

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION PETITION NO.715 OF 2014**

Home Care Retail Marts Pvt. Ltd.

....Petitioner

vs

Haresh N. Sanghavi

...Respondent

.....

Mr. Rajiv Kumar, Senior Advocate, a/w. Mr. K.G. Munshi, Ms. Ferzana Behramkamdin, Ms. Shivani Khanna and Ms. Rabab Ghugharia, i/b. FZB & Associates, for the Petitioner.

Mr. Joaquim Reis, Senior Advocate, a/w. Mr. Yadunath Chaudhari, Mr. Omkar Kulkarni and Mr. Susmit Phatale, i/b. Ms. Kejal Kamdar, for the Respondent.

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CORAM : S.C. GUPTE, J.**DATED: 11 FEBRUARY 2019****ORAL JUDGMENT:**

. This arbitration petition, filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act'), challenges an award passed by a sole arbitrator in a reference arising out of a leave and licence agreement. The short facts of the case may be stated as follows :-

2. The Respondent herein (original respondent in the arbitration reference) was developing a piece or parcel land admeasuring about 3200 sq. meters or thereabouts at Kandivali West, Mumbai. He had proposed construction of a commercial building on the land. On or about 17 February 2006, the Respondent executed in favour of the Petitioner (claimant in the reference) a leave and licence agreement for use and occupation of premises in the proposed building (designated as

portion 'B-2') having an aggregate built-up area of 62040 sq. ft. in accordance with plans annexed to the agreement. The premises were described in the annexures as 15240 sq. ft. built-up area on first basement floor, 15030 sq. ft. on the ground floor, 15885 sq. ft. on the first floor, 15885 sq. ft. on the second floor, together with the right to exclusive use of an area admeasuring 15,885 sq. ft. on the terrace above the second floor of portion 'B-2'. The licence was for a period of 36 months. The Respondent was to complete the construction within 15 months from the date of execution of the leave and licence agreement as per plans approved by Municipal Corporation of Greater Mumbai ('MCGM') and handover possession of licensed premises complete with electric and water supply to the Petitioner thereafter. The leave and licence agreement provided for interest at the rate of 12% per annum on the amount of the security deposit paid by the Petitioner to the Respondent for the period of delay in handing over possession of the licensed premises beyond the aforesaid period of 15 months. The agreement also provided for a rent-free fit-out period of two months from the date of the licensor handing over the premises to the licensee, so that the licence period of 36 months would commence only after the two month rent free period. This date was to be treated as 'effective date' for the 36 months' lock-in period of licence to commence. The licence was for a licence fee of Rs.14,28,000/- per month payable from the effective date. As a security for due observance and performance of conditions of licence, the Petitioner paid to the Respondent an agreed sum of Rs.4,02,11,111/- as interest free deposit. The agreement also provided for car parking space of 12,500 sq. ft. area in the aggregate in the second basement floor of the building and in the compound of the

building. The car parking space was said to be indicated in plans annexed to the agreement. (Though they were described as Annexures 'D-1' and 'D-2', in fact, there was only one plan designated as 'D-1' actually annexed to the agreement of licence.)

3. On the same day, i.e. 17 February 2006, the Respondent addressed to the Petitioner a letter titled as 'purchase option letter'. Under this letter, the Petitioner was given an option to purchase the entire licensed premises between 30th and 36th months of licence at or for a total consideration of Rs.40,21,00,000/- calculated at the rate of Rs.6481.30 per sq. ft. built-up area. The option was to be exercised by a writing at any time after expiry of thirty months but before expiry of 36th months from the effective date. On exercise of such purchase option, the agreement of transfer was to be signed within thirty days of expiry of the licence of three years.

4. The construction of the building commenced in pursuance of approved plans of 13 January 2006. Though it was agreed to be completed within 15 months of the leave and licence agreement, i.e. by 17 May 2007, the completion date was not adhered to. The Respondent, by his letter dated 17 October 2008, informed the Petitioner that the premises were ready and could be taken possession of on or about 15 October 2008 with a fit-out period of sixty days. It is, however, an admitted position that the premises were, in fact, not ready to be occupied by that date. The occupation certificate applied for by the Respondent on 7 February 2009 was, in fact, received on 23 June 2009. The correspondence between the parties around this time indicates that

some modifications had been proposed in the premises and these had to be carried out. Finally, by his letter dated 29 September 2009, the Respondent informed the Petitioner about the progress of the construction including the modifications carried out and called upon the latter to take possession of the subject premises within seven days. At that stage, by its letter dated 31 December 2009, the Petitioner, for the first time, raised an issue of approval of commercial use of the first basement floor, requiring the Respondent to apply to MCGM for change of user from “storage” to “commercial” or “Anchor Shop”. The Petitioner did not take possession of the premises, purportedly on the ground that the premises were not ready and amenities/facilities to be provided under the agreement were not in place. It also raised certain incidental issues such as non-availability of regular water supply and certificate under Section 270A of the Mumbai Municipal Corporation Act. The Respondent, in the premises, by his letter dated 16 January 2010, informed the Petitioner that if the latter failed to take possession on or before 18 January 2010 (effective date for payment of licence fees to be treated as 18 February 2010), the leave and licence agreement would automatically stand terminated from 18 February 2010. Following this letter, by his final notice dated 19 February 2010, the Respondent claimed that the agreement of licence had stood terminated. In the premises, by its notice of invocation dated 14 June 2010, the Petitioner referred the disputes to arbitration.

5. Since the parties could not agree on constitution of the arbitral forum, an application was made to this Court under Section 11(6) of the Act and a sole arbitrator came to be appointed to adjudicate

upon the disputes and differences. On 6 July 2012, the sole arbitrator resigned purportedly on the ground of non-cooperative attitude of the parties. By this time, on an interlocutory application under Section 9 of the Act, the matter was carried by the parties to the Supreme Court. The Supreme Court, by its order dated 4 March 2013, appointed the present sole arbitrator by consent of parties by invoking powers under Section 15(2) of the Act and the arbitration proceedings thereupon resumed.

6. The learned arbitrator, by his impugned award dated 31 December 2013, rejected the Petitioner's prayer for specific performance of the agreement contained in the purchase option letter as not maintainable. Though the arbitrator ordered payment of interest at the rate of 12% per annum by the Respondent on the security deposit for the period from June 2007 to September 2008 on account of his failure to complete the construction within 15 months of the leave and licence agreement, the arbitrator held the action of the Respondent in terminating the leave and licence agreement as valid and legal. The arbitrator also held the Respondent to be justified in forfeiting the security deposit amount of Rs.4,02,11,111/- and rejected, accordingly, the Petitioner's prayer for its refund. The Petitioner's prayer for recovery of damages for loss of business from 17 July 2007 was also rejected by the arbitrator. The arbitrator held that the subject building was ready for taking possession on 1 September 2009 and it was the Petitioner who defaulted in taking over possession. The arbitrator held that the purchase option letter had come to an end by reason of valid termination of the leave and licence agreement. The arbitrator rejected the Respondent's counter-claim for recovery of licence fee for the period

from 1 July 2009 onwards.

7. In his challenge to the impugned award, Mr. Rajiv Kumar, learned Senior Counsel appearing for the Petitioner, brought out the following broad aspects of the challenge:

(a) In the first place, learned Counsel submitted that the arbitrator had improperly refused to exercise jurisdiction and determine the Petitioner's claim for specific performance of the purchase option letter. Learned Counsel submitted that the arbitration agreement contained in Clause 39 of the leave and licence agreement was wide enough to include within its scope disputes and differences of whatsoever nature or kind arising out of or pursuant to the leave and licence agreement and these would include all disputes under the purchase option letter. Learned Counsel argued that the words “any matter on which the parties have acted in pursuance thereof” appearing in Clause 39 of the leave and licence agreement were of widest amplitude and content and would include any dispute arising out of the purchase option to be exercised by the Petitioner, the option letter for such exercise being in pursuance of the leave and licence agreement. Learned Counsel submitted that the purchase option letter referred to the leave and licence agreement at a number of places and had no existence without the leave and licence agreement as an independent or stand-alone transaction.

(b) The second aspect of the challenge was in connection with the first basement area offered by the Respondent to the Petitioner in

pursuance of the leave and licence agreement. Learned Counsel submitted that this area was not capable of commercial user; the original plan annexed to the leave and licence agreement showed this area as available for commercial user and constructed by making use of FSI; the area finally offered to the Petitioner in pursuance of the leave and licence agreement was, however, free of FSI and its user was restricted only for storage. Learned Counsel contended that this aspect of the matter was not properly appreciated by the learned arbitrator and the award could be termed as perverse for that reason.

(c) Learned Counsel, thirdly, submitted that the parking space finally offered by the Respondent in pursuance of the leave and licence agreement was deficient in area. Learned Counsel submitted that the leave and licence agreement required the Respondent to provide car parking space of 12500 sq.ft. area in the aggregate, the plan annexed to the agreement showing this area in the second basement of the building. Learned Counsel argued that at site, admittedly, a part of this area was barricaded and made available to a rival shop, namely, D-Mart, and what was instead proposed to be allotted to the Petitioner in its place was an area below a ramp, which did not satisfy the provision for parking space under the agreement.

(d) The fourth aspect of the challenge related to the arbitrator's finding on readiness and willingness on the part of the Petitioner to perform its part of the leave and licence agreement, namely, to take possession of the subject premises at any time after the occupation certificate was obtained or any time after 1 September 2009 so as to

trigger the effective date. Learned Counsel submitted that having found that there was a delay in construction of the building and in fact breach of the leave and licence agreement on the part of the Respondent to that extent, the arbitrator could not have held in favour of the Respondent on his compliance of the agreement; the arbitrator should not have found the Respondent's offer of possession either in compliance of the agreement or within the agreed period. Learned Counsel submitted that there was no breach on the part of the Petitioner in taking possession of the licensed premises; there were various stipulations, including the stipulation of permanent water supply, which were not in place and, accordingly, the arbitrator's conclusion on readiness and willingness of the Petitioner was contrary to the contract as also contrary to the record of the case.

(e) There were other miscellaneous grounds of challenge including the defective nature of the premises due to water sewage leakage, dampness, etc., belated occupation certificate, lack of continuous water supply, want of certificate under Section 270A and other matters.

(f) The sixth and the last aspect of the matter brought out by learned Counsel related to forfeiture of the security deposit. Learned Counsel submitted that there was no case for ordering any forfeiture and, in any event, the relevant aspects of the matter for ordering such forfeiture were not considered by the learned arbitrator.

8. As far as the purchase option is concerned, the learned

arbitrator came to the conclusion that the purchase option letter was a separate offer made by the Respondent and accepted by the Petitioner; it was not part and parcel of the leave and licence agreement. The learned arbitrator held that making of a general reference to the leave and licence agreement in the purchase option letter did not have the effect of incorporating the arbitration clause (Clause No.39) of the leave and licence agreement into the second contract, i.e. purchase option letter. The learned arbitrator, in this behalf, referred to the case of **M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited**¹, which dealt with the subject of incorporation of an arbitration clause. The learned arbitrator also considered in this behalf the large number of letters exchanged between the parties as also the relevant terms and conditions of the leave and licence agreement in the light of pleadings of the parties as also oral depositions of witnesses. Based on a combined reading of the relevant clauses of the leave and licence agreement and considering the evidence before him, the learned arbitrator held that the leave and licence agreement was an independent contract and had no connection with the purchase option letter issued by the Respondent.

9. There is absolutely nothing wrong with this interpretation of the two contracts, namely, the leave and licence agreement and the purchase option letter, by the arbitrator. Merely because the two contracts were of the same date or between the same parties or that one was referred to in the other or even that one was the occasion for entering into the other, the two contracts could not be said to be intrinsic part of each other. At the most, what can be said is that the leave and

¹ (2009) 7 Supreme Court Cases 696

licence agreement formed the backdrop of the purchase option letter but for that reason, there is no warrant for either treating the two agreements as one whole contract or reading the arbitration clause in the leave and licence agreement as incorporated in the purchase option letter. The Supreme Court in **M.R. Engineers'** case has succinctly laid down the principles of incorporation of an arbitration clause. A mere general reference of another contract does not have the effect of incorporating the arbitration clause contained in such other contract into the referring contract. For an arbitration clause to be incorporated into a contract by reference, the contract should contain a clear reference to the document containing the arbitration clause; the reference to such other document should clearly indicate an intention to incorporate the arbitration clause into the referring contract; and the arbitration clause should be appropriate, that is to say, capable of being applied to disputes arising under the referring contract and not repugnant to any term of that contract. An arbitration clause in another contract, thus, can be incorporated only by specific reference to such arbitration clause, and not general reference to the underlying contract. The only exception to this rule, as noted by the Supreme Court in the case of **Inox Wind Limited vs. Thermocables Limited**², is when a general reference is made to a consensual standard document. If such consensual standard document contains an arbitration agreement, even a general reference to it shall imply incorporation of the arbitration agreement contained therein. In that view of the matter, the arbitral tribunal constituted under Clause 39 of the leave and licence agreement indeed would not have any jurisdiction to adjudicate the disputes and differences between

² (2018) 2 Supreme Court Cases 519

the parties arising out of the purchase option letter.

10. The judgments of **Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khetan**³ and **Rashmi Mehra vs. Eac Trading Ltd.**⁴ cited by learned Counsel of the Petitioner are clearly distinguishable. In **Olympus Superstructures**, the dispute revolved around three agreements for sale of flats and three related agreements for interior design of these flats. The agreements for sale had an arbitration clause *inter alia* requiring disputes in any way connected with the subject matter of the agreements to be referred to a sole arbitrator. There were three separate agreements appointing the appellants as “Interior Designers”. Each of these three agreements also had an arbitration clause requiring the disputes to be referred to two named arbitrators. All three agreements for sale were terminated by the appellants on account of default of payment. The respondents contested the case of default; they gave details of payments made under the main as well as interior design agreements and claimed that there was no significant balance. On the respondents' application under Section 11 of the Act, a sole arbitrator was appointed. The arbitrator passed an award granting the relief of specific performance in respect of all three main agreements as well as interior design agreements. In their challenge before the Supreme Court, the argument of the appellants was that the arbitrator could not have decided the disputes regarding the three interior design agreements as the reference was based on the three main agreements for sale; the interior design agreements had their own arbitration clauses. The Supreme Court held that the disputes and differences arising under the

³ (1999) 5 Supreme Court Cases 651

⁴ 2007(2) Mh.L.J. 737

interior design agreements were integrally “connected with” the disputes and differences under the main agreements. The court held that where there were disputes in connection with the main agreement and also disputes in regard to “other matters” “connected” with the subject matter of the main agreement, such disputes would be governed by the general arbitration clause of the main agreement. The court observed that the intention of the parties, when they incorporated clause 39 in the main agreement and clause 5 in the interior design agreement, was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter when there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the interior design agreement. The court held that that was the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision concerning the named arbitrator contained in clause 5 of the interior design agreement could be harmonised and reconciled. The court held that there could not be conflicting awards under the two agreements; such a situation was never contemplated by the parties. These facts and the consideration applied to those are clearly distinguishable from our case. In our case, the two agreements cannot be said to be integrally connected with each other. The leave and licence agreement is referred to in the purchase option letter at a few places only to indicate, generally, that the purchase option letter was in the backdrop of the leave and licence agreement and, particularly, the exercise of option under the purchase option letter and the effective date of sale thereunder, were related to a particular juncture during the subsistence of the leave and licence agreement and the date of its expiry,

respectively. In **Rashmi Mehra's** case there was, on the one hand, an agreement to invest and a shareholders' agreement, and on the other, a related buy back agreement. The buy back agreement did not have an arbitration clause whereas the shareholders' agreement had such clause. This court, however, held that the buy back agreement formed an integral part of the shareholders' agreement and was not an independent or stand-alone agreement. The court held that the buy back agreement was not only connected with or related to, but in fact, had stood merged with, the agreement to invest and the shareholders' agreement; these latter agreements were really the substratum, the sole purpose and the root of the former agreement. The court held that the buy back agreement in the case was indeed the basis of the entire arrangement/transaction comprised in the shareholder's agreement; without the buy back agreement, the entire venture would be still born. These facts, the court observed, established that the buy back agreement was inalienable from the shareholders' agreement, and it was, therefore, unnecessary for the parties to provide for a separate arbitration clause in the buy back agreement; by implication, the terms and conditions of the agreement to invest and the shareholders' agreement would get incorporated into the buy back agreement along with the arbitration clause. Once again, these facts are clearly distinguishable from the facts of our case, where there is no such integral relationship for merger of the two agreements. Neither of the agreements can be said to be the substratum or purpose or the root of the other. They are not in any sense inalienable.

11. Though the arbitrator's conclusion on his jurisdiction vis-a-

vis the disputes under the purchase option letter was correct, he appears to have nevertheless gone ahead and decided the validity of the purchase option letter, holding it to have come to an end as a result of the acts of the parties including valid termination of the leave and licence agreement. If the arbitrator had no jurisdiction to adjudicate the disputes and differences between the parties arising out of the purchase option letter, he had, by that very token, no business to decide any issues arising out of the purchase option letter. To that extent, the arbitrator's conclusions on matters pertaining to the purchase option letter and the respective rights and liabilities of the parties thereunder cannot be sustained. If the Petitioner has any grievance about non-performance of the purchase option letter by the Respondent, it may be free to adopt such remedy as may be available to it under law. The impugned award cannot be cited in support of any plea of *res judicata*.

12. Coming now to the alleged breach on the part of the Respondent in offering the first basement area, which was not capable of commercial user, the arbitrator, firstly, held that the relevant clause of the leave and licence agreement made it clear that the Respondent was to construct the subject building as per plans approved by MCGM. The plans sanctioned by MCGM on 13 January 2006, which were available when the leave and licence agreement was executed between the parties, clearly showed the first basement area as storage for Anchor Shop 2. The arbitrator noted that the Petitioner's witness had admitted in his evidence that the Petitioner was aware of this sanctioned plan. This was also corroborated by oral evidence of the Respondent's witness. It had also come in the evidence of the Respondent that as of 25 July 2000, the

first basement was to be constructed as part of Anchor Shop, but these were merely tentative plans. Finally, when the approved plans came on 13 January 2006, the Petitioner (through Ashok Maheshwari) had seen these, and compared the same with the plans annexed to the agreement when the agreement of licence was signed. The arbitrator, secondly, considered that the term 'built-up area' was different from 'carpet area'. Built-up area was designated in DC Regulations as area covered by a building on all sides including cantilevered portion, if any, but excepting the area specifically excluded under the Regulations. The arbitrator noted that both parties were aware of the position that if the first basement was shown and approved as commercial area, in all probability, the subject building would not go beyond the first floor. The arbitrator also noted that till the occupation certificate was obtained on 23 June 2009 and OC plans were received, no grievance was raised by the Petitioner about the first basement. For all these reasons, the arbitrator held that the first basement area offered to the Petitioner was not in breach of the leave and licence agreement; the area was always shown as storage for Anchor Shop; and considering the obligation of the Respondent to construct the building strictly as per sanctioned plans, the construction of the first basement had been in order. The arbitrator's view on this aspect is clearly a possible view. It is based on a reasonable interpretation of the agreement of licence. The view is supported by evidence, and cannot be described either as a view, which no fair or judiciously minded person would take, or a view which would shock the conscience of the Court. Accordingly, the award does not merit any interference under Section 34 of the Act.

13. As far as the parking space is concerned, the arbitrator considered the relevant provisions of the leave and licence agreement, noting in particular clause 17(a) thereof. Clause 17(a) requires parking space of 12500 sq. ft. in the aggregate not only from the second basement floor but together with area in the compound of the building. The arbitrator noted that when plans were submitted to MCGM and sanction was given on 13 January 2006, parking area was envisaged as per plan being Annexure 'D-1' to the agreement. When, however, MCGM sanctioned plans for two underground floors and the ground floor, there was a set back provided to the second basement by way of earth filling and this was pursuant to the guidelines of MCGM. The arbitrator noted that in this set back, an area of about 2350 sq. ft. of the second basement was lost; the loss of this car parking area was, however, more than made up by reserving space under the ramp for parking. The arbitrator observed that the total parking area made available to the Petitioner was in excess of 12500 sq. ft. originally promised. The arbitrator, accordingly, held that there was no breach on the part of the Respondent in making provision of parking space, since, in any event, the available parking space was not less than 12500 sq. ft. in the approved plan with OC. Even this conclusion of the learned arbitrator appears to be a possible view of the material placed before him. Though the arbitrator's conclusion that parking space was subject to increase/decrease of 5% does not appear to be in accordance with the agreement of leave and licence, the other reasons cited by the learned arbitrator are good enough to sustain the award. Learned Counsel for the Petitioner submits that parking requirement was fundamental to the agreement of licence between the parties. A mere look at the statement

of claims would suggest otherwise. There is not a single averment about inadequacy or shortage of parking space being a reason for the Petitioner not agreeing to accept possession of the licensed premises offered by the Respondent. In any event, parking space was not really part of the licensed premises, but an amenity to be offered to the Petitioner and as long as a total parking space of not less than 12500 sq. ft. was made available within the compound of the complex, that is to say, partly in the second basement and partly under the ramp, it is possible to say that the Respondent was not in breach of the contractual stipulation of making available parking space of 12500 sq.ft. to the licensee. This view is based on a reasonable construction of the contract and supported by evidence. There is nothing shocking in it. Any fair or judiciously minded person could well have taken such view.

14. The arbitrator's finding on want of readiness and willingness on the part of the Petitioner is also supported by evidence. The arbitrator came to a positive conclusion that the Respondent was not guilty of any breach. The individual components of this conclusion have been discussed in detail above, and found to be in order. There is no merit in the Petitioner's contention that having found the Respondent not to be ready to deliver possession in time and actually ordered compensation against him for having delayed delivery of possession, the arbitrator ought not to have held him as ready and willing to perform this part. Any delay in delivery of possession was contractually capable of being compensated. The contract expressly provided for it, and that is what the learned arbitrator ordered. It surely cannot be described as a breach on the part of the Respondent entitling his promisee to renege

from performance. Since the arbitrator has rendered a positive finding that there was no breach on the part of the Respondent in offering licensed premises to the Petitioner in accordance with the leave and licence agreement, it is clear that the refusal to take possession of the licensed premises, which is not a matter of dispute, is squarely to the account of the Petitioner. The arbitrator's conclusion, in this behalf, cannot be faulted either as an impossible view or a view which no fair or judiciously minded person would take or a view which would shock the conscience of the Court. It, accordingly, merits no interference.

15. As for the minor objections on water sewage leakage, etc., or want of permanent and continuous supply of water or other miscellaneous grievances, these are all matters of fact and the arbitrator's conclusions on them cannot be said to be in any way perverse. The arbitrator has construed the relevant provisions of the contract as also the provisions of law including Section 270A of the Mumbai Municipal Corporation Act reasonably, and rendered his findings. No fault can be found with the same within the parameters of the law of challenge to an arbitration award under Section 34 of the Act.

16. As far as the award of forfeiture of the security deposit, however, is concerned, the award suffers from a serious infirmity in as much as it is clearly in contravention of public policy of India. As our Courts have ruled time and again, it is a fundamental policy of Indian law that damages are awarded by Indian Courts as a compensatory measure and never as a punitive measure. Our Courts have consistently held that even when a contract names a particular sum

as liquidated damages or as penalty for breach of contract, the Courts still have a discretion to award only reasonable damages not exceeding the sum named or the penalty provided in the contract. Even if there is a provision of liquidated damages or penalty for breach of contract, the Courts have, in all cases of claims for damages, required the party complaining of the breach to prove damages. It is only in a case where such damages are either impossible or difficult to prove that the Courts consider whether the liquidated sum or penalty mentioned in the contract was a genuine pre-estimate of damages as considered by the parties and also by the Court, and then grant damages accordingly within their discretion. Nothing of this has been considered by the learned arbitrator, whilst accepting the Respondent's forfeiture of the entire amount of the security deposit as legitimate. Non-application of mind to the relevant considerations for award of damages, which are enjoined upon courts and tribunals, is not only in breach of public policy of India, but results into a patent illegality appearing on the face of the award. This part of the award, accordingly, cannot be sustained and will have to be set aside.

17. In the premises, the arbitration petition is partly allowed by setting aside the impugned award to the extent it relates to forfeiture of the security deposit by the Respondent and does not allow refund of the same to the Petitioner. The rest of the award is sustained. No order as to costs.

(S.C. GUPTE, J.)