

Sequeira

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

***ARBITRATION APPEAL (Stamp) NO. 28420 OF 2018
with
CIVIL APPLICATION (Stamp) NO.28423 OF 2018***

M/s.D.M.Corporation Pvt. Ltd. .. Appellant
Vs
The State of Maharashtra and others .. Respondents

Mr.Ajinkya Udane i/b Yuvraj P.Narvankar, for the Appellant.

Mr.A.R.Patil -Additional Government Pleader, for Respondent No.1.

Mr.N.N.Singh, for Respondent No.5.

***CORAM : PRADEEP NANDRAJOG, C.J. &
N.M.JAMDAR, J.***

Date : 18 April, 2019.

P.C. :

1. Heard learned counsel for the parties.
2. The Appellant was awarded a contract by the Respondents concerning a Hydro Electric Project. The Appellant was required to furnish performance security by means of a bank

guarantee and in compliance with the terms of the contract bank guarantee dated 13 March 2012 was submitted. The guarantee was by Bank of Baroda.

3. Dispute arose. Respondents terminated the agreement and the Appellant came under a threat of invocation of the bank guarantee. There being an arbitration clause in the contract requiring each party to nominate an arbitrator and the two in turn to nominate a presiding arbitrator, farcing an agreement, Indian Council of Arbitration to do the needful, the Appellant nominated its arbitrator and called upon the Respondents to nominate its arbitrators. The Appellant also sought interim measure under Section 9 of the Arbitration and Conciliation Act, 1996 praying that the Respondents be restrained from invoking the bank guarantee and from enforcing the notice terminating the contract.

4. Earlier granting ad-interim injunction to the Appellant, vide impugned order dated 7 September 2018 the learned District Judge-1 Satara, vacated the ad-interim injunction on the principal reason that the Appellant did not take steps to get the arbitrator appointed.

5. The impugned order overlooks the fact that the Appellant nominated its arbitrator and by the time the impugned order was passed the Respondent was in default.

6. There are observations in the impugned order that the Appellant has failed to make out a *prima facie* case. But, the said observations are *sans* a discussion of the facts from which an opinion could be formed whether or not the Appellant had a *prima facie* case.

7. We are informed that on 1 April 2019, the Respondents also appointed its arbitrator.

8. Under the circumstances, we dispose of the Appeal directing the two nominated arbitrators to hold a sitting within the next two weeks. If the learned arbitrators agree on a common name the said person would be nominated as the presiding arbitrator. If they cannot do so, the Appellant can approach the Indian Council of Arbitration as per the arbitration clause.

9. Noting that in the Appeal a direction was issued for status-quo to be maintained, we direct that status-quo qua bank guarantee shall continue till the arbitral Tribunal commences hearing. The Appellant would be entitled to file an application under Section 17 before the arbitral Tribunal for continuation of the status-quo.

10. We also terminate further proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 before the learned

District Judge-1 Satara for the reason issue concerning termination of the agreement is a matter of substantive dispute and the same has to be resolved through arbitration.

11. In view of the above order Civil Application does not survive and hence stands disposed of accordingly.

N.M.JAMDAR, J.

CHIEF JUSTICE