

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

F.A.O.No.5816 of 2015 (O&M)

Date of Decision: March 17th, 2016

**Chandigarh Administration through Joint Secretary, Tourism, Sector 9,
Chandigarh & another**

...Appellants

Versus

M/s Parsvanath Film City Ltd., New Delhi & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? **YES**
3. Whether the judgment should be reported in the Digest?

Present: Mr.Sanjeev Sharma, Senior Advocate with
Mr.Shekhar Verma, Additional Government Pleader,
for the appellants.

Mr.Naresh Markanda, Senior Advocate with
Ms.Kavita Markanda, Advocate,
for Caveator-respondent No.1.

AMIT RAWAL, J.

Before advertng to the submissions and counter submissions of the learned Senior Counsel for the parties, it would be apt to give a brief preface of the admitted facts.

A development agreement dated 2.3.2007 was entered into between the appellant-Chandigarh Administration (hereinafter called “CA”) and respondent-M/s Parsvnath Film City Limited (hereinafter called “the Developer”). The aforementioned agreement was entered/executed for a period of 99 years and the lessee was granted liberty to set up Film City,

Multimedia Park, Multimedia College and Research Centre and Multimedia Entertainment Centre. The completion date of the scheduled project was 36 months or such extended date as agreed by the CA starting from the date of agreement, excluding any such period of delay attributable after payment of the entire bid price by the Developer and in actually handing over the leasehold land to the Developer. As per Article 2 of the agreement, if any of the conditions precedent have not been fulfilled or waived in writing by the CA, without prejudice to its rights hereunder and under applicable laws, CA can terminate the agreement and the amount paid towards the bid price or bid security by the Developer to the CA shall be forfeited. As per Article 4.2 of the agreement, the Annual Ground Rent (AGR) shall be the amount payable by the Developer to the CA at the rate specified in Schedule IV annually in advance from the date of signing the agreement till the end of the agreement period, in essence, the Developer was required to pay the AGR yearly in advance. As per Article 4.3.1, the bid price was Rs.191.00 crores only and a sum of Rs.47.75 crores was deposited by the Developer being part of the bid price, required to be paid upfront by the Developer. The Developer was required to pay the balance and outstanding bid price to the CA in accordance with the timelines specified in Schedule IV. Article 5 of the Agreement deals with obligations of the parties and as per Article 5.1.1, the Developer was required to obtain all necessary approvals from the Ministry of Commerce, Ministry of Finance and Department of Industrial Development, Ministry of Environment & Forests and other statutory authorities, whereas Article 5.2 deals with the obligations of the CA to grant to the Developer, the requisite permission(s) to develop the land required for the development of the Project, in essence, the CA shall

provide the Developer the land free from all encumbrances and occupations and assist the Developer in obtaining the necessary approvals in accordance with the agreement. Article 12 of the Agreement deals with the events of default and termination. The relevant clauses read thus:-

"12.1 The Developer Event of Default

12.1.1 A "Developer Event of Default" shall be deemed to have occurred if any of the following events has occurred, unless the same has so occurred as a consequence of a Force Majeure Event:

- i) The Developer fails to obtain all necessary Approvals (except environmental clearance from MOEF; provided however that, in the reasonable opinion of the CA, the Developer has exerted all necessary efforts to obtain the said environmental clearance) required for commencement of work on the Leasehold Land within six Months from the date of execution of this Agreement; or*
- ii) The Developer fails, neglects, reuses, or is unable to pay the consideration in accordance with the Payment Schedule indicated in Schedule IV.*
- iii) The Developer fails to complete the development of the Project within the period as agreed therein.*
- iv) The Developer repeatedly and persistently remains in breach of any of its obligations under his Agreement; or*
- v) If any representation made or warranties given by the Developer under this Agreement is found to be false or misleading.*
- vi) The Developer fails to comply with any of the terms and conditions of the Lease Agreement.*
- vii) The Developer does not issue, renew, replace or provide the Bank Guarantee in accordance with the terms of this Agreement or if the Bank Guarantee ceased to be in effect prior to the discharge of payment obligations of the Developer to CA as under Article 4.*
- viii) The Developer passes a resolution for voluntary winding*

up.

ix) Upon appointment of a provisional liquidator, administrator, trustee or receiver of the whole or substantially whole of the undertaking of the Developer by a court of competent jurisdiction in proceedings for winding up or any other legal proceedings.

x) Upon levy of an execution or restraint on the Developer's assets which has or is likely to have Material Adverse Change and such execution or restraint remaining in force for a period exceeding 90 Days.

xi) Upon amalgamation of the Developer with any other company or reconstruction or transfer of the whole or part of the Developer's undertaking [other than transfer of assets in the ordinary course of business) without the CA's prior written approval, provided, if the amalgamated entity, reconstructed entity or the transferee as the case may be, has the ability demonstrated to the satisfaction of the CA, to undertake, perform/discharge the obligations of the Developer under this Agreement, necessary approval shall be granted by the CA.”

Article 12.2.3 deals with the termination notice which shall be effective from such date not exceeding 30 days, which reads thus:-

"12.2.3 The Termination Notice shall be effective from such date not exceeding thirty (30) days from the date of issue of notice as may be specified in the Termination Notice. During the period specified in the Termination Notice, the parties shall, subject where applicable to the provisions of Article 12, continue to perform such of their respective obligations under this Agreement which are capable of being performed with the object, as far as possible, of ensuring continued availability of the Project to the users, failing which the Developer shall compensate CA for any loss or damage occasioned or suffered on account of the underlying failure/breach.”

As per Schedule 1 of the Project, for the development of the

Project, zoning for the aforementioned facilities shall be decided by the selected Developer complying with minimum area (stipulation) specified under the respective heads and overall Floor Area Ratio (F.A.R.) for the development of the Project will be 1.00 with ground coverage of 30% and the total height for the aforementioned facilities could be taken maximum upto 57'-6" above the plinth level. The Schedule prescribes the specimen of the performance guarantee of amount of Rs.10.00 crores, to be furnished by the Developer. After execution of the aforementioned agreement, the Developer wrote a letter dated 2.3.2007 (C-18) to the Director (Tourism), Chandigarh Administration regarding development of Multimedia-cum-Film City as an integrated Project at Sarangpur, Chandigarh and requested that the date of start of the development period would be the date on which the final demarcation plan, i.e., the final Layout plan is issued to them and the payment of next instalment shall be due, which is 75% of the bid price, to be paid by them, should be 90 days from the final demarcation plan issued to them instead of 90 days of signing of the agreement. The aforementioned request was acceded by the CA vide C-19. The relevant contents of the letter read thus:-

"From

*The Director Tourism
Chandigarh Administration,
UT Secretariat (ground floor), Sector 9,
Chandigarh,
0172-2740056, Tele fax: 2740025.*

To

*M/s.Parsvnath Developers Ltd.
(ground floor), Arunachal Bldg.,
19, Barakhambha Road,
New Delhi.*

Memo No.768

Dated: 2.3.2007.

Subject: Development of Multimedia-cum-Film City as an integrated project at Sarangpur, Chandigarh.

Kindly refer to your letter No.CHD:MMFC:2006-07:P-3 dated 2.3.2007, on the subject cited above.

The two requests made by you regarding the following points have been considered:-

1. Date of start of the development period would be the date on which the final demarcation plan, i.e., the final Layout plan is issued to us.

2. The payment of next installment due which is 75% of the bid price to be paid by us within 90 days of signing of the agreement should be 90 days from the final demarcated plan is issued to us.

While the demarcation by the Revenue Department of both the states would be carried out at the very earliest, the request made by you is agreed to.

Director Tourism,

Chandigarh Administration”

On 4.2.2008, CA wrote a letter (C-21) to the Developer to deposit the remaining amount as per the terms and conditions of the agreement directly with the Estate Officer, U.T.Chandigarh under intimation to the undersigned. However, the aforementioned letter was replied by the Developer vide letter dated 7.2.2008 (C-22), wherein it was stated that the final demarcation plan has not yet been issued to them till date and assured that they shall immediately make the payment of the remaining bid amount within 90 days of the receipt of the final demarcation plan in terms of the letter dated 2.3.2007. The operative part of the aforementioned letter dated 7.2.2008 reads thus:-

"We wish to further submit that the final demarcation plan has

not yet been issued to us till date. We request that the same may be got expedited. We assure you that we shall make payment of the remaining bid amount within 90 days of the receipt of the final demarcated plan in terms of your letter dated March 2, 2007.”

Vide letter dated 17.7.2008 (C-26) written by the Chief Engineer, Union Territory, Chandigarh to the Developer, the demarcation plan was enclosed for further necessary action. The contents of the aforementioned letter read thus:-

"MOST URGENT

From

*The Chief Engineer,
Union Territory, Chandigarh.*

To

*M/s Parsvnath Developers Limited,
Local Office
SCO-1, Ist Floor, Madhya Marg,
Sector-26, Chandigarh.*

Memo No.W2/08/13820

Dated, Chandigarh the 17-7-08

Subject: Demarcation of Multi Media Film City at Sarangpur.

As desired by the Director Tourism and Project Director, U.T. Chandigarh, the demarcation has been marked on plan as per Nishan given by the concerned Revenue Officer as received from the Superintending Engineer, Construction Circle-I, Chandigarh vide his office Memo No.1711 dated 15.7.2008. The Demarcation plan is enclosed for further necessary action please.

*Executive Engineer (W&E),
for Chief Engineer U.T.Chandigarh.*

Endst.No.W2/08/

Dated:

A copy is forwarded to the Director Tourism and Project Director, Multimedia Film City Project, Chandigarh for kind

information please w.r.t. your office memo 2706 dated 15.5.2008.

*Executive Engineer (W&E),
for Chief Engineer U.T.Chandigarh.*

DA/Nil

Endst.No.W2/08/

Dated:

A copy is forwarded to the Superintending Engineer, Construction Circle-I, Chandigarh for kind information with reference to his office Memo No.1711 dated 15.7.2008.

*Executive Engineer (W&E),
for Chief Engineer U.T.Chandigarh.”*

DA/Nil

Thus, it is admitted that development plan was supplied to the Developer on 17.7.2008 and the payment of the balance 75% of the bid price as per the agreement, arrived at vide letter dated 2.3.2007, was to be paid upto 16.10.2008. On 28.7.2008 (C-27), the CA wrote a letter to the Developer to deposit the remaining amount. The contents of the letter read thus:-

"From

*The Director Tourism Project Director,
Multimedia-cum-Film City,
Chandigarh Administration,
UT Secretariat (ground floor), Sector 9
Chandigarh,
0172-2740056.*

To

*M/s.Parsvnath Developers Ltd.
(ground floor), Arunachal Bldg.,
12, Barakhambha Road,
New Delhi.*

Memo No.2486

Dated: 28/7/08

Subject:- Multimedia-cum-Film City Project

Kindly refer to the Chief Engineer, UT, Chandigarh letter No.13821 dated 17.7.2008, copy enclosed regarding demarcation of Multimedia-cum-Film City Project.

Since the Chief Engineer has issued demarcation plan as per requirement of the agreement signed with you for the Multimedia-cum-Film City Project, you are requested to deposit the remaining amount for the said project as per the terms of the agreement within the prescribed time period.

*Director Tourism and Project Director
Multimedia-cum-Film City,
Chandigarh Administration.*

Endst.No.

Dated

A copy of above is forwarded to the following for information:-

- 1. The PA/FS for the kind information of Finance Secretary, UT, Chandigarh.*
- 2. The PA/EO for the kind information of Estate Officer, UT, Chandigarh.*

*Director Tourism and Project Director
Multimedia-cum-Film City,
Chandigarh Administration.”*

Vide letter dated 5.9.2008 (C-27/A), the Developer applied for environmental clearance to the Ministry of Environment and Forests, Delhi . In the meantime, the Developer had written a letter dated 8.10.2008 (C-28) to the CA requesting them to remove two 11 K.V.High Tension lines passing through the Project Land and provision of infrastructure for the Project and release of Zoning plans for the Project and also requested the CA to agree and confirm the revised schedule of payments, asked for the credit of amount of Rs.14.00 crores, being interest @ (SBI PLR plus 9%) on the amount of Rs.47.75 crores from 1.3.2007 till 17.7.2008 and sought the approval of the layout and building plan of all the buildings submitted by

them be granted within the initial six months etc., in essence, the Developer deviated from the agreed period of 90 days. Since a lot of correspondences in this regard exchanged between the Chandigarh Administration and Developer, a joint meeting between the officers of the CA and the representatives of the Developer was held on 11.11.2008. For the sake of brevity, the minutes of the meeting are extracted herein below:-

“MINUTES OF THE MEETING HELD UNDER THE CHAIRMANSHIP OF SH.SANJAY KUMAR, IAS FINANCE SECRETARY, UT on 11.11.2008 REGARDING MULTI MEDIA CENTRE CUM FILM CITY.

The following officers attended the meeting:

- | | |
|----------------------------|---|
| <i>1 Sh. R.K. Rao, IAS</i> | <i>Estate Officer, UT</i> |
| <i>2.Sh. Manjit Brar</i> | <i>Director-IT</i> |
| <i>3 Smt. Sumit Kaur</i> | <i>Chief Architect, UT</i> |
| <i>4 .Smt. Manjit Kaur</i> | <i>Senior Town Planner</i> |
| <i>5 Sh.Surinder Pal</i> | <i>SE- Electricity, UT</i> |
| <i>6 Sh. Harsh Kumar</i> | <i>SE- Construction Circle-I, UT</i> |
| <i>7 Sh. P.K. Jain</i> | <i>Re-presentative of Parsavnath Film)
City Ltd .</i> |

At the Outset, it was informed by Director-IT that the reason for convening this meeting was a letter dated 8.10.2008 received from Parsavnath Film City Ltd, attached as Annexure-I, wherein it has been demanded that as per the provisions of the Agreement dated 02.03.2007 executed between Chandigarh Administration and Parsavnath Film City Ltd. (Developers) for the establishment of the Multi Media Centre cum Film City, and even after 17 months. of the execution of the Agreement, certain deliverables by Chandigarh Administration were due for a long time resulting in delay in the commencement of the development of the project and as such there was a need to re-structure the schedule of payments. The representation dated 8.10.06 made by the Developer was already circulated to all the invitees. Accordingly, the issues

raised in the representation were deliberated and the decisions taken on each one of them are as: detailed below:

(i) Removal of two 11 KV HT lines passing through the Project Land:

It was informed by the SE Electricity that after the land was demarcated, it was observed that there were two HT lines owned by Punjab State Electricity Board passing through the said land. He further informed that he had already raised the issue with the concerned Chief Engineer PSEB for their shifting but keeping in view the emergent situation need to meet the time lines in providing encumbrance free land to the Developer, it would be appropriate that the matter should be taken at the highest level in PSEB. It was therefore decided that a demi-official request be made to Chairman, PSEB which would be followed up by SE at his personal level by coordinating with the concerned Chief Engineer.

(Action by: SE Electricity)

(ii) Provision of infrastructure for the project:

It was informed by SE Construction Circle-I that the requisite road have been paved (WBM level) and the same was motorable and could be used to access the said land. It was further informed by him that there was no delay in this regard by the Administration for other infrastructural support for the development of the project such as Water Supply connection, which would be provided immediately as and when the Developer applies for the same. Similarly, it was also assured by SE Electricity that the power connection would also be provided to the Developer as and when they apply for the same. The Developer expressed his satisfaction on this issue.

(Action by: Chief Engineer, UT)

(iii) Release of Zoning Plan

It was informed by the Senior Town Planner that the zoning plan was ready which was not accepted by the Developer as the same provided only 30% ground coverage, whereas the Agreement provided 35% ground coverage, as

clarified by the letter dated 18.12.2006 issued by Project Director to all the bidders as a part of Queries raised by them in a Pre-Bid Conference. Accordingly, it was decided that STP would release the revised zoning plan in accordance with the terms of the Agreement by 17.11 2008. It was further decided that before the zoning plan is released the Chief Architect and SE-Electricity would jointly visit the area and explore the possibility whether the power lines running through the area could be made a part of the non-construction area, so that in case there was any delay in the shifting of the power lines by PSEB, the development of the project could start.

(Action by Chief Architect, Senior Town Planner and SE-Electricity)

(iv) Revision in the Schedule of Payments

While reiterating the contents of the representation dated 08.10.2006 made by the Developer, Sh P.K.Jain informed that as per Article 2 of the Agreement, there were certain conditions precedent attached with regard to the performance of both the parties viz. Administration and the Developer. As such, it was not appropriate for the Developer to pay 75% of the amount due till they were provided encumbrance free possession of the land (which was still due, even after 17 months of the date of the Agreement) as well as the sanction of building plans. He further stated that since the Developers were not even provided the zoning plan, as per the terms and conditions of the Agreement, they were not in a position to submit the building plans. Moreover, they were still to get encumbrance free possession of the land as 2 HT lines were bisecting the land chunk, as discussed at (i). He further requested that keeping in view the default of the Chandigarh Administration it was difficult for the Developer to pay 75% of the balance as the Administration had defaulted on the timely deliverables to be undertaken by them in terms of the Agreement and it would be appropriate that the schedule of payments be revised as follows:

A. Bid Price

<i>Installments</i>	<i>Amount</i>	<i>Amount Due as per</i>	<i>Revised Schedule</i>
<i>1st</i>	<i>(Rs.)</i>	<i>Agreement</i>	
	<i>25% of the</i>	<i>On/before the date of</i>	<i>On the date of</i>
	<i>Bid Price</i>	<i>signing the Agreement</i>	<i>handing over of the</i>
	<i>Rs.47.75 crores</i>		<i>Demarcated Plan by</i>
			<i>CA</i>
<i>2nd</i>	<i>75% of the Bid</i>	<i>Within 90 days after</i>	<i>Within 90 days of the</i>
	<i>Price</i>	<i>the date of signing</i>	<i>release of approved</i>
	<i>Rs.143.25 crores</i>	<i>the Agreement</i>	<i>layout and building</i>
			<i>plans by CA.</i>

Total amount to be paid in installments (Rs.191,00,00,000/- only (Rupees One hundred and ninety one crores only).

B. Annual Ground Rent (AGR)

AGR is payable at the following rate for the Lease Period to be calculated on the Bid Price. AGR is to be paid annually in advance from the date of release of approved layout and building plans by CA till the end of the Agreement Period.

Period	Rate	Amount (in INR)
<i>First 33 years</i>	<i>2.50%</i>	<i>4,77,50,000/-</i>
<i>Next 33 years</i>	<i>3.75%</i>	<i>7,16,25,000/-</i>
<i>Last 33 years</i>	<i>5.00%</i>	<i>9,55,00,000/-</i>

Apart from the above, he also claimed the following reliefs:

(i) schedule of payments stands revised as per ANNEXURE-I hereto;

(ii) credit to our account an amount of Rs.14.0 crores being interest @ (SBI PLR plus 9%) on the amount of Rs.47.75.Crores from 01.03.2007 till 17.07.2008, the date of delivery of the demarcation plan.

(iii) the approval of the lay-out and building plan of all the buildings submitted by us shall be granted within the initial six (6) months for approvals as stipulated in the Agreement.

(iv) the construction period shall commence from the date we receive approval of the building plans and all the other requisite approvals from CA.

(v) the lease period and payment of the Annual Ground Rent shall commence from the date of receipt of all approvals by us from CA.

After making due deliberations on the issues raised by the Developer, all the invitees were of the common view that since the Chandigarh Administration had not been able to provide the deliverables on time, the Developer was entitled to relief especially since the Developer was not even provided zoning plan, how could the Developer submit building plans and commence the the development of the project. Moreover, since the Administration could not provide encumbrance free land to the Developer who could not start using the land, what was the rationale for him to pay Annual Ground Rent @ 2.5% per annum etc. It was thus felt that keeping in view the inordinate delay on the part of Administration and the need to have a balance of rights between the Developer and the Administration, it would be appropriate that the schedule of payments may be re-worked. It was unanimously decided that the Administrative Department (Department of IT) would work out a proposal with regard to the re-scheduling of payments by the Developer.

((Action by:Director IT)

The meeting ended with a vote of thanks to the Chair.”

On perusal of the aforementioned minutes, it is evident that the Zoning Plan was ready, which was not accepted by the Developer as the same provided only 30% ground coverage, whereas the agreement provided 35% ground coverage and there was also proposal whether the power lines running through the area could be made a part of the non-construction area. It was held that the schedule of payments shall be re-worked and it was unanimously decided that the Department of IT of CA would work out a proposal with regard to the re-scheduling of payments by the Developer, in essence, the parties parted with the positive note vis-a-vis re-scheduling of

the payments, however, the Developer, vide letter dated 10.12.2008, showed unwillingness to go ahead with the project and frustrated the agreement.

The contents of the letter dated 10.12.2008 (C-30) read thus:-

“Gen. (Retd.) S.F. Rodrigues, PVSM, AVSM

His Excellency the Governor of Punjab and Administrator,

Union Territory of Chandigarh

Raj Bhawan, Sector - 6,

Chandigarh.

Your Excellency,

Sub: Film City Project, Chandigarh.

We take this opportunity to draw your kind attention to the Development Agreement dated 2nd March, 2007, executed between us and the Chandigarh Administration for development of a Multimedia-cum-Film City on the plot of land measuring 30 acres at Sarangpur, Chandigarh.

2. As per the Development Agreement, we are required to pay the Bid Price of Rs.191 crores (Rupees One hundred and ninety one crores) to the Chandigarh Administration as follows :

(a) 25% of the Bid Price, i.e., Rs. 47.75 crores to be paid on or before the date of signing of the Agreement which stands duly paid by us through Bank Pay Order dated 1st March, 2007;

(b) 75% of the Bid Price, i.e., Rs. 143.25 crores to be paid within 90 days of the date on which the final demarcated plan of the land was issued to us by Chandigarh Administration after verification/confirmation of the same by its Revenue Department and the State Govt. of Punjab;

(3) As per terms of the Agreement, Chandigarh Administration was required to perform, inter alia, the following obligations:

(a) to demarcate the Land and make the same available to us free from all encumbrances and occupations;

(b) to grant to us the exclusive right to enter upon, occupy and use the Land for the purpose of implementing the Project;

(c) to put us in peaceful occupation and enjoyment of the Land for a period of 99 years;

(d) to assist us in obtaining approvals, licenses, sanctions, clearances, etc., for the development of the Project; and
(e) to make arrangement for laying of facilities of electricity lines, sewerage and drainage connection up to the Land, at its own cost.

4. However, inspite of various requests and reminders made by us in this regard, Chandigarh Administration has not provided the demarcated plan of the Project Land till date, i.e. even after expiry of twenty months from the date of the Development Agreement, resulting in delay in the commencement of development of the Project. Such prolonged delay by Chandigarh Administration in providing the demarcation plan has caused tremendous losses to us in terms of both time and money. Due to this inordinate delay, the arrangements made by us with our various Associates including M/s Real Good Film for Technical Partnership, M/s Mega Entertainment for setting up and operation of Multimedia College and commercial CGI, VFX and Gaming Studio and M/s Digital Academy for setting up and operation of Multimedia College, have been completely frustrated with the result that we will be compelled to find out new associates and rejig the entire working on fresh terms.

5. This delay has also a "cost" element. While Bid-Price remains the same, the project costs have substantially escalated. Besides, we have incurred huge losses by way of losing interest and opportunity cost on the amount of Rs.47.75 crores paid by us over 20 months ago. The market scenario over the last 20 months has undergone tremendous changes for the adverse thereby seriously impacting the requirement and economic feasibility of the project.

6. Even on the date of this communication the following still remain to be implemented by Chandigarh Administration:-

- (i) Removal of two 11 K.V. High Tension lines passing through the Land;*
- (ii) Provision of infrastructure for the project;*
- (iii) Release of Zoning plans for the project;*

7. *We have already raised these issues with the Director Tourism, Chandigarh Administration, vide our letter of 8th October, 2008. Pursuant to our letter, the Finance Secretary, U.T., convened a meeting of concerned officers on 11.11.2008 to which we were also invited. During discussions in the meeting it was revealed that the Chandigarh Administration was still not in a position to hand over the land to us, free from encumbrances and occupations. The officers pointed out that the two 11 High Tension Lines passing through the Land were under the control of PSEB and could be shifted by PSEB only, which would take time.*

The land is not yet clear of encumbrances and occupations and, as such, the demarcation of land provided to us is not final. In the absence of finality of demarcation of the Land, neither the zoning plans can be finalized nor can any planning of development be conceived.

The current market scenario has seriously impacted the requirement and economic feasibility of the Project and, consequently, no reputed Indian or international Group is coming forward to be associated with the project.

8. *The tremendous delay on the part of Chandigarh Administration has caused enormous losses to us by way of opportunity cost, interest on the amount of Rs.47.75 crores paid by us over 20 months and other costs incurred on the project.*

(9) In view of the present economic scenario and inability of Chandigarh Administration in providing the Land for over 20 months of commitment, we have been pushed to a situation wherein it has become virtually impossible for us to go ahead with the project. Therefore, it will not be inappropriate to conclude that the Development Agreement stands frustrated on account of Chandigarh Administration not being in a position to deliver the Land. To avoid further losses to us, we very humbly request that necessary instructions may be given to the Chandigarh Administration to refund the amount paid by us,

together with interest”.

The Developer also requested for the refund of the earnest money and the said request was repeated vide letter dated 21.3.2009 (C-31) and ultimately vide letter dated 16.12.2009, CA terminated the agreement and forfeited 25% of the bid price, i.e., Rs.47.75 crores. It is in these circumstances, a dispute arose and the reference was sought through the arbitration and the matter was referred to the Arbitrator.

Mr.Sanjeev Sharma, learned Senior Counsel assisted by Mr.Shekhar Verma, Additional Government Pleader, appearing for the appellants submitted that the award of the Arbitral Tribunal is a bounty for the Developer, inasmuch that the CA has been burdened with the liability of payment of almost a sum of Rs.100.00 crores. For the sake of brevity, he has referred to the summary of the award which reads thus:-

<i>Claim No.</i>	<i>Particulars</i>	<i>Amount Awarded</i>
1	Claim for an amount of Rs.47.75 Crores paid by the claimants to the respondents towards 25% of bid price	Rs.47,75,00,000/-
2	Claim for interest @ 9% above the prevailing PLR of State Bank of India on the amount of Rs. 47.75 Crores from 01.03.2007 till the date of refund.	Interest @ 12% p.a. on Claim No.1 w.e.f. 01.03.2007.
3 & 5	Claim of compensation for all losses and damages by the claimants due to breaches of contract, commissions and omissions of the respondents along with interest thereon @ 9% above the prevailing PLR of State Bank of India. Claim for compensation for loss of profit/loss of opportunity.	Rs.47,75,000/-.
4	Claim for an amount of Rs.3,00,00,000.00 incurred by the claimants for works carried out/ commissioned for the Project	Rs.46,20,715/-

<i>Claim No.</i>	<i>Particulars</i>	<i>Amount Awarded</i>
6	Claim for pre-suit, pendent-elite and future interest @ 9% above the prevailing PLR of State Bank of India on the claims.	@ 12% p.a. from 16.12.2009 till date of payment on Claim No.3 and 4.
7	Costs	Rs.50,00,000/-.

Over and above the refund of earnest money, the Developer has been held entitled to interest @ 12% per annum on a sum of Rs.47.75 crores, the compensation for losses and damages of Rs.47.75 lacs, a sum of Rs.46,20,715/- for the expenses incurred by the claimants for the work carried out and 12% interest from 16.12.2009 till the date of payment on Claim Nos.3 and 4, i.e., the compensation of Rs.47.75 crores and Rs.46,20,715/- and costs of Rs.50.00 lacs.

He further submitted that the award of the Arbitral Tribunal is totally against the documentary evidence, much less the terms and conditions of the contract and, thus, falls within expression “against the public policy”. The same was challenged by filing objections as envisaged under Section 34 of the Arbitration and Conciliation Act, 1996 (for short “1996 Act”), but the Objecting Court has wrongly and perversely dismissed the same. The Developer failed to lead any evidence, much less prove on record the compensation purported to be under Section 73 of the Indian Contract Act, 1872 (for short “1872 Act”) as no bills for losses or damages have been placed or proved on record. There was no proof with regard to the work being carried out in commission of the Project and a sum of Rs.46,20,715/- has been awarded. No justification has been given while granting costs of Rs.50.00 lacs. He has further submitted that once the Developer had frustrated the agreement, Sections 39, 46, proviso to Section 56 and 63 of 1872 Act would come into play as it is a clear cut case where the Developer has refused to perform, or disabled himself from performing,

his promise in entirety, the promisor is to perform the promise, but the engagement will be performed within reasonable time as the letter dated 10.12.2008, vide which the Developer has frustrated the agreement, does not fulfill the requirement of Section 56 of 1872 Act and, thus, is not entitled to claim compensation as per Section 63 of 1872 Act. The Developer did not wait for the outcome of the minutes of the meeting vis-a-vis re-schedule of the payments and the Arbitral Tribunal has failed to advert to the letter dated 10.12.2008. In this regard, he has drawn the attention of this Court to the findings rendered by the Arbitral Tribunal. The respondent was unable to discharge his obligation under the contract, inasmuch as that in order to prove the frustration of the contract, a party to the contract is obliged to prove that it is still capable of discharging its obligation under the contract, but the contract may not be viable in view of changed circumstances. Since the respondent had to pay and spend money on development works, it was obligatory on its part to prove that it had the resources to develop the Project.

The Arbitral Tribunal has erroneously granted compensation though the correct Zoning Plan was supplied, whereas the CA had proved 30% ground coverage for the project area. The then Director, I.T.Chandigarh without any authority in law at his own level referred/agreed to 35% ground coverage. However, on 18.7.2007, the Zoning Plan for the project was prepared and issued as per the approval of the competent authority, but the Developer failed to prepare and submit the layout and building plans as per the Zoning Plan. The respondent did not object to the same, but it is only at the time when it started blaming the CA with regard to the change in the Zoning Plan. The Arbitral Tribunal erroneously ignored

and rejected the counter claims of the CA. He has also referred to Article 239 of the Constitution of India and, thus, prays that the impugned order and the award be set-aside.

Mr.Naresh Markanda, Senior Counsel assisted by Ms.Kavita Markanda, Advocate appearing for Caveator-respondent No.1 submitted that it is the conceded position on record that the demarcation plan was handed over on 17.7.2008, but as per the contract, CA after having provided the demarcation plan was to supply the Zoning Plan. It is only thereafter the role of the Developer had to begin by submitting the layout plan, in essence, the terms and conditions of the contract were reciprocal, but the CA failed to adhere to the same and this fact was highlighted to the CA vide letter dated 8.10.2008 (C-28), which has been referred above and ultimately, the CA failed to refund the earnest money. Vide letter dated 1.12.2009 (C-32), the Developer invoked the arbitration clause. It is thereafter the CA, without complying with the terms and conditions of the agreement, terminated the contract on 16.12.2008 vide C-33 without giving any 30 days notice as envisaged in the contract. As per Clause 12.2.3 of the Agreement, 30 days' notice was required and it was not complied with and, therefore, the termination was bad in law. Till date, the land has not been developed and fault is of the CA and not that of the Developer. The Arbitrator Tribunal has dealt with the letter dated 10.12.2008, whereby the Developer had shown his unwillingness, much less frustrated the agreement. He has drawn the attention of the Court to page 355 of the paper book. The award of the Arbitral Tribunal is perfect in terms of the contract, much less it cannot be said to be against the public policy and, thus, the objections were not falling within the realm of Section 34 of 1996 Act. The Arbitral Tribunal rejected the

contention of the CA, vis-a-vis the frustration of the agreement dated 10.12.2008 by holding therein that the delay was on the part of the CA as the arrangements made by the claimants with their associates, which included M/s Real Good Films, had become frustrated and the claimants had to look out for new associates. It was a private contract between the claimants and M/s Real Good Films and, thus, prays for dismissal of the appeal.

Mr.Sanjeev Sharma, on the other hand, in rebuttal submitted that it has been proved on record that the High Tension lines were shifted on 12.4.2009 and without waiting for the outcome of the minutes of the meeting, the Developer ultimately frustrated the agreement. No reasoning has been given to the submissions and arguments submitted on behalf of the appellants, vis-a-vis frustration of the agreement, though the Arbitral Tribunal found that there was no threat extended by M/s Real Good Films against the claimants and without there being any finding, CA has been held liable for termination of the contract. He has further submitted that once the Developer had shown unwillingness to do the work, there was no need of compliance of the provisions of the 1872 Act by sending 30 days' notice because even after submission of letter dated 10.12.2008 request was sent for refund of the earnest money, the Developer had shown unwillingness as he did not have the resources. No evidence has been placed on record vis-a-vis the cancellation of any arrangement between the Developer and M/s Real Good Films.

I have heard the learned counsel for the parties and appraised the paper book and of the view that the appeal deserves to be allowed.

It would be apt to reproduce Articles 2.1 and 2.3 of the

agreement, which read thus:-

“2.1 CA may, in its sole option, terminate this Agreement and/or the Lease Agreement if the following conditions (“Conditions Precedent”) are not (in the reasonable opinion of CA) achieved/fulfilled by the Developer before the expiry of six (6) Months after the Agreement Date or such extended date as may be permitted by CA.”

“2.3 If any of the Conditions Precedent have not been fulfilled or waived in writing by the CA, then the CA may, at its sole option, without prejudice to its rights hereunder and under Applicable Laws, terminate this Agreement whereupon the amount paid towards Bid Price and Bid Security/Performance Security (as the case may be) by the Developer to CA shall forthwith stand forfeited.”

On a conjoint reading of the aforementioned provisions and as well as the contents of the letter dated 2.3.2007 (C-19), extracted above, it reveals that the CA had agreed that the payment of 75% of the bid price shall be construed as 90 days from the date of final demarcated plan to the Developer and the conceded position on the record is that on 17.7.2008, demarcation plan was handed over to the Developer and the payment of 75% of the bid amount was to be paid on 16.10.2008, i.e., within the period of 90 days, but however, certain deliberations were on with regard to some issues as noticed in the minutes of meeting dated 11.11.2008 (extracted supra). It has surfaced that the Zoning Plan was ready, but was not accepted by the Developer and both the parties put their hands together to solve the issue by working out a proposal with regard to the re-scheduling of the payments by the Developers. However, within less than a month after the expiry of the minutes of the meeting, the Developer vide letter dated 10.3.2008 frustrated the agreement, thus, the plea of Mr.Markanda that the

CA did not comply with the provisions of the agreement by not issuing 30 days' advance notice before termination of the contract would have no force, much less it would be meaningless as the Developer had shown unwillingness to carry on with the work and the said frustration would not fall within the provisions of Section 56 of 1872 Act, much less would not entitle the Developer to claim compensation as it was not an agreement to do any impossible act. In other words, the Developer, on his own has, as noticed above, frustrated the agreement and the act of the Developer squarely falls within the provisions of Section 39 of 1872 Act. For the sake of brevity, Section 39 reads thus:-

“Effect of refusal of party to perform promise wholly.-When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signed, by words or conduct, his acquiescence in its continuance.”

It was not a case where the CA, after having repeatedly extending promise, did not perform its commitments within a reasonable time giving a cause to frustrate the agreement. The Arbitral Tribunal, in my view, has failed to notice the contentions, much less refer/rely upon the record by awarding compensation of equal amount of 25% of the bid money as the Developer has failed to lead any evidence in support of such compensation. Even a sum of ₹46,20,715/- has been awarded for the work allegedly conducted by the Developer, whereas the Contractor had not even used the spade or dug a pit, therefore, the question of awarding so much enormous amount of compensation and interest, in my view, is not only but putting an onerous obligation upon the CA. It is a case where the Developer, after giving the bid of 25%, on his own, frustrated the agreement and moves

out with a kitty of ₹100.00 crores. In my view, the award of the Arbitral Tribunal amounts to gladdening the Developer without any evidence both oral and documentary, much less supported by any case law.

Section 73 of 1872 Act enables a party to claim damages, but there has to be some substance/material for that. The plea of Mr.Markanda that once the Zoning Plan and the demarcation plan were not handed over to the Developer, there was no question of submission of the Layout plan, falls flat, for the reason that the High Tension Lines have been shifted on 12.5.2009, but it was the Contractor, who, as noticed above, within less than a month of the minutes of the meeting, frustrated the agreement. It is a matter of record that the Developer gave the bid after inspecting the site and was aware of the overhead High Tension lines. Had it been so, the Developer ought to have raised the issue before submitting the bid or ought not to have participated in the bidding. In my view, the Arbitral Tribunal has not given any reasons with regard to the contents of the letter dated 10.12.2008, whereby the Developer frustrated the agreement, though there is a passing reference of the same. In the minutes of the meeting dated 11.11.2008, it has been noticed that the Zoning Plan with regard to 30% of the FAR was supplied, but the Developer did not raise the grievance with regard to 35% as allegedly agreed in the agreement and it was in these circumstances, the meeting ended with a positive note of re-schedulement of the payments.

As noticed above, Section 56 of 1872 Act, would not come to the rescue of the Developer as it was not an agreement to do any impossible act, which would render the same to be void and the act of frustration, in any manner, would remotely render the claim of the Developer within the

ambit of the aforementioned facts. For the sake of brevity, Section 56 of 1872 Act reads thus:-

“Agreement to do impossible act.-An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.-A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.-Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.”

In my view, the award of the Arbitral Tribunal is against the public policy and the objections were, thus, within the realm of Section 34 of 1996 Act, but the Objecting Court dismissed the same without appreciating the aforementioned facts.

It appears that the Developer did not show any interest, rather lost the interest in carrying out the work as after submission of the bid, the prices of the property had fallen, otherwise till 11.11.2008 both the parties were ad idem in solving the trivial issues. The Arbitral Tribunal has failed to notice that the CA acted strictly as per the terms and conditions of the agreement by forfeiting the bid amount. After 10.12.2008, the Developer had shown no remorse from recalling its act of frustration and positive note of carrying out any construction/development, rather the contract with a third party has also not seen the light of the day. Even the Bank guarantee of

₹10.00 crores as contemplated under Article 10.12.1, which was Condition Precedent as per Article 2.1.1 was not furnished.

Clause 3.2.1 of the agreement also gives the Developer exclusive rights for and in relation to development of the Project for achieving the purpose. Even from the perusal of the letter Annexure AD-1 dated 18.10.2009 issued on behalf of the Ministry of Environment & Forests, it has surfaced that the matter with regard to the environmental clearance was placed before the Expert Appraisal Committee in the 34th meeting held in December, 2008 and nobody on behalf of Developer attended the meeting. Despite the fact, an intimation was sent to the Developer that the Project will be included in the agenda of the next meeting provided they comply with certain requirements. It is an unilateral act of the Developer in frustrating the agreement and, thus, cannot take the aid of the fact that the agreement had become unexecutable owing to the unforeseen and certain facts as envisaged under Section 56 of 1872 Act.

The CA having left with no other option rightly terminated the contract vide letter dated 16.12.2009 and forfeited the earnest money. This Court is unable to assimilate as to how the Arbitral Tribunal awarded the compensation of equal amount of earnest money, i.e., ₹47.75 lacs as compensation for the losses and damages in the absence of any bills or report of the surveyor assessing the loss. There is a total non-application of mind. Rather, in my view, the claim was liable to be dismissed by imposing costs upon the Developer instead of holding the CA liable to pay the wrath/brunt of costs.

Keeping in view the aforementioned facts and circumstances, the award of the Arbitral Tribunal dated 10.3.2012 and the order dated

8.4.2015 of the Objecting Court are hereby set-aside, in essence, the claim of the Developer is dismissed. The act of the CA in forfeiture of 25% bid amount, i.e., ₹47.75 crores is upheld.

The appeal stands allowed.

March 17th , 2016
ramesh

(AMIT RAWAL)
JUDGE