/s. Kamla Developers	.. Respondent

Mr.P.J. Thorat a/w Ms.Aditi Naikare for the petitioner.
Mr.Aditya Shirlakar a/w Mr.Ulhas Pai for the respondent.

CORAM : R.D. DHANUKA, J.
DATE : 28th August 2018

P.C.:

1. By this petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 30th July 2018 passed by the Learned Judge, City Civil Court at Dindoshi, Mumbai granting conditional leave to the petitioner in Summons for Judgment No.102 of 2014 to file written statement subject to deposit of an amount of Rs.10 lakhs. within one month from the date of the said order i.e. 30th July 2018.

2. Parties had entered into an agreement. The respondent had developed the plot of land and constructed building on the said plot. The petitioner has already paid consideration of Rs.6,83,00,100/- to the respondent.

3. Summary Suit No.2916 of 2013 was filed by the respondent on the basis of clause 22 of the agreement entered into between the parties. It was the case of the respondent before the trial Court that under

clause 22 of the agreement, liability to pay tax, if any, on the said transaction would be borne by the respondent. The respondent herein amended the plaint filed before the City Civil Court and inserted paragraph 17A to the effect that if the amendments regarding reimbursement of the amount are held as unconstitutional by the Supreme Court and the amount of tax is refunded to the plaintiffs along with interest, if any, the plaintiffs would be remitted to the defendants forthwith any and all the monies paid by the government authority to it. In the summary suit, the petitioner had filed affidavit-in-reply to the summons for judgment and applied unconditional leave.

4. Mr.Thorat, learned counsel for the petitioner invited my attention to clause 22 of the said agreement entered into between the parties and also various observations made by the learned trial Judge. He submits that though in paragraph 10 of the impugned order, the learned trial Judge has held that the contents of clause 22 will have to be proved by leading evidence and the same is definitely a triable issue, the trial Court has granted conditional leave to the petitioner on deposit of Rs.10 lakhs.

5. Learned counsel for the respondent (original defendant), on the other hand, invited my attention to the said clause 22 and would submit that liability to pay tax was of the respondent as declared by the Supreme Court in the Special Leave Petition arising out of the judgment delivered on 10th April 2012 by this Court in Writ Petition No.2022 of 2007 filed by the ***Maharashtra Chamber of Housing Industry & Ors. Vs. State of Maharashtra & Ors.*** and other connected matters and thus

the respondent was justified in filing the summary suit upon making payment of the substantial payment to the government on behalf of the petitioners. He submits that the impugned order passed by the learned trial Judge is in order and does not warrant any interference.

6. A perusal of the order dated 30th July 2018 passed by the learned trial Judge and more particularly paragraph 10 of the impugned order indicates that the learned trial Judge has interpreted clause 22 of the agreement entered into between the parties and has observed that the contents of clause 22 of the agreement would be definitely required to be proved by leading evidence and the same was a triable issue. The learned trial Judge has observed that on the basis of clause 22 of the agreement, the plaintiff was asking that the defendant has to repay the said amount to the plaintiff which is the triable issue and is required to be decided by this Court. In spite of the trial Court clearly holding that the issue raised by the petitioner herein was a triable issue, the learned trial Judge has granted conditional leave asking the petitioner to pay a sum of Rs.10 lakhs. In my view, the conclusions drawn by the learned trial Judge is contrary to the prima facie finding rendered in paragraph 10 of the impugned order to the effect that the contents of clause 22 of the agreement was required to be proved by leading evidence and was a triable issue. The impugned order dated 30th July 2018 shows perversity and deserves to be set aside.

7. I therefore pass the following order :-

(i) The order dated 30th July 2018 passed by the Ad-hoc Judge, City Civil Court, Dindoshi, Mumbai is quashed and set aside.

(ii) The petitioner is granted unconditional leave to defend the suit. Written statement shall be filed within four weeks from today.

(iii) Hearing of the suit is expedited.

(iv) Writ petition is disposed of in aforesaid terms. No order as to costs.

R.D. DHANUKA, J.