IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO No.3066 of 2021 (O&M)

Date of decision: 22nd April, 2022

Mayanagri World One Private Limited

… Appellant

Versus

State of Punjab and another

… Respondents

CORAM: HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present: Mr. Damanbir S. Sobti & Mr.Aashutosh Jerath, Advocates for the appellant.

Mr. Kanishth Ganeriwala, Asstt. Advocate General, Punjab for respondent No.1.

Mr. D.V. Sharma, Senior Advocate with
Mr. Manbir Singh, Advocate for respondent No.2.

FATEH DEEP SINGH, J.

For the conservation of Gobindgarh Fort (Amritsar), a heritage building, the State of Punjab (respondent No.1) and Punjab Heritage and Tourism Promotion Board (respondent No.2) (also referred to as 'Concessioning Authority') invited interested parties for the development, design, finance, installation, marketing, operation and maintenance of virtual reality shows and operation and maintenance of Gobindgarh Fort (Amritsar) on Public Private Partnership mode (PPP mode). After necessary adoption of process of tender and bidding, the appellant Company (also referred to as 'Concessionaire') which was incorporated on 28.11.2016 under the Companies Act, 2013 was called upon to enter into concession agreement/contract for this project. On carrying out the necessities of project at site, a bank guarantee of Rs.1,75,00,000/- as construction performance security was given on 18.11.2016 and concession agreement was executed on 28.11.2016 followed by execution of lease deed the same day as per Schedule 'L' of the agreement. The total area of the fort was assessed to be 42.26 acres and has been detailed in Annexure II of the Schedule 'A' of the agreement and which was divided in Lot-1, Lot-2 and Lot-3A. It is worthwhile to refer here that the project was under the Asian Development Bank funded scheme and possession of the area under Lot-1 and Lot-2 was to be delivered to the appellants on 26.01.2017. However, due to reasons best known to the respondents only 20% of Lot-1 and Lot-2 was handed over and as a consequence of which more than 2½ years lapsed by extending the deadline by the respondents when out of committed area of Phase-1 only 25% was handed over to the appellant and 55% of the portion was left out still to be handed over the possession. It is also worthwhile to refer here that the entire project site was to be handed over to the appellant by June 2019 and when it was not done so, has led to the invocation of the provisions of Section 14(i)(vi) of the Punjab Infrastructure (Development & Regulation) Act, 2002 (in short, 'the Act'). The primary reason for this invocation set out by the appellant is that in spite of execution of the agreement and performance security having been given in November 2016, the respondents have breached the terms of the contract of the project on the grounds of having not handed over the entire areas as envisaged in the timeline of the agreement (Annexure II of Schedule A) which is vital component of this agreement. It is the case of the appellants that they have been dispatching communications to the respondents, oral and in writing, dated 21.11.2017 and 25.11.2017 highlighting irritants and hurdles being faced by the appellants in carrying on with the project and the fact that the conservation and restoration of the remaining areas which was to be handed over to the appellants was still in progress despite numerous reminders and deadlines for completion of the works. It is subsequently thereto a letter dated 02.01.2018 was sent followed by a meeting scheduled for 17.01.2018 with the Managing Director of respondent No.2 where all these averments were duly reiterated by the appellant and letter dated 17.01.2018 was also handed over and which was also part of the another communication dated 11.06.2018. The appellant has well highlighted and enumerated the set-backs which were pointed out to the respondents from time to time and claimed that due to the acts of the respondents they have accumulated operational losses to the tune of Rs.4.08 crores till July 2018 and thus, termed it to be a breach of agreement. As if it was not sufficient, the appellants claimed to have sent a detailed representation dated 06.10.2018 to the respondents underlining the facts and the grievances arising out of the failure of the respondents towards their obligation of undergoing the terms and conditions of the agreement so executed and even in its letter dated 03.09.2019 the respondents have invariably conceded to this failure on their part leading to the losses that have accrued to the appellants.

The respondents then raised a demand notice dated 02.05.2018 and 03.05.2018 calling upon the appellant to pay the annual concession fee and which the appellant refuted by underlining the failure of the respondents to undergo their part of the obligation. An endeavour to resolve the dispute through direct discussion under Article 44.2 of the agreement was made but was rendered futile. The appellants claim that reciprocity which is fundamental principle of this agreement was not there, they were under no obligation to carry on with the same and even the encumbrances that have come about in the area of the project were posing a hindrance in the functioning of the appellants in carrying on with their obligation arising out of the contract, were also well highlighted. The appellant thereafter sent a notice of dispute dated 28.05.2019 and thus, the Adjudication Petition was brought about before the Punjab Infrastructure Regulatory Authority wherein it was pleaded (i) the respondent has breached the agreement; (ii) seeking quashment of notices dated 02.05.2018, 03.05.2018, 16.05.2018, 13.08.2018, 12.09.2018, 29.11.2018, 23.04.2019 and 03.09.2019 sent by respondent No.2; (iii) seeking direction to respondents to perform their contractual obligation to hand over complete project site to the appellant without any further delay and reckon the 'appointed date' from the actual date when possession of the complete project site is handed over to the appellant; (iv) thereby calling upon the respondents to treat the date of commencement of the period of 50 years from the date the condition precedent set out in Article 4.1 are fulfilled by the respondents (v) seeking direction to the respondents to commence the minimum guarantee clause from the date the vacant possession of the site is handed over to the appellants and (vi) to adjust the advance minimum guarantee/ annual concession fee amounting to Rs.95,37,000/- already paid by the appellant to respondent No.2 in part performance of their contract. It was also in the alternative prayed that the agreement be declared as void, unenforceable, seeking direction to the respondents to restore the status quo ante and paying damages as well as compensation to the tune of Rs.23.43 crores along with future interest @ 12% p.a. from the date of institution of the petition till its realization; and further release of the securities, compensate the appellant for the loss of business at the rate of Rs.24.00 lacs per month and any other relief.

The respondents filed a joint written reply to this petition taking preliminary objections that the petition was ill-motivated and mala fide with a view to evade their obligation to pay concession fee of Rs.5,69,87,018/- along with interest after 31.07.2019. It was termed that the grounds carved out in the petition were beyond the scope of the agreement and that no case for damages was made out. It was contended that the appellants were bound by the agreement and cannot back out of the same and claimed that from the appointed date i.e. 10.02.2017 the appellants are earning revenue out of the use of the premises and denied that any date was fixed for handing over the possession though accepted that the entire project area is currently under renovation/restoration by the authority under an ADB funded scheme and that only handing over of possession would be in phased manner. Reiterating each and every term and condition of the agreement, the answering respondents have tried to ridicule the plea of the appellants terming it to be false figment of imagination, untenable and a way to escape from their obligation arising out of the contract between the two sides. The respondents have sought to lay the blame on the appellants trying to escape unscathed.

On merits, though accepted the agreement dated 28.11.2016, it is claimed that the dates given for handing over the site were only tentative in nature and which was to the satisfaction of the appellant and reiterated in the correspondence by the respondents. Terming each and every claim of the appellant to be false, unfounded and alleged that 21 % of the total project area has already been handed over to the appellants. The respondents have denied each and every claim of the appellants and have taken a categoric stand that the appellants are earning out of the project and it is a ploy to escape their obligation in making the payment so due for a period of one year which has accumulated to Rs.5,69,87,018/- as well as interest after 31.07.2019. It is claimed that Escrow account has not been opened with the bank as per the terms of the agreement. The answering respondents have refuted each and every claim of the appellant, terming it to be a figment of imagination, concocted and thus sought its dismissal.

The Punjab Infrastructure Regulatory Authority gave its judgment dated 14.10.2020 whereby out of the total 10 claims led by the appellant, 9 were dismissed whereas one pertaining to interest accrued after March 2020 was decided in favour of the appellant. It is against these findings the appellants perturbed over it, have come up in this appeal under Section 44 of the Act.

Heard Mr. Damanbir Singh Sobti and Mr.Aashutosh Jerath, Advocates appearing for the appellant; Mr. Kanisth Ganeriwala, Assistant Advocate General, Punjab representing respondent No.1; Mr.D.V. Sharma, Senior Advocate assisted by Mr. Manbir Singh, Advocate for respondent No.2 and with their invaluable assistance have the opportunity to go through the voluminous records of the case.

The very pleadings which are foundation of the case of a party clearly reflect that the respondents invariably accept the fact that the renovation works at the site were still being carried on by the authority concerned and that in terms of the agreement, the entire site detailed therein in a phased manner has not been handed over to enable the appellants to carry on with their business for which this agreement has come about by the two sides. Though with much fanfare Mr.D.V. Sharma, Senior Advocate assisted by Mr.Manbir Singh, advocate representing respondent No.2 has led much stress on the fact that the agreement in question does not spell out particular dates when and which portion out of the three categories i.e. Lot-1, Lot-2 and Lot-3A were to be handed over and were merely tentative in nature, strengthens the belief of the Court that the counsel is trying to accept the flaws in the agreement which is more of a unilateral agreement to the advantage of the respondents. The onus shifts upon the respondent State in terms of the Evidence Act to establish and undergo their obligation for which Section 46 of the Indian Contract Act provides that where no time for performance is specified the engagement must be performed within a reasonable time. What is reasonable time, to the query of the Court Mr.D.V. Sharma, Senior Advocate could not make it out. From the pleadings, what one can decipher is that the contract was executed way back on 28.11.2016 and till the filing of the Adjudication Petition on 04.10.2019 the State was in limbo, unable to perform its part of the contract in spite of the fact of having received innumerable representations, oral as well as in writing. It needs to be kept in mind, what is reasonable time is a question of fact having regard to the circumstances of the case. Since it is a matter where business interests are involved so it is desirable that once an agreement has come about and the appellant has paid the initial construction performance security and therefore it was desirable for the respondents to have undergone their part of the contract and which even at the time of filing of pleadings the possession was not handed over by any means, is a circumstance which goes adverse to the interest of the respondents. It is the principle of law where a party fails to perform terms of the agreement it cannot be expected in terms of the contract for the opposite party to do so. In the present case, respondent Authority which has agreed to do so initially in handing over the vacant possession of the developed site failed to do so and has gone back of its promise and to the mind of this Court cannot seek reciprocal performance of the contract from the opposite side, and therefore upon failure of the promisor of the first promise to perform, the promisor of the first promise cannot enforce the dependent promise of the promisee and the promisee of the first promise need not perform his dependent promise. It is there in the records that the commercial operation of the agreement was to commence with effect from 10.02.2017 and even after 2 ½ years having elapsed in spite of repeated reminders and requests by the appellants and assurances by the officials of the respondents nothing tangible has come about and therefore certainly financial loss has accrued to the appellant besides the fact that respondents cannot claim payment of further amounts once they themselves have approached their promise. Even the very provisional certificate issued by the respondent officer of the rank of Chief General Manager accepts that the works were still incomplete having been delayed as a result of reasons attributable to the authority and since the entire works have not been completed it cannot be reasonably accepted as has been sought to be argued by Mr.D.S. Sobti, Advocate that no objection certificate from the authorities including fire safety department cannot be issued and even completion certificate under Article 14 lays down that the project shall be subject to tests for which date and time of each of the tests shall be determined by the engineer in consultation with the appellants and which would be notified to the respondents who can designate their representative to witness the tests. To the query of the Court if any such tests were conducted, learned counsel could not satisfy the Court to this effect nor place on record any such completion certificate in terms of the agreement. The act and conduct of the respondents in not undergoing their obligation in terms of this agreement clearly reflect that this contract/agreement between them has become virtually impossible to be performed and in terms of Section 64 of the Indian Contract Act respondents are bound to restore the position and pay back the money so derived from the opposite side as a consequence of the same. Since the admission by the respondents in their pleadings that it is on their own accord, delay has come about and which is a reason for this breach of the contract, the appellants are certainly entitled to seek damages for non-performance by the respondents of this agreement in terms of Section 73 of the Indian Contract Act. Since under the terms of the agreement the possession has to be handed over within sixty days of the agreement, which was admittedly not done so and therefore, has put to hold the commercial activities which has prompted the appellants to enter into this arrangement with the respondents.

A faint prayer has sought to come about from the side of respondents over the non-maintainability of the appeal terming it to be an award by the adjudicating authority. Section 44 of the Act provides remedy by way of an appeal against such an order/judgment of adjudicating authority and even otherwise if it is an award under Section 14(i)(vi) too lays down the remedy by way of an appeal challenging such an award. Moreover, as per the pleadings this objection was never raised by the respondents in their written reply filed during the proceedings before the adjudicating authority.

The claim during the course of arguments that appointed date is yet to come, does not ushers well for the respondents as it is there in the agreement that the possession shall be handed over within 60 days of the agreement and therefore, by that analogy the appointed date certainly can be calculated by that very manner.

How, as is claimed that there has been a waiver in terms of Clause 47.5 of the agreement and there is nothing substantial on the records to that effect. Rather what one can make out is that there is material breach of the concession agreement so arrived at between the parties. It would not be out of place to refer here that consequent upon this agreement, a lease deed has come about executed on 28.11.2016 and in spite of the same possession has not been handed over to the appellants by the respondents and which argument so raised by the appellant side could not be refuted by Mr.D.V. Sharma, Senior Advocate for the respondent Authority.

The present appeal has come about within the prescribed period of 60 days of the intimation of the impugned judgment and therefore, the appeal is certainly within the prescribed period of limitation. The adjudicating authority on the mere premise that it was the appellant who was supposed to complete the conditions precedent and satisfy holding it to be an obligation of the appellant and further has misconstrued the provisions what were enunciated in the Provisional Certificate regarding commercial operation and misrepresentation of the phased manner of handing over of the possession of the site in question and which as per the own stand of the respondents in their written reply was not done by the appointed date and time and is further corroborative by the provisional certificate placed by them on record are sufficient enough to hold that there is a clear cut default by the respondents where the conservation procedure was still underway. Mere because the lease deed shows *'as is where is basis'* does not mean that the obligation of the authorities in handing over possession stood obliterated when the appellant has already undergone his part of the contract by submitting construction performance security and had been regularly intimating the respondents from time to time, orally as well as in writing, calling upon to undergo their part of the obligation.

Even the deposit of Rs.95,35,000/- is suggestive of the very performance of the appellants in going ahead with the terms of the agreement. There is no occasion brought on the record how or by what means *force majeure* had come into action delaying the project. Mere assertion to that effect would not satisfy the purpose unless and until there are specific instances and reasons brought forth in support of the same. The impugned judgment certainly suffers from serious illegality and perversity having regard to the respondents taking undue benefits of their own wrong which has led to the frustration of the contract between the two. Findings of the adjudicating authority under challenge are certainly illegal, infirm and unsustainable and needs to be set aside by way of acceptance of the present appeal.

The appeal stands allowed in those terms.

(FATEH DEEP SINGH)
JUDGE

April 22, 2022
rps

Whether speaking/reasoned Yes/No

Whether reportable Yes/No