
(2014) 10 MP CK 0074
In the Madhya Pradesh High Court
Case No : Writ Petition No. 5996/2011

R.S.I. Stone World Pvt. Ltd.

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 10-10-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 74

Citation : (2014) 10 MP CK 0074

Hon'ble Judges : S.K. Gangele, J; Rohit Arya, J

Bench : Division Bench

Advocate : Arun Dudawat, Advocate for the Appellant; M.P.S. Raghuvanshi, Additional Advocate General and Harish Dixit, Advocate for the Respondent

Judgement

1. By this petition under Article 226 of the Constitution of India challenge is made to the order dated 1/6/2011 passed by Collector, Gwalior forfeiting the earnest money and security deposits, on failure of execution of agreement as well as non fulfillment of conditions on the part of petitioner in furtherance of award of mining lease for 5 years w.e.f. 1/4/2011 to 31/3/2016 as enumerated in order dated 1/3/2011.

2. Facts necessary for disposal of this petition are to the effect that an auction notice dated 15/2/2011 was published from the Office of Collector, Gwalior inviting tenders for grant of lease for 5 years from 1/4/2011 to 31/3/2016 for mining of flag stone and minerals. Petitioner was one of the bidder and was declared successful vide communication dated 1/3/2011. As per tender notice, petitioner was required to deposit 5% earnest money and 25 % security deposits in terms of clause 7 and 8 of the auction notice. Petitioner was further required to furnish bank guarantee of the same amount of 25% security deposit for the period of grant of lease within 7 days from the date of agreement. As per clause 10, the petitioner was required to execute the agreement within 30 days in form 18 from the date of order granting lease, failing which, the earnest money and

security deposits were liable to be forfeited. Vide letter dated 1/3/2011, petitioner was called upon to execute the agreement pursuant to award of lease for the aforesaid period and in that behalf certain conditions were to be complied with. Condition No. 4 inter alia provided that within 30 days of the order passed, the petitioner is required to execute the agreement and take possession, failing which the contract shall be cancelled and earnest money and security deposits shall be forfeited. Re-auction shall take place and if any loss is caused to the State, the same shall be recovered from the petitioner as land revenue. Condition No. 6 required the petitioner to procure the consent letter from Air and Water Pollution Control Board for the purposes of operating the mines. It appears that the petitioner neither could procure the consent letter from Pollution Control Board nor did he execute the agreement with State as aforesaid and therefore, failed to comply with the conditions of grant of lease. Petitioner vide letters Annexure P/5, P/6, P/7 and P/8 was called upon to comply with the conditions of letter dated 1/3/2011 but did not comply with the aforesaid requirements. As a result, impugned order of termination of lease and forfeiture of earnest money and security deposit has been passed.

3. Learned counsel for the petitioner submits that he has submitted all requisite documents as required by the Pollution Control Board and therefore, non issuance of consent letter by it cannot be treated to be failure on the part of petitioner. Further forfeiture of earnest money and security deposit without issuing any notice to the petitioner is bad in law.

4. Respondents/State has filed return wherein the allegations made in the writ petition are specifically denied. It is submitted that impugned order dated 1/6/2011 forfeiting the earnest money and security deposits has been passed due to non-compliance of NIT conditions and order granting lease to the petitioner vide dated 1/3/2011. A preliminary objection has also been taken that the impugned order of cancellation of lease dated 1/3/2011 is appealable under Rule 57 of the Mines and Mineral Rules, 1996 and therefore, this petition is not maintainable.

5. Consequent upon award of lease to the petitioner in respect of flag stone quarry No. 947-948 area 2.604 hectare the bid of the petitioner was at Rs. 77 lacs per annum and therefore, he was required to deposit 30% of the total value of the quarry lease (5% earnest money and 25% security deposits). 30% was required to be deposited at the time of auction and after grant of lease 25% amount was required to be secured in the form of Bank Guarantee/NSC/Fixed deposit within a period of 7 days from the date of auction. Undisputedly, petitioner has deposited 30% amount of security vide challan No. 473 dated 1/3/2011 but failed to secure 25% amount i.e. Rs. 19,25,000/- in the form of Bank Guarantee/NSC/Fixed deposit. Besides, petitioner also failed to obtain consent letter from the Pollution Control Board after award of contract within 30 days and also did not execute the agreement as per clause 4,5, and 6 of award, as a result, the respondent Collector has passed the impugned order forfeiting

the security deposit as well as the earnest money.

6. Petitioner has filed rejoinder wherein it has been submitted that he had filed an application for grant of consent letter/NOC before the Pollution Control Board, however, same was not issued even after submission of all required information and documents on 25/4/2011. It is submitted that respondent No. 4 was hell bent upon to deny the consent letter to petitioner for no rhyme and reason. Petitioner's application was rejected on 2/5/2011 arbitrarily and illegally by the Pollution Control Board.

7. Heard learned counsel for the parties.

8. Upon perusal of the documents brought on record, it is evident that at the time of participation in the bid as required, petitioner had deposited 30% of the total value of the contract i.e. Rs. 23,10,000/- (5% earnest money and 25 % security deposit). Consequent upon award of lease, petitioner was required to fulfill certain conditions. Petitioner has failed to furnish the bank guarantee of 25% of total bid amount i.e. Rs. 19,25,000/- .Petitioner did not execute the agreement. Petitioner also did not submit NOC/consent letter from the Pollution Control Board. Petitioner did not take possession of quarry lease. As a result, the amounts of earnest money and security deposit have been forfeited. It appears that respondents have given sufficient opportunity to the petitioner vide letters dated 25/4/2011, 30/4/2011, 3/5/2011 and 7/5/2011 requiring the petitioner to complete the formalities as required in the order dated 1/3/2011. However, the requirements remained incomplete.

9. That apart, though the petitioner claims to have deposited all requisite documents and informations in response to the Pollution Control Board letter dated 13/4/2011 on 25/4/2011, but as a matter of fact the complete documents as required were not supplied as is well evident from rejection letter of the M.P. Pollution Control Board dated 2/5/2011; wherein, the reference of repeated letter being issued to the petitioner have been made viz. dated 13/4/2011 and 21/4/2011 but since the petitioner failed to comply with the directions, M.P. Pollution Control Board declined to issue consent letter/NOC. Counsel for the petitioner submitted that respondent/M.P. Pollution Control Board was not justified having denied the consent letter and submitted that again since he had submitted the complete information on 6/5/2011 in all fairness, the Pollution Control Board ought to have considered the same and issued the NOC/consent letter.

10. Having perused Annexure P/12 and alleged resolution of Gram Panchayat dated 8/6/2011 filed alongwith rejoinder, the claim of the petitioner of having filed the aforesaid documents is falsified by the fact that alleged documents is said to have been sent alongwith letter dated 6/5/2011. As such conduct of petitioner appears to be suspicious in nature in the matter of completion of requirements as sought for by the Pollution Control Board. In view of the aforesaid, no fault can be found with the Pollution Control Board having passed

order dated 2/5/2011. Therefore, consequential action taken by the respondents for non- fulfillment of conditions, in the opinion of this Court are impregnable.

11. So far as grievance as regards nonobservance of principles of natural justice as regards opportunity to the petitioner before forfeiting of earnest money, suffice it to say that NIT was issued on 15/2/2011 and thereafter lease was granted on 1/3/2011. Since 1/3/2011, there have been number of letters issued by the respondents dated 25/4/2011, 30/4/2011, 3/5/2011 and 7/5/2011, still the petitioner failed to comply with the conditions stipulated in the order granting lease and more that three months period has passed. That apart, even for procurement of consent letter/NOC from Pollution Control Board, petitioner has not been able to satisfy the requirements, which resulted into rejection of his application. Under such circumstances, no grievance in that behalf can be made and therefore, respondents were justified having forfeited the earnest money by the impugned order.

12. Now the question arises as to whether the amount of security deposited could have been forfeited when agreement was not entered and the subsequently also the contract was not executed. As the security deposit is made for ensuring satisfactory completion of contract and default in that process shall entail forfeiture thereof, in other words performance guarantee. Before addressing upon the aforesaid question, it is considered apposite to refer to the judgment of Hon. Supreme Court in the matter of Saurabh Prakash Vs. DLF Universal Ltd., ; wherein, distinction has been drawn and explained between words earnest money and security deposit in the context of contractual matter and consequence flows therefrom. For ready reference para 42 & 43 of the aforesaid judgment is quoted hereinbelow:-

"42. The distinction between a security and an earnest money has also been pointed out by this Court in *Maula Bux Vs. Union of India (UOI)*,] in the following terms:

"4. Under the terms of the agreements the amounts deposited by the plaintiff as security for due performance of the contracts were to stand forfeited in case the plaintiff neglected to perform his part of the contract. The High Court observed that the deposits so made may be regarded as earnest money. But that view cannot be accepted. According to Earl Jowitt in *Dictionary of English Law* at p. 689; "Giving an earnest or earnest- money is a mode of signifying assent to a contract of sale or the like, by giving to the vendor a nominal sum (e.g. a shilling) as a token that the parties are in earnest or have made up their minds". As observed by the Judicial Committee in 94 Ind. Cas. 782 (Privy Council),:

"Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."

In the present case the deposit was made not of a sum of money by the purchaser to be applied towards part payment of the price when the contract was

completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest money."

43. Referring to Section 74 of the Indian Contract Act, it was observed:

"There is authority, no doubt coloured by the view which was taken in English cases, that Section 74 of the Contract Act has no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach, *Natesa Aiyar v. Appayu Padayachi*; *Singer Manufacturing Company v. Raja Prosad*; *Manian Pattar v. Madras Railway Company*. But this view is no longer good law in view of the judgment of this Court in *Fateh Chand* case. This Court observed at p. 526: "Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases: (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulation by way of penalty.'" The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74, reasonable compensation not exceeding the penalty stipulated for."

The Court also observed:

"It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74, applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases whereupon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture, and that, - There is no ground for holding that the expression "contract contains any other stipulation by way of penalty" is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited."

13. This Court is of the view that facts in hand if juxtapositioned with the

aforesaid authoritative pronouncement of law by the Hon. Apex Court, as the petitioner chose not to execute the agreement as required by the order granting lease dated 1/3/2011, did not furnish the bank guarantee of 25% of the total value of the contract, did not submit the consent letter/ NOC of Pollution Control Board. As such the contract for mining lease did not come into existence. Under such circumstances, failure on the part of petition in the matter of non-fulfilling of aforesaid conditions shall entail forfeiture of earnest money. However, forfeiture of security deposit which was secured for performance of contract during the currency of contract could not have been fortified as the agreement/ contract did not come into existence for execution of mining lease. In view of the aforesaid, petition is partly allowed and the order impugned dated 1/6/2011 is quashed to the extent it forfeited the security deposits of 25%. Same is liable to be refunded to the petitioner within a reasonable period of 8 weeks from the date of passing of this order.