

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.02.2019

Delivered on :06.03.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

O.P.No.697 of 2008

M/s.Macro Marvel Projects Limited
rep. By its Director Mr.M.Ravikumar
GC "Gieneden Place"
No.813, Poonamallee High Road
Kilpauk, Chennai - 600 010

..Petitioner

Vs.

1.M.Arumugam

2.AR.Kumar

3.AR.Thirumurthy (Dead)

4.Mr.Justice R.Balasubramaniam (Retd.,)
No.157/17 Kumarasamy Raja Road
Raja Annamalaipuram, Chennai - 600 028

5.T.Amutha

6.T.Lavanya (Minor)

7.T.Hariprasath (Minor)

8.AR.Gomathi

.. Respondents

(Respondents 5 to 8 are brought on record as LRs
of the deceased third respondent as per order
dated 19.01.2018 in A.No.395 of 2018)

Original Petition filed under Section 34 of Arbitration and
Conciliation Act, 1996 (Act 26 of 1996) to set aside the award dated
22.07.2008 passed by the fourth respondent herein.

For Plaintiff : Mr.M.Rajaraman

For Defendants : Mr.PL.Narayanan

JUDGMENT

This original petition (hereinafter 'OP' for brevity) has been filed under Section 34 of 'The Arbitration and Conciliation Act, 1996' ('A & C Act' for brevity) assailing an award dated 22.07.2008 made by an Arbitral Tribunal constituted by a sole Arbitrator appointed by then Hon'ble Chief Justice of this Court vide order dated 20.11.2007 in O.P.No.159 of 2007 under Section 11 of A & C Act.

2.To be noted, Section 34 of A & C Act, which deals with proceedings for setting aside an arbitral award refers to such a proceeding as an 'application', but such proceedings initiated in this Court are given the nomenclature 'Original Petition' by the Registry in this Court and therefore, I am referring to the instant proceedings under Section 34 of A & C Act as 'OP' for the sake of convenience and clarity.

3.Considering that this is a OP under Section 34 of A & C Act, it will suffice to give a thumbnail sketch of facts, which gives a panoramic overview of the factual matrix. This is done under the caption 'Factual Matrix in a Nutshell'.

4.Factual Matrix in a Nutshell:

4(i) Subject matter of instant OP is vacant agricultural lands admeasuring 4.5 acres in all, which shall hereinafter be referred to as 'said property' for the sake of brevity, convenience and clarity. Said property, is described as two items of properties. Item No.1 ad-measuring 2.66 acres stands in the name of second respondent in instant OP i.e., Mr.AR Kumar. Item No.2 admeasuring 1.84 acres stands in the name of third respondent in instant OP i.e., Mr.AR.Thirumurthy. Details of Item Nos.1 and 2 of the properties as can be culled out from the claim petition is as follows:

'Item No.1 Property belongs to Mr A R Kumar

All the piece and parcel of vacant agricultural lands situated in No.66, Manapakkam Village, Kundrathur Panchayat Union, Sriperumbudur Taluk, Kancheepuram District comprised in the following Survey Nos. measuring 2.66 Acres:-

<u>Sl.No.</u>	<u>Survey No.</u>	<u>Extent (In Acres)</u>
1.	300/1	0.66
2.	300/2	0.90
3.	301	0.08
4.	314	0.64
5.	372/2	0.38

Total **2.66**

situated within the Sub-Registration District of Saidapet and Registration District of Chennai South.

Item No.2 Property belongs to Mr A R Thirumuthy

All the piece and parcel of vacant agricultural lands situated

in No.66, Manapakkam Village, Kundrathur Panchayat Union, Sriperumbudur Taluk, Kancheepuram District comprised in the following Survey Nos. measuring 1.86 Acres:-

<u>Sl.No.</u>	<u>Survey No.</u>	<u>Extent (In Acres)</u>
1.	295	0.46
2.	295/2	0.32
3.	296	0.09
4.	297	0.71
5.	298	0.10
6.	299	0.16
Total		1.84

situated within the Sub-Registration District of Saidapet and Registration District of Chennai South.

4(ii) Third respondent AR.Thirumurthy died pending instant OP and his legal heirs, namely wife, two daughters and mother have been brought on record as Respondents 5 to 8. To be noted, Respondent No.1 Mr.M.Arumugam is father of respondents 2 and 3. Sole Arbitrator, who constituted the Arbitral Tribunal, has been arrayed as fourth respondent.

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4(iii) It is not in dispute that Respondents 2 and 3 entered into an agreement for sale of said property with the petitioner, which is a company registered under the Companies Act in India. Petitioner company goes by the name 'Macro Marvel Projects Limited' ('MMPL' for brevity). Therefore,

the petitioner in the instant OP is a juristic person. Narrative thus far has also set out the array of parties in the instant OP. In other words, narrative thus far has also explained the array of parties in instant OP, i.e., a sole petitioner and eight respondents.

4(iv) It is not in dispute that Respondents 2 and 3 entered into an agreement for sale of said property with the petitioner company i.e., MMPL vide an agreement for sale dated 17.02.2004, which was followed by a supplementary agreement dated 12.05.2004. This agreement for sale dated 17.02.2004 and supplementary agreement dated 12.05.2004 have been marked as Exs.C1 and C2 respectively before the Arbitral Tribunal.

4(v) These two agreements i.e., Exs.C1 and C2 constitute the fulcrum of this lis and therefore, shall hereinafter be referred to as 'said agreement' (collectively) for the sake of convenience and clarity. It is not in dispute that vide said agreement, respondents 2 and 3 agreed that they will obtain permission from 'Chennai Metropolitan Development Authority' ('CMDA' for brevity) for conversion of said property from agricultural zone to primary residential zone, obtain layout approved by the CMDA as per the scheme worked out by MMPL, form roads with trenches on both sides and make individual plots as per the sanctioned plan of CMDA. It was also agreed that respondents 2 and 3 will also subsequently arrange for survey and

measurement of all plots. It was further agreed that total sale consideration will be computed on the basis of such measurements at agreed rates. To be noted, agreed rate initially was Rs.3,85,000/- (Rs.3.85 lakhs) per CMDA approved plot admeasuring 2400 sq.ft and subsequently it was increased to Rs.4,15,000/- (Rs.4.15 lakhs) per CMDA approved plot admeasuring 2400 sq.ft.

4(vi) It is also not in dispute that MMPL agreed to pay Rs.50 lakhs towards adjustable advance.

4(vii) It has also been covenanted in Ex.C1 that out of Rs.50 lakhs, advance of Rs.15 lakhs had already been paid by MMPL on 23.06.2003 and that the remaining 35 lakhs would be paid at a time and mode mutually agreed and that would be when MMPL avails project finance from its bankers.

4(viii) There are several other covenants which are in the nature of usual and regular covenants in agreements of this nature and it may not be necessary to advert to all covenants and recitals in said agreement in great detail owing to the narrow compass on which instant OP (being one under Section 34 of A & C Act) turns.

4(ix) Suffice to say that the dispute resolution clause is an arbitration

clause, the same is Clause 16 in Ex.C1 and the same reads as follows:

'16.Any dispute between the parties to this agreement in regard to the interpretation of this agreement and of any matter arising out of this agreement shall be referred to arbitration under the provisions of the Arbitration Act to arbitrators-one nominated by each party. Any award given in any such arbitration proceedings shall be final and binding on the parties to this agreement. The venue of the arbitration proceedings shall be the City of Chennai only.'

4(x) Post said agreement (in the year 2004) sometime in May 2007, Government of Tamil Nadu decided to set up a Greenfield Airport at Sriperumbadur and expand the then existing Chennai Airport as part of this project. A decision was taken to acquire 1070 acres of land in several villages including Manapakkam. It is not in dispute that said property was also hit by this land acquisition proposal.

4(xi) It is also not in dispute that aforesaid land acquisition proposal translated into acquisition proceedings under Tamil Nadu Acquisition of Land for Industrial Purposes Act, 1997 (Act 10 of 1999). However, MMPL contended that the acquisition proceedings in all probability will not be carried to its logical end as agreed to and Government will drop expansion project. Besides this, MMPL also alleged that Respondents 2 and 3 had not taken any effort in getting approval of layout from CMDA in accordance with the covenants of said agreement which is a precondition for proceedings

further, but insisted for increase in sale consideration. It was also contended by MMPL that they were always ready and willing to perform their obligations under the said agreement, but respondents 2 and 3 are getting evasive.

4(xii) Aforesaid complaint of MMPL was resisted by Respondents 2 and 3 *inter alia* on the grounds that there is impossibility of performance of said agreement owing to acquisition proceedings, that MMPL had not paid the adjustable advance as agreed and that owing to impossibility of performance, MMPL is precluded from claiming specific performance of said agreement.

4(xiii) Having set out the crux and gravamen of arbitrable dispute between the parties suffice to say that fourth respondent, a retired Hon'ble Judge of this Court was appointed as a sole Arbitrator by the then Hon'ble Chief Justice of this Court in a petition under Section 11 of A & C Act, as mentioned supra.

4(xiv) Fourth respondent shall hereinafter be referred to as 'Arbitral Tribunal' for the sake of convenience and clarity. Arbitral Tribunal entered reference, arbitration proceedings were commenced and the same culminated in an arbitral award dated 22.07.2008, by which the Arbitral

Tribunal dismissed the claim of MMPL. This arbitral award dated 22.07.2008 shall hereinafter be referred to as 'impugned arbitral award' for the sake of convenience and clarity.

4(xv) Assailing the impugned arbitral award *inter alia* on the ground that it has dealt with terms not contemplated and not falling within the terms of submission to arbitration and contained decisions on matters beyond the scope of submission to arbitration and that it is vitiated by patent illegality appearing on the face of the impugned arbitral award, instant OP has been filed.

5. Mr.M.Rajaraman, learned counsel on record for the sole petitioner and Mr.PL.Narayanan, learned counsel on record for the contesting respondents were before this Court.

6. The grounds on which the impugned arbitral award was assailed, the rival submissions and discussion on the same shall all be set out infra under the caption 'DISCUSSION AND DISPOSITIVE REASONING'.

7. DISCUSSION AND DISPOSITIVE REASONING

7(i) The grounds on which the impugned arbitral award was assailed by learned counsel for petitioner can be broadly set out as follows:

a) Said agreement is not frustrated by land acquisition

proceedings, the impugned arbitral award proceeds on the basis that said agreement has been frustrated by land acquisition proceedings and this is erroneous.

b) impugned arbitral award has proceeded on the basis that the determinants are variables, whereas a perusal of the said agreement reveals that price has been fixed i.e., a constant.

c) impugned arbitral award has completely misread the very statute under which the land acquisition proceedings were initiated.

d) It was the specific say of learned counsel for petitioner that land acquisition proceedings qua said property was initiated under 'Tamil Nadu Acquisition of Land for Industrial Purposes Act, 1997' (Act 10 of 1999) (hereinafter 'Tamil Nadu Acquisition Act' for brevity) whereas the impugned arbitral award proceeds on the basis that acquisition is under a Central Act i.e., Land Acquisition Act, 1894. Under the Tamil Nadu Acquisition Act (unlike the Central Act) there is a provision in which land automatically vests with the owners on acquisition proceedings being dropped. Therefore, this misreading vitiates the impugned arbitral award.

e) The impugned arbitral award lost sight of the fact

that claim of MMPL does not fit under any of the clauses adumbrated in Sub-section (2) of Section 20 of Specific Relief Act and therefore, the prayer for specific relief ought to have been acceded to.

7(ii) In response to the aforesaid submissions made by learned counsel for petitioner, it was submitted on behalf of contesting respondents that the said contract is, in fact, frustrated by acquisition proceedings as it has resulted in impossibility of performance, that price being fixed is not the sole determinant, that said agreement is a contingent contract and as it makes CMDA approval a condition precedent, which is not within the control of either of the parties, that the impugned arbitral award has not proceeded on the basis that the acquisition is under the Land Acquisition Act, 1984 (Central Act, whereas the acquisition was actually under the Tamil Nadu Act) and therefore the argument that this vitiates the impugned arbitral award and that the claim of MMPL is certainly hit by the various sub-clauses of sub-section (2) of Section 20 of Specific Relief Act.

7(iii) Before I proceed further with testing the impugned arbitral award and the grounds on which the same has been assailed, it is necessary to notice that MMPL as claimant before the Arbitral Tribunal has sought for specific performance of said agreement, but has not sought for alternative prayer. To be noted one limb of claim i.e., for Rs.66 lakhs is alternate prayer and is not towards refund is learned counsel's say. Learned counsel

for petitioner MMPL made it clear that this Rs.66 lakhs pertains to income tax and the same is not pressed owing to the trajectory of the transaction.

7(iv) Besides this, it is to be borne in mind that the instant OP is not an appeal qua impugned arbitral award. It is not a revision either. It is not even a review. On the contrary it is a mere challenge to an award i.e., impugned arbitral award.

7(v) To be noted, challenge to an arbitral award can be only by perambulating within the contours of Section 34 of A & C Act.

7(vi) With regard to the contours of Section 34 of A & C Act and the nature of proceedings under Section 34 of A & C Act, Hon'ble Supreme Court in *Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited* reported in (2009) 17 SCC 796 held that it is a one issue summary procedure. This Fiza Developers principle has been reiterated by Hon'ble Supreme Court in *Emkay Global Financial Services Ltd. v. Girdhar Sondhi* reported in (2018) 9 SCC 49 wherein the Hon'ble Supreme Court held that Fiza Developers principle i.e., that proceedings under Section 34 of A & C Act are summary procedures is a right step in the direction of expeditious disposal of petitions under Section 34 of A & C Act.

7(vii) To put it in a nutshell, there should be no review of the arbitral award on merits and there shall be no re-appreciation of evidence.

7(viii) Be that as it may, with regard to the relief of specific

performance, while examining the challenge to impugned arbitral award in instant OP, it is to be borne in mind that the relief of specific performance is an equitable discretionary relief.

7(ix) In support of this contention that said agreement is not frustrated by land acquisition proceedings, learned counsel for petitioner pressed into service a judgment of a learned single Judge of the Allahabad High Court in ***Nathu Singh Vs. Jagdish Singh*** reported in ***AIR 1992 Allahabad 174*** and submitted that this judgment was subsequently upheld by Hon'ble Supreme Court in a reported judgment in AIR 1992 SC 1604.

7(x) Learned counsel drew my attention to Paragraphs 18 to 20 of the reported judgment of the learned single Judge of the Allahabad High Court and Paragraph 6 of the judgment of the Hon'ble Supreme Court reported in AIR 1992 SC 1604, which confirmed the judgment of the Allahabad High Court.

7(xi) To avoid prolixity and to avoid this order becoming verbose, I refrain from extracting and reproducing all the aforesaid paragraphs. Suffice to say that the principle laid down in Nathu Singh's case is that in cases of land acquisition, owner of the land does not loose all rights in the holding but new rights are created in the land allotted to him in lieu thereof. It has also been held that in cases of acquisition, compensation is payable and therefore, on that basis it was held that the original holding

and persons so holding are not completely divested of all their rights.

7(xii) This Nathu Singh's case is clearly distinguishable on facts, as rightly pointed out by learned counsel for contesting respondents. In Nathu Singh's case there is no covenant or clause to the effect that the original owners of land should obtain approval for conversion of land use i.e., from agricultural use to that of residential use and also should get approval for housing plots as conditions for sale.

7(xiii) In the instant case, owing to the land acquisition proceedings, obtaining such conversion and obtaining such approval for housing plots certainly became an impossibility. When these conditions become an impossibility, said agreement is clearly frustrated. Therefore, Nathu Singh's case does not help the petitioner in the instant case owing to the same being distinguishable on facts. The Arbitral Tribunal has also referred to Gian Chand case [*Gian Chand V. Gopala and others reported in (1995) 2 SCC 528*] wherein the Hon'ble Supreme Court clearly held that a contract in the form of an agreement for sale gets frustrated on issuance of declaration under Section 6 of Land Acquisition Act.

7(xiv) It was also held that question of readiness and willingness of parties in such a case is not of any relevance.

7(xv) Learned counsel for the petitioner submitted that Arbitral Tribunal erred in placing reliance on Gian Chand case law as in the said case, the land acquisition notification preceded the agreement for sale unlike the instant case where the land acquisition proceedings is post said agreement. A perusal of the impugned arbitral award reveals that, learned sole arbitrator has clearly noticed this factual distinction and has come to the conclusion that, this does not alter the position of law. This is articulated in Paragraph 10 of the impugned arbitral award and relevant portion of Paragraph 10 reads as follows:

'The Apex Court in the judgment reported in (1995) 2 SCC 528 Gian Chand Vs. Gopala and Others held that the agreement of sale stands frustrated. It is no doubt true that in that case the Notification preceded the agreement of sale. But however that does not alter the position in law. In other words even if the claimant is to succeed, yet the proposed sale would not be binding on the Government. Therefore, I hold that Ex.C1 stands frustrated on account of the proposed acquisition.'

7(xvi) In my considered opinion, learned Arbitral Tribunal was right in coming to the conclusion that the land acquisition notification being post said agreement does not alter the position of law. Gian Chand principle is correct. In any event, it may not be necessary to delve further in this aspect of the matter as the said argument in instant OP this is clearly a

contingent contract wherein the conditions of obtaining conversion permission (conversion of agricultural use to residential plot use) and approval for residential plots from CMDA was a condition precedent which was not necessarily within the control of either of the parties to the said agreement. In the light of the land acquisition proceedings it is clear as daylight that obtaining such conversion from CMDA much less approval for residential plots became an impossibility and said agreement stood frustrated.

7(xvii) Aforesaid distinction clearly answers the other point raised by learned counsel for petitioner that the price was fixed (initially Rs.3,85,000/- per plot admeasuring 2400 sq.ft and subsequently enhanced to Rs.4,25,000/- per plot admeasuring 2400 sq.ft) is of no consequence as that is not the only determinant. Price being a constant and not a variable is of no consequence as obtaining CMDA approval clause is clearly a variable. It is not only a variable but, it is not within the control of either of parties. With regard to misreading of Acquisition Act, a careful and close perusal of relevant portion of the impugned Arbitral award reveals that there is no misreading as rightly pointed out by learned counsel for contesting respondents. The relevant portion is contained in paragraph 10 of the impugned arbitral award and the same reads as follows :

“10....Let me now examine the impact of Ex.R8 on the enforceability of Ex.C1, dated 17/02/2004. Ex.R8 series

notices are dated 05/12/2007. The arbitral proceedings are shown to have been initiated on 21/12/2006. Ex.R8 series are issued under Section 3(2) of the TamilNadu Act referred to earlier. Under this notice respondents 2 &3 were called upon to show cause against the proposed acquisition of the lands in question. On considering the objections, if any, the Government may acquire the land by publishing a notice in the TamilNadu Government Gazette as provided for under Sec.3(1). Then under Sec.4(1) of the Act, on the publication as referred to earlier, the land concerned vests absolutely with the Government free from all encumbrances. It is not in dispute that the challenge made to the acquisition had failed. Dealing with a case of a transaction arising after the Notification under Sec.4(1) of the Land Acquisition Act and the Declaration under Sec.6 of the same Act, the Apex Court in the judgment reported in (1995)2 SCC 528 Gian Chand vs Gopala and others held that the agreement of sale stands frustrated. It is no doubt true that in that case the Notification preceded the agreement of sale. But however that does not alter the position in law. In other words even if the claimant is to succeed, yet the proposed sale would not be binding on the Government. Therefore I hold that Ex.C1 stands frustrated on account of the proposed acquisition."

(underlining made by Court to supply emphasis and highlight)

7(xviii) Apparently, if there had been para break from the sentence commencing 'Dealing with a case of a transaction', it would not have given scope for even raising this argument of misreading the two land acquisition Acts. Upto that part of the extracted portion, i.e., that part before commencement of the sentence 'Dealing with a case', the impugned

arbitral award deals with land acquisition proceedings in the instant case. Thereafter, starting from the sentence commencing with 'Dealing with a case of a transaction', impugned arbitral award moves on to Gian Chand case, which has been alluded to supra. There is no dispute or disagreement that Gian Chand case is under the Central Act, unlike the instant case which is under the Tamil Nadu Acquisition Act. Therefore, I have no hesitation in coming to a conclusion that the impugned arbitral award has not misread the relevant acquisition Act, under which land acquisition proceedings were initiated in the instant case.

8. The discussion and dispositive reasoning supra explains and answers the plea that Gian Chand principle has been wrongly applied though the acquisition proceedings are post contract in the instant case.

9. In support of his submission, learned counsel for respondent pressed into service *Urmala Devi case [Urmila Devi and Others Vs. Deity Mandir Shree Chamunda Devi through Temple Commissioner and Others reported in (2018) 2 MLJ 360 (SC)]* for the principle that Section 21 of the Specific Relief Act provides for compensation in lieu of specific performance when there is impossibility of performance of contract. K.Narendra's case *[K.Narendra Vs. Rivera Apartments (P) Ltd., reported in (1999) 5 SCC 77]* was also pressed into service for the principle that a plea of specific performance is discretionary and the Court is not bound to grant such a relief merely because it is lawful to do so.

10. There can be no dispute or disagreement with regard to aforesaid propositions. In the light of the considered opinion/view of this Court that said agreement has been frustrated and the land acquisition proceedings has resulted in impossibility of performance qua the said agreement, it is not necessary to delve further into these aspects of the matter.

11. In the light of said contract being frustrated and in the light of impossibility of performance qua said contract, sub-section (2) of Section 20 is attracted. Therefore, I have no hesitation in coming to the conclusion that judicial intervention is not warranted qua impugned arbitral award.

12. While arriving at the aforesaid conclusion, it is to be noted that in the earlier part of dispositive reasoning, I have noticed that this is neither an appeal nor a revision. I have held that it is a mere challenge to the impugned arbitral award, that too, within the contours of Section 34 of A & C Act. I have also referred to Fiza developers principle. All these lead to a salutary principle and sublime philosophy underlying A & C Act and Section 34 of A & C Act. In my considered view, 'minimum judicial intervention' is that salutary principle and sublime philosophy. It has also been borne in mind in coming to the conclusion that the impugned arbitral award is not patently illegal. It has not dealt with disputes not contemplated by or falling within the terms of submission to arbitration and

it does not contain the decision on matters beyond the scope of submission to arbitration as contended. It is certainly not an award which shakes the conscious of this Court. This is one of the parameters for judicial intervention under Section 34. As already noticed, review on merits of the dispute and re-appreciation of evidence are impermissible.

13. BEFORE PARTING WITH INSTANT OP

While adverting to Urmila Devi's case and K.Narendra's case, learned counsel for respondent submitted that the contesting respondents should demonstrate not only illegality but also morality in defending an arbitral award. In such a spirit, learned counsel submitted that Rs.15 lakhs paid as adjustable advance way back in 2003 has certainly multiplied manifold and offered to pay one crore. However, on instructions, learned counsel for petitioner submitted that this is not acceptable for two reasons. One reason, according to learned counsel for petitioner, is that it is incorrect to contend that only Rs.15 lakhs was paid as adjustable advance. According to learned counsel, entire Rs.50 lakhs was paid as it is not a stand alone agreement in isolation, but said agreement has to be read along with other agreements of sale between the parties which have been marked as Exs.C3 and C4 and in other words, there is a factual dispute on the quantum of adjustable advance paid by MMPL. Refund of advance is unacceptable and quietus, if any, can be given only by sharing said property in sum agreed

proportion is learned counsel's say on instructions. To be noted, it is not in dispute that this matter was sent to Mediation and it failed. Though all these will be clearly outside the scope of a OP under Section 34 of A & C Act, as learned counsel for respondent made a fervent plea that the impugned arbitral award is being defended by him not only on legality, but also on morality, I found it appropriate to record this as part of the trajectory of the hearing. Thereafter, this has been set out under the caption '**BEFORE PARTING WITH INSTANT OP**'.

14. DECISION

14(i) In the light of narrative supra, the instant petition i.e., OP fails and the same is dismissed.

14(ii) Owing to the nature of the matter and the trajectory of the hearing, this Court deems it appropriate to leave the parties to bear their respective costs.

06. 03 .2019

Speaking order

Index: Yes

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M.SUNDAR.J.,

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