

(2021) 06 CAL CK 0104

In the Calcutta High Court

Case No : MAT No. 499 Of 2019, IA No. CAN 1 Of 2019 (Old CAN 5No. 665 Of 2019)

Lipi Sarkar

APPELLANT

Vs

West Bengal Industrial Infrastructure Development Corporation & Ors.

RESPONDENT

Date of Decision : 25-06-2021

Acts Referred:

Citation : (2021) 06 CAL CK 0104

Hon'ble Judges : Saugata Bhattacharyya, J;Subrata Talukdar, J

Bench : Division Bench

Advocate : Pratik Dhar, Pappu Adhikari, Probal Mukherjee, Amit Kumar Nag, Swarajit Dey, Maharnab Roy

Judgement

Under challenge in this appeal is the order impugned of the Hon'ble Single Bench dated 25th of February, 2019 in the writ petition being WP No.

22509(W) of 2018.

At issue before the Hon'ble Single Bench was the complaint by the writ petitioner of alleged wrongful withholding of the earnest money deposited

by her under a contract with the respondents-Corporation, the West Bengal Industrial Infrastructure Development Corporation (for short referred to

only as the Corporation).

The Hon'ble Single Bench decided that issues raised in the writ petition and contested by the respondents constitute disputed questions of facts

which require further evidence to be taken.

Accordingly, the Hon'ble Single Bench did not interfere and disposed of the writ petition. Mr. Dhar, learned Senior Counsel, takes this Court to

the clause in the contract by which the Security Deposit (SD) deposited by the

writ petitioner/the present appellant/the contractor was to be refunded.

It is submitted that the SD is refundable on the expiry of three months after the issue of the certificate, final or otherwise, showing the completion of

the work order. It is also submitted from the terms of the contract that refund was subject to the condition that no such refund shall be allowed till the

final bill is prepared and passed.

Next, learned Senior Counsel for the appellant, takes this Court to the general terms and conditions of the contract referring to the clause marked as

SD refund. It will be apropos this discussion to set forth the contents of the particular clause as appearing in the General Terms and Conditions which

have been made part of the stay application by the appellant. It reads as follows:-

â?? 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.â??

Next, this Court is taken by the appellant to a Certificate dated the 8th of August, 2018 issued by the Corporation denoting the date of completion of

work to be 15th of November, 2017 along with the preparation of the 6th RA and Final Bill. From a succeeding page dated the 8th of October, 2018,

the Corporation is shown to have prepared the 6th the RA and Final Bill on the 28th February, 2018.

Adding up the above stated General Terms and Conditions of the contract relating the refund of SD with the documents as furnished by the

Corporation itself, Mr. Dhar submits that, in the opinion of this Court prima facie correctly so, the appellant became eligible to receive 75% of the

security deposit after three months from the date of successful completion of the work. It is the stand of the appellant that such would be the admitted

position, keeping in mind the document of the Corporation which shows the work had been completed on the 15th of November, 2017 and 6th RA and

the Final Bill was prepared on the 28th of February, 2018.

To the above extent, Mr. Dhar submits, the Honâ??ble Single Bench fell into error by failing to perceive the admitted position of the above facts and

therefore could not have relegated the parties away from the Writ Court and before an appropriate forum for the purpose of producing evidence.

Mr. Mukherjee, learned Senior Counsel appearing for the Corporation, takes this Court to the dispute resolution clause in the contract which is Clause-

25. The dispute resolution clause, as applicable in normal commercial contracts, permits the parties to raise all disputes arising out of the contract in an

arbitration proceeding which is to be executed in terms of the Finance Department Audit Branch, Government of West Bengal, Memo No. 818-F (Y)

dated 26th September, 2012. Mr. Mukherjee places heavy emphasis on a communication dated 28th May, 2018 from the Corporation to the appellant

raising issues connected to the maintenance of the subject work. Therefore, learned Senior Counsel appearing for the Corporation relying on the

authorities as reported in AIR 2020 SC 5215 (at paragraph 22); AIR 2020 (6) SCC 256 (also at paragraph 22) and 1996 (6) SCC 22 (again at

paragraph 22), makes the legal point that a writ Court cannot interfere where there are facts which are disputed and there is an alternate mode

specified for settlement of disputes by arbitration particularly in case when a writ is prayed for seeking refund of deposit connected to work performed

under the contract.

Mr. Mukherjee submits that the appellant is yet to be discharged from her obligations under the contract and therefore the Honâ??ble Single Bench

did not commit any error by refusing to examine the conduct of the parties pertaining to the defect liability period of the contract. In view of the non-

performance of contractual obligations by the appellant , Mr. Mukherjee submits that the entire SD has been forfeited by the Corporation.

In order to meet Mr. Mukherjeeâ??s submissions on the non-maintainability of a writ petition, qua the circumstances as discussed above, Mr. Dhar,

relies upon the authorities of 1996 (3) SCC 769 (at Paragraph 16), 2012 (12) SCC 170 (at paragraph 21); and 2019 (16) SCC 794 (at paragraph 3) as

well as the decision in ABL International as reported in 2004 (4) SCC 553 to stress the point that a writ remedy is not barred under every

circumstance arising out of a contract.

Having heard the parties and considering the materials placed, at this stage this Court must go by the settled position printed in the contract. The

position is as follows:-

The work was completed on the 15th of November, 2017 and accordingly the respondents following the terms of the clauses governing refund of the

SD were liable to refund 75% of the earnest money on expiry of three months of completion of the work. The balance 25% was to be released after

12 months from the date of handing over of the completed work to the Corporation inclusive of the one-year maintenance period.

To the mind of this Court the disputed question of facts, if at all, would apply to the 25% refund of the SD which is attached to the maintenance sought

to be raised by the Corporation before the Honâ??ble Single Bench.

It can therefore be safely understood that there is no impediment to releasing 75% of the SD in terms of the contract itself on expiry of three months

from the date of the successful completion of work. It is not shown to this Court that the work has not been successfully completed. On the other

hand, a correspondence, which is as late as of 28th May, 2018, i.e. long after the expiry of three months from the date of completion of the contract

on the 15th of November, 2017 is shown to this Court to invoke the defect liability clause.

This Court must also notice the documents of the Corporation itself dated 8th August, 2018 which are documents after the letter dated 28th May, 2018

and, in the subsequent document dated 8th August, 2018 there is mention of dates of completion as well as 6th and Final RA Bill, two points which

already stand discussed above. It stands to reason therefore that subsequently on 8th August, 2018 the Corporation could not have placed on record a

completion date for the tender work as well as a date for the 6th RA and Final Bill, in the event the Corporation decided to go ahead with the

impositions contained in its communication dated 28th May, 2018. Even then, the Corporation, in law, was only entitled to forfeit 25% of the earnest

money treated to be as the SD, being directly liable to release 75% within three months of the completion of work, i.e. three months from 15th

November, 2017.

Accordingly, let there be a direction upon the Corporation to deposit 75% of the SD aggregating to Rs. 39 lakhs (approx) with the Learned Registrar-

General, Appellate Side of this Court within a period of three weeks from this date.

The Learned Registrar-General shall keep the deposit in an interest-bearing

renewable short term fixed deposit account of a nationalised bank, until further orders.

In view of the directions above, the order of the Honâ??ble Single Bench directing the parties to produce evidence before an appropriate forum

remains suspended. Let the matter return under the heading â??To Be Mentionedâ? on the 16th of July, 2021, on which date the Learned Registrar-

General shall furnish a Report.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.