

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

218

**CWP-23126-2017
Date of decision: 13.01.2023**

ISHU GROVER

.....Petitioner

VERSUS

STATE OF PUNJAB AND OTHERS

.....Respondents

CORAM : HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present:- Mr. K.K. Gupta, Advocate
for the petitioner.

Mr. Vishnav Gandhi, DAG, Punjab

Mr. Ashish Gupta, Advocate
for respondents No.2 & 3.

VINOD S. BHARDWAJ, J. (Oral)

The instant petition has been filed under Articles 226/227 of the Constitution of India for the issuance of a writ in the nature of mandamus directing the respondents to release the security amount of Rs. 5,02,000/- lying with the respondents on the ground that the site in question was never handed over to the petitioner, hence, he was not liable to pay the bid money.

2. Briefly stated the facts of the present case are that the District Administration at Faridkot had organized a “Baba Farid Agaman Purav (Faridkot Virasat Mela)” at Faridkot in collaboration with the Red Cross Society. The said mela is organized every year. The same was to be held for a period of 10 days from 15.09.2017 to 25.09.2017 and an advertisement in

this regard was issued in various newspaper on 23.08.2017 inviting bids in the open auction held on 31.08.2017 at the Red Cross Bhawan. The petitioner claims to be engaged in the business of running amusement rides etc. and had deposited a security amount of Rs. 1,00,000/- to enable him participate in the auction and furnished the highest bid of Rs. 15,05,000/- which was thus accepted. The petitioner deposited an amount of Rs. 5,02,000/- as earnest money/security. The site in question was, thereafter, handed over to the petitioner for installation of the amusement rides.

3. It is alleged by the petitioner that when he hired JCB machines for removal of bushes and leveling of the site for installation of the amusement rides and other structures, there was water logging at the site since the water level was very high. The site was thus unfit for installation of amusement rides and was not safe. He was also not allotted any alternative site by the respondent District Administration due to which the petitioner had to hire a small private vacant site adjacent to the area and installed his amusement rides to meet part of the expenditure. A representation was thereafter submitted by him on 24.09.2017 (Annexure P-5) for release of the deposited earnest money/security amount and the goods and rides.

4. Reply on behalf of respondents No.2 & 3 has been filed wherein they had taken a specific stand that there was an arbitration clause which stipulated that in the event of any dispute, the matter was to be referred to arbitration. Accordingly, the arbitration proceedings were conducted by the Sub Divisional Magistrate, Jaito wherein the final award was passed against the petitioner. It is further submitted that the petitioner had installed the rides in question but has chosen not to deposit the bid money offered by him. It is also submitted that the petitioner does not dispute the fact that the rides in

question had been established and operated for the entire duration of the 'mela' and after having done so, an application for seeking release of EMD/security was submitted only on 24.09.2017 i.e. on the last day of the mela and not at any time of the entire duration of the 'mela' which shows that the application itself was mischievous and malicious. It is contended that the respondent-District Administration is entitled to recovery of the entire bid amount and that the EMD being payable towards the license granted to the petitioner to install the rides at the 'mela', the Administration is entitled to retain the same.

5. Learned counsel appearing on behalf of the petitioner has reiterated his arguments noticed above and has also submitted that he had taken private land on rent of Rs. 30,000/- from the owner and installed the rides only to meet part of the expenses even though the respondents were obligated to provide the land for setting up the amusement rides. Since the land earmarked by the respondent-Administration was unfit for installation of the amusement rides, they are not entitled to claim any charges despite the bid submitted by the petitioner. The grievance of the petitioner having not being redressed, the action of the respondents in claiming the said amount and/or retaining the earnest money is illegal and unsustainable. He further submits that the agreement executed between the parties did not contain any arbitration clause and that the clause No. 16 relied upon by the respondents is only an alternate dispute resolution clause and the same would not fall in the definition of an arbitration clause as provided under Section 7 of the Arbitration and Conciliation Act, 1996, which reads thus:-

***Section 7 in THE ARBITRATION AND
CONCILIATION ACT, 1996***

7 Arbitration agreement. —

(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

6. The Act specifies the pre-requisites of an arbitration agreement and that the aforesaid clause does not fall within the above said definition and as such, the description given by the respondents to the order passed by the Sub Divisional Magistrate being akin to an arbitral award is misconceived.

7. He has additionally argued that the respondents were conscious of the said clause not being the arbitral clause and it was for the said reason that even though the proceedings in question were initiated during the pendency of the writ petition, no application under Section 8 raising an

objection to the maintainability of the petition was filed in light of the arbitration clause. He further submitted that the said order having been passed during the pendency of the present petition, the same is not binding on the rights of the petitioner.

8. Per contra, learned counsel appearing on behalf of the respondents No.2 & 3 contends that the petitioner has not placed on record any document to establish that any other land had been taken by him on rent from any person. Besides, even if the said contention of the petitioner is to be accepted for the sake of the arguments and without conceding to the same, it was only a small area which has been alleged to have been rendered unfit for use. The same cannot by itself entitle the petitioner to claim that he is under no obligation to pay the charges. He further contends that the bid was not only for the use of the land but was also a license to establish of the amusement rides during 'Mela'. The petitioner has not disputed that he had installed the amusement rides and had operated the said rides for the entire duration of the "mela", he thus becomes obligated to deposit the bid money. He further argues that the very fact that the petitioner submitted an application on the last date of the Mela itself shows that the same was moved for malicious reasons and to avail accord liability. Had there been any real and actual grievance, he ought to have approached the concerned authorities on the very first day when the cause of action accrued. Having availed the benefit and the permission as per the license of setting up the amusement rides during mela, the present dispute is now being raised only to avoid of the liability to pay the bid money as offered by the petitioner in the open auction conducted by the respondents. It is also pointed out that the Mela was held over a large area of land and that some

part of the area in the entire earmarked place was to be used for amusement park. The petitioner having availed the benefit under the agreement cannot now claim that he is not liable to make the payment especially when the factum of the petitioner having operated the amusement rides is undisputed.

9. I have heard learned counsel appearing on behalf of the respective parties and have gone through the documents appended alongwith the present petition.

10. It is not in dispute that an order has already been passed by the Sub Divisional Magistrate, Jaito and that the said order is not a subject matter of challenge. Even though the said order cannot be construed as an arbitral award and is at best only a decision through an alternative dispute redressal mechanism as contemplated under the agreement, however, in any case the said order was required to be challenged. Even otherwise, the parties have raised conflicting claims as it is not evident on record as to what was the total area allocated to the petitioner for establishment of the amusement rides; the area which was rendered unfit for use by the petitioner on account of water logging; the additional area taken by the petitioner on alleged lease; the details of land owner whose area was utilized are also not mentioned. In the absence of any such relevant necessary documents, it cannot be assumed at this juncture that the area in question was rendered unfit for use or that the petitioner had to establish his amusement rides at a site other than the site allocated by the respondent-District Administration. Merely because there was a possibility of the petitioner seeking some additional area may also be possibility for putting up some additional rides by enhancing the area and the same does not *ipso facto* mean that the entire area allocated to the petitioner was rendered unfit for use for which it was

handed-over to the petitioner in the auction proceedings. It is also noticed that the application for seeking release of the EMD/Security money and alleging that the area to have been unfit for the use is submitted on 24.07.2017 i.e. on the last day of the 'Mela' and not at the initial start when the defect was noticed.

11. Since the disputed questions of fact are involved, the same cannot be looked into by the High Court in exercise of a writ jurisdiction. The instant petition is accordingly disposed of in view of disputed questions of fact noticed above. The petitioner is, however, at liberty to take recourse to the alternative remedies available to him in accordance with law.

12. Counsel for the petitioner submits that since the petitioner has been permitted to take recourse to the alternative remedies, his Bank Guarantee be not encashed by the respondent-authorities till such time. He undertakes to take recourse to the alternative remedies with in a period of 04 weeks and to keep the Bank Guarantee alive till 31.03.2023. The prayer is accepted. The respondents shall not encash the Bank Guarantee for a period of 04 weeks subject to the petitioner submitting an unconditional and valid guarantee in terms of the statement above valid and upto 31.03.2023.

(VINOD S. BHARDWAJ)

JUDGE

JANUARY 13, 2023

Vishal Sharma

Whether speaking/reasoned	:	Yes/No
Whether Reportable	:	Yes/No