

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.05.2017

+ **O.M.P. 23/2016 & IA No. 7146/2016**

SMT. NIRMAL KAPUR & ORS.

..... Petitioners

Versus

MAHINDER KUMAR BATHLA & ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Jayant Bhushan, Senior Advocate with Mr Manish Bishnoi and Mr Venkat Poonia.

For the Respondents: Mr A.S. Chandhiok, Senior Advocate, Mr Ravi Gupta, Senior Advocate, Mr Ankit Jain, Mr Sachin Jain, Mr S. Rai, Advocates and Ms Sweta Kakkar, Ms Shruti Sharma and Ms Bonita Singh.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') *inter alia* impugning the arbitral award dated 06.05.2016 (hereafter 'the impugned award') made by the sole arbitrator.

2. The impugned award was rendered in the context of certain disputes that had arisen between the parties in relation to the Memorandum of Understanding dated 12.05.2011 (hereafter 'the MoU') as extended by an agreement dated 02.11.2013 (hereafter 'the Extension Agreement') entered into between the parties for release of five acres of land bearing Khasra No. 12/9, 12, 10, 11/1, 6, 15/1 in Village Daulatpur, Nasirabad (Carterpuri) Tehsil, District Gurgaon, Haryana (hereafter 'the subject land').

3. The petitioners are the joint owners of the subject land. They had constructed certain structures on the subject land, which were in use as a “Residential Farm House”. Around 1980, Indian Oil Corporation Limited (hereafter ‘IOCL’) wanted to lay a gas pipeline over the subject land and the Central Government issued Notification No. 1469 dated 08.05.1980 under Section 3 of the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962. As the construction of the pipeline would have adversely affected the existing structures built on the subject land, the petitioners filed a civil suit for an injunction against the same. By order dated 11.05.1981, interim injunction was granted in favour of the petitioners. IOCL appealed against the said order, however, the same ended in a compromise between the parties therein to the effect that pipelines would be laid in a manner without affecting the existing structures on the subject land.

4. On or about 30.11.1981, the Haryana Government issued a notification under Section 4 of the Land Acquisition Act, 1894 (hereafter ‘the 1894 Act’) for acquiring a large tract of land including the subject land. The petitioners filed their objections to the same. Thereafter, on or about 15.11.2004, a declaration was issued in terms of Section 6 of the 1894 Act proclaiming the subject land to be required for public purpose.

5. The petitioners filed a writ petition (W.P. No. 394/1984) in the Punjab and Haryana High Court (hereafter ‘the High Court’) challenging the validity of the proceedings *inter alia* on the premise that structures had been raised on the subject land - which were used for residential purposes - prior to issuance of the notification under Section 4 of the 1894 Act. However, the same was dismissed. This led the petitioners to move the

Supreme Court by way of two Special Leave Petitions. By an order dated 14.10.1986, the Supreme Court allowed the appeals by remitting the matter to the High Court for fresh consideration.

6. Whilst the proceedings were pending, the Haryana Government issued a policy decision dated 24.01.2011 to the effect that requests for release of land acquired by it will be considered in cases where objections were filed against such acquisition; the lands acquired had any structure built upon them prior to the date of the notification under Section 4 of the 1894 Act; and such structure was inhabited and used by the owner for his own residential purposes.

7. During the pendency of the writ petition, the petitioners entered into the MoU dated 12.05.2011 with the respondents with the objective that the respondents will get the subject land released from the State Government and its land use would be changed for building residential apartments. The MoU was valid for a period of 30 months, that is, till 11.11.2013. In terms of the MoU, it was agreed that after the release of the subject land, the petitioners would transfer 30% of their share in the subject land in favour of the respondents. Further, it was agreed that an application for change in the use of the subject land would be filed with the concerned authorities, so that residential apartments could be built on the subject land or part thereof. In the event such permission was granted, the petitioners would transfer additional 30% of the land for which such permission is granted.

8. The respondents filed representations before various state authorities for release of the subject land under the 1894 Act relying upon the policy dated 24.01.2011. The respondents also filed an application before the High Court to the aforesaid effect. On 17.05.2013, the High Court passed

an order which reads as: *“Mr Kulvir Narwal Additional Advocate General Haryana, seeks time to get instructions as to whether on account of existing policy, land owned by petitioner can be released or not”*.

9. Apparently, the State Government rejected the representation made before it and by letter dated 10.10.2013 addressed to the learned Advocate General, Haryana, stated that on examination of records, it was found that although some structure existed prior to the notification issued under section 4 of the 1894 Act, the same was not inhabited; therefore, the subject land was considered fit for acquisition and could not be released under the then prevalent policy.

10. It is the case of the petitioners that the MoU was extended at the request of the respondents upto 11.11.2014 in terms of the Extension Agreement, however, such extension was granted in the absence of the knowledge of the rejection dated 10.10.2013 as the information regarding the same was allegedly withheld by the respondents. According to the petitioners, they came to know about the letter of rejection dated 10.10.2013 on 20.11.2015 during the cross examination of the official witness in the arbitral proceedings.

11. It is also stated that the respondents, prior to the extension of the MoU, also concealed the information relating to the enactment of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereafter ‘the 2013 Act’). By virtue of Section 24(2) of the 2013 Act, land acquisition proceedings in cases where award had been made under the 1894 Act but physical possession had not been taken or compensation had not been paid, lapsed.

The 2013 Act was passed by the Parliament in September 2013, however, the same came into force on 01.01.2014.

12. Thereafter, the respondents (on behalf of the petitioners) filed an application before the High Court *inter alia* seeking a declaration that the acquisition of the subject land under the 1894 Act had lapsed. On 20.05.2014, the High Court rendered a common judgment in a batch of similar matters - which included the writ petition of the petitioners - declaring the acquisition proceedings relating to certain properties, including the subject land had lapsed by virtue of Section 24(2) of the 2013 Act. The High Court also restrained the writ petitioners (the landowners) from alienating or selling and /or changing the nature of the released lands for a period of one year from the receipt of the certified copy of the order. The petitioners stated that they came to know about the aforesaid judgment of the High Court from another landowner. Thereafter, the petitioners also came to know that lands of various landowners had been released on the basis of the order dated 20.05.2014.

13. After the aforesaid decision was delivered by the High Court, the respondents started approaching the petitioners for the transfer of 30% of the subject land in their favour. They also sought a power of attorney in their favour to apply for change in the use of the subject land. The petitioners declined to do the same *inter alia* for the reason that according to them the subject land stood automatically released from the land acquisition proceedings due to the enactment of the 2013 Act and not owing to any efforts made by the respondents. Further according to the petitioners, the respondents were entitled to transfer of the subject land only on (i) release of subject land and (ii) conversion of the land use

enabling construction of residential apartments before 11.11.2014. The respondents wanted to enter into a further agreement, a draft of which was sent to the petitioners by an email dated 29.07.2014, however, the petitioners refused to sign the same.

14. Subsequently, further correspondence was exchanged between the parties wherein the petitioners maintained their stand that the respondents have failed to fulfil their obligations under the MoU and therefore, they were not entitled to any share in the subject land. The respondents invoked the arbitration clause for adjudication of the disputes between the parties by the Indian Council of Arbitration (hereafter 'ICA'). The petitioners objected to arbitration by ICA. This led the respondents to move this court under Section 11 of the Act and by order dated 22.05.2015, this court appointed the sole arbitrator to adjudicate the disputes between the parties.

15. Before the arbitral tribunal, the respondents contended that the terms of the MoU were to be performed in two distinct stages:-

- “i. Release of the land from acquisition- as per notification dated 13.11.1981 under Section 4 of the 1894 Act and on the completion thereof, the Respondents were to transfer 30% of the land released in favour of the Claimant; and
- ii. Grant of approval in respect of change in land use of the released land for construction of residential apartments; in terms whereof the Claimants were to become entitled to an additional 30% of the land, for which such change of land usage had been obtained.”

16. The respondents claimed that they had acted diligently and sincerely in performance of the obligations under the MoU. However, by virtue of

the 2013 Act, the acquisition proceedings lapsed. On 20.05.2014, the High Court passed an order disposing of a batch of writ petitions, including the one filed by the petitioners, declaring that acquisition proceedings had lapsed. However, the writ petitioners were restrained from alienating and/or changing the nature of the released lands for a period of one year from the receipt of the certified copy of the order. The district administration was also directed to ensure that there was no change in land use.

17. The respondents contended that they had performed their obligations under the first stage of the MoU and were entitled to 30% of the subject land. They further claimed that they are also entitled to obtain power of attorney so as to enable the respondents to apply for change in land use.

18. The respondents sought the following reliefs in their statement of claims:-

“Pass an award in favour of the claimants and against the respondents holding;

- a) stating that the Claimants are entitled to 30% of the subject land that belongs to the Respondent's; and
- b) Restrain the Respondents from alienating another 30% of their land as the Claimants are willing and able to perform their second part of the contract which entitles them to additional 30% of the land by directing the respondents to provide all support and assistance required by the Claimants to get the change of land use from the competent authorities within a reasonable period of one year or such extended period as may be warranted by the facts and circumstances of this case, or

- c) Direct the respondent compensate the breach of the contract by the respondents of not getting the second part of the MOU fulfilled and provide an additional 20% of their land as their entitlement under the MoU;

AND

- d) Pass such other award order as this Hon'ble Forum may deem fit."

19. The petitioners resisted the aforesaid claims on several grounds which are summarised as under:-

19.1 The MoU is champertous in character and, therefore, could not be given effect to as being opposed to public policy.

19.2 The respondents were required to perform both the stages - release of subject land and conversion of land use - within the specified period of thirty months from the date of the MoU, that is, by 11.11.2013 and in any event, as extended by a further period of twelve months, that is, by 11.11.2014; and, time was the essence of the MoU.

19.3 By virtue of the injunction passed by the High Court restraining the parties from alienating and/or changing the land use, the MoU was frustrated and rendered change of land use within the specified time, an impossibility.

19.4 The Extension Agreement extending the term of the MoU was obtained by fraud and misrepresentation. The said agreement was entered into on 02.11.2013 and as on 10.10.2013, the concerned authority had already communicated its decision not to release the subject land from acquisition. It was contended that this was concealed by the respondents and thus the Extension Agreement could not be given effect to. It was

alleged that the respondents had also concealed the fact that the 2013 Act had been enacted.

19.5 The respondents at best were entitled to obtain award in respect of the amounts spent in pursuing the petitions before the High Court and in making representations to the State Government and other statutory authorities. However, in absence of any evidence as to the quantum of the amounts spent, no such award could be made.

19.6 The specific performance of the MoU could not be granted and at best the respondents were entitled to damages subject to the same being proved.

20. On the other hand, the respondents took a stand that they had fulfilled their obligations under the MoU and, therefore, were entitled to 30% share in the subject land as well as the additional 30% share in the subject land once permission to change the use of the subject land is accorded. The respondents asserted that by reason of the judgment and order dated 20.05.2014 passed by the High Court, the subject land was released and therefore, the respondents have performed their part of the obligations under the MoU. It was further contended that the order of injunction passed by the High Court restraining the petitioners from alienating the subject land or changing the use thereof for a period of one year, by itself did not give rise to any impediment to implement the terms of the MoU.

Impugned Award

21. The arbitral tribunal rejected the contention that the MoU was a champertous agreement for several reasons including (i) absence of any

pleading regarding illegality and invalidity of the MoU; (ii) no such contentions had been raised in the evidence or in response to the notice invoking arbitration; (iii) there was nothing to suggest that recourse to any illegality was to be resorted to; and (iv) the MoU did not *ex facie* show that it is illegal and opposed to public policy.

22. In regard to the performance of the MoU, the arbitral tribunal accepted the respondents' contention that the same was to be performed in two stages. It held that the first stage (clause 5 of the MoU) constituted an independent obligation of the parties and could be enforced on its own. The arbitral tribunal held that clause 6 of the MoU uses the word “*additional 30% (total 60%)*” which indicated that the respondents would be entitled to the additional 30% of the subject land on change of land use. Insofar as clause 8 of the MoU is concerned, the arbitral tribunal held that the said clause basically provided the timelines for completion of performance of the contract by the respondents.

23. Further, the arbitral tribunal also rejected the contention that the extension of MoU was entered into on the basis of fraud or misrepresentation mainly for the reason that no such ground was pleaded or established by evidence.

24. The petitioners' contention that the lapsing of acquisition proceedings by virtue of the 2013 Act would not amount to release of the subject land from acquisition proceedings as contemplated under the MoU was also rejected. The arbitral tribunal held that the term “*release*” used in the MoU must be read in the context in which the same was used, which would mean getting the land free from acquisition proceedings. The arbitral tribunal reasoned that the High Court was required to declare that

the acquisition proceedings had lapsed. The arbitral tribunal further held that the 2013 Act had only advanced the cause and had not rendered the MoU impossible. The arbitral tribunal was of the view that by virtue of the 2013 Act, the performance of the MoU “*became accelerated*”.

25. The contention that the question of change of land use did not arise because of the injunction passed by the High Court was also not accepted. The arbitral tribunal *inter alia* held that (i) the High Court did not restrict the parties to file an application for change of land use and, therefore, it was open for the parties to file and pursue such application; (ii) only if an order allowing change in land use was passed by the concerned authorities, the same could not have been implemented by virtue of the injunction order passed by the High Court; (iii) no time period was specified for performance of the second stage - securing the change in land use; and (iv) since the injunction was only for a period of one year, the order of change of land use if passed could have been given effect to after the expiry of the said period and, therefore, the contract (MoU) could have been performed after the injunction had expired (after the period of one year).

26. The arbitral tribunal held that since the petitioners had not provided the said power of attorney for making application for change of land use, therefore, the petitioners were in breach of the MoU.

27. The operative part of the impugned award reads as under:-

“A. The Respondents are directed to execute a deed of sale in favour of the Claimants in respect of undivided 30% of the land within a period of one month from the date of receipt of this award.

- B. In addition, the Respondents are liable to pay damages unto the Claimant, a sum of Rs.1,08,03,600/-, which sum they are directed to pay within one month from date, failing which interest thereon shall be payable at the rate of 9% p.a. from the date of expiry of the said period till the date of actual payment.
- C. Keeping in view the quantum of fees of the Arbitral Tribunal, 50% whereof has been borne by the Claimants, and having regard to the number of hearings before the Tribunal, as well as the conduct of the Respondents, interest of justice would be subserved if the Respondents are directed to pay a sum of Rs.25,00,000/- to the Claimant by way of costs.”

Submissions

28. Mr Jayant Bhushan, learned senior counsel appearing for the petitioners challenged the award on several fronts. First, he submitted that the finding that statutory lapse of the acquisition proceedings in terms of the 2013 Act, amounted to release of subject land within the meaning of the MoU is *ex facie* perverse and unsustainable. He contended that the MoU was entered into only for the purposes of release of the subject land from acquisition proceedings under the 1894 Act and a statutory lapsing of such proceedings was not in contemplation of the parties. He contended that fundamental factual premise on which the MoU was entered into was that the land was subject to acquisition and respondents were to ensure release of the subject land from acquisition under the then prevalent policy of the State. He contended that the MoU was entered in the backdrop of the policy notification dated 24.01.2011, which permitted release of property which was used for residential purposes prior to the issuance of notification under Section 4 of the 1894 Act. He referred to the decisions of the Supreme Court in **Tikka Sahib Singh & Anr. v. State of Haryana and**

Others: (2009) 11 SCC 480 and ***Adbul Majeed Sahib and Another v. District Collector and Others***: (1997) 1 SCC 297 in support of the contention that a withdrawal/release from acquisition proceedings was different from a statutory lapse. He earnestly contended that the bargain between the parties was not that the petitioners would transfer 30% of the subject land on a statutory lapsing of the acquisition. He also referred to ***Satyabrata Ghose v. Mugneeram Bangur & Co. and Another***: AIR 1954 SC 44 in support of his contention that the enactment of the 2013 Act, changed the foundation on which the parties had rested their bargain, and in a sense rendered the performance of the MoU an impossibility.

29. Second, he contended that the arbitral tribunal had erred in holding that time was not the essence of the MoU as the MoU was for a specified term and used the language that it “*shall remain in operation for 30 months*” and the Extension Agreement used the expression “*final*”.

30. Third, Mr Bhushan contended that the arbitral tribunal's decision that extension of MoU was not obtained by fraud and misrepresentation on the ground that it was not pleaded was irrational as the petitioners had become aware of the same only during the course of arbitration proceedings by the evidence provided by the official witness summoned by the respondents. He stated that during his cross-examination the official witness produced the letter dated 10.10.2013, which indicated that the concerned authority had declined the request for release of the subject land from the acquisition proceedings. Therefore, the petitioners could not take the plea of fraud earlier and, thus, it was taken in their evidence.

31. Fourth, he argued that the finding that the letter dated 10.10.2013 addressed to the Advocate General was only a communication and was not

rejection of the claim for release of the subject land was perverse and wholly unsustainable. He contended that the said letter was addressed to the Advocate General to inform the High Court that the subject land could not be released from acquisition proceedings and the representation had been rejected by the State Government; therefore, the said letter plainly indicated that the petitioners' representation for release of the subject land stood rejected. No other view was plausible.

32. Fifth, he contended that the finding of the arbitral tribunal that despite the stay order granted by the High Court, an application for change of land use could have been made and the petitioners had breached the MoU by not signing the power of attorney for the purposes of applying for the change in land use, was perverse. The High Court had restrained the petitioners from seeking change of land use for a period of one year. However, in any event even if the application was made, the land use could not be changed during the term of the MoU as the extended term of the MoU would end on 11.11.2014 whereas the stay order passed by the High Court would continue till July 2015.

33. Lastly, Mr Bhushan contended that the award of damages is also perverse as there was no material or evidence to establish any loss alleged to have been suffered by the respondents. He pointed out that the respondents neither quantified the expenses claimed to have been incurred nor produced any material to establish the same; on the contrary, they contended that no account of expenses had been kept and even the counsel was paid in cash.

34. Mr Gupta, learned senior counsel appearing for the respondents countered the aforesaid submissions and supported the conclusion and

reasoning of the arbitral tribunal. He, however, conceded that the finding of the arbitral tribunal to the extent that the petitioners had not raised any objection to the effect that the MoU was not performed as the acquisition proceedings regarding the subject land had lapsed and the same has not been released by efforts of the respondents, in their reply to the respondents' legal notice invoking the arbitration clause, was erroneous. However, he contended that the same was not material or determinative of the conclusions arrived at by the arbitral tribunal.

Reasoning and Conclusion

35. At the outset, it is necessary to note that the scope of the present proceedings is restricted and this court does not sit as an appellate court to re-appreciate the evidence and supplant its opinion in place of that expressed by the arbitral tribunal. Thus, the examination in these proceedings must be confined to the grounds as set out under Section 34(2) of the Act.

36. The first and foremost question to be addressed is whether the decision of the arbitral tribunal that the MoU can be split in two parts, is contrary to the express language of the MoU. At this stage, it is relevant to refer to clauses 4, 5, 6, 7 and 8 of the MoU which read as under:-

- “4 That after getting the land released from the acquisition the parties of the IInd part will also get the change of land use from the competent authority with their own efforts and cost including the payment of development charges payable to the eligible Competent Authority.
5. It has been settled between the parties that after the release of land from the acquisition of HUDA, the parties of the 1st Part shall transfer 30% of the land so

released in favour of the parties of the IInd part or their nominee.

6. It has been settled between the parties that after the parties of the IInd Part have got land released from the acquisition and also got the change of land use (residential apartments) from the Competent Authority, the parties of the 1st Part shall transfer additional 30% (total 60%) of the land for which change of land use has been obtained from the Competent Authority in favour of the parties of the IInd Part towards consideration for the time, effort and money spent by the parties of the IInd Part.
7. That the said entitlement of land by Parties of the IInd Part unless transferred in their name or in the name of their nominee shall remain a charge on the entire property.
8. This agreement shall remain in force for a period of 30 months from its date of execution. If during this period the parties of the IInd Part fail to get the land released from acquisition and also get the change of land use (Residential apartments) from the Competent Authority, the parties of the 1st Part shall not be liable to make any payment whatsoever to the parties of the IInd Part towards the cost incurred by them or transfer any part of the land to them.

It is further settled between the parties that the parties of the IInd Part shall be entitled to 60% of the land as per Clause 6 of this MOU, only after the change of land use (residential apartments) is obtained by the parties of the IInd Part.”

37. Although, it appears from the plain reading of clause 8 that the petitioners were not obliged to transfer "*any part of the land*" till the respondents had secured the release of the subject land from acquisition as well as obtained order permitting change of land use. However, the arbitral tribunal has interpreted clause 8 of the MoU to only indicate the time

period for performance of the MoU; in the arbitral tribunal's view, reading the said clause otherwise would render clauses 5 and 6 of the MoU otiose. This court is not called upon to examine the correctness of the said interpretation. Plainly, the question of interpreting the contract falls squarely within the jurisdiction of the arbitral tribunal and this court is unable to accept the aforesaid interpretation to be perverse or plainly contrary to the terms of the MoU. The view expressed by the arbitral tribunal being a plausible one, warrants no interference in these proceedings.

38. The second question to be addressed is whether the statutory lapsing of the acquisition of the subject land by virtue of the 2013 Act falls within the scope of the MoU. Indisputably, the MoU was entered in the context where the petitioners were unable to secure the release of the subject land under the relevant policy of the State Government. It is also apparent that the subject land was not "*released*" from acquisition by virtue of the efforts of the respondents but lapsed by virtue of enactment of the 2013 Act.

39. The Haryana Government had framed a policy (as indicated in the Memo dated 24.01.2011) for release of lands acquired under the 1894 Act, which *inter alia* provided as under:-

- "a) Any request or application where structure has been constructed provided the structure existed prior to section 4, is inhabited and is being used by the owner for his own residential purposes.
- b) Any factory or commercial establishment which existed prior to section 4 provided it was functional at the time of Section 4 and is also functional at the moment.

- c) Any religious institution or any building owned by community which is being used for community purposes.”

40. Indisputably the MoU was entered into in the aforesaid context where the petitioners were desirous of obtaining a release of the subject land from acquisition. The lapse of acquisition by a statutory enactment was not in contemplation of the parties at the time of entering into the MoU. Plainly, it is not the case of the respondents that they had or could have had any role to play in the enactment of the 2013 Act resulting in the lapse of the acquisition of the subject land. Concededly, the role of the respondents was to pursue litigation in Courts as well as pursue with the concerned authorities for securing “*release*” of the subject land in the context of the 1894 Act and the then prevalent policy of the State Government. In the impugned award, the arbitral tribunal also took note of the deposition of petitioner no.1 (RW-1) that “*the State Government was releasing land around mine and they kept on denying that there was no house and I could not prove the same as I didn't know anybody in the Government*”. This indicates the reason why petitioners entered into the MoU.

41. The arbitral tribunal had also observed that “*It may be true that the parties to the MoU, in all probability did not contemplate that the Parliament would enact the ‘New Act’*”. Although, the arbitral tribunal had used the expression “*in all probability*”, it is relevant to note that it is a conceded position that the enactment of the 2013 Act was not in contemplation of the parties at the time of entering into the MoU; during the course of arguments, Mr Gupta was pointedly asked whether lapsing of

the acquisition was contemplated at the time of entering into the MoU and he had responded in the negative.

42. The recitals of the MoU also indicate the context in which the MoU was entered into. The same are reproduced below:-

“And whereas parties of the 1st Part are the owner and in possession of five acre no. 12/9, 12,10, 11/1 & 11/5.6.15/1 land in Village Daulatpur Nasirabad (Carterpuri) Tehsil and District Gurgaon (Haryana).

And whereas the said land was acquired by the HUDA vide notification dated 13/11/1981 Under Section 4 and from the said date the parties of the 1st Part had been pursuing the said matter in court of law qua HUDA. But the parties of the 1st Part could not succeed in District Court and their appeal before the High Court was also dismissed. However, the Hon'ble Supreme Court had remanded back the appeal to Hon'ble High Court where the matter is being still perused as per directions of Hon'ble Supreme Court.

And whereas the parties of the 1st Part failed to get any result from tireless, troublesome, expensive and endless litigation for the last more that 30 years and in these circumstances the parties of the 1st part have got some practical problems to pursue the said matter in courts. Thus parties of the 1st Part have approached the parties of the IInd part in this regard who have considerable experience in legal matters. Parties of the IInd part after going through the facts of the case have assured the parties of the 1st Part that they are quite confident of success and are also hopeful to get the change of land use (residential apartments) of the land so released from the acquisition from the competent authority.

And whereas in these circumstances it has been deemed expedient in the interest of all the parties to enter into an arrangement regarding the said five acres of land so that the property and the efforts made by the parties of the 1st Part for the last 30 years should not go waste and a

Memorandum of Understanding may be executed in writing confirming all the terms and conditions of the arrangement and the understanding made between the parties so that the interest of all the parties are safe eligible And to avoid any dispute or difference which may arise in future among the parties.”

43. In terms of the MoU, the respondents were obliged to look after and supervise the pending litigations in regard to the release of the subject land and were also obliged to spend money, time and energy on the legal matters qua the subject land and to endeavour their best to release the subject land from acquisition. Further, the respondents had also agreed to get the order for change in land use from the competent authority by their own efforts and resources including payment of development charges payable to the competent authority. In consideration for the same, the respondents were entitled to 30% of the subject land “*after the release of land from the acquisition of HUDA*” and additional 30% of the land for which change in use had been obtained.

44. It is an admitted fact that the respondents had not secured the release of the subject land from acquisition proceedings under the then prevalent policy of the State Government. Thus, if the 2013 Act had not come into force, the subject land would have continued to be under acquisition unless any order releasing the same was passed by the High Court or the concerned authorities reviewed their decision not to release the subject land from acquisition proceedings.

45. In view of the above, it is difficult to accept that lapsing of the acquisition by virtue of the 2013 Act would fall within the scope of the MoU which would entitle the respondents to claim 30% of the land in question. The arbitral tribunal had concluded that the MoU was essentially

an agreement to sell; assuming this to be correct, the consideration for the agreement would clearly include “*release of land from the acquisition*”. The fundamental basis of this transaction was lost once the acquisition lapsed by enactment of the 2013 Act, in which the respondents had no role to play. In *Satyabrata Ghose* (*supra*), the Supreme Court had in the context of Section 56 of the Indian Contract Act, 1872, explained as under:-

“This much is clear that the word “impossible” has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.”

46. The arbitral tribunal had held that the decision was not applicable in the facts of the present case. However, there is no dispute in regard to the principle that if the fundamental premise on which the parties had entered into a contract is altered by a supervening event, the contract would be rendered impossible to perform. In the context of the present case, if the bargain between the parties was that the respondents would secure and release the subject land from acquisition, the performance of the same was clearly not possible because of the supervening event of enactment of the 2013 Act. By virtue of the 2013 Act, the acquisition proceedings had lapsed and, therefore, there was no question of the same being released from acquisition by the efforts of the respondents.

47. The arbitral tribunal had accepted the contention that the lapse of acquisition by virtue of the 2013 Act was also included in the MoU for mainly two reasons. First, the arbitral tribunal had noted that the MoU was entered into not only for the purposes of filing representations but also for the purposes of enabling the respondents to represent the petitioners before the court of law. And, notwithstanding the lapse of acquisition by virtue of Section 24(2) of the 2013 Act, a decision was required to be rendered by the court. Second, the arbitral tribunal also held that the understanding of the parties as to the term "*release*" would be a relevant factor for determination of the disputes between the parties. In this context, the arbitral tribunal observed as under:-

"15.19 The Respondents through their Advocate Shri Jagmohan Krishan Dang in response thereto by his letter dated 07.10.2014 (CW-6/26) denied only the liability of the Respondents to transfer any part of land in favour of the Claimants, 'at the stage'.

15.20 It was furthermore contended that the Claimants would be entitled to transfer of the land only upon obtaining permission for change of land use. It is, therefore, evident that the Respondents did not raise any contention that the lands had not been released by reason of any effort on the part of the Claimants and that they were not entitled to obtain transfer of land in their favour only in the event the land was released by the State. The land, which was the subject matter of the proceedings under the 1894 Act, could be released by different modes, including the one provided for under Section 48 of the 1894 Act as also the policy of the state dated 24.01.2011. It could stand released by a subsequent Parliamentary Act also."

48. Concededly, the aforesaid finding is erroneous. The response of the petitioners - through their advocate (Shri Dang) - to the respondents' notice dated 24.09.2014 expressly indicated the petitioners' stand that the statutory lapse of acquisition of the subject land would not constitute respondents' performance of the MoU. The relevant extract of the said response dated 07.10.2014 is as under:-

“4. Para no.4 of the notice under reply is absolutely wrong and is vehemently denied. It is wrong and denied that you put in untiring and considerable efforts or incurred huge expenditure by everytime going to Chandigarh from New Delhi for attending each and every hearing and to follow up the matter in the Court as well as with the counsel appearing for the parties. It is wrong and denied that the land in question was released from acquisition on account of the efforts put in by you. The judgment dated 20th of May 2014 passed by the Honourable High Court of Punjab and Haryana; is a matter of record. From a perusal of the same it is evident that the Honourable High Court has taken up and decided matters pertaining to several landowners and not only those pertaining to my clients. Further, perusal of the aforesaid judgment makes it clear that the land in question had been released from the purview of acquisition on the basis of the judgment passed by the Honourable Supreme Court of India in the matter titled Union of India and other Vs. Shiv Raj and others, rendered in Civil Appeals no.5478-5483 of 2014 as well as the coming into force of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. You definitely had no role to play both insofar as the decision rendered by the Honourable Supreme Court of India is concerned and also in the enactment of the aforesaid statute. Thus, it is presumptuous on your part to attribute the release of the land in question from acquisition to your efforts alone. Furthermore, by it's judgment dated 20th May, 2014 the Honorable

High Court enables the State Authorities to consider to require the land in question under the provisions of the 2013 Act if need be.”

49. Mr Gupta conceded that the aforesaid reasoning of the arbitral tribunal was erroneous; however, he contended that the same was not material as the arbitral tribunal had concluded that the word "*release*" as used in the MoU would also include statutory lapse of acquisition.

50. This court is unable to accept the aforesaid contention that the finding in question though erroneous is not material. More so, when the arbitral tribunal had also concluded in paragraph 15.18 of the impugned award that "*how the parties understood the said term would be a relevant factor for determination of the disputes between the parties*". It is in this context that the arbitral tribunal had referred to the letter dated 07.10.2014 sent in response to the legal notice dated 24.09.2014. This reasoning was material to the arbitral tribunal's conclusion as to the understanding between the parties.

51. Having fallen in error in holding that there was no denial on the part of the petitioners in the response dated 07.10.2014, the arbitral tribunal came to the conclusion that the contention raised by the petitioners was an afterthought. This is articulated in paragraph 15.28 of the impugned award; the relevant extract of which reads as under:-

"Only in the reply to the second notice, a contention has been raised that the "release of the land in question has not come about as a result of any effort "put in by you" but on account of legislative act". That was purely an afterthought on the part of the Respondents, presumably on the basis of legal advice received by them in the meanwhile."

52. This reasoning was again indicated by the arbitral tribunal in paragraph 18.22 of the impugned award.

53. It is evident from the above conclusion that the apparent error as to the stand of the petitioners in the reply to the respondents' notice dated 24.09.2014 had a material bearing on the conclusion of the arbitral tribunal. It is not possible for this court to evaluate as to what extent the said reason has weighed with the arbitral tribunal. It is not possible for this court to speculate whether the arbitral tribunal would have come to a different conclusion, if it had not erred by proceeding on the basis that the petitioners' stand that lapsing of the acquisition by virtue of the 2013 Act did not amount to performance of the obligations under the MoU by the respondents, was an afterthought.

54. In my view, the recitals of the MoU, the attendant circumstances in which the MoU was entered into as well as the stated position of the respondents leaves little room for doubt as to the bargain between the parties. It was clearly directed towards (i) the release of the subject land from acquisition under the 1894 Act and (ii) the change of land use for development of residential apartments. The lapsing of the acquisition by virtue of the 2013 Act was not plainly a part of the bargain contemplated between the parties.

55. It is also relevant to mention that the petitioners had supported their contention that "*release*" of the subject land from acquisition was different from statutory lapse of acquisition by citing two decisions of the Supreme Court namely, *Adbul Majeed Sahib* (*supra*) and *Tikka Sahib Singh* (*supra*). A plain reading of the aforesaid decisions indicate that the Supreme Court had made a clear distinction between withdrawal of

acquisition proceedings and a statutory lapse of acquisition. The arbitral tribunal had observed that there was no quarrel as to the law declared by the Apex Court but proceeded to hold that even so decisions in **Pune Municipal Corporation and Anr. v. Harakchand Misirimal Solanki and Others**: (2014) 3 SCC 183 as also in **Union of India and Others v. Shiv Raj and Others**: (2014) 6 SCC 564 had been rendered despite the provisions of Section 24(2) of the 2013 Act. In view of this court, the decisions rendered in *Pune Municipal Corporation* (*supra*) and *Shiv Raj* (*supra*) were not germane to the question before the arbitral tribunal. The question before the arbitral tribunal was whether release of the subject land from acquisition as contemplated under the MoU took within its sweep, statutory lapsing of the acquisition by virtue of the 2013 Act. Merely because an owner of a property acquired under the 1894 Act may be called upon to approach the courts for a declaration that the acquisition had lapsed by virtue of the 2013 Act, did not in any manner indicate that such lapse of acquisition was contemplated by the parties, while entering into the MoU or was within the bargain struck by the parties.

56. Keeping in mind the limited scope of judicial review under Section 34 of the Act, it may have been possible for the respondents to contend that even though in view of this court, the decision of the arbitral tribunal is erroneous, it is not permissible for the court to supplant its view in place of that of the arbitral tribunal. However, it is not necessary to examine this contention in any detail given that it is not only *ex facie* apparent but also conceded by the respondents that the arbitral tribunal had proceeded on an factually erroneous premise that the petitioners had not raised the relevant contention (that the release of the subject land had not come about as a result of any effort by the respondents), in the response to the notice

invoking the arbitration clause and thus, was an afterthought. The impugned award directing specific performance by transfer of 30% of the subject land to the respondents is liable to be set aside on this ground alone.

57. The next question to be addressed is whether the extension of the MoU was vitiated by fraud.

58. The MoU was extended by the parties on 02.11.2013. The recitals of the said agreement *inter alia* record that "*efforts taken by the 2nd party are likely to mature in all respects fully and finally within a period of another 12 months i.e. 11th November, 2014*". On the said date, the representation made to the State Government had already been rejected. This is clearly evident from the letter dated 10.10.2013 addressed to the learned Advocate General representing the State before the High Court. On 17.05.2013, the Advocate General had requested the High Court for time to take instructions and the letter dated 10.10.2013 were the instructions issued to him by the State. The arbitral tribunal has held that this was only an internal communication and did not amount to a rejection. This finding is difficult to accept as the letter dated 10.10.2013 clearly indicates that the concerned authority had decided that the subject land could not be released as the structures thereon were not used for the purposes of residence. This was undisputedly the stand of the State of Haryana before the High Court. However, it is necessary to observe that the aforesaid finding was not the basis on which the arbitral tribunal had rejected the contention that extension of the MoU was vitiated by fraud. The arbitral tribunal had noted the necessary conditions for establishing fraud and misrepresentation and had concluded as under:-

"14.27 Thus, both on the ground of absence of pleading, and proof, it must be held that the extension of the MoU dated 2.11.2013 is not vitiated in law on the ground of any misrepresentation and fraud, on the part of the Claimants."

59. The aforesaid finding of the arbitral tribunal is final and warrants no interference by this court. It may be correct that rejection of the representation was not disclosed on the date of the Extension Agreement but the petitioners were unable to establish that this was in the knowledge of the respondents at the material time and had been deliberately withheld.

60. The next question to be examined is whether the MoU in regard to the second stage, that is, the obligation of the respondents to secure change in use of the subject land stood frustrated on account of the order passed by the High Court on 20.05.2014. The High Court had held that the acquisition had lapsed but, nonetheless, directed *status quo* to be maintained for a period of one year. It would be relevant to refer to the relevant passage of the said order dated 20.05.2014, which reads as under:-

“[8] Having held that, we cannot be oblivious of the fact that the land was acquired for the regulated development of Gurgaon City. As a consequence of the lapse of acquisition, if the petitioners succeed in changing the nature of land or if they create third party rights, it is likely to be detrimental to the 'public interest' as several basic amenities like road, sewerage or park etc. would also be adversely affected. We, thus, restrain the petitioners from alienating and/or changing the nature of their released land for a period of one year from the date of receipt of certified copy of the order. No construction shall be raised by the petitioners on their respective sites and the District Administration shall ensure that nature of the land is not changed by anyone.”

61. It is apparent from the above that the High Court had (i) restrained the petitioners from alienating and/or changing the nature of the released

land; (ii) interdicted any construction on the respective sites; and (iii) directed District Administration to ensure that the nature of land is not changed “*by anyone*”. The aforesaid order is clear and unambiguous. In terms of the aforesaid order, there was no question for any authority authorising change in land use for a period of one year from the date when the certified copy of the order dated 20.05.2014 was made available. In other words, at least till 20.05.2015, the injunction issued by the High Court would operate.

62. In the aforesaid circumstances, the contention that the parties could have performed their contract is wholly unsustainable. The arbitral tribunal clearly fell in error in holding that the aforesaid order did not render the performance of the MoU an impossibility. The arbitral tribunal proceeded on the basis that “*the High court did not pass any order of injunction against the state*” (paragraph 17.7 of the impugned award). This is plainly incorrect as the High Court had directed that “*the District Administration shall ensure that nature of the land is not changed by anyone*”.

63. The arbitral tribunal further held that the parties could have pursued their obligation for change in land use and if such order had been passed, they could not have implemented the same by virtue of the injunction. But, since the period of injunction was only for one year, the said order could have been given effect to after the expiry of the period of one year. Undisputedly, the injunction order was operative for one year and there could be no change of land use within the said period. The question of change in land use being implemented thereafter was of no relevance since the MoU was only extended for a period of 12 months, that is, till 11.11.2014. However, the arbitral tribunal observed in paragraph 17.3 of

the impugned award that *"No timeline was laid down for performance of the second part of the MoU, nor was any minimum period fixed therefor."* This finding is also *ex facie* erroneous. It is not only contrary to the express terms of the MoU (clause 8 of the MoU) and the Extension Agreement but is also contrary to the arbitral tribunal's finding in paragraph 13.9 of the impugned award, wherein the arbitral tribunal had expressly held that clause 8 of the MoU provided for timelines for completion of the performance of the MoU by the respondents. The Extension Agreement also clearly records: *"Whereas clause 8 of the said agreement provides that the said agreement shall remain in force between the parties for a period of 30 months from the date of its execution aforementioned (i.e. until 11th November, 2013)"*. The last recital of the Extension Agreement also expressly provides that *"The first party is willing to grant a final extension of 12 months until 11th November, 2014 for the 2nd party to fulfill its obligation"*.

64. In the circumstances, the impugned award cannot be sustained as it is based on assumptions that run contrary to the plain language of the MoU and the Extension Agreement.

65. The arbitral tribunal also concluded that time was not the essence of the MoU. This court finds it difficult to accept the same considering that the MoU had to be performed within a fixed time period of 30 months from the date of execution of the MoU. Clause 8 of the MoU expressly provided that the MoU shall remain in force for a period of 30 months. The Extension Agreement also reiterated the same in the recitals and extended the period of MoU till 11.11.2014. The MoU/Extension Agreement would stand terminated by the efflux of time on expiry of the period as specified. Having stated the above, this court is also mindful that although this court

does not agree with the view that time was not of the essence, the same may not be a ground to set aside the impugned award. But, as indicated earlier, the impugned award is based on other *ex facie* incorrect assumptions/findings and therefore cannot be sustained.

66. The award directing specific performance of the MoU by directing the petitioners to transfer 30% of the subject land to the respondents is plainly unsustainable as the said directions are based on a finding that the respondents had performed the MoU. This finding is in turn based on the assumption that the MoU contemplated statutory lapsing of acquisition of the subject land; this, as discussed above, is not sustainable.

67. The arbitral tribunal has further awarded ₹1,08,03,600/- which is computed at 1/4th of the value of 30% of the subject land and the structure built thereon. The arbitral tribunal has awarded the same as “*nominal damages*” since concededly, the respondents had been unable to establish any loss.

68. The aforesaid damages are clearly unsustainable for several reasons. First, there was no possibility of the respondents performing the second part of the MoU, in view of the injunction granted by the High Court as discussed above and the arbitral tribunal was in error in holding that the second part of the MoU could have been performed notwithstanding the injunction or after the injunction was lifted. Second, the respondents had taken no steps for vacation of the injunction, which would have been necessary if the change in land use was to be permitted within the term of the MoU. Third, the finding that no time was specified for performance of the second part (change in use of the subject land) was *ex facie* incorrect. Fourth, there was no material to establish that the respondents had suffered any loss on account of the petitioners not providing the power of attorney

and/or not entering into a fresh MoU. And, fifth, the award of ₹1,08,03,600/- can hardly be considered as nominal. Although, nominal damages do not connote a trifling amount, however a sum of 25% of the value of the share of subject land claimed by the respondents cannot be considered as nominal.

69. Before concluding, it would be relevant to note that Mr Bhushan had (on behalf of the petitioners) offered to pay all costs and expenditure that may have been incurred by the respondents as may be reasonably assessed. Further they had also offered reasonable compensation for the time spent by the respondents. The petitioners would be bound by the same.

70. For the reasons as indicated above, the petition is allowed and the impugned award is set aside. Pending application also stands disposed of. The parties are left to bear their own costs.

MAY 01, 2017
RK

VIBHU BAKHRU, J