M/S Nitesh Indiranagar Retail vs Mr. George Thangiah on 23 February, 2022

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Com.A.S 134 of 2018

IN THE COURT OF LXXXVII ADDL.CITY CIVIL &
SESSIONS JUDGE, (EXCLUSIVE DEDICATED
COMMERCIAL COURT)
AT BENGALURU (CCH.88)

THIS THE 23rd DAY OF FEBRUARY 2022

PRESENT:
SRI.CHANDRASHEKHAR U., B.Sc., LL.M.,
LXXXVII ADDL.CITY CIVIL & SESSIONS JUDGE,
BENGALURU.

Com.A.S.No.134/2018

PETITIONERS: 1. M/s Nitesh Indiranagar Retail
Private Limited,
Nitesh Time square, 7th floor,
No.8, M.G. Road,
Bengaluru - 560 001
Represented by its General Manager -
Litigation, Mr. K.B. Swamy,
S/o K. Veerabrahmam
Aged about 56 years

(Reptd by Sri. VH - Sr. Counsel)

2. M/s Nitesh Estates Limited,
Nitesh Time square,
7th floor, No.8, M.G. Road,
Bengaluru - 560 001
Represented by its General Manager -
Litigation, Mr. K.B. Swamy,
S/o K. Veerabrahmam
Aged about 56 years

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AND

RESPONDENTS: 1. Mr. George Thangiah,
Aged about 85 years,
Son of late Mr. Mark Thangaiah
Residing at No.21,
George Thangiah Complex East 6,
80 feet Road, Indiranagar,

Bengaluru 560 075

Also at:
No.6, Commissariat Road,
Bengaluru 560 025

(Reptd by Sri MK Sr. Counsel)

2. Hon'ble Mr. Justice
S.Venkataraman,
Retired, High Court of Karnataka,
No. 161, 3rd Stage, 2nd Block
West of Chord Road,
Basaveshwaranagar,
Bengaluru 560 079.

(Reptd by Sri. MS Sr. Counsel)

3. Hon'ble Mr. Justice G. Patri
Basavana Goud,
Retired, High Court of Karnataka,
No.58, 'Ganga', ISRO Road,
RMV II Stage, Sanjaynagar,
Bengaluru 560 094

4. Hon'ble Mr. Justice Jagannathan,
Retired, High Court of Karnataka,
No.221, 7th Main, 2nd Cross,
Judicial Layout, Thalaghattapura
Kanakapura Road,
Bengaluru 560 062

Date of Institution of the suit	23.06.2018
Nature of the suit (suit on pronote, suit for declaration & Possession, Suit for injunction etc.)	Arbitration Suit
Date of commencement of recording of evidence	-
Date on which judgment was pronounced	23.02.2022

Total Duration	Year/s	Month/s	Day/s
	03	08	00

(CHANDRASHEKHAR U),
LXXXVII Addl.City Civil & Sessions Judge,
(Exclusive dedicated Commercial Court)
Bengaluru.
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Com.A.S 134 of 2018

JUDGMENT

The applicants have filed the above petition under Section 34 of the Arbitration & Conciliation Act, 1996, (hereinafter called as 'the Act') for setting aside the Arbitral Award, dated 25.04.2018, passed by the Arbitral Tribunal except to the extent that there is a finding that the applicants have not repudiated the Joint Development Agreement, (as amended by the supplementary Joint Development Agreement) and to allow the claim statement filed by the applicants in dispute No.1 and for setting aside other reliefs.

2. The brief facts of the case of the appellants are as hereunder:-

> The first applicant is a private limited company incorporated under the provisions of Companies Act, 1956 and is the developer of the schedule property and the second applicant is a public limited company, registered under the Companies Act, 1956, and first applicant is the Com.A.S 134 of 2018 wholly owned subsidiary of second applicant and reputed builders and developers in Bengaluru. The respondent is the owner of the property, bearing Municipal Corporation No. 21, PID No. 82-82-21, situated at 80 feet Road, Indiranagar, Bengaluru and measuring 2,20,497 Sq.ft, which is more fully described in the schedule.

3. With an intention to develop the schedule property into a shopping mall and operating and maintaining the same, in a manner that would financially benefit to both the applicants and respondent, the applicant and respondent executed Memorandum of Understanding, dated 19.10.2007, supplementary Memorandum of Understanding, dated 26.10.2007, second supplementary Memorandum of Understanding, dated 29.3.2010, Joint Development Agreement, dated 11.2.2011 and supplementary Joint Development Agreement, dated 11.2.2014. It is further stated that one of the fundamental features of the Memorandum of Understanding, as is the case, with such projects in general, was the permissibility Com.A.S 134 of 2018 of the applicant No.1 as the developer of the schedule property to raise funds against its share of built up area and the leaseable built up area of the schedule property required for the project. Clause No. 12 (I) of Memorandum of Understanding stipulates that after signing of the Joint Development Agreement, applicant No.1 would be entitled to create encumbrance on its share of the schedule property in order to raise finance. The Memorandum of Understanding provides for what is built up area and

right of the parties and they were modified by way of supplementary Memorandum of Understanding. However, the same underwent a drastic change to the complete prejudice of the applicants under coercion and duress exerted by the respondent. The term of the scheme of the Memorandum of Understanding, the parties had to to first comply with various conditions and precedents set out under clause 2 of the Memorandum of Understanding. The main condition was that the respondent had to obtain Khata certificate in respect of schedule property in his Com.A.S 134 of 2018 name as stipulated in clause No.2 (a) of Memorandum of Understanding. As per Clause No.2(a) of Memorandum of Understanding, the respondent had pending legal disputes with the BBMP in respect of betterment charges levied and also the quantum of the property taxes levied. Due to on going disputes, the BBMP had not issued Khata certificate in the name of respondent. Therefore, it was undertaken by the respondent under clause No.2 (a) of Memorandum of Understanding that he would secure the disposal/ settlement of the legal disputes with BBMP and obtain Khata certificate in his name. It was also agreed upon by the parties that if the respondent failed to comply with the above, the applicant No.1 had the option to pay the betterment charges/property taxes to the BBMP and recover the same from the amounts payable to the respondent under the Memorandum of Understanding. After completion of the obligation as per clause No.2(a) parties were required to execute proposed Joint Development Agreement as per clause No.25(a) of Com.A.S 134 of 2018 Memorandum of Understanding. It was only upon such execution of proposed Joint Development Agreement, that the respondent was required to issue a licence to the applicant No.2 under clause No.14 of Memorandum of Understanding. Without such licence, the applicant No.1 was dis-entitled to enter in the schedule property and start the construction activities. Escrow agreement dated, 3.12.2007, appointing HDFC Ltd., as Escrow Agent, and the applicant No.1 deposited a sum of Rs.20,50,00,000/- with the said Escrow Agent. The escrow agreement was valid for a period of 3 months. Before the expiry of the first Escrow Agreement, the parties on 2.03.2008, renewed the first escrow agreement by entering into another Escrow agreement, for a further period of 30 days.

4. In the meanwhile, the applicant conducted the topographic survey of the schedule property and collected all the preliminary data required for design and appointed as architects for the projects Callison from Seattle USA and Com.A.S 134 of 2018 RK Associates, New Delhi. In view of the traffic management and there was some adverse affect on the proposed project due to interfering with utilisation of the frontage in design terms, etc. On 4.3.2008, the applicants informed the same to the respondents/applicants and proposed the acquisition of the parcel of land and also proposed to resolve the commercial terms relating to the mixed use of development in the schedule property before being able to finalise the proposed Joint Development Agreement. Since, there was no representation from the respondent by cryptic communication, dated 27.3.2008, the respondent refused to have an extended timeline for the execution of proposed Joint Development Agreement. In the said communication, the respondent chose to completely ignore the practical difficulties pointed out by the applicants based on the Architect's report and remained absolutely silent on the same. Since, the applicant constrained to submit to the whims of the respondent and agreed to deposit further Rs.4,50,00,000/-

Com.A.S 134 of 2018 before the proposed Joint Development Agreement engaging consultants, obtaining approvals, identification of financial investors. However, by his letter dated 15.5.2008, the

respondent highhandedly informed the applicants that he was not inclined to react to the contents of the letter, dated 14.5.2008 from the applicants and threatened the applicants that if within 48 hours, an escrow agreement is not extended and if the additional amount of Rs.4,50,00,000/- was not paid, he would treat the MoU to have come to an end. Because of high handed arm-twisting tactics employed by the respondent, the applicants immediately issued two cheques for Rs.4,50,00,000/- and informing the respondent that extension of escrow agreement for the tune of Rs.20,50,000/- could be processed by the Bank, only if the Memorandum of Understanding is extended. Hence, the applicants once again requested for the extension of Memorandum of Understanding till 30.8.2008. However, respondent refused to extend Memorandum of Understanding inspite of Com.A.S 134 of 2018 extension of escrow agreement. The applicants again and again issued communication to the respondent to extend the Memorandum of Understanding, but, in vain, but, the respondent issued a cryptic two line reply communication stating that the proposal was not accepted. Further, he appointed his wife Ms. Chitra Poornima to act as his agent. The applicants soon realised that the above obstinacy of respondent was aimed to extract more amounts from the applicants, who had already invested heavily into the proposed project and could therefore, not afford the same being aborted. Thereafter, the applicant paid Rs.1,25,00,000/- towards compensation for the delay and offered corporate guarantee by second applicant. The delay was due to respondent not by the applicants. Therefore, the execution of proposed Joint Development Agreement was extended till 31.8.2008. On 31.7.2008, the applicants handed over a cheque for a sum of Rs.24,00,00,000/- to the respondent instead of the extension of the escrow arrangement for a sum of Rs.

Com.A.S 134 of 2018 20,50,00,000/-. However, issues which were required to be resolved before the proposed Joint Development Agreement was executed remained unresolved. Further, the respondent had also completely ignored his responsibility to fulfill the condition precedent set out under clause No.2 (a) of the Memorandum of Understanding.

5. It is further stated that though, the parties were in continuous negotiations by holding personal meetings on the way forward as is evidenced by the communication, dated 31.1.2009 from the applicants to the respondent, thereby, referring to the discussions between the parties and attaching the draft Joint Development Agreement, to the surprise of the applicants, the respondent started creating some documentation to create an impression that the delay in the execution of the Joint Development Agreement was on account of the applicants and that the respondent was not very keen on taking forward the project. The respondent, then issued a letter, dated Com.A.S 134 of 2018 27.1.2009 to the applicant No.1 stating that the applicants had defaulted and giving notice to rectify the purported breach within 30 days. The applicants were shocked to see the conduct of the respondent when it was placed on record that the respondent had failed to comply with the Memorandum of Understanding. The respondent issued a response, dated 24.2.2009 alleging that the Memorandum of Understanding did not subsist, which is contrary to the fact that parties were under continuous negotiations as stated in the communication, dated 24.2.2009. The respondent could not have appropriated the amounts paid by the applicants, inspite of communications made by the applicants, on many occasions as per Ex.C33 series. Though, the necessary communications were exchanged, when, the applicant No.2 became a public company by listing its share on the Bombay Stock Exchange and the National Stock Exchange, the respondent in order to harass the

applicants published about Memorandum of Understanding and other things, so as to project that Com.A.S 134 of 2018 applicants are not trustworthy and thereby tried to tarnish the image. Though, the respondent obtained Khata in respect of property, there was some other problems with another land belonging to third party, which was a hindrance for preparing a perfect plan for the construction of the mall. The amount paid to the respondent to the tune of Rs.35.5 crores, was treated to be a non-refundable on account of the coercion and duress by the respondent. The applicants were made to agree for additional deposit of Rs.79 crores under clause No.16 of the Joint Development Agreement and respondent made to part with the properties of the applicant situated in Ernakulam district and the applicant made its best efforts to engage contract with L&T for civil works contract, providing alternate office space to respondent, engaged Jones Lang Lasalle (JLL) as the international property consultants and potential financier identified so as to proceed with the work. Further, a piece of the land was also regularised by the applicants and ground breaking ceremony was also held on the birth day Com.A.S 134 of 2018 of the respondent, besides agreement entered into with various consultants as stated in the page No.20 of the petition. The applicants were also made available portable cabins and obtained NOC from BESCOM, KPTCL, Airport authority, Karnataka State Pollution Control Board, Fire Force, Ministry of Environment and Forest, Bangalore Water Supply and Sewerage Board and BSNL. Further, development plan was also obtained from BDA and licence plan from BBMP by spending huge amount. Inspite of getting everything cleared and inspite of getting loan facility from the Bank and also engaging international standard consultant, contractors, the respondent did not adhere to the terms of the contract and unilaterally terminated the Joint Development Agreement, which resulted in filing of the Arbitration Suit. The applicants have spent huge amount, besides amount paid to the respondent, but same was not taken note of by the Arbitrator. Learned Arbitrator without going through the terms of the contract and evidence and documents placed passed an impugned Com.A.S 134 of 2018 Award. Since, the respondent was not in good state of account, he being represented by his wife, who had hidden agenda to gain unlawfully and they were having different yardstick towards the applicant somehow to knock of the money.

6. The applicants have sought for setting aside the award on the grounds that the award, dated 25.4.2018, passed by the Arbitral Tribunal is erroneous in rejecting the application filed under Section 27 of the Act to cross- examine the respondent, which resulted in grave miscarriage of justice and it has rendered the impugned award opposed to public policy, in contravention of fundamental policy of Indian law, opposed to basic notions of justice and patently illegal, apart from being contrary to evidence on record. The order, dated 11.12.2016 passed by the Arbitral Tribunal under Section 17 of the Act, though got merged with main order was erroneous, self- contradictory and opposed to public policy. The Arbitral Com.A.S 134 of 2018 Tribunal having held that the alleged theory of repudiation set up by the respondent is not true, ought to have directed specific performance. The Arbitral Tribunal failed to appreciate that nowhere in the communication, dated 19.1.2015 (Ex.C62), which was the letter under which, the respondent alleged that applicants had repudiated the contract. The respondent had alleged that applicant did not have funds of their own to build the first three basement floors. Infact, that was not even the case of the respondent in any of the pleadings filed before the Tribunal. The applicant clearly pointed out that it was never a requirement for the applicant to specifically prove that it had the necessary funds to commence the construction and complete three floors. It was at all points of time, very well known to the parties

that the project loan covered only half of the project cost and the remaining amounts in any case were to be infused by the applicant.

7. The Arbitral Tribunal choose to completely ignore even the fact pointed out by the applicants about its Com.A.S 134 of 2018 capacity to go on with construction, wrongly proceeded on the premises that the applicants did not specifically show that they were ready with the funds for the construction of the first three basement floors and that such deficiency amounted to lack of readiness and or willingness. The Arbitral Tribunal erroneously chose to ride roughshod over the facts of the matter which were amply evident on the face of the matter. On the one hand, the Arbitral Tribunal chose to ignore the vast majority of the fact placed before it. On the other hand, while, selectively considering aspect alone, the Arbitral Tribunal once again chose to ignore the crucial aspects. The Arbitral Tribunal has failed to make serious or in-depth factual analysis, on the material placed before it in the light of Joint Development Agreement and supplementary Joint Development Agreement. The approach of the Arbitral Tribunal is unwarranted and which resulted in gross miscarriage of justice. The Arbitral Tribunal adopted the same narrow and selective approach in respect of the communication on record pointed out by Com.A.S 134 of 2018 the applicants, so as to establish readiness and willingness. Out of all the communications, the Arbitral Tribunal selected some and rendered its opinion. The respondent inspite of the applicants providing necessary contract with the L&T and other contentions raised by him has not considered the same and unilaterally terminated the Joint Development Agreement, which is against the terms of the contract. Inspite of furnishing letter from the Bank regarding financial assistance, the same was not considered by the Arbitral Tribunal. The Arbitral Tribunal has not considered the documents and various communications made by the applicants with respondent regarding its intention to proceed with the work obtaining of permission and consent for lending loan by the Bank, etc. The Hon'ble Tribunal failed to notice that the applicants have also independently established their continued efforts and commitments by drawing attention of the Hon'ble Tribunal to the agreement dated 30.1.5.2015 (Ex C83) entered into with Goldman Sachs and also Com.A.S 134 of 2018 sanction letters of Yes Bank, Ex. C84, C85, C87 and C88. The Tribunal has failed to notice the said commitment was also proved by depositions of the claimant's witnesses, particularly CWs 1 and 2. The Arbitral Tribunal also erroneously held that since, the applicants have sold a property, they had earlier owned in Kochi and on which a second charge was required to be created by the applicants in favour of the respondent in terms of the Joint Development Agreement, the applicants were not ready and willing to perform the terms of the Joint Development Agreement. The Arbitral Tribunal has erroneously chose not to refer to this argument or decide on the validity or otherwise of this interpretation. The Arbitral Tribunal has failed to appreciate that the restraints on the grant of specific performance under Section 14 of the Specific Relief Act. It has failed to consider the decision of the Apex Court reported in 1979 (4) SCC, 393, AIR 1964 SC 978, ILR 1992, Kar 717, AIR 1996 Orissa 89, AIR 2014 Calcutta 92 (FB), 2005 SCC OnLine Kar 342 (DB), Com.A.S 134 of 2018 MANU/TN/2768/2017 and MANU/MH/1227/2012 (DB) and other decisions. The Arbitral Tribunal failed to notice that a bare perusal of the provisions of Section 14(3) (c) of the Specific Relief Act, 1963 itself showed that a building and works contract is specifically enforceable, inter-alia, if the terms of the contracts are sufficiently precise to enable the Court to determine the exact nature of the building or work. Further, in a contract relating to construction, the time is not essence for contract. The Arbitral Tribunal failed to notice that under Clause 26 of the Joint Development

Agreement, both parties had agreed that they had the right to seek specific performance of the terms and conditions of the Joint Development Agreement. The Arbitral Tribunal has erroneously concluded that the instant Joint Development Agreement was not amenable to the relief of specific performance, despite specifically finding that this was not a case, which could be compensated by payment of damages. The Arbitral Tribunal failed to appreciate that in anticipation of future Com.A.S 134 of 2018 breaches, for which, future remedies will have to be availed, the present relief cannot be denied. The respondent could terminate the Joint Development Agreement only in December 2015 for non-fulfillment of the set of 8 obligations under clause No. 6.1.19 of the supplementary Joint Development Agreement. The observation that the contract stood terminated by repudiation committed by the applicants is incorrect. There has not been any termination of the contract. The Tribunal had failed to notice that the applicants had paid Rs.105.5 crores, which has been kept in Fixed Deposit in Bank by the respondent and interest earned was received by the respondent. The respondent must have earned more than Rs.200 crores, out of interest for the last so many years. The impugned award also suffers from inherent contradictions, since on the one hand, it concluded that there was no repudiation of contract by the applicants and on the other hand, it awarded damages to the respondent, which is against the terms of the contract. The award of damages without any Com.A.S 134 of 2018 material and evidence. The refusal of the Arbitral Tribunal drawing adverse inference for non-response of the respondent is incorrect and opposed to public policy. The Tribunal has committed fundamental error in appreciating that the applicants were not seeking to enforce any oral contract contrary to and in replacement of Joint Development Agreement, was a fatal error which is not the case of the applicants. The Tribunal has failed to consider clause No.35 of the Joint Development Agreement and observation is in conflict with most basic notions of justices and being vitiated by patent illegality perpetrated on the face of it. The impugned award is surrounded with perversity inconsistent findings and unsustainable in law and thus liable to be set aside as per well-established proof of law placed before it. Accordingly, it has prayed for setting aside the Arbitral Award by allowing the petition.

8. The first respondent has filed objection statement stating that application is not maintainable either in law or on facts and is liable to be dismissed in limine. The Com.A.S 134 of 2018 jurisdiction of the Court to set aside the award is limited to the Court set out in Section 34 of the Arbitration Act. No grounds on which, the Court may interfere with an Arbitral Award have been made out by the applicant in the instant Arbitration Suit and the grounds urged are beyond the parameters of Section 34 of the Act. As is evident from the application, the applicants have completely failed to demonstrate that the Arbitral Tribunal has not acted in a bonafide, fair, reasonable and objective manner and that its decision is actuated by any extraneous consideration. Therefore, the instant application is without merits and ought to be dismissed.

9. It is further stated that there is no scope for reviewing the factual and legal issues arising out of the Arbitral Award in an application under Section 34 of the Act. This Court does not sit in appeal and cannot re- appreciate the evidence. The Arbitral Tribunal, after considering the material on record and the pleadings of the parties, has passed a well-reasoned award against the Com.A.S 134 of 2018 applicants. It cannot be stated that the Award stands vitiated by non-receipt of material or non-consideration of relevant aspects of the matter, merely because on the same view, the Court could arrive at a different conclusion than the one arrived at by the Arbitral Tribunal. No grounds

are made out, much less one mentioned under Section 34 of the Act to set aside. The first respondent by referring to clause No.10.10, 10.11. 10.12, 10.14, 10.22, 10.35, 10.30, 10.33 of the Award has stated that the controversy between the parties have been properly adjudicated by the Tribunal and there is no scope.

10. It is further stated that, very perusal of the Joint Development Agreement and supplementary Joint Development Agreement, it is clear that the applicants are incapable of performing their part of duty as rightly observed by the Arbitral Tribunal and there is no scope for interference. Further, it is specifically held by the Arbitral Tribunal about financial capacity of the applicants, to Com.A.S 134 of 2018 perform their part of contract and Tribunal had completely come to a conclusion and rejected the claim of the applicants herein. The applicants have given up their specious plea regarding the alleged oral understanding confirming, occupant mortgage and have thus given up the very basis on which they had hoped to put up construction of the mall. The Arbitral Tribunal has passed by considering that the applicants had no financial capacity and rightly rejected the claim and restricted the same. Further, on perusal of the order sheet, it is evident that the applicants do not have the requisite plan sanction and statutory approvals to put up construction of the mall and the same have lapsed long going, the applicants do not have capacity to put up construction of the mall and have to this date, not been able to secure a loan from the Project lenders in conformity with the terms of the Joint Development Agreement and supplementary Joint Development Agreement, by releasing the charge in favour of the project lenders, in respect of the Kochi property and Com.A.S 134 of 2018 subsequently, disposing it off, the applicants have disabled themselves from performing their obligation, in terms of clause No.6.1.4 of the supplementary Joint Development Agreement. The applicant had agreed to achieve the total permissible built up area of 7,71,833 Sq.ft by procuring transferable development right. The applicants have even, till this date, not procured the required TDRs and the sanction obtained by the applicants is not for the total permissible built up area. The applicants were never ready and willing to perform their obligations under the Joint Development Agreement and the supplementary Joint Development Agreement. Therefore, there is no question of interference by this Court. Further, the first respondent has denied para Nos. 1 to 5, 9, 39 to 46, 51, 52, 54 and contended that para Nos. 55, 66 are not helpful to the applicants and further denied about para Nos. 63, 66, 67 and contended that para Nos. 68 and 69 are of no availed to the applicants. Further, he has denied para Nos.17 and contended that para Nos. 71 to 74 are misleading. Further, Com.A.S 134 of 2018 he has denied para Nos. 75, 77 to 80 and contended that para No.81 is matter of record. He has further, denied about para Nos.85, 88, 89 to 91, 95, 98, 104, 107, 108, 113 to 124, 129, 132, 133 to 136 and contended that para No. 137 is misleading. He has further denied para No. 138 to 153 and admitted some of the paras, regarding the communication documents produced before learned Arbitrator, the decision taken by learned Arbitrator, etc. He has further denied para Nos. 154 to 166 and contended that para No. 168 (a) to (e) are misleading. He has denied para Nos. 168, 169, 171 to 183, 185 to 202. He has further, contended that Arbitral Tribunal has elaborately considered every aspects by giving fullest opportunity and there is no scope for interference. Some of the paras, he has stated that it is a matter of record and requires any denial. Accordingly, he has prayed for dismissal of the petition filed by the applicants.

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11. After the death of defendant No.1 his legal heirs were brought on record and they have filed similar objection statement to the main petition.

12. The applicants have filed IA V under Order 41 Rule 27 of CPC to receive additional documents in support of their petition under Section 34 of the Act, contending that the documents produced are the copy of the complaint lodged by one Manjunath, advocate for cancellation of Khata certificate issued in favour of George Thangaiah in respect of schedule property and another complaint, dated 12.9.2020 before the Special Commissioner, BBMP, copy of letter, dated 11.9.2021 issued by the Thasildar East Taluk, Bengaluru to conduct spot inspection to report the alleged encroachment of Government land by the legal heirs of George Thangaiah, copy of complaint, dated 22.7.2021 by Sri. A. Shivakumar, advocate, regarding unlawful encroachment of public road by legal heirs of George Thangaiah and some more documents as listed therein.

Com.A.S 134 of 2018 13 The General Manager, Legal, has sworn to an affidavit in support of IA V, wherein, he has stated that the applicants have filed the above arbitration suit challenging the arbitral award, dated 25.4.2018, rejecting the claim for specific performance and partly allowing the refund of the amount, by partly allowing the counter claim. In the cross- examination of CW2, Nitesh Setty, the Managing Director of applicants has specifically stated on oath that due to various land related problems i.e.., legal hurdles in Khata transfer, land encroachment problem etc., project of the applicant got delayed and the tribunal without appreciating the same, disallowed the claim of specific performance. During the pendency of the arbitration suit, several proceedings have been initiated by the authority against the children and Ms. Chitra Poornima, the wife of the respondent herein in respect of land in question and so many complaints have been filed before the Government authority and unless and until, those legal hurdles were settled, one cannot expect to complete the project and the Com.A.S 134 of 2018 Hon'ble Arbitral Tribunal has not considered the same. Further, the proceedings have been initiated before the BDA, Special Court for Land Grabbing, Bengaluru and the filing of Writ Petition on the file of High Court of Karnataka would go to show that there was some legal hurdles regarding encroachment of Government Karab land by the respondent and proceedings have been initiated by the Special Thasildar. So, the documents sought to be produced now, would throw light on those aspects and they are necessary to prove the case of the applicants and if the documents are not received, they will be put to loss and hardship. Those documents should not be produced inspite of due diligence and if they are not allowed, they will be put to loss and hardship.

14. The defendants 1 (a) and (b) have filed objection, stating that the application is not maintainable and same is liable to be dismissed. Since, the petition is filed under Section 34 for setting aside the award, the additional documents cannot be received for the reason that Civil Com.A.S 134 of 2018 Procedure Code 1908 deals with making provisions for regular Civil Suits and appeals that arise out of the same. There is no automatic or wholesale import of all the provisions of CPC to proceed under Section 34 and therefore, Order 41 Rule 27 has no application. Since, the petition under Section 34 is not an appeal, there is no scope for receiving of additional evidence and since, proceedings under Section 34 is summary in nature, no documents can be received as per Section 34 (2) of the Arbitration & Conciliation Act, as amended by Arbitration & Conciliation Act, 2019. Since, documents are beyond the scope of the enquiry, the same cannot be received, that too when the case

was posted for arguments. Without prejudice, it is contended that the documents sought to be produced are of recent origin and did not even exist at the time when the arbitration proceedings were pending and therefore, they cannot throw light on the disputed aspect. Since, there was no dispute about the land related problem, etc., it was within the knowledge of the party and issue Com.A.S 134 of 2018 regarding ready and willingness to perform the contract, and the capacity of the applicants to raise project finance and nothing else. When the applicants were able to obtain No Objection Certificates from various departments, there is no question of production of these documents to show further legal hurdles. Further, the documents sought to be produced by the applicants relating to the proceedings that have been initiated at the instigation of the applicants themselves with an intention to arm twist the legal representative of the deceased defendant. Further, in those proceedings the applicants are not the parties and therefore, there is no question of receiving the same. The genuineness, legality and veracity of additional documents cannot be gone into by this Court under Section 34. In order to receive the original documents, the Court must have power of Appellate Court after appreciating the same having original jurisdiction and since, the procedure adopted is summary procedure and therefore, the provisions of Section 107 (d), 107(2) of CPC cannot be made Com.A.S 134 of 2018 applicable. Since, the scope of Section 34 is limited the documents cannot be received, at this stage. Accordingly, they have prayed for dismissal of the IA V.

15. Heard learned counsel for the appellant and respondent.

16. Now, the points that arise for my consideration are:-

> 1. Whether the applicants prove that the award dated 25.4.2018 passed under dispute No.1/2016 is against the terms of the contract, the evidence placed before the Tribunal and the decisions cited by the applicants before the Arbitral Tribunal and as such it is opposed to public policy and patent illegality and as such it is liable to be set aside?
>
> 2. Whether the applicants have made out grounds to receive the documents filed under IA No V under Order 41 Rule 27?
>
> 3. What Order?

17. My findings on the above Points are as under:

> Point No.1 :- In the Negative.
>
> Point No.2 :- In the Negative.
>
> Com.A.S 134 of 2018 Point No.3 :- As per the final Order for the following reasons.
>
> REASONS

18. POINT Nos.1 & 2: Learned senior counsel for the applicants would argue that the defendant No.1 died, accordingly, his legal heirs were brought on record and they have stepped into the shoes of defendant No.1 and therefore, they are answerable to the claim made by the applicants as they have succeeded to the properties left out by the deceased defendant No.1. After submitting the same, he took the Court to Joint Development Agreement produced at ink page No. 365, it is dated 11 th February 2011 entered into between George Thangaiah and the applicants and at ink page No. 371, there is a clause No.4, which deals with representation and warranties of the owner, who is none other than the deceased defendant. The said clause reads that (i) owner is the sole and absolute owner of the schedule property with inhibited rights of Com.A.S 134 of 2018 alienation and development of the schedule property in the manner contemplated herein:

> iii) the owner has not mortgaged /hypothecated his rights in schedule property or done any acts, deeds or things, which had or likely to contravene the terms and conditions of this agreement.
>
> iv) no other person has any right, title, interest, or claims over the schedule property, except the owner.

However, later it has come to know that a portion of Government land has been encroached by the owner and therefore, there was some difficulty in getting Khata and the defendant has not disclosed the said aspect to the applicants at the time of either entering into Memorandum of Understanding or Joint Development Agreement. When they applied for change of single Khata, they came to know about encroachment made by the defendant in the Government land, it was a hurdle to get the work done on time. Thereafter, he took the Court to ink page No. 405, which deals with non-refundable deposit and clause Com.A.S 134 of 2018 No.16(i) provides that the developers (applicants) has paid a sum of Rs.35,50,00,000/- to the owner under the Memorandum of Understanding and has acknowledged that the said sum is non-refundable in any circumstances whatsoever by the owner. Apart from that amount, the developer is now agreed to pay to the owner a sum of Rs.79 crores as refundable deposit. The non-refundable deposit shall be paid by the developer to the owner in the following manner. It is stated further in sub para No.(a) that a sum of Rs.50,00,000/- shall be paid simultaneously at the time of execution of the Joint Development Agreement and the same is paid under Bank cheque on 9.2.2011. A sum of Rs.19 crores was agreed to be paid on or before 1 st February 2012 and failing which the owner is entitled to invoke Bank Guarantee and further a sum of Rs.10 crores was agreed to be paid before expiry of first two months of execution development agreement. So, the main contention of the applicants is that, he has paid huge amount to the defendant and first amount which was paid to the tune of Com.A.S 134 of 2018 Rs.35,50,00,000/- was forfeited and balance amount has been paid from time to time, but, there was inordinate delay in getting Khata on account of encroachment of land and some other reasons and inspite of the same, the applicants obtained Khata from different authorities as contended in the plaint. Subsequently, since, there was issue regarding construction and providing financial arrangement for the construction of building, they entered into a supplementary agreement on 11.2.2014, whereunder, the defendant has consented for mortgaging 50% of right and interest over the schedule property in favour of the project lenders as collateral security and accordingly, the earlier development agreement was modified and regarding non-refundable deposit, it is available in clause

No.3.1.1, wherein, it is stated that "in terms of clause 3 (v) and clause 15 (i) (b) and (iii) of the development agreement (prior to the amendment), the developer was required to pay to the owner a sum of Rs.19 crores towards a portion of non-refundable deposit or Com.A.S 134 of 2018 provides to the owner a irrecoverable and un-conditional Bank Guarantee for a sum of Rs.19 crores, for payment towards a portion of the non-refundable deposit on or before 1st February 2012. The clause 3.1.2 provides that the developer has paid Rs.19 crores at the time of supplementary agreement including Rs.1 crore more, as per Demand Draft of HDFC Bank Ltd., and the same has been accepted by the defendant. So, in all, the applicants have paid Rs.105 crores and there is no dispute about the said fact. Further, it has paid Rs.2.75 crores as processing fee, paid to the project lenders and the account certificate is produced. Thereafter, he took the Court to Chartered Accountant certificate available at page No. 1165 in Volume IV and in total the applicants have paid Rs.169.38 crores and all the No Objection Certificates were obtained and contract was also entered into between the L & T, a reputed construction contractor and also referred to Ex. C37 to 46 to show that they have obtained permission from different departments. Further, thereafter, he referred Ex. C48 to 60 Com.A.S 134 of 2018 available in Volume III, regarding loan sanction and appointment of 14 consultants as shown in para No.55 of the claim petition. Further, in order to commencement of work, old building required to be demolished and there was inordinate delay in giving consent by the defendant and infact, the deceased defendant was not senile and he was not mentally fit to give evidence and therefore, non- examination of defendant goes against the case of the defendants and adverse interference has to be drawn. Though, the Power of Attorney was examined, her evidence cannot be accepted as she was not party to the any of the transaction or Joint Development Agreement. The observation of the Arbitrator that the applicants had no financial capacity is incorrect as the Power of Attorney Holder has also participated in the discussion with Goldman Sachs entity, which was ready to fund the project and same is not taken note of by the Arbitrator. The RW1 has admitted about the same at question No. 249 about meeting with Goldman Sachs company, which is one of the Com.A.S 134 of 2018 lenders of the proposed project and there was no cross- examination to that effect. Further, regarding mental condition of the defendant, no medical records are produced and application filed for appointment of guardian came to be rejected and therefore, adverse interference has to be drawn.

19. Thereafter, he referred to Ex.C63 available in Volume IV and he referred to the repudiation and reply given by and infact, contract cannot unilaterally terminated as 35 months was there to complete the work and it was repudiated in the month of January 2015, though the time was available up to 2017. The clause No.6.1.9 of the supplementary agreement provides for time line for commencement and completion of construction, occupancy certificate, etc. Therefore, there cannot be any unilateral repudiation of the contract and observation of the same by the Arbitral Tribunal is highly incorrect and it requires interference. After arguing on the said aspect, he referred to the award at ink page No. 101 and internal page No.12, Com.A.S 134 of 2018 which deals with the point for determination regarding dispute No.1 and point for determination for dispute No.2 and as far as repudiation is concerned, point No.5, 5(a), in dispute No.1 and point No.2 in dispute No.2 are similar and at ink page No.117, the Arbitral Tribunal considered point No.5, 5(a) in dispute No.1 and point No.3, 3(a) in dispute No.2 together.. He would argue that the respondent by treating the letter, dated 19.1.2015 as repudiation of the contract on account of their failure to obtain letter from the project lenders in conformity with Joint Development Agreement and supplementary Joint

Development Agreement, is untenable and learned Arbitrators misconducted themselves by ignoring the evidence and when there is an admission of RW1 that whatever the amount paid by the applicants have been deposited, since 2007 in fixed deposit and therefore, there is no question of granting any damages in lieu of rent and therefore, the award is against the evidence on record and admission of documents.

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20. He would further argue that the award passed by the Arbitral Tribunal is against the law laid down by the Apex Court and in the said connection, he would cite the decision in the case of Ssangyong Engineering and Construction Company Ltd., Vs. National High ways Authority of India, reported in 2019 (15) SCC 131, wherein, at para No.34, it is held that:

> 34. "What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment.

However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)

(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders".

In para No.36, it is held that:

> Com.A.S 134 of 2018
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> 36. "Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with".

21. With the help of the above Judgment, he would argue that the Arbitral Tribunal has failed to deal with the decision relating to repudiation of contract and damages, then, it amounts to against public policy of Indian law. The termination of contract is provided under clause No. 24 of Joint Development Agreement, at running page No.75, which deals with the termination of the contract by issuing a 60 days' notice by the owner and consequences of termination is also provided under clause No.24. When that is the case, how the letter issued by the developers amounts to repudiation, having received, so much of amounts by the defendant. Further, when the contract Com.A.S 134 of 2018 provides for a period of 35 months for completion of the work, how the defendant could repudiate the contract. Whether unilateral repudiation can be sustained, etc., has been discussed in various decisions. One such decision is reported in 1984 (1) SCC 728 in the case of The Workmen and others Vs. M/s Hindustan Lever Ltd., wherein, at para No.24, it is held that:

> 24. "The emerging situation would be that neither the union repudiated the agreement nor the employer and till the present dispute, both swore by the agreement. The divergence in the approach was as to the interpretation the coverage, the ambit and the width of the agreement. Both the parties swore by the agreement but differed in their approach and interpretation and the forum namely the Industrial Tribunal consistently upheld at the instance of the employer that there was a binding valid agreement subsisting between the parties forbidding the union from raising a dispute of an all-India nature at the regional level and succeeded in getting the reference thrown out at the threshold on the ground that the dispute was of an all-India nature and not of a regional level as contended by the union. This constitutes adherence to agreement, performance of the agreement, implementation of the agreement and being bound by the agreement. This conduct in no sense can be said to constitute repudiation of agreement by the union. Unilateral repudiation of an agreement, as contended by Mr. Pai, does not result in termination of a solemn agreement because the Com.A.S 134 of 2018 wrongful repudiation can be corrected by enforcement of agreement through machinery provided by the statute. And that is what the employer has succeeded in achieving. The employer relying on the agreement got a number of references rejected on the preliminary objection founded on the agreement. The employer cannot therefore be heard to say that the attempted repudiation by the union, if any, permits the employer to disown the same when it suits it.

Unilateral repudiation is distinct from termination and an agreement/settlement remains in force and binding till terminated and does not come to an end by unilateral repudiation. But it must be made clear that there is no substance in the contention of Mr. Pai that the union repudiated the agreement.

22. He would cite another decision in the case of Claude-Lila Parulekar (Smt) Vs. Sakal Papers (P) Ltd., and others, reported in (2005) 11 SCC 73, wherein, it is held at para No. 53 that:

> 53. "Furthermore for an act to constitute a repudiation of a contract it must be ".such an act as indicated an intention to refuse to perform the contract and to set the other

> party free from performing his part. an act by which the party renounced all intention to perform his part of the contract, and thereby set free the other party or an intimation that it was no use for you to go on, because I tell you that I do not mean to keep to the contract" . [See: Freeth v. Burr (Lord Coleridge, CJ Com.A.S 134 of 2018 (1874- 80) All ER.753]. The question to be asked is "is the act to be relied on as rescission, an act which on the part of the person doing it amounts to an abandonment, or refusal by him to perform his part of the contract?" (ibid at pg.754) IV.4.I Repudiation of a contract is "a serious matter, not to be lightly found or inferred".

23. He has cited one more decision in the case of Rash Behary Shaha Vs. Nrittya Gopal Nundy of High Court of Calcutta, reported in MANU/WP/009/1906, wherein, it is held at para No.20 that:

> 20. "There was a delay in fulfilling the obligation to pay the money; it may have been with or without good reason, but, it did not go to the root or essence of the contract, or do I think that there is any sound principle upon which it could do so".

24. So, merely because a party fails to perform a part of the contract does not tantamount to absolute renunciation or an absolute refusal to perform the contract, such as to tantamount to recession.

25. Regarding unilateral termination of contract, he would rely upon the decision in the case of M.B. Desai & Bros, Vs. Coorg & Mysore Coffee Co. Ltd., reported in Com.A.S 134 of 2018 1975 (2) Kar L J 46 and the decision in the case of National Fertilizers Vs. Puran Chand Nangia, reported in 200 (8) SCC 343, wherein, it is held at para No.23 that:

> 23. "We may also state that under the general law of Contracts, once the contract is entered into, any clause giving absolute power to one party to override or modify the terms of the contract at his sweet will or to cancel the contract -even if the opposite party is not in breach, - will amount to interfering with the integrity of the contract (Per Rajamanner, CJ. In Maddali Thathiah Vs. Union of India AIR 1957 Mad.82). On appeal to this Court, in that case, in Union of India Vs. Maddali Thathiah [1964(3) SCR 61 AIR 1966 SC 1724] the conclusion was upheld on other grounds. The said judgment of the Madras High Court was considered again in Central Bank of India Vs. H.F. Insurance Co. (AIR 1965 SC 1288) but the principle enunciated by Rajamanner CJ was not differed from. (See the discussion on this aspect in Mulla's Contract Act, (10th Ed.) PP.371-372, under Section 31 of the Indian Contract Act.)"
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> 26. So, with the help of the above decisions, he would argue that when there is no scope for unilateral repudiation or termination of contract for non-fulfillment of part of contract, owing to various difficulties, then, it amounts to against the public policy of Indian law and therefore, liable to be set aside.
>
> Com.A.S 134 of 2018

27. Regarding the 'time as essence of contract', he would argue that in construction contract, it depends upon the various factors, right from the obtaining of permission and various No objection certificates and due to delay either it may be attributed to the contractor or to the owner. Therefore, the time is not the essence of contract in construction contract and in the said regard, he relies upon the decision in the case of McDermott International Inc. Vs. Burn Standard Co. Ltd., and others, reported in (2006) 11 SCC 181, wherein, it is held at para No.59 that:

59. "Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the Arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merit of the matter.

28. He has cited one more decision in the case of Bangalore Development Authority Vs. Syndicate Bank, Com.A.S 134 of 2018 reported in (2007) 6 SCC 711, wherein, at para No.17, it is held that:

17. "In a self financing scheme, the installments paid by the allottees are used for construction. If an allottee does not pay the installments, he cannot obviously expect completion of construction. In this case, the payment was received by BDA (without charging any interest) by way of adjustment on 15.5.1989. Even if the reasonable period for construction is taken as two years, BDA had to explain the 'delay' only from 15.5.1991 and not from 1985 as assumed by the Commission. BDA delivered four houses in time, that is in 1989 and 1990. It did not deliver the remaining 11 houses, as its contractor delayed execution of the work. It may be mentioned that the project contemplated construction of 558 HIG houses and the work got stuck only in regard to 68 houses (including the 11 houses to be delivered to the Respondent). When the respondent wrote letters in 1989, 1990, 1993 and 1994 and also got in touch with BDA officers, seeking possession, BDA explained that the delay was on account of its contractor (M/s Khoday Engineering) stopping work and raising a dispute. BDA took necessary steps, and even sought government intervention, to persuade the contractor to proceed with the work.

Having failed in its effort, it ultimately cancelled the contract with the contractor and got the work completed through an alternative agency and immediately after completion, delivered the houses in January/March, 1997.

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29. He has cited one more decision in the case of M/s Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by LRs Vs. State of Maharashtra, reported in (1979)

2 SCC 70, wherein, at para No.8, it is held that:

> 8. "It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental, for instance, if the contract were to include causes providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract.

30. So, with the help of the above three decisions, he would argue that in the construction contracts, time is not the essence of the contract and it depends upon various factors, the same has not been taken note of by learned Arbitrators.

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31. He would further argue about evidentiary value of evidence given by RW1, who is the Power of Attorney holder of deceased defendant, who according to the applicants was not senile and therefore, he could not have given Power of Attorney and non-examination of the defendant is fatal to the case of the defendant herein. But, learned Arbitrators have not considered the said aspect, which is against the decision in the case of Mahendra Pratap Singh (deceased) and another Vs. Smt. Padam Kumari Devi reported in AIR 1993 All 143, wherein, Allahabad High Court has held that "a person becoming weak or of frail health because of which he is unable to comprehend or take care of himself is a situation, which will result in the termination of agency. In the said matter it was also held that the agent will be committing a fraud, cheating and criminal breach of trust by acting on a Power of Attorney of a Principal, who he knows to be mentally infirm". So, with the help of this decision, he would argue that when the respondent was not mentally fit to give Com.A.S 134 of 2018 answer, whether the power of attorney can act upon, the power of attorney already issued. In-fact, the guardian ought to have been appointed, the Arbitral Tribunal, by rejecting the application of the applicants herein proceeded to record evidence of RW1 on the basis of the power of attorney and the power has to be received under the said document, which is against the law of the land, therefore, it amounts to patent illegality.

32. So, when the best witness is not produced before the Court, an adverse inference has to be drawn as per the decision reported in 1999 (3) SCC 573 and 1999 (3) SCC 457, but, the Arbitral Tribunal has failed to do the same. Though, it was canvassed before learned Arbitrators that the evidence of RW1 is of no significance on account of age and mental ill-health of the respondent, but, the same was not considered and non-examination of defendant is fatal to the case of the defendant, but, same has not been considered by the Arbitral Tribunal.

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33. Regarding oral agreement, when could be admitted, has been held in the decision, reported in AIR 1936 Privy Council 70 and 2003 (6) SCC 595 and when a departure can be made by way of oral evidence, when, there is a written deed.

34. He would further argue that a party cannot take advantage of his own wrong and he cannot be permitted to form a claim of his own inequity. He who prevents the thing from being done shall not avail himself of the non- performance he has occasioned and in the said connection he would cite the decision in the case of Shamumal Vs. State of Rajasthan and others reported in AIR 1998 Raj 248 and according to learned counsel for the applicants, because of the unbearable conditions put forth by the defendant and each and every step, there was objection by the defendant, which made the applicants to suffer huge loss, for getting so many no objection certificates from different departments as contended in the plaint and after receipt of huge amount to the tune of Rs.105 crores, the Com.A.S 134 of 2018 defendant repudiated the contract as if as applicants have expressed their inability to proceed with the construction. Though, the applicants have been successful in getting project lender to lend huge amount, because of the attitude of the defendant that was not materialised. Therefore, the respondent cannot take advantage of his own wrong and retained the entire amount. The Arbitral Tribunal has committed error in deducting the rent and receivable out of the amount paid as the defendant has derived interest right from the year 2007 till date, which is more than Rs.100 crores and therefore, the award is not justifiable one. Regarding party cannot take advantage of his own wrong, he has cited two more decisions in the case of Ashok Kapil Vs. Sanaullah (dead) and others, reported in (1996) 6 SCC 342 and in the case of Devendra Kumar Vs. State of Uttaranchal and others, reported in (2013) 9 SCC 363. So, with the help of these decisions, he would argue that the defendant unilaterally repudiated the contract and having received more than Rs.105 crores as non-refundable Com.A.S 134 of 2018 deposit and further, the applicants have spent more than Rs.60 crores for obtaining various permission, the claim of the respondent to the tune of Rs.350,39,67,142/- is unjustifiable and it is nothing, but, making unlawful enrichment, if possible. The total claim made by the respondent is 507,84,18,514/-and after deducing non- refundable deposit of Rs.64,50,00,000/-, he has claimed 443,34,18,514/- which is unjustifiable. On the other hand, the applicants have claimed specific performance, which was subsequently not pressed. The amount paid by it and Arbitral Tribunal granting Rs.42,45,00,000/- out of the amount paid by it by awarding Rs.55,05,00,000/- is against the terms of the contract and unjustifiable and it is nothing, but, perverse order. Since, the applicants have not pressed the relief of specific performance, this Court is not required to consider the same and as far as refund is concerned, the value of the property has now increased, which benefit goes to the defendant and therefore, the Arbitrator ought not to have deducted the amount by Com.A.S 134 of 2018 treating the rent and receivables on account of demolition of the building. Further, on account of the initiation of the proceedings by the Government authority for encroachment of land, it was not disclosed by the defendant, made the applicants to suffer and therefore, application was filed under Order 41 Rule 27 to receive additional documents. In the additional documents, the order of the Government, Survey map, etc., are produced to support the claim that there was suppression of encroachment of land by the defendant which is also one of the reasons. Therefore, the Arbitral Tribunal has failed to consider these aspects, which required attention of the Court. Since, the building has been demolished as per the amended agreement, general agreement, there is no question of claiming rent, and it is the defendant who repudiated the contract, he cannot claim rent,

etc., and therefore, that part of the award directing the applicants to pay damages to the tune of Rs.55,00,00,000/- is against the decisions and the order becomes perverse. When the Com.A.S 134 of 2018 time is not essence of contract and when the witness is prevented from appearing before the Court to speak about the truth and when inspite of production of various NOCs obtained by the applicants from various authorities and having failed to pay Rs.105 crores and having held meeting with Goldman Sachs, then, awarding the damages is highly incorrect and same is not sustainable. So, when the arbitrator is go against the evidence on record and terms of the contract and failure to follow the decisions laid down by the Apex Court as well as our High Court and various Hon'ble High Courts, then, it amounts to patent illegality and what is the consequences has been held in the decision in the case of ONGC Limited Vs. Garware Shipping Corporation Limited reported in (2007) 13 SCC 434, Sumitomo Heavy Industries Limited Vs. Oil and Natural Gas Corporation Limited, reported in (2010) 11 SCC 296, to the effect that when the Arbitral Tribunal failed to consider the terms of the contract and goes against the law laid down by the Apex Court, then it amounts to Com.A.S 134 of 2018 against the public policy of Indian and is liable to be set aside.

35. Now, regarding award against the terms of contract is concerned, he relies many decisions and one in the case of Hindustan Zinc Ltd., Vs. Friends Coal Carbonsisation, reported in (2006) 4 SCC 445, wherein, it is held that when the Award is contrary to the contract and in conflict with the price variation formula in the contract then, it is liable to be set aside. Similarly, he has cited seven more decisions and among them the latest is the decision in the case of Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India and PSA SICAL Terminals Pvt. Ltd., Vs. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and others, which is the latest decision on the aspect at para Nos. 43, 81, 85 it is held that:

> 43. "It will thus appear to be a more than settled legal position, that in an application under Section 34, the court is not expected to act as an appellate court and re-appreciate the evidence. The Com.A.S 134 of 2018 scope of interference would be limited to grounds provided under Section 34 of the Arbitration Act.

The interference would be so warranted when the award is in violation of "public policy of India", which has been held to mean "the fundamental policy of Indian law". A judicial intervention on account of interfering on the merits of the award would not be permissible. However, the principles of natural justice as contained in Section 18 and 34(2)(a)(iii) of the Arbitration Act would continue to be the grounds of challenge of an award. The ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". It is only such arbitral awards that shock the conscience of the court, that can be set aside on the said ground. An award would be set aside on the ground of patent illegality appearing on the face of the award and as such, which goes to the roots of the matter. However, an illegality with regard to a mere erroneous application of law would not be a ground for interference. Equally, re-appreciation of evidence would not be permissible on the ground of patent illegality appearing on the face of the award".

81. "In this scenario, the finding of the Arbitral Tribunal, that there was a law when the Agreement was entered into between the parties, which provided royalty as a pass through and that the said law

has been changed for the first time in 2003 and subsequently again changed in 2005, in our view, is a finding based on 'no evidence'. Had the Arbitral Tribunal perused the tariff orders of 1999 and 2002, it would have found that in the 1999 tariff order TAMP has specifically observed that its approval of the tariff should not be Com.A.S 134 of 2018 construed as its implicit approval of royalty related issue and the 2002 tariff order specifically states that royalty was not permitted to be factored in the cost while determining tariff. The Arbitral Tribunal has totally failed to take into consideration this aspect of the matter".

85. "However, ignoring the stand of TPT, by the impugned Award, the Arbitral Tribunal has thrust upon a new term in the Agreement between the parties against the wishes of TPT. The 'royalty payment method' has been totally substituted by the Arbitral Tribunal, with the 'revenue sharing method'. It is thus clear, that the Award has created a new contract for the parties by unilateral intention of SICAL as against the intention of TPT".

36. So, since, other decisions which are not mentioned, also speak about the same aspect, the latest decisions are taken note of and when we go through these decisions, one thing is clear that the award is perverse, which amounts to patent illegality and if the award is contrary to the contract and against the law laid down by the Apex Court and other High Courts, then, the same is liable to be set aside.

37. Per contra, learned senior counsel for the defendant would argue by referring to the award passed by Com.A.S 134 of 2018 learned Arbitrators, wherein, Arbitral Tribunal has categorically held that the applicants herein are not entitled to specific performance of contract, but, ordered for refund of the amount, after deducting the rent and receivables that would have been received, had the building not been demolished for the purpose of construction. Thereafter, he would refer to Ex. C11, which is the Joint Development Agreement produced before the Arbitral Tribunal in connection with the dispute No.2, which is dated 11.2.2011 and it is contended that though damages was granted, it was not adequate as claimed by the defendant in his counter claim and there is no proper findings on the repudiation of contract. He would refer to Section 39 of the Indian Contract Act and the applicants herein set up a contention that the defendant has agreed for creating mortgage in respect of the property, which is inconsistent with the Memorandum of Understanding and terms of the Joint Development Agreement and therefore, that was not accepted by the Arbitral Tribunal. Section 39 deals with Com.A.S 134 of 2018 effect of refusal of party to perform promise wholly; when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance. On the basis of the provisions of law, when the applicants expressed their inability to obtain huge loan from the project lenders on account of the terms stated by the lenders to create mortgage in respect of entire property or undivided share of the applicants which was not available in Joint Development Agreement or supplementary Joint Development Agreement and therefore, the Tribunal has rightly concluded that the applicants disabled themselves from performing their promise in its entirety and therefore, there is no question of breach on the part of the defendant. The oral understanding as contended by the applicants was not accepted. The letter written by the Bank insisting for up front mortgage, has not been contemplated in Joint Com.A.S 134 of 2018 Development Agreement. Therefore, the applicants

were not in a position to fund the project, which culminated in repudiation by conduct and there was no such oral understanding between the applicants and the defendant. Learned Arbitrators have decided the same while deciding the point No.5 , 5(a) in dispute No.1, point No.3, 3(a) in dispute No.2 and it is contended by the applicants that they have repudiated to perform their obligations under Joint Development Agreement and it was argued that they had spent over Rs.189 crores in connection with the project and it has taken several steps such as obtaining approvals and No objection certificates from several authorities and entering into several agreements with other agencies and complied with all conditions stipulated in clause No.3.5, which were possible that though they had secured sanction of loan of Rs.300 crores from the project lenders, later did not agree with the terms of the Joint Development Agreement. The Arbitrators have observed that the letter issued by the defendant after the letter by the applicants Com.A.S 134 of 2018 regarding their inability to obtain the loan for want of conditions to be fulfilled by the defendant. The defendant terminated the contract and in this regard, the Arbitrators have categorically held that the letter issued by the applicants dated, 6.1.2005 does not amount to repudiation. The non-consideration of repudiation of error by Arbitrator becomes patently illegal as held in the case of Ssangyong Engineering & Construction Company Limited. Thereafter, he refers to Ex C11 and Ex. C20. As I have already stated Ex. C11 is the Joint Development Agreement and Ex. C 20 is the supplementary Joint Development Agreement, dated 11.2.2014 and he referred to the terms therein. Learned counsel for the defendant drew the attention of the Court to clause No. 6.1.2, which deals with aspect that clause Nos.3, 4, 5 of development agreement shall stand deleted and (b) substituted as follows:

> 1. "the developer shall be entitled to commence demolition of the front building or rear building only after the (a) the developer has made payment to the owner for a sum of Rs.19 crores towards part payment of non-refundable deposit, payable in terms of clause No. 16 of the development agreement, (b) the Com.A.S 134 of 2018 developer has obtained sanction building plans with respect to the mall (c) the developer has provided alternative office space ..... (d) the developer has secured a project loan for a sum not exceeding Rs.310 crores from its lenders/bank, under an arrangement, in conformity with the terms of this agreement.... (e) the project lenders have expressly confirmed the receipt of the development agreement as amended and shall have also acknowledged in writing that the project loan has been extended by them based on the terms of the development agreement as amended.

But, the amended Joint Development Agreement, does not provide for upfront mortgage of the schedule property or the shares of the property of the applicants after development. Therefore, when the defendant did not agree for mortgaging of property, actually there was no financial capacity for the applicants to get huge amount and infact, the Bank insisted for modification of Joint Development Agreement, which the defendant did not agree. What type of amendment sought for by the Bank has been stated in the Joint Development Agreement dated 11.2.2011 at ink page No. 515, clause No.13, which states that subject to provisions of clause No.12 (iv) below and not otherwise. The developer may create any charge on its development rights accrued to it under this agreement, in order to raise a debt for the purpose of the project, without creating any mortgage, encumbrance, charge, (i) on the schedule property or any portion thereon or (ii) on the rights of the

owner to the schedule property and the mall, so that the developer shall permitted to create any charge encumbrance on its development rights inform the owner of the same and satisfy the owner that creation of such charge on the development right of the developer shall not in any manner create any mortgage or encumbrance on the schedule property. So, according to learned senior counsel for the Com.A.S 134 of 2018 defendant, when the Joint Development Agreement does not provide for mortgaging of property, how to believe that the project lenders were ready to lend Rs.310 crores for the development of the land and when they sought for modification of the award. In this regard, he refers to ink page No. 723 available in Vol No. III, which relates to supplementary agreement, dated 11.2.2014, wherein, clause No. 6.1.19 has been substituted as "subject to provisions of clause No. 12, 14 below and not otherwise, the developer may avail the project loan for this purpose, create a charge on the development rights accrued to it under this agreement. In order to enable, the developer to obtain the project loan, the owner at the instance of developer has agreed to mortgage 50% undivided right, title and interest in the schedule property in favour of the project lenders, the developer shall be entitled to call upon the owner to create a mortgaging of the owners mortgage property only after fulfillment of the below conditions to the satisfaction of the owner. The conditions are mentioned in column No.1 regarding the property situated in Kochi and mortgage of the same and payment of Rs.70 crores or furnishing the Bank Guarantee, etc., and payment of Rs. 3 crores as non-refundable deposit and the above clause shows that there was no any agreement for upfront mortgage of the property to the project lenders and it was agreed for creating second charge in respect of property owned by the applicant at Kochi, but, subsequently, the said property was sold out by the applicant and therefore, they have not acted in accordance with the terms of the contract and therefore, the Arbitrators have rightly refused to grant specific performance.

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38. Learned counsel for the defendant would further argue by referring to Ex. C 19, at page No.678, produced by them in dispute No.2, which is the sanction of project loan of Rs.120 crores by Bank of Baroda and the conditions mentioned in the letter dated 9.10.2014, reveals that the additional collateral security, which is the immovable property and measuring in all 405.83 cents situated in Survey No.506/13, 506/1, 514/10 of Kakanadu village, Kanayur taluk, in Ernakulam district value of Rs.77.12 crores to be released. The condition No.3 states that the company to amend the supplementary agreement to address the observation of our bank panel advocate and legal department of our bank and create mortgage over the project land before 1st disbursement. In the very same document at page No. 669, the bank has imposed certain conditions to release the property at Kochi and also give upfront mortgage of the property and the observation of the Bank reveals that unless and until upfront mortgage is provided, no lending can be granted which shows that the Com.A.S 134 of 2018 applicant has no financial capacity to proceed with the construction, which is the reason for why the defendant has issued termination notice. Para No. 29 of the observation of the project lenders stipulates about the restriction imposed in the Joint Development Agreement, which hampers the lending and come in the way of recovery and therefore, the applicants were aware of this aspect. Further, CW2 and 4 have admitted about the observation made by the Bank and necessity to provide upfront mortgage of the schedule property for at least 50% of the property. Thereafter, he refers to the legal notice issued at Ex.C37, which is available in Volume V, at page No. 1471, which was issued by learned counsel for the applicants, invoking arbitration

clause available in Joint Development Agreement. In the para No.5 of the legal notice, discloses that "on account of various delays attributed to your non- cooperation, our client was constrained to mobilize to raise fund, and our client has requested you to agree to create mortgage of 50% of the land and that stage itself, insisted Com.A.S 134 of 2018 of doing so, after completion of the construction of three floors. However, much to our client shock and dismay, instead of co-operating with our client, he would decide to use opportunity to arm-twist of our client and permit Ms. Chitra Thanggiah to negotiate and make personal demand". The said statement is against the fact as the observation of the project lenders at para No.29 goes to show that they were not happy with the terms of the Joint Development Agreement as there is no provisions for upfront mortgage of the schedule property or at least 50% of the share of the development of the schedule property, etc. Therefore, according to learned counsel for the defendant the contention of the applicants that they were ready and willing to perform their part of contract and their project lenders were ready to finance the project is a myth and cannot be considered and the arbitrators have rightly rejected the same. Thereafter, he refers to statement of defence submitted by the defendant. After referring to the same, learned senior counsel referred to the award passed Com.A.S 134 of 2018 by referring to dispute No.1 and issues raised therein and issue No.8 is the entitlement of defendant to claim the amount under various heads. Regarding issue No.2 relating to repudiation of contract and tribunal has held that there is no repudiation of contract, but it was terminated by the defendant. He refers to ink page No.165 of the award and internal page No.75, wherein, under point No.13 the Arbitrators have taken point No.3 in dispute No.2 which relates to the breach of contract committed by the applicants herein and respondent in their counter claim and the said issue has been elaborately discussed by the Arbitral Tribunal and learned senior counsel took the Court to para No. 13.2, which deals with the claim under the head damages for loss of opportunity at Rs.353,39,67,142/- with interest and various contentions taken by the defendant herein, about the amount which could have been earned by the defendant George Thangiah up to 19.7.2016 by way of rent and failure to get the same on account of failure to commencement and Com.A.S 134 of 2018 complete the building. Further, he refers to the observation made by learned Arbitrator that if the project had been completed, the defendant would have earned some profits after completion of 37 months provided in the supplementary Joint Development Agreement, of the year 2014. Further, the chance of getting profit of 50% after completion of the mall, is also taken note of by the Arbitrators and rent receivables by the defendant and he has referred the documents produced by the defendant at Ex.R 55 i.e., estimated market value in the year 2014 and on the basis of the value of schedule property has gone up by nearly three times and by taking consideration of the same, Arbitral Tribunal has assessed the loss, but, the awarding of Rs.10 crores as damages is not correct and the same requires to be interfered. Further, the additional claim has not been touched it and these aspects will be considered in the separate paras while dealing with the connected arbitration suit filed by the defendant herein in Arbitration Suit No. 153/2018. So, the main attack of Com.A.S 134 of 2018 learned senior counsel for the defendant is that the order of the Arbitral Tribunal directing the defendant to pay a sum of Rs.42,45,00,000/- is unsustainable as the defendant has lost the building, rent and the reputation has also lowered on account of boosting of the project and non-completion of the project. Further, while ordering for refund of the balance amount, the tribunal has erred in calculating rent and it is a grave error and it requires to be interfered. Further, regarding other claim there is no whisper by the arbitration tribunal and the same will be taken note of in the connected Arbitration suit. Further, the Arbitrators have not taken note of the land dispute

and exchange of land having more value for the lesser value on account of the so called project which also culminated in huge loss. Therefore, the awarding of Rs.15,00,05,000/- is not proper and without any basis and orders for refund is also incorrect. Further, the tribunal has not considered the cost relating to restoration of the demolished portion and not considered the other documents, etc. These aspects will be Com.A.S 134 of 2018 considered in the connected case. So, the sum and substance of arguments of learned senior counsel for the defendant is that, the Arbitrators have not taken note of the repudiation of the contract by the applicants herein and considered only unilateral termination by the respondent and the award for refund of Rs.42,45,00,000/- is incorrect and against the terms of the contract and therefore, the applicants are not entitled to the same.

39. Learned senior counsel for the defendant would cite the decision in the case of Oil and Natural Gas Corporation Ltd., Vs. Saw Pipes Ltd., reported in (2003) 5 SCC, 705, which deals with when a arbitral award can be set aside , wherein, at para Nos. 74 (A) and (B) it is held that:

> 74. "In the result, it is held that:-
>
> 74A. (1) The Court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:-
>
> (i) a party was under some incapacity, or Com.A.S 134 of 2018
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
>
> 2) The Court may set aside the award:-
>
> (i) (a) if the composition of the arbitral tribunal was not in accordance with the agreement of the parties,
>
> (b) failing such agreement, the composition of the arbitral tribunal was not in accordance with Part-I of the Act.
>
> (ii) if the arbitral procedure was not in accordance with:-
>
> (a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part-I of the Act.

However, exception for setting aside the award on the ground of composition of arbitral tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part-I of the Act from which parties cannot derogate.

(c) If the award passed by the arbitral tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

Com.A.S 134 of 2018 (3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to:-

(a) fundamental policy of Indian law;

(b) the interest of India; or

(c) justice or morality, or

(d) if it is patently illegal.

(4) It could be challenged:-

(a) as provided under Section 13(5); and

(b) Section 13(6) of the Act".

74 (B). "(1) The impugned award requires to be set aside mainly on the grounds:-

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the respondent to extend the time limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

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(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract".

40. He has cited another decision in the case of Delhi Development of Authority Vs. R.S. Sharma and Company, New Delhi, reported in (2008) 13 SCC 80, by referring the decision in the case of State of Rajasthan Vs. Navabharath Construction Company has held at para No.21 that:

> 21. "From the above decisions, the following principles emerge:
>
> (a) An Award, which is
>
> (i) contrary to substantive provisions of law ; or
>
> (ii) the provisions of the Arbitration and Conciliation Act, 1996 ; or Com.A.S 134 of 2018
>
> (iii) against the terms of the respective contract ; or
>
> (iv) patently illegal, or
>
> (iv) prejudicial to the rights of the parties, is open to interference by the Court under Section 34(2) of the Act.
>
> (b) Award could be set aside if it is contrary to :
>
> (a) fundamental policy of Indian Law; or
>
> (b) the interest of India; or
>
> (c) justice or morality;
>
> (c) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.
>
> (d) It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

Associated Builders Vs. Delhi Development Authority reported in (2015) 3 SCC 49 to the very same effect, and next decision in the case of Ssangyong Engineering and Construction Company Limited Vs. Com.A.S 134 of 2018 National Highways Authority of India, which elaborately discussed about when an Arbitral Award can be set aside.

41. Learned Senior counsel has also cited the decision in the case of PSA Sical Terminals Pvt. Ltd., Vs. Board of Trustees of V.O Chidambaranar Port Trust Tuticorin and others, reported 2021 SCC online 508 to the very same effect.

42. The next decision is in the the case of MMTC Limited Vs. Vedanta Ltd., reported in (2019) 4 SCC 163, wherein, it is held that at para No.11,

11. "As far as Section 34 is concerned, the position is well settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2) (b), i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial Com.A.S 134 of 2018 approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract."

43. Next decision is in the case of Union of India Vs. M/s Warsaw Engineers in Com Appeal No. 25/2021 of High Court of Karnataka, to the effect that what are the requirements to be followed by the Court dealing with Section 34 of the Act by referring to the decision in Dyna Technologies Private Limited Vs. Crompoton Greaves Limited. With the help of the above decisions, he would argue that the observation of the Arbitral Tribunal that there is no repudiation of contract by the applicants by sending a letter about their inability to borrow money on account of stringent conditions in Joint Development Agreement is highly incorrect and further, the Arbitral Tribunal has considered the case of the applicants in detail and since scope under Section 34 is very limited as observed in the above decisions, the decision in support Com.A.S 134 of 2018 of refund of money cannot be entertained by this Court as this Court is not sitting in appeal. Further, the documents sought to be produced cannot be looked into, as they were not in existence during the arbitral proceedings and they were of the recent origin and therefore, since this Court does not exercise jurisdiction on original suits like Civil Court, or in appeal, there is no scope for receipt of evidence under Order 41 Rule 27 CPC.

44. With this background, I have to go through the award. The main attack of the applicants is that the award is against the fundamental policy of Indian law and opposed to basic notions of justice and patently illegal, as learned Arbitrators have not followed the terms of the contract and mis-interpreted the same and further, the decision quoted by the applicants have not been considered regarding appointment of guardian and the repudiation of contract etc. So, when it is specific

contention that the Arbitral Tribunal has erroneously rejected the application, then, it is to be seen whether the reason assigned by the Com.A.S 134 of 2018 Arbitral Tribunal is against the law of the land. In this regard, the Arbitral Tribunal, while considering the issue No.2 in dispute No.1 and issue No.1 in dispute No.2 has considered the same. Therefore, let me go through the reasons assigned by the Arbitral Tribunal to the point No.2 and 2(a) in dispute No.1 and point No.1 and 1(a) in dispute No.2. It is specifically contended that the wife of the first defendant Mrs. Chitra Poornima does not have valid authority to represent the respondent before the Arbitral Tribunal on the ground that the power of attorney given to her has no application as the respondent was not mentally fit and therefore, automatically it comes to an end. Learned Arbitrator while rejecting the application filed for appointment of guardian has referred to the decision in the case of Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited, reported in (2011) 5 SCC 532, has come to the conclusion by referring to para No.36 of the Judgment, when guardian can be appointed and it is specifically stated in para No. 7.3 that the decision is not Com.A.S 134 of 2018 applicable to a dispute about mental infirmity or status of a person. According to the Arbitral Tribunal, the guardianship matters referred to above is with reference to appointment of guardian under the Guardian and Wards Act or Minority and Guardianship Act and not to the appointment of a guardian for a party for the purpose of particular case. No doubt, under Section 17(1) of the Act, the party may, during the arbitral proceedings seek for appointment of a guardian for a minor or a person of unsound mind for the purpose of arbitral proceedings. However, learned Arbitrators have referred to the very claim statement filed by the applicants herein by making the respondent as party, wherein, they were not stated about his mental condition and just because he was sufficiently aged and unable to recollect certain aspects, it does not mean that he was mentally incapable of taking decision. Therefore, by rejecting the contention of the applicants herein and the decision cited by learned counsel for the applicants herein reported in AIR 1993 Allahabad 143 in Com.A.S 134 of 2018 a case of Mahendra Pratap Singh (deceased) Vs. Padma Kumari Devi, has held categorically by interpreting Section 201 of the Contract Act that the appointment of guardian is not necessary, accordingly, the IA came to be rejected. The Arbitral Tribunal has given elaborate reasons and even in the arbitration application filed under Section 9, the claimant have obtained interim order by showing the respondent without alleging anything about his mental condition. Therefore, the Tribunal has rightly rejected the claim, as rightly pointed out learned senior counsel for the first defendant. Absolutely there is no mistake committed by the Arbitral Tribunal in arriving at conclusion about mental condition of the deceased defendant and fact that the RW1 who has been assisting her husband right from the date of Memorandum of Understanding till the death of the defendant and in somewhere it is stated that she herself attended the meetings along with the claimant for the purpose of project lending, etc., it cannot be held that RW1 was not Com.A.S 134 of 2018 conversant with each and every aspects of the project and therefore, I do not find any irregularity in the decision regarding appointment of guardian. Therefore, I am of the view that the Arbitral Tribunal has rightly interpreted the case regarding alleged mental illness and has rightly concluded the same and it cannot be held that the tribunal has not considered the decision cited by learned senior counsel for the applicants

45. Now, coming to the aspect of repudiation of contract or/unilateral termination of the contract, etc. Learned senior counsel for the applicants has cited almost five decisions and the said aspect has been taken note of by the Arbitrators, while dealing with issue Nos.5, 5(a) in dispute No.1 and issue No.2 in dispute No.2 and the reasons are available in para No.9 of the award. It is specifically

contended by the respondent that he accepted the letter issued by the applicants stating that if the Joint Development Agreement is not suitably amended for the purpose of availing loan from the project lenders, then, it is Com.A.S 134 of 2018 difficult to proceed with the contract and the respondent expressed that if applicants are not able to proceed with the construction for want of fund and the defendant was not prepared for modification of Joint Development Agreement as desired by the opinion given by the advocate for the project lender, then, whether it amounts to repudiation, etc. Learned Arbitral Tribunal by referring to the clause No.3 (a) of the Joint Development Agreement has stated that it is the obligation on the part of applicants to obtain loan for development of the mall from project lenders in conformity with the terms of the Joint Development Agreement (underlined by me)and obtained letter from the project lenders that they confirmed the receipt of the Joint Development Agreement and sanctioned the project loan based on the terms of the Joint Development Agreement; the project loan sanctioned letter dated 9.10.2014, which was not in conformity with the terms of the Joint Development Agreement and which stipulated that a fresh Joint Development Agreement is to be executed to suite Com.A.S 134 of 2018 the requirement of the Bank/ or its legal advisers without complying the pre-condition stipulated in clause No.3 and 5 of Joint Development Agreement. The applicants repeatedly sought consent of the defendant to modify the Joint Development Agreement which was not accepted by the defendant. Therefore, according to the applicants the respondent has repudiated the contract unilaterally and according to the defendant it is by conduct, the applicants have repudiated the contract. The Arbitral Tribunal by referring to the various NOCs obtained from the various authorities and payment made by it towards non- refundable deposit to the tune of Rs.69 crores and obtaining of project loan for a sum of Rs.310 crores, etc., and by referring to the clause No. 23 (5) of Joint Development Agreement, regarding 40% of deposit received from the tenant of the mall into designated deposit amount and other conditions and documents furnished by the parties, has rightly come to the conclusion that the applicants have not repudiated the contract. The Com.A.S 134 of 2018 applicant no.1, vide its letter dated 6.1.2015 at Ex. C60(a) has expressed that it is able to secure loan of Rs.124 crores from Bank of Baroda and the sanction letter stipulates certain modification to the Joint Development Agreement and therefore, same may be accepted. However, the defendant has not agreed for it. Thereafter, the respondent as per Ex.C62, dated 19.1.2015 has expressed that the applicants have breached and repudiated the obligation under Joint Development Agreement and he accepted the same. The Arbitral Tribunal by referring to the decision in the case of Workmen and others Vs. M/s Hindustan Levers Limited, reported in (1984) 1 SCC 728 to the effect that unilateral repudiation of an agreement does not result in termination of agreement, has opined that there is no repudiation on the part of the applicants. The Arbitral Tribunal has not considered unilateral termination as alleged by the applicants or deemed repudiation by the applicants as contended by the defendant and the decision quoted by the applicants in the case of Smt. Claude - Lila Com.A.S 134 of 2018 Parulekar Vs. Sakal Papers Private Limited of the Apex Court has also been taken note of by the Arbitral Tribunal and the attempt made by the applicants to secure loan from Goldman Sachs Ltd., by entering into contract with said company and in view of the RBI guidelines, requested the defendant to modify the Joint Development Agreement to suit the condition. The above two decisions have been considered by the Arbitral Tribunal and the decision which was not cited before the Arbitral Tribunal i.e., MANU/WP/009/1906 though cited, it has come within the line of above decision and the ratio laid down is one and the same. The Arbitral Tribunal, by referring to the decision cited by learned

counsel for the respondent regarding repudiation, has come to the conclusion that the claimant wanted to respondent to agree for modifying the Joint Development Agreement by agreeing for upfront mortgage of the schedule property to secure the loan, which was not the desire of the defendant as per the Joint Development Agreement. So, by referring to the evidence Com.A.S 134 of 2018 as well as materials on record, concluded by holding that there was no repudiation by the applicants and further, the respondent have not unilaterally terminated the contract by holding that mere acceptance of letter, dated 19.1.2015 cannot be treated as repudiation of contract. Accordingly, negatived contention of both the parties regarding termination of contract.

46. Learned counsel for the applicants has submitted two more decisions before this Court, i.e., one in the case of M.B. Desai & Bros, Vs. Coorg & Mysore Coffee Co. Ltd., reported in 1975 (2) Kar L J 46 and the decision in the case of National Fertilizers Vs. Puran Chand Nangia, reported in 200 (8) SCC 343, that unilateral termination of contract is not permissible under law. However, the facts of the case are different here and learned Arbitrators have correctly considered this aspect in their impugned award and I do not find any error or any grounds, much less one mentioned in Section 34 are made out. Hence, above decisions are not applicable to the case on hand.

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47. The another leg of arguments of learned counsel for the applicants is that non examination of the respondent is fatal to their case as best witness has been prevented from appearing before the Tribunal and therefore, adverse inference has to be drawn and this aspect has not been considered by the Arbitral Tribunal. Learned Arbitrators, while dealing with issue No.2 in the dispute No.1 and 2, has categorically held that the evidence of RW1 cannot be thrown out as she has participated in many meetings with respondent and even the applicants, have admitted her presence at the time of meetings with Goldman Schs, a project lender and the various communications produced before the tribunal goes to show that it is the RW1, who was taking active role on account of the age of the defendant and therefore, the contention that the non-examination of defendant is fatal and adverse inference has to be drawn etc., cannot be considered. Though, point No.2 in dispute No.1 and point No.1 in dispute No.2, the Arbitral Tribunal has held in para No. 7.5 Com.A.S 134 of 2018 of the award that the applicants were interacting in connection with this project with RW1 as representative of the respondent. Merely, because the respondent due to old age has become forgetful or suffers from loss of memory, the agency does not come to an end. Further, since, RW1 who is the respondent's wife had been acting on behalf of the respondent even in respect of the transaction in question and as she is examined, no adverse inference can be drawn and the said opinion is based upon the finding and their question, who recorded the evidence of RW1 and RW1 was also subjected to cross-examination. Therefore, the opinion expressed by the tribunal regarding the evidence of RW1 cannot be substituted with any other view by this Court under Section 34. Though, the applicants cited a decision in the case of Vidyadhar Vs. Manikrao and another reported in 1999 3 SCC 573, to the effect that if the party does not appear and subject him for the cross-examination, then, the presumption would arise that the case set up by him is not correct. But, the above Com.A.S 134 of 2018 decision is not applicable for the reason that here, the wife of the defendant who has been actively participating along with her husband as admitted by applicants in all the meetings, then, it cannot be held that adverse inference has to be drawn on account of

non-examination of the defendant George Thanngaiah. Therefore, above decision is not helpful to him.

48. The next decision is in the case of Iswar Bhai C. Patel & Bachu Bhai Patel Vs. Harihar Behera and another reported in (1999) 3 SCC 457, which is also the decision come under the same aspect, but, the facts are different and above decision is also not applicable to the case on hand, as the RW1 was actively participating with all right from 2007 and most of the meetings she was present along with her husband. Therefore, it cannot be held that the award suffers from to patient illegality on account of non-consideration of the decisions cited by the learned senior counsel for the applicants.

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49. Since, the applicants have not pressed the relief of specific performance, the question requires to be determined is to whether the award suffers from non application of terms of the contract regarding refund of the amount and whether it is against the evidence placed by the parties before the learned Arbitral Tribunal. As far as the contention of the applicants that the defendant has not produced the documents regarding mental condition of the respondent so as to examine the power of attorney holder is of no consequence for the reason assigned by the Arbitrator and same cannot be found fault with. It is contended by learned senior counsel for the applicants that they have spent Rs.169 crores for the purpose of payment of non- refundable deposit, obtaining of various permissions, NOCs, besides other expenses of earth breaking ceremony which was done by spending huge amount as desired by the defendant, etc., the submission made by the both the counsels also documentary evidence placed before the Arbitral Tribunal, this Court has to see whether the Com.A.S 134 of 2018 findings given by the learned Arbitrator regarding the refund of money is just and proper. Learned Arbitrators on the basis of the records and also the contention taken by the applicants that a sum of Rs.69 crores have been paid as non-refundable deposit to the respondent, which he has earned lot of interest and Rs.116 crores of rupees have been spent on the project as stated in the claim statement by engaging so many consultants as stated in the claim statement and it is contended that major portion of amount has been paid by the applicants and therefore, it cannot be held that the applicants were not in a position to arrange fund for the development of the property and these aspects have been considered by the Arbitrators by referring to the Ex.C84 and C88, letter issued by the Yess Bank stating that they are ready to lend Rs.350 crores and the contention of learned senior counsel for the defendant is that the applicants were not able to even keep the amount of Rs.,20,50,00,000/- in the escrow account for more than three months and it could be gathered from the financial Com.A.S 134 of 2018 position of the applicants that they were not in a position to arrange huge fund, unless, the Joint Development Agreement is suitably amended as per the opinion of the legal advisors of the project lenders. Learned Arbitrators have taken into account, the e-mails sent by the applicants to respondent, which also disclose problems faced on account of the stringent conditions imposed by the defendant in the Joint Development Agreement and as per Ex. R76, SMS sent to RW1 goes to show that the draft Joint Development Agreement has been prepared etc., and subsequently, portion of the same has been withdrawn by the CW2. The project lender insisted for upfront mortgage of a portion of the share of the developer though, it was agreed to by the defendant by modifying Joint Development Agreement, but the upfront mortgage of schedule property was not permissible as per the clause of Joint Development

Agreement, which cannot be termed as the reason for the developer to get the proper loan from the project lenders. The defendant has claimed sum of Rs.353,39,67,142/-

Com.A.S 134 of 2018 under the head of damages for loss of opportunity and document No. 38 was placed, how the damages has to be ascertained and rents and other income from the mall up to 19.7.2016 and the Arbitral Tribunal has considered all these aspects, while dealing with refund of money paid by the defendant, while deciding the claim of the defendant, it has taken into account the estimated market value for the year 2014 at Ex.R55 and the hike in the market value in the year 2014 and the title value in the year 2017, etc., has taken into consideration, to assess the loss and by assessing the same, Tribunal has granted Rs.10 crores towards loss. As far as, loss of rent is concerned, it has taken into account the interest portion also and it is specifically stated that since, the tenants were vacated still they are vacant and the building requires repair also and by taking into account, the rent which the defendant was receiving from Escer as well as M/s Genisis, and also by calculating maintenance charges and other aspects, has granted Rs.34 crores and regarding security maintenance Com.A.S 134 of 2018 and electric charges, which required to be paid by the respondent has also taken note and a sum of Rs.4 crores was awarded. Regarding the maintenance charges, the Tribunal has awarded Rs.1.5 crores and regarding reimbursement of electric charges about Rs.5,84,500/- was ordered and a sum of Rs.54,63,968/- is ordered to be given towards security and electric charges and regarding reinstating of schedule property on account of partial demolition the Tribunal has granted Rs.1 crore and regarding cost incurred for restoration of the building was not allowed and reimbursement of property tax was not allowed for the year 2009-10, but for the year 2010-11 was also considered, but the same was not allowed. Regarding interest on account of delay in payment of Rs.19 crores was also not allowed and in all the Tribunal has ordered to refund Rs.51,04,63,968/- and after deducting the amount paid by the defendant a sum of Rs.42.45 crores were ordered to be paid to the claimant and the Arbitral Tribunal has given correct account how, they have arrived at. The Com.A.S 134 of 2018 main argument of learned senior counsel for the applicants is that the awarding of Rs.10 crores towards compensation for loss suffered is without any basis, but, the reason is assigned. According to him, the defendant has earned huge interest as admitted by RW1 and therefore, the amount paid by it ought not to have been deducted and the portion of amount is not correct, etc. But, learned Arbitrators have taken into account each and every aspect, in its rights perspective by referring the documents and evidence and has rightly pointed out by the learned counsel for the defendant, the award regarding refund of the amount of Rs.42.45 crores cannot be touched as right from the year 2007 till 2015, nothing has happened, except obtaining licence, NOCs and earth breaking ceremony exchange of property and the defendant has lost huge rent on account of vacating the premises and maintaining the same. Therefore, in view of the above facts, I do not find any mistake in the award regarding refund of the amount paid by the defendant and as the applicants have not Com.A.S 134 of 2018 pressed the relief of specific performance, I am of the view that the award does not suffer from any patent illegality as contended.

50. Ofcourse, he has referred to various documents as stated in the previous paras and whether an award of this nature can be set aside as stated in the various decisions cited by learned counsel for the defendant and when an award can be set aside. Ofcourse, the applicants contend that the defendant who himself is wrong cannot be allowed to take benefit of his own wrong by referring to

two decisions reported in AIR 1998 Rajasthan 248 and 1996 6 SCC 342 and also latest decision reported in (2013) 9 SCC 363. It is contended that the above award is perverse it can be set aside and if it is contrary to the contract, the same is liable to be set aside under Section 34 of the Act, and in the said regard both the counsels have cited the decisions in the case of Ssangyong Engineering and construction Company Ltd., and the some more decisions which I have already stated in the previous paras. An Com.A.S 134 of 2018 award can be set aside only if it is against the public policy, terms of the contract and failure to apply the decision of the Apex Court and High Courts regarding terms of the contract which amounts to patent illegality. When we read the entire award, there is nothing to show that the Arbitral Tribunal has failed to consider the case of the applicants and that they have failed to interpret the terms of the contract and further, the Arbitral Tribunal has elaborately discussed, each and every aspect by raising proper points and therefore, there is no scope for interference under Section 34 of the Act. Hence, I find no merits in the application.

51. Further, the documents sought to be produced now, are pertaining to the period after the award and they were not available at the time of Arbitral proceedings and therefore, they cannot be receive like in Appeal and there is no question of appreciation of those facts by this Court and there is no scope for production of the documents. The Court has to decide the case on the basis of the documents Com.A.S 134 of 2018 produced before the Tribunal and not before this Court and Court cannot opine anything on those documents to show that the applicants were vigilant and to prove ready and willing to perform their part of contract. Since, the Arbitration is the chosen forum, Arbitrators are the chosen Judges of the parties and when the parties are governed by the contract between the them and when they failed to perform their part of contract in a reasonable time, then, this Court cannot interfere with such findings as scope is very limited. Hence, I answer point Nos.1 and 2 in the Negative.

52. Point No.3:- For the aforesaid reasons, I proceed to pass the following Order.

ORDER The suit/petition filed by the applicants under Section 34 of Arbitration & Conciliation Act, 1996 is hereby dismissed. No costs.

Com.A.S 134 of 2018 Consequently, I.A V filed for receiving additional documents, stands rejected.

(Dictated to the Stenographer, typed by him, corrected and then pronounced by me in open Court on this the 23rd day of February, 2022).

(CHANDRASHEKHAR U), LXXXVII Addl.City Civil & Sessions Judge, (Exclusive dedicated commercial Court) Bengaluru.

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