

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL (ST) NO.11664 OF 2019

Kalyan Dombivli Municipal Corporation. ...Appellant

Versus

M/s.S.M.Associates. ...Respondent

with

Civil Application (St) No.12530 of 2019

Mr.J.P.Sen, Senior Advocate I/b. Mr.A.S.Rao, for the Appellant.

Mr.Rajiv Narula with Ms.Ashwini A Mahadvi I/b. Jhangiani Narula & Associates, for Respondent.

CORAM : G.S. KULKARNI, J.**DATE : 14 August 2019**

P.C.

1. Heard learned Counsel for the appellant and the learned Counsel for the respondent.

2. This is an appeal filed under Section 37 of the Arbitration and Conciliation Act,1996 (for short 'the Act') whereby the appellant-Kalyan Dombivli Municipal Corporation is before the Court challenging an order dated 9 January 2019 passed by the learned Principal District Judge,

Thane, whereby Civil Miscellaneous Application No.178 of 2018 filed by the respondent under Section 9 of the Act, has been allowed in the following terms:-

“Application is allowed with costs.

Respondent, its officers, employees, representatives or anyone claiming through or under them is restrained from dispossessing the applicant from suit property viz. All those contiguous pieces and parcels of land admeasuring 23,130 sq.mtrs. In aggregate and bearing Survey Nos.7(p), 8(p), 10(p) and 21A(p) lying, being and situated at Durgamara Chowk, Kalyan Murbad Road, Kalyan (West), Taluka Kalyan, District Thane, as per houndaries mentioned in prayer clause 16(a), or from obstructing the activities of applicant being carried on in suit property or any part thereof, before and during the arbitral proceedings till the arbitral award is passed by Arbitrator. “

3. A perusal of the record would indicate that disputes and differences had arisen between the parties under the Lease agreement dated 31 August 2009 which was entered between the appellant and one M/s.S.M.Associates. The lease in question was a consequence of tender issued by the appellant on 5 February 2005 and in pursuance thereto a letter of intent dated 28 June 2005 being issued in favour of M/s.S.M.Associates being the successful bidder.

4. The case of the appellant is that under the lease agreement entered by the appellant with M/s.S.M.Associates, there was a default on the part of the lessee M/s.S.M.Associates in making payment of the lease rent. In

these circumstances, the appellant intended to enforce its rights under the said lease deed against M/s.S.M.Associates by taking coercive steps.

5. In the aforesaid situation, the respondent approached the learned Trial Judge by moving an application under Section 9 of the Act, subject matter of the present proceedings praying for interim measures pending the arbitral proceedings. The appellant-Municipal Corporation appeared and raised an objection to the maintainability of the said application on the ground that the respondent-applicant before the learned Trial Judge is not the same entity which had participated in the tender dated 5 February 2005 and with whom the appellant had entered into an agreement dated 31 August 2009. To support this contention, documents were placed on record including extract of Registrar of Firms which according to the appellant showed that the respondent is completely a new entity and not the same entity. This case of the appellant was denied by the respondent-S.M.Associates.

6. The learned District Judge, however, did not find favour with the contentions as urged on behalf of the appellant in regard to the respondent-firm, being a completely new entity and not the same

M/s.S.M.Associates. The learned District Judge while allowing Section 9 application as filed by the respondent in paragraph 24 of the impugned order observed as under:-

“24. Respondent has also alleged that applicant firm is bogus and fraudulently floated partnership firm and fraud came to light only when one of the victim of the fraud lodged FIR no.55/2018 under Sections 467, 468, 479, 406, 409, 420, 387, 504, 506(ii), 34, 114, 120B of the Indian Penal Code. Copy of FIR is also filed on record. Pendency of criminal prosecution will have no bearing to the case in hand at this stage. After satisfying itself, respondent Corporation entered into a contract and till last moment persisted with the demand of arrears of rental amount and contemplated cancellation of contract on the ground of breaches and not on the ground that applicant had fraudulently induced respondent to enter into transaction.”

7. Mr.J.P.Sen, learned Senior Counsel for the appellant has drawn my attention to the several documents as placed on record as also the reply filed by the appellant in opposing the Section 9 application.

8. Mr.Narula, learned Counsel for the respondent has also argued on the basis of the documents to contend that the contentions as urged on behalf of the appellant is not a correct contention.

9. Having heard the learned Counsel for the parties and having perused the record, in my opinion, the impugned order does not satisfactorily decide the objection as urged on behalf of the appellant in

regard to the respondent being not the same entity to whom the appellant had issued a letter of intent dated 28 June 2005 and ultimately with whom the appellant entered into the said lease agreement. It is quite clear that the appellant in its reply filed to Section 9 application had raised a categorical case of the respondent (applicant in the Section 9 application), being different from the M/s.S.M.Associate to whom the lease was granted, that too, on the basis of the documents placed on record categorically contending that the names of both the entities although is the same however actually they are different. The impugned order finds no discussion on this issue.

10. In the above circumstances, in my opinion, interest of justice would be served if the impugned order is set aside and the matter is remitted back to the learned Principal District Judge, Thane, for reconsideration of Section 9 application as filed by the respondent alongwith the objections urged on behalf of the appellant. Needless to observe that the learned Principal District Judge shall consider all the documents which are placed on record by the parties and decide the Section 9 application afresh on its own merits and without being influenced by the impugned order. All contentions of the parties in that regard are expressly kept open. Learned

Principal District Judge shall endeavour to adjudicate the Section 9 application as expeditiously as possible within a period of three weeks from today. Ordered accordingly.

11. In the meantime both the parties shall maintain status quo as it exists today which shall continue to operate till the adjudication of Section 9 application.

12. Parties are permitted to produce such further documents and material as they may so desire.

13. Disposed of in the above terms. No costs.

14. In view of disposal of the appeal, pending civil application does not survive. It is accordingly disposed of.

(G.S.Kulkarni, J.)