

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)**

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

AP 381 of 2013

Vasavi Infrastructure Projects Limited

Versus

The Kolkata Municipal Corporation

Mr. Debmalya Ghoshal

Mr. Atish Ghosh

Mr. Sumana Biswas

.....For the Petitioner

Mr. Alak Kumar Ghosh

Mr. Ambar Nath Banerjee

Mr. Gopal Chandra Das

.....For KMC

Heard on : 17.05.2022 & 18.05.2022

Judgment on : 13.07.2022

Krishna Rao, J.: The respondent being the owner of the Premises No. 169, Rash Behari Avenue, Kolkata had published a tender notice on 5th September, 1998 for construction of commercial building complex. The petitioner had participated in the said tender by depositing an amount of Rs. 2,00,000/- as an earnest money with the condition that in case the offer of the petitioner is accepted the said amount shall be treated as security deposit. The respondent had accepted the offer of the petitioner on 7th

October, 1999 and on 23rd July, 2001 an agreement was entered between the respondent and petitioner for construction of multistoried Air Conditioned Commercial Complex in the aforesaid property. As per the terms and conditions of the contract the petitioner had deposited further amount of Rs. 8,00,000/- as security deposit and the respondent had converted the earnest money of Rs. 2,00,000/-deposited by the petitioner as security deposit and the total security amount would come Rs. 10,00,000/-.

As per the terms and conditions of the agreement entered between the parties the respondents shall return 50% of the security amount on completion of the work and the remaining 50% of the amount shall keep the respondent with them for 12 months as security for removal of defects, if any occurred.

In terms of the agreement, the petitioner had completed the construction of the Multistoried Air Conditioned Commercial Building Complex consisting of ground plus sixth floor and accordingly, the respondent had provided Completion Certificate to the petitioner on 18th May, 2006.

After completion of the construction the Commercial Building, in terms of the agreement, the petitioner had made request to the respondent for refund of the of the security deposit and on receipt of the request of the petitioner, the respondent had directed the petitioner to provide the receipt of the security deposit and accordingly, the petitioner had provided the same to the respondent. Though the petitioner had completed construction work and the respondent had provided completion certificate but the respondent

had not refunded the security deposit to the petitioner accordingly, the petitioner had requested for appointment of an Arbitrator in accordance with Clause 29 of the agreement and the Mayor of Calcutta Municipal Corporation was appointed as an Arbitrator.

On 13th December, 2012, the Ld. Sole Arbitrator has passed an Award and had rejected the claim of the petitioner.

The petitioner being aggrieved with the Award dt. 13th December, 2012 had filed the instant application under Section 34 of the Arbitration and Conciliation Act, 1996.

The Counsel for the petitioner submits that the error appearing on the face of record that the petitioner had invoked the provision of arbitration clause of the agreement for refund of Security Deposit of Rs.10,00,000/- along with interest but the Ld. Arbitrator has recorded that the petitioner is claiming refund of 50% of the Security Deposit and it is admitted that 50% of the Security Deposit is already refunded.

Ld. Counsel for the petitioner submits that the Award passed by the Ld. Arbitrator is totally contrary to law as in terms of the agreement 50% of the Security Deposit is required to be refunded immediately on completion of the work and in the instant case on completion of work the respondent provided completion certificate but had not returned the 50% of the amount but the Ld. Arbitrator was of the view that 50 % already refunded.

Ld. Counsel for the petitioner submits that the finding of the Ld. Arbitrator is based on no evidence as the Ld. Arbitrator held that the

petitioner had deviated the plan by constructing stair case instead of ramp but the petitioner has constructed ramp and only after inspection of the building completion certificate was provided to the petitioner.

Ld. Counsel submits that the Ld. Sole Arbitrator without any evidence has referred that the commercial complex did not run satisfactorily for the year immediately succeeding its completion or the alleged defects did not removed by the petitioner.

Ld. Counsel for the petitioner submits that the Ld. Arbitrator held that the petitioner has not constructed temple but the construction of temple is not the part of the contract entered between the petitioner and respondent.

Ld. Counsel for the petitioner submits that the Ld. Arbitrator has not considered that the dispute regarding construction of temples was the subject matter of another proceeding of Arbitration between the petitioner and the "Purba Banga Basthura Babsayee Sanga Ltd."

Ld. Counsel for the petitioner submits that the Ld. Arbitrator has wrongly held that the petitioner cannot be permitted to have refund of the balance Security Deposit unless and until the petitioner established that petitioner has duly performed his obligation by authorizing the occupant/stall holder for their rehabilitation in the newly constructed building though the said fact is not the subject matter of the agreement and with regard to the same another Arbitration proceeding was pending and subsequently it was adjudicated in favour of the petitioner.

Ld. Counsel for the petitioner submits that the Award passed by the Ld. Arbitrator is contrary to the documents available on record, perverse and illegal.

Per contra, Ld. Counsel appearing for the respondent submits that the Ld. Arbitrator upon analyzing the facts and considering the documents on record come to the conclusion that the petitioner has committed breach of certain terms and conditions of the agreement and grant of completion certificate does not make the petitioner liable for refund of Security Deposit.

Ld. Counsel for the respondent submits that the Ld. Arbitrator has adjudicated the issue whether there was any non-satisfactory performance of the commercial complex or failure of the petitioner to remove the defects in the said complex and come to the conclusion that the petitioner failed to discharge his obligation under the agreement.

Ld. Counsel for the respondent submits that the dispute between the petitioner and Purba Bangha Basthura Byabsayee Sangha Ltd. was pending before another Arbitrator and accordingly, the Arbitrator has rejected the claim of the petitioner.

Ld. Counsel for the respondent submits that the other Arbitration proceeding was disposed of by another Arbitrator only in the year 2018 and the instant Award is passed in the year 2012 and thus the Ld. Arbitrator has not committed any error by rejecting the claim of the petitioner.

Ld. Counsel for the respondent submits that the respondent has filed counter claim against the petitioner before the Ld. Arbitrator for declaration

that respondent is entitled to forfeit the sum of Rs. 10,00,000/- of the Security Deposit and Rs. 48,07,859/- being the amount of secondary basic rent which the respondent would have realize from the stall holders who have been allocated space by the petitioner in the ground floor and the first floor of the concern building.

Ld. Counsel for the petitioner submits that the petitioner cannot claim the benefit of the Award dt. 31.03.2018 in the instant case.

Ld. Counsel for the respondent submits that the ground as urged by the Ld. Counsel for the petitioner is not covered any of the ground enumerated in Section 34 of the Arbitration and Conciliation Act, 1996.

Heard, the Ld. Counsel for the parties, perused the materials available on record and the judgment relied by the petitioner.

It appears from record that at the time of entering into an agreement the petitioner company was known as Pam Infrastructure Projects Private Limited and subsequently the name of the petitioner was changed to Pam Infrastructure Projects Limited and now the petitioner company is known as Vasavi Infrastructure Projects Limited.

Clause 28 of the Agreement reads as follows:-

*“28. **Security Deposit:** The Security Deposit of Rs. 200000/- (Rupees Two Lac) converted from Earnest Money deposit furnished by the Agency shall remain with the CMC during the entire period of the agreement. The Agency has in addition to the said Security Deposit furnished to the CMC additional security of Rs. 800000/- (Rupees Eight Lac) for the due performance of this agreement. On completion of the project, 50 % of the Security Deposit shall be released and the balance after 12 months of*

completion of satisfactory performance of the Commercial Complex and removal of defects if there be any.”

Admittedly, the petitioner had deposited an amount of Rs. 10,00,000/- as security deposit with the respondent.

The respondent had provided Completion Certificate to the petitioner on 18th May, 2006 reads as follows:

***“Completion certificate for the commercial complex erected on KMC’s land at 169, Rashbehari Avenue Kolkata – 19, developed on joint venture basis.*”**

Dear Sir,

*This has reference to your letter addressed to KMC on the above captioned subject submitted by you from time to time. In terms of your appeal for issuance of completion certificate for the above mentioned project, you are hereby informed that as per the departmental inspection and subsequent agreed decisions taken by the appropriate authority of KMC on 17.05.06, it is hereby declared that the instant commercial complex erected at the above mentioned premises now may be treated as **‘fit to be occupied fully’**.”*

As per clause 28 of the Agreement, the petitioner is entitled to get 50% of the security amount back and the petitioner had applied for the same. Completion certificate was issued on 18th May, 2006 and immediately on receipt of the certificate, the petitioner had applied for refund of 50% of the security. Till 27th April, 2009, the respondent had not refunded the Security Deposit to the petitioner in the mean time, the 12 months period was also expired and thus the petitioner is entitle to get the total security amount of

Rs. 10,00,000/-and accordingly, the petitioner had invoked Clause 29 of the agreement for Arbitration.

Clause 29 of the agreement reads as follows:-

*“29. **Settlement of dispute:** All disputes and differences whatsoever arising between the parties as to the due performance of the contract or in respect of implementation of any Clause in respect of construction and management and of the meaning of any Clause or anything arising out of the same and incidental thereto shall be referred to the arbitration of the Mayor of Calcutta Municipal Corporation whose decision is final and binding for the both parties.”*

Though the offer of the petitioner was accepted by the respondent on 7th October, 1999 but the agreement between the petitioner and the respondent was on 21st July, 2001. Before execution of the agreement between the petitioner and respondent, the petitioner had entered into a separate agreement with Purba Banga Bastuhara Babsayee Sangha Ltd. and about 74 members of the said Sangha on 26th April, 2001 with respect of the said property.

In the instant case the claim of the petitioner before the Ld. Arbitrator is for refund of security deposit of Rs. 10,00,000/- along with interest. In paragraph 8 of the Award the arbitrator has recorded as follows :

8. *“It is not in dispute that 50% of the security deposit amounting to Rs. 10 lacs has been refunded. The dispute relates to the balance amount of security deposit, which has been withheld by the respondent”.*

In paragraph 15 of the Award the Ld. Arbitrator recorded that:

15. *“The principal question which arises for consideration in adjudicating the claim submitted by the claimant for refund of its balance security deposit is whether there was any non-satisfactory performance of the commercial complex or failure of the claimant to remove defects, if any, in the aforesaid complex despite the same having brought to the notice of the claimant.”*

The Ld. Arbitrator has rejected the claim of the petitioner on the ground that (a) the petitioner has not constructed the 2nd Temple, (b) one Sefali Sadhukhan has filed a suit and the same is pending for adjudication and unless the said issue is not sorted out the claimant cannot be given clean chit, (c) petitioner failed to hand over space required spaces for rehabilitation of the existing stallholders and other authorised occupants and (d) the completion certificate does not and cannot imply the compliance by the claimant of its contractual obligation. Ld. Arbitrator while rejecting the claim of the petitioner in the impugned Award dt. 13th December, 2012 has not decided the counter claim made by the respondent and admittedly, the respondent had accepted the award and have not filed any application under Section 34 of the Arbitration and Conciliation Act.

In terms of the agreement entered between the petitioner and Purba Banga Basthuhara Babsayee Sangha Ltd. dt. 26th April, 2001, an another Arbitration Proceeding was initiated by the petitioner claiming an amount of Rs. 3,77,74,930.77/- against Purba Banga Basthuhara Babsayee Sangha Ltd. and its members on the ground that shop owners have not vacated the premises in question in time and have obstructed the petitioner for construction of new commercial building and the petitioner was forced to

pay an amount of Rs. 6,27,930.77/- to the CESE Limited on account of the minimum demand charges.

In the said Arbitration proceeding the Purba Banga Bastuhara Babsayee Sangha Ltd. and its members have also raised counter claim against the petitioner in which one of the claim is with regard to the temples for an amount of Rs. 36,00,000/- but the Ld. Arbitrator while deciding the said issue held that:

“The counter claim no. 3 for Rs. 36,00,000/- is for 720 sft area of temple. In this connection statements made in paragraph 19 of the Counter Statement and in paragraphs 17 and 29 of the affidavit of evidence of RW-2 are relevant. The statements in paragraph 5 of the affidavit of evidence of RW-1 is also referred to. The award passed by the Mayor in the connected proceeding and findings therein have been referred to but the respondent nos. 1 to 74 being not parties in the said proceeding, findings therein are not binding in this proceeding. Clause 9 of the agreement speaks of “a temple” as obligation of the claimant without mentioning its area, though area of office room and dining room has been stated in clause 8. But in answer to Q. No. 131 the C.W.1 admitted two temples to be constructed though agreement provided only one temple. In answer to Q. 25 to 46 and 81 to 89 RW-1 admitted construction of one temple in the new complex though it was stated to be tinned structure. In answer to Q. 88 the said witness admitted another temple constructed but described it as a small room and not a temple. The location of temple was uncertain even on 31.01.2005 by reason of different suggestions by different groups of stall holders as appears from Minutes of Meeting of that date (Page 4 of claimant’s documents-1) KMC’s letter dated November 7, 2005 addressed to the respondent no. 1 also records that temple was constructed (P.7 of claimant’s documents-1). Even letter dated March 10, 2004 by Respondent No. 1 (Page 12 of claimant’s documents-1) also admits the same. Letter dated December 16, 2005 (Ext. 56 Page 77 third supplementary affidavit) records why second temple could not be constructed which gets support from KMC’s letter dated July 28, 2005 (Ext. 54 Page 75 third supplementary affidavit). But admittedly the respondents took possession of the new stalls with the said temple without raising any objection. In absence of any specifications of the temple in the agreement and in view of above facts, claimant cannot be held liable for any breach of agreement in this respect.”

In paragraph 54 of the instant Award, the Ld. Arbitrator held that :

54. *“It may be noted that grant of completion certificate does not and cannot imply the compliance by the claimant of its contractual obligations. Grant of completion certificate dt. 18.05.2006 issued by the then Dy. CE(P)/P&D only certified that the building / premises would be treated as “fit to be occupied fully”. The claimant cannot be permitted to have refund of the balance security deposit unless and until it stands established that the claimant had duly performed its obligations to give proper and appropriate rehabilitation to the authorised occupants and shareholders in accordance with the rehabilitation plan. The said issue is pending adjudication in the reference before the Hon’ble Justice Alok Chakraborty (Retd). To allow refund the balance security deposit would amount to pre-judging of the issue.”*

The Ld. Arbitrator in one hand was of the view that pending adjudication of the issue before the Hon’ble Justice Alok Chakraborty (Retd) and if, the claim of the petitioner is allowed, the same would amount to prejudging the issue and on the other hand the Ld. Arbitrator has rejected the claim of the petitioner holding that the petitioner is not entitled to refund of balance security and the respondent has rightly rejected the claim of the petitioner. Since, beginning the Arbitrator has proceeded with the matter for refund of 50% of the Security Deposit but the claim of the petitioner is refund of total security amount as the respondent has not released any part of the total security amount.

The judgment referred by the petitioner reported in (2010) 11 SCC 296 Para 42 which reads as follows:-

“42. *Can the findings and the award in the present case be described as perverse? This Court has already laid down as to which finding would be called perverse. It is a finding which is not only against the weight of evidence but altogether against the evidence. This Court has held in Triveni Rubber & Plastics v. CCE that a perverse finding is one of which is based on no evidence or one that no*

reasonable person would arrived at. Unless it is found that some relevant evidence has not been considered or that certain inadmissible material has taken into consideration the finding cannot be said to be perverse. The legal position in this behalf has been recently reiterated in Arulvelu .- Sate.”

In the present case, the finding of the Arbitrator is perverse as the Ld. Arbitrator even has not considered that on completion of the construction work, the petitioner is entitle to get 50% of the security amount in terms of Clause 28 of the agreement and the official of the respondent has provided completion certificate and the said certificate was never withdrawn but the respondent had not released the 50% of the security amount. The said evidence was available on record but has not been considered by the Arbitrator and contrary, the Arbitrator was of the view that Rs.10,00,000/- is the balance security amount.

In the present case, the question whether the petitioner committed any breach of the terms and conditions of the agreement dt. 23rd July, 2001, whether the respondent was justified in forfeiting the security amount of Rs. 10,00,000/- and whether the respondent had power to forfeit the security money in the fact of this case?

Section 74 of the Contract Act reads as under :

“74. Compensation for breach of contract where penalty stipulated for.- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.- When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.- A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.”

In the case referred by the petitioner reported in (2017)16 SCC 757, the Hon’ble Supreme Court held that:-

“23. Reading of [Section 74](#) would go to show that in order to forfeit the sum deposited by the contracting party as "earnest money" or "security" for the due performance of the contract, it is necessary that the contract must contain a stipulation of forfeiture. In other words, a right to forfeit being a contractual right and penal in nature, the parties to a contract must agree to stipulate a term in the contract in that behalf. A fortiori, if there is no stipulation in the contract of forfeiture, there is no such right available to the party to forfeit the sum.”

In the instant case, Clause 28 of the agreement defines “Security Deposit” but in the agreement, there is stipulation of forfeiture of the security deposit and thus the respondent has no such right to forfeit the Security Deposit. There is no evidence available on record to prove that the petitioner has violated any terms and conditions of the agreement and in the other proceeding of arbitration, the Ld. Arbitrator on considering the documents and evidences held that admittedly, the respondents (Purba Banga Basthuhara Babsayee Sangha Ltd. and its members) took possession

of the new stalls with the said temple without raising any objection and in the absence of specification of the temple in the agreement and in view of the above facts, claimant (the petitioner herein) cannot be held for any breach of agreement in this respect.

In view of the above, this court of the opinion the reason assigned by the Ld. Arbitrator is perverse and wrong appreciation of evidence and thus the Award dated 13th December, 2012 is set aside.

The respondent, The Kolkata Municipal Corporation is directed to refund the amount of Rs. 10,00,000/- (Rupees Ten Lakhs Only) out of which Rs. 5,00,000/- shall carry interest at the rate of 8% per annum from 18th May, 2006 and the balance Rs. 5,00,000/- shall carry interest 8% per annum from 18th May, 2007 till the realisation of the total amount to the petitioner.

AP 381 of 2013 is thus **allowed**.

(Krishna Roa, J.)