

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Raja Basu Chowdhury

MAT 499 of 2019
+
IA No.: CAN 1 of 2019 (Old No.: CAN 5665 of 2019)

Lipi Sarkar
- versus -
West Bengal Industrial Infrastructure
Development Corporation & Others

For the Appellant : *Mr. Pratik Dhar,*
Mr. Pappu Adhikari.

For the Respondents : *Mr. Prabal Mukherjee,*
Mr. Amit Kumar Nag,
Mr. Abhishek Nag.

Hearing is concluded on : *15th June, 2022.*

Judgment On : **13th July, 2022.**

Raja Basu Chowdhury, J.

1. The present intra-Court mandamus appeal has been preferred challenging an order dated 25th February, 2019 passed in W.P. 22509 (W) of 2018 by which the learned Single Judge refused to the grant the reliefs, as prayed for, observing that the matter involves disputed questions of fact and

that the parties would be at liberty to avail of their respective remedies, in accordance with law before the appropriate forum.

2. The appellant assails the aforesaid order *inter alia* on several grounds. It is the appellant's case that the appellant participated in an e-Tender for Green Power Solar Photo Voltaic Plant and energy efficient LED luminaries and emerged to be successful. A work order was issued on 1st July, 2016 and subsequently a contract was executed between the appellant and the West Bengal Industrial Infrastructure Development Corporation Ltd. (hereinafter referred to as the Corporation) on 11th July, 2016. To comply with the terms of the tender the appellant deposited earnest money to the tune of Rs. 10,57,249/-. According to the appellant the work was commenced on 8th July, 2016 and the same was duly completed on 15th November, 2017. The total value of work executed by the appellant was Rs.5,27,30,252/-. As per the terms of the contract, the Corporation had from time to time deducted 10% from the total value of bills, payable to the appellant and the said sum so deducted along with the earnest money deposit to a tune of Rs. 10,57,249/- made up the security deposit amount of Rs. 51,47,546/-.

3. The appellant says that as per clause 17 of the conditions of contract, the Corporation was obliged to refund the aforesaid amount of Rs.51,47,546/- which constituted the security deposit amount, including earnest money deposit. Since the Corporation failed to refund the security deposit including the earnest money, the appellant submitted several representations but the same did not evoke any response and as such the appellant was constrained to file the writ petition on 12th November, 2018.

4. The appellant says that when the matter came hearing, the advocate representing the Corporation had *orally* submitted before the Hon'ble Court that during pendency of the writ petition and before expiry of the defect liability period, various issues have been pointed out to the appellant, which the appellant was required to rectify for the Corporation to release the security deposit but the appellant failed. The appellant says that the learned Single Judge only on the basis of the aforesaid submission refused to interfere, observing that the said issues involved disputed questions of fact.

5. The appellant says that the learned Judge erred in law in not appreciating that the writ petition did not involve any disputed question of fact and there was a specific clause, being clause no. 17 of the '*conditions of contract*', which provided for security deposit refund.

6. According to Mr. Dhar, learned senior advocate representing the appellant, the work in respect of the contract was completed on 15th November, 2017 and despite expiry of 3 months therefrom, the completion certificate was not issued by the Corporation. The said certificate was belatedly issued on 8th August, 2018, however, confirming that the work had been completed as per tender specifications and schedule of works and that as such all allegations contrary to the same are an after-thought.

7. Relying upon the payment certificate dated 8th August, 2018, Mr. Dhar submits that the Corporation had passed six several R.A. Bills including a Final Bill and from each such bill an aggregate amount of Rs. 40,90,297/- was deducted towards security deposit. As per payment certificate the date of final payment was 28th February, 2018 but the

appellant's account was actually credited on 14th March, 2018. He then takes this Court to the general conditions of the contract and refers to clause marked as SD Refund. The said clause reads as follows:

“SD Refund 75% (seventy five percent) of Security Deposit will be released after three months from the date of successful completion of work towards the satisfactory performance in favour of the installation including handing over. Balance 25% (twenty five percent) will be released after 12 months i.e. from date of handing over which covers expiry of 1 (one) year maintenance period.”

8. Mr. Dhar submits that as per general terms and conditions of the contract relating to refund of security deposit read with the completion certificate and the payment certificate both dated 8th August, 2018, the Corporation was under an obligation to refund 75% of the security deposit after 3 months from the date of successful completion of the work.

9. According to Mr. Dhar, the learned Single Judge failed to perceive such admitted position and therefore ought not to have relegated the parties to any other authority for the purpose of producing evidence.

10. He submits that the learned Judge erred in law in not appreciating that Corporation never raised any dispute within a period of 3 months from the date of completion of work i.e. 15th November, 2017 or at least within 3 months from the date of issuance of completion certificate and as such the Corporation had no authority in law to withhold the security deposit of the appellant. This aspect has been completely overlooked by the learned Judge.

11. Drawing our attention to a letter dated 19th November, 2018, he submits that after receipt of the copy of the writ petition, such letter was issued, in an attempt to unjustly withhold the security deposit. A perusal of the said letter would clearly demonstrate that the same was issued as and by way of an after-thought raising new grounds with the sole intent to frustrate the writ petitioner's claim. Such action is most unbecoming of a statutory body.

12. He points out that subsequent to dismissal of the writ petition, the Corporation most illegally issued a letter dated 15th January, 2020 so as to justify the illegal withholding of security deposit by seeking to forfeit the same. Such purported forfeiture is bad in law. The grounds on which forfeiture of security deposit has been sought to be effected are grounds which have been introduced beyond the defect liability period and as such this Hon'ble Court should disregard the letter dated 15th January, 2020 and direct refund of the entire security deposit.

13. According to Mr. Dhar the learned Judge ought to have appreciated that the appellant's right to receive the security deposit emanates from the tender document itself and the Corporation cannot act arbitrarily in denying such legitimate right. Proceeding on such premise, the learned single Judge ought to have directed the Corporation to release the security deposit of the appellant. In support of his arguments Mr. Dhar has placed reliance upon the judgments delivered in *Unitech Limited and Ors -Vs.- Telangana State Industrial Infrastructure Corporation (TSIIC) and Ors* reported in 2021 SCC OnLine 99; *Real Estate Agencies -Vs. - State of Goa and Ors.*, reported in

(2012) 12 SCC 170; B. R. Ramabhadriah –Vs. – Secretary, Food and Agriculture Department, Andhra Pradesh and Ors. reported in *(1981) 3 SCC 528; Anil Kumar Sau –Vs. – The State of West Bengal and Ors.* in W.P.S.T. No.190 of 2009 and *Smt. Gunwant Kaur and Ors –Vs. – Municipal Committee, Bhatinda and Ors.*, reported in *(1969) 3 SCC 769.*

14. *Per contra*, Mr. Mukherjee learned senior advocate appearing for the respondents submit that the authority to withhold the security/contract deposit flows from the terms and conditions of the tender document itself. The Corporation is otherwise authorized in law to withhold security deposit and in support of such contention, he places reliance upon clause 19B and of the conditions of contract.

15. According to him it was the obligation of the appellant as contractor to make payment of the labourers employed by the appellant in connection with execution of the aforesaid contract. The Corporation had received complaints from a group of workers employed by the appellant. Such complaints relate to non-payment of workers' dues. On 27th March, 2018 a complaint was lodged against appellant with regard to the non-payment of dues of the labourers. The appellant committed breach of contractual terms by defaulting in payment of labour dues and payment of wages.

16. On the question of issuance of completion certificate, Mr. Mukherjee submits that there is no scope to indicate in the prescribed format of completion certificate, with regard to performance of installations and as such nothing could be indicated in the completion certificate with

regard to performance of installations. In support of such contention, he has placed reliance upon the averments made in paragraph 4 sub-paragraph (m) and (o) of the affidavit-in-opposition filed on behalf of the Corporation. He has in fact attempted to make out a case that notwithstanding issuance of completion certificate, it was well within the authority of the Corporation to *inter alia* claim that the appellant had acted in breach of the contract and had failed to discharge its obligations under the contract.

17. Mr. Mukherjee next places reliance upon various paragraphs of the affidavit-in-opposition and submits that inspection was carried out on 4th December, 2018 at two of the Growth Centres wherein it was detected that the installations made by the appellant under the said contract were not functioning and although the appellant was called upon to attend the inspection and cure the defects, the appellant refused to be present at the inspection. In this context, reliance has been placed upon a notice dated 15th December, 2018.

18. On the issue of forfeiture, Mr. Mukherjee contends that Corporation has a right to forfeit the security deposit, and its right of forfeiture is subject to adjudication by the arbitral tribunal and that the contract between the parties provides for adjudication of disputes by arbitration. In answer to our query, Mr. Mukherjee, however, informed us that till date no step has been taken by the Corporation for having, the aforesaid issues raised by them, adjudicated. According to him it is for the appellant to seek adjudication through arbitration.

19. He submits that refund of security deposit would require computation through an enquiry and this Court ordinarily would not embark upon such enquiry. Reliance has also been placed on clause 25 of the terms and conditions of contract to demonstrate that the parties have been provided alternate dispute redressal mechanism through arbitration. Forfeiture is for the purpose of securing the workers' dues and as such no relief can be granted to the appellant and the learned judge has rightly dismissed the writ petition and no interference is called for. However, if this Court is of the view that the order impugned cannot be sustained, the matter should be sent back on remand, as the respondents did not get opportunity to use any affidavit before the first Court.

20. Records would reveal that in the stay application, an order was passed by a coordinate Bench of this Court on 25th June, 2021 directing the Corporation to deposit 75% of the security deposit aggregating to Rs. 39 lakhs (approx.) with the learned Registrar-General, Appellate Side within a period of three weeks. Challenging the said order, the Corporation preferred a Special Leave Petition which was disposed of by an order dated 16th July, 2021 modifying the interim direction issued by the High Court to the effect that if the appeal filed by the respondent before the High Court succeeds, the Corporation shall pay the entire dues, including interest, if any, within ten days from the date of order so passed by the High Court.

21. We have heard the parties, we have considered the documents and the materials on record, we have also taken note of the fact that the Corporation was given an opportunity to use an affidavit before the

Appellate Court and the same also forms part of the paper book. The writ petition was preferred praying for refund of the security deposit including earnest money. However, no interest had been claimed.

22. We find that the respondents themselves have issued a completion certificate. Although Mr. Mukherjee attempted to make out a case that the completion certificate has been issued in prescribed format and as such there was no scope to indicate the performance of installations in the completion certificate, we are, however, not impressed by such submissions. It is not the case of the Corporation either, that the work had not been executed or the work had not been completed as per tender specification. On the contrary, we find that the completion certificate categorically identifies that the work has been completed as per tender specifications and as per schedule of works. The same leaves no room for any contrary view.

23. We also find from the payment certificate, which is at page 321 of the paper book, that a sum of Rs. 40,90,297/- has been deducted from the running bills including the final bill of the appellant on account of security deposit. We also find from the records that a sum of Rs. 10,57,249/- has been paid by the appellant towards earnest money and the said figure as per the contractual terms also add up to the security deposit.

24. We find that the '*conditions of contract*', as relied on by the parties, provides that 75 % of the security deposit is refundable on the expiry of 3 months after issuance of the certificate, final or otherwise, of the completion of work. The said clause read with the general terms and conditions on security deposit refund, which is at page 156 of the paper book, in no

uncertain terms provide that 75% of the security deposit would be released after 3 months from the date of successful completion of work towards satisfactory performance of installation including handing over. The balance 25% will be released after 12 months i.e. from the date of handing over which covers expiry of 1 (one) year maintenance period. Admittedly, the completion certificate has been issued. The said certificate creates a right in favour of the appellant to seek refund of 75% of the security deposit after 3 months from date of issuance of such certificate.

25. We have carefully scrutinised the records of the case. There is no contemporaneous document on record prior to filing of the writ petition to substantiate the claim of the Corporation that the appellant had not addressed the complaints or that the installations were not functioning. On the contrary we find that the Corporation had issued the completion certificate long after the work had been completed and installations handed over to them. In ordinary course, the Corporation only upon satisfying themselves that work had been executed as per the tender had caused such certificate to be issued. The purported notice dated 5th December, 2018 forming Annexure “U” to the affidavit-in-opposition of the Corporation had been issued subsequent to service of the writ petition affirmed on 12th November, 2018. The purported inspections referred to in the affidavit in opposition had taken place more than a year after the work had been completed by the appellant.

26. In the instant case, Mr. Mukherjee the learned senior advocate representing the Corporation has claimed that forfeiture of security deposit

was for securing the claim of labourers and/or workers employed by the appellant. He has also referred to certain complaints in support of his claim. We are afraid that the terms and conditions of the tender/contract do not authorise the Corporation to either withhold or forfeit security deposit on such ground. We further find that the Corporation has failed to quantify the loss suffered.

27. According to the Mr. Mukherjee loss can only be quantified through arbitral proceedings. We find that the Corporation has not referred the dispute to arbitration. On the contrary, the Corporation has simply purported to forfeit the security deposit. The Corporation is only interested to retain the security deposit without having any intention to have such issues adjudicated. The matter has been hanging fire for more than five years now. Although ordinarily where an arbitral clause exists, a writ petition is not entertained. However, the presence of the arbitral clause is not an absolute bar to entertain a writ petition. The remedy available under Article 226 of the Constitution of India also cannot be denied simply because the Corporation chooses to raise certain disputes, without taking any steps to have the same adjudicated through arbitration. In the given facts, referring the parties to arbitration would be travesty of justice.

28. We find that the work has duly been executed by the appellant and such fact stands corroborated through the completion certificate. We also find that at the first instance after expiry of 3 months from the date of issue of the completion certificate, it was obligatory on the part of the Corporation to release the security deposit at least to the extent of 75%. The

same has not been done. On contrary after disposal of the writ petition the Corporation has purportedly issued a letter of forfeiture dated 15th January, 2020 forfeiting the security deposit. The said letter dated 15th January, 2020, which is at page 353 of the paper book, does not indicate that the forfeiture was on account of securing the workers' dues, which according to Mr. Mukherjee, is yet to be quantified. Mr. Dhar has, however, submitted that there is no claim of the workers.

29. We find that no real opportunity to show cause was issued prior to the decision adopted to forfeit the security deposit. We have already held that the Corporation cannot be permitted to dispute the due completion of the work by the appellant, belatedly and contrary to the terms of the completion certificate. Once the Corporation acknowledges issuance of completion certificate, all disputes as regards completion of work obliterates. The Corporation was duty bound to act reasonably and with fairness. We find that the Corporation has acted arbitrarily and contrary to principles of natural justice. No notice preceded the forfeiture. No opportunity of hearing was provided. No steps were taken by the Corporation for years to have the matter referred to arbitration.

30. For the reasons discussed above, we set aside the order dated 25th February, 2019 passed by the learned Single Judge in W.P. 22509 (W) of 2018 and direct the Corporation to refund of the entire security deposit amount of Rs. 51,47,546/- to the appellant. As already directed by the Hon'ble Supreme Court, the said amount shall be paid by the Corporation to the appellant within ten days from date.

31. The appeal and the connected application are, accordingly, disposed of.

32. There shall, however, be no order as to costs.

33. Urgent Photostat copy of this judgment if applied for, be given to the parties, as expeditiously as possible, upon compliance of formalities in that regard.

(Raja Basu Chowdhury, J.)

(Tapabrata Chakraborty, J.)