Expat Projects And vs Sri K.C. Alva on 23 June, 2018

Form No.9
(Civil) Title
Sheet for
Judgment
in Suits
R.P. 91

PRESENT: SRI S.A. HIDAYATHULLA SHARIFF,
B.A.,LL.M.,
C/c XXVII Additional City Civil
Judge and LVIII Additional City
Civil and Sessions Judge,
Bengaluru City.

Dated this the 23rd day of June 2018

PLAINTIFF: EXPAT PROJECTS AND
DEVELOPMENT PRIVATE LIMITED,
A Company incorporated under the
provisions of the Companies Act,
having its registered office at No.1,
Shobha Pearl, II Floor,
Commissariat Road,
BENGALURU-560 025.
Represented by its Senior Vice
President and Authorised signatory
Sri Diwakar Mysore Ramamurthy.
[By Sri Ramalingegowda B, Advocate]
/v e r s u s/

DEFENDANTS: 1. SRI K.C. ALVA
Son of Sri K.T. Alva,
Aged about 72 years.

2. SMT. MUKTHA C. ALVA
Wife of Sri K.C.Alva,
Aged about 65 years,

3. SRI UMAKANTH ALVA S/o Sri K.C.Alva, Aged about 42 years, Defendants 1 to 3 are residing at 'Ganesh Prasad', Yekkarady Kavoor, Mangalore-575 015.

4. SRI VISHWANATH V. ANGADI Sole Arbitrator, Arbitration and Conciliation Center, Khanaja Bhavan, 3rd floor, East Wing, Race Course Road, BENGALURU-560 001.

D1 & D3 -By Sri HVS, Advocate Plaintiff has filed this suit under Section 34 of Arbitration and Conciliation Act, 1996 r/w Section 16 (6) and Section 12 (1) of Arbitration and Conciliation Act, 1996 for setting aside the arbitral award dated 8/9/2017 passed by the learned Arbitrator who is the defendant no.4 in the present suit.

2. In brief the facts of the case are as under:

> Defendants 1 and 2 represented the plaintiff that they were the absolute owners of converted land situated at Konaje village, Mangalore taluk, Dakshina

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Kannada District bearing sy.no.196/p1 measuring 1 acre 63.15 cents, sy.no. 196/p2 measuring 2 acre 30 cents, sy.no. 197/2 p2 measuring 2 acres 94.72 cents, sy.no. 84/6 p2 measuring 55 cents, sy.no. 195/p4 measuring 1 acre, 195/ p5 measuring 65 cents, sy.no. 84/6 p1 measuring 16 cents, sy.no. 197/2 p1 measuring 1 acre 84 cents by expressing their interest to enter into joint development agreement with the plaintiff. On the promises and assurances made by the defendants 1 to 3 with regard to their co-operation for proper development of the above mentioned land, plaintiff and defendants 1 to 3 have entered into a registered joint development agreement dated 4/7/2014. Even before execution and registration of the joint development agreement plaintiff based on the representation of the defendants 1 to 3 had paid a total sum of Rs.1,00,00,000/- to the defendants 1 to 3 on different dates as refundable security deposit by way of RTGS transaction, cash and through cheques. Plaintiff also agreed to pay further 4 CT0028_A.S._158_2017_Judgment_.doc .

sum of Rs.1,00,00,000/- to the defendants 1 to 3 once they obtained the plan sanctions from the concerned authority.

Plaintiff further submits that in terms of the joint development agreement dated 4/7/2014, defendants 1 to 3 have executed a General Power of Attorney in favour of the plaintiff/company authorising to deal with the schedule property and also delivered possession of the said property to the plaintiff. When the General Power of Attorney was presented for registration, the same was impounded by the registering authority for non-payment of proper stamp duty. The third defendant who had agreed and undertaken to resolve the said issue of impounding of General Power of Attorney with the District Registrar has failed to resolve the said dispute and impounded General Power of Attorney continued to be in possession of the District Registrar. In absence of Power of Attorney nothing could have been done by the plaintiff in pursuance of the joint development 5 CT0028_A.S._158_2017_Judgment_.doc .

agreement and hence it was impermissible to find any fault with the plaintiff if some action is not taken in pursuance of joint development agreement. Plaintiff has done substantial work in pursuance of joint development agreement. But, for want of General Power of Attorney, the plaintiff would not have got any plan sanction and do any act before public authorities. In clause 3.3 of joint development agreement, it is stated that the defendants have given Power of Attorney to the developer to secure clearances. Since Power of Attorney was never given to the plaintiff in reality

plaintiff could not have done any act. Consequently, no fault could ever have been found out with the plaintiff. In clause 3.4 of joint development agreement, it is categorically stated that it was the owners of the property to secure sanction of license and plans. Plaintiff had prepared the required plans and had given it to the defendant 1 to 3 to get the plan sanctioned and defendants 1 to 3 did not get the plan sanctioned. The defendants 1 to 3 also failed 6 CT0028_A.S._158_2017_Judgment_.doc .

and neglected to get the requisite various licenses, plans, and permissions required for commencement of the said project in terms of the joint development agreement and obligation was cast on them.

Plaintiff further submits that thereafter, the defendants 1 to 3 have entered into a memorandum of understanding dated 30/12/2014 with him. The said Memorandum of understanding was insufficiently stamped and unregistered document. Apart from that, the said Memorandum of understanding does not even contain an arbitration clause.

Plaintiff submits that in the decision of the Apex Court of the land reported in MANU/SC/3374/2000 at para 6, the Apex Court has stated that the terms of registered document can be altered, rescinded or varied only by subsequent registered document and not otherwise. In view of the ratio of the above cited decision, Memorandum of understanding did not have any effect of altering joint development agreement. The sole arbitrator has 7 CT0028_A.S._158_2017_Judgment_.doc .

permitted for marking of Ex.P2 Memorandum of understanding subject to objections of the plaintiff. The Memorandum of understanding could not have been looked into by the arbitrator which was marked subject to objection.

Plaintiff further submits that, apart from payment of refundable security deposit of Rs.1,00,00,000/- in terms of joint development agreement, on the demand made by the defendants 1 to 3 he had paid a sum of Rs.41,04,000/- towards meeting the expenses of Liasoning and also paid a sum of Rs.4,80,994/- to Eda Consultancy Services on 13/1/2015 for handling electric work and also paid a sum of Rs.3,50,000/- to M/s Slacline Company on 5/5/2015 for conducting marketing event. The defendants 1 to 3 have also collected a sum of Rs.24,93,000/- from the plaintiff towards stamp duty and registration fees in respect of joint development agreement and General Power of Attorney. Even after payment of huge amount towards payment of stamp 8 CT0028_A.S._158_2017_Judgment_.doc .

duty and registration fee till date General Power of Attorney is not handed over to him by the defendants. Plaintiff has also paid a sum of Rs.15,00,000/- to defendants 1 to 3. Plaintiff has totally paid a sum of Rs.1, 89,27,994/- to the defendants 1 to 3.

Plaintiff submits that in view of the several breaches committed by defendants 1 to 3 the project itself could take of and he was made to suffer both in terms of money and reputation. He was under a rude shock to receive a legal notice dated 17/2/2016 issued by the defendants 1 to 3 making

allegations that he had not commenced the project even after lapse of 18 months from the date of execution of joint development agreement and threatened to terminate the said joint development agreement . In the notice dated 17/2/2016, defendants have not made any monetary claim whatsoever nature under whatsoever head. After receipt of the said notice, he had issued a reply notice dated 4/3/2016 to defendants 1 to 3 informing that the breach of vital terms of the joint 9 CT0028_A.S._158_2017_Judgment_.doc .

development agreement has been committed by them and the document relating to the property were not fully furnished and the obligation to obtain sanctioned plan, permissions, licences and necessity of commencement of the project was on them and the delay was because of their inaction and not because of him. In his reply notice, he has also reminded defendants 1 to 3 that he had paid a total sum of Rs.1,89,27,994/- to them and called upon them to jointly and severally repay the said sum together with interest at the rate of 18% per annum. After service of the said reply notice defendants 1 to 3 issued a rejoinder notice dated 26/4/2016 taking all untenable contentions and called upon him to comply the demand made in the notice dated 17/2/2016 issued by them. In the rejoinder notice, the defendants 1 to 3 have not disputed the payments made by him to them to the tune of Rs.1,89,27,994/- thereby impliedly admitted the receipt of the said sum under the joint development agreement. Thereafter, defendants 1 to 3 10 CT0028_A.S._158_2017_Judgment_.doc .

issued another notice dated 4/7/2016 stating that the demands made by them in the previous legal notices were not complied and therefore, they have invoked clause 31 of joint development agreement, in terms of appointment of arbitrator to adjudicate the dispute. By virtue of the legal notice dated 4/72016 defendants 1 to 3 proposed for adjudication of the dispute arising under the joint development agreement only and sought for concurrence in the matter of appointment of the arbitrator for adjudication of the disputes under joint development agreement. There is no arbitration clause in Memorandum of understanding dated 30/12/2014 and hence the question of referring he disputes under the said Memorandum of understanding does not arise at all and therefore defendants 1 to 3 invoked clause 31 of the joint development agreement and sought for adjudication of the dispute that arise only under the said joint development agreement.

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Plaintiff further submits that since he did not agree with the nomination made by defendants 1 to 3 for appointment of sole arbitrator, the defendants 1 to 3 approached Hon'ble High Court of Karnataka under Section 11 of the Arbitration and Conciliation Act, 1996 in CMP No.194/2016 and sought for appointment of sole arbitrator as per clause 31 of joint development agreement for adjudication of the disputes and differences arising under the said joint development agreement only. Memorandum of understanding was not produced before Hon'ble High Court of Karnataka. The Hon'ble High Court of Karnataka allowed the CMP 194/2016 and passed an order by appointing sole arbitrator to arbitrate the dispute and conduct the arbitration proceedings. The order passed by the Hon'ble High Court of Karnataka in CMP No.194/2016 clearly discloses that only the disputes arising under the joint development agreement was referred for adjudication to the sole arbitrator and dispute in connection with the 12 CT0028_A.S._158_2017_Judgment_.doc .

Memorandum of understanding was not at all referred for adjudication and the dispute in connection with Memorandum of understanding was not the subject matter of arbitration.

Plaintiff further submits that in pursuance of the order passed in CMP No. 194/2016, the 4th defendant was appointed as the sole arbitrator to adjudicate the disputes arising under the joint development agreement only. The sole arbitrator entered reference and issue notice to both the parties. Defendants 1 to 3 of the present suit were the claimants before the sole arbitrator and they have sought for the relief of declaration that the joint development agreement dated 4/7/2014 and Memorandum of understanding dated 30/12/2014 entered between the claimants and respondents as null and void and also sought for direction to the respondent to pay a sum of Rs.34,39,47,929/- along with interest at the rate of 18% per annum being the promises made by the respondent and also towards the losses suffered by 13 CT0028_A.S._158_2017_Judgment_.doc .

the claimants and also sought for cost of the arbitral proceedings.

Plaintiff further submits that it is well settled that when a declaration is given that certain document creating a contract is void, Section 65 of Indian Contract Act comes into force and consequently, the only relief that can be given would be to put parties back to their original position. It was impermissible to ask for payment on the ground that any default had taken place because there can be no default with respect to void contract. Further, the direction for payment of amount was sought for on the basis of Ex.P2 an inadmissible document for want of registration and stamp duty as such no order could have been passed for payment of the amount. Section 34 of Karnataka Stamp Act provides that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authorized to receive evidence or shall be acted upon. Hence, in view of the bar under 14 CT0028_A.S._158_2017_Judgment_.doc .

Section 34 of Karnataka Stamp Act, Memorandum of understanding could not have been acted upon and no relief could have ever been given.

Plaintiff submits that after service of the claim statement, he has filed this counter/reply/defence statement to the claim statement denying the claim of defendants 1 to 3 and sought for dismissal of the claim statement. In the defence statement it was his specific contention that the claim of the defendants 1 to 3 in the claim statement is outside the scope and purview of Joint Development Agreement dated 4/7/2014 and hence the claim statement was liable to be dismissed in limine. Apart from that in none of the notices issued by defendants 1 to 3 they have made any monetary claim against him. All of a sudden for the first time in the claim statement, defendants 1 to 3 made huge money claim. Even in the rejoinder notice dated 26/4/2016 issued by the defendants 1 to 3, they have not denied the receipt of the amount from him but have also not stated that they are entitle for 15 CT0028_A.S._158_2017_Judgment_.doc .

any amount from him. Even in the CMP, there was no contention that any amount is payable. Dispute under Memorandum of understanding was not sought to be referred and Memorandum of understanding was not produced before Hon'ble High Court of Karnataka in the CMP.

Plaintiff further submits that after exchange of notices dated 17/2/2016, 4/3/2016 and on 26/4/2016 between him and defendants 1 to 3, the third defendant had addressed an e-mail dated 28/6/2016 offering a sum of Rs. 25,00,000/- to him in full and final settlement of his claim and to close the deal. This e-mail of the third defendant shows that defendants 1 to 3 themselves have admitted that they are not entitle for any monies from him and in turn they are liable to pay him. Thereafter, the third defendant has enhanced the offer from Rs.25,00,000/- to Rs.50,00,000/- by virtue of e-mail dated 29/6/2016. The conduct of defendants 1 to 3 in not making any monetary claim in any of the notices / 16 CT0028_A.S._158_2017_Judgment_.doc .

communications sent by them coupled with the fact that they themselves have offered to pay certain amount to him in full and final settlement of his claim clearly goes to show that the exorbitant claim made by defendants 1 to 3 in the claim statement is not only baseless but also an after thought and speculative. The entire claim in the claim statement is a fanciful and speculative claim without any basis and justification. The obligation to pay money in terms of said Memorandum of understanding would arise only after the units are put up in the developed property and sold. Admittedly, the units are neither constructed nor sold. Therefore, the question of making any payment by him to defendants 1 to 3 do not arises at all.

Plaintiff further submits that arbitrator has not made declaration as is mandatorily required under Section 12 of the Arbitration and Conciliation Act, 1996. The award is in conflict with public policy of India. The defendants have filed their rejoinder to his 17 CT0028_A.S._158_2017_Judgment_.doc .

counter statement. Thereafter, the fourth defendant arbitrator framed issues / terms of reference, recorded the evidence, heard arguments and has passed the impugned award. Aggrieved by the impugned award dated 8/9/2017 passed by the fourth defendant in A.C.21/2017 he has filed the present suit to set aside the impugned award in terms of Section 34 of Arbitration and Conciliation Act, 1996 on the following grounds:

> GROUNDS:
>
> 1) The award is not valid and perverse because the arbitrator has not disclosed his interest as is mandatorily required under Section 12 of the Act inspite of the proceedings having commenced in pursuance of the notice dated 4/7/2016.

Hence, the award is liable to be set aside by virtue of Section 34 (2) (b) (ii) of the Act.

2) The arbitrator has exercised jurisdiction not vested in him by adjudicating the disputes 18 CT0028_A.S._158_2017_Judgment_.doc .

that have arisen under the Memorandum of understanding which disputes were not referred to the arbitrator by virtue of the orders passed in CMP 194/2016. Hence, the award is liable to be set aside under Section 34 (2) (a) (iv) of the Act.

3) The tribunal erred in proceeding on the basis of Ex.P2 being valid when the same had been executed by third defendant for himself and at the General Power of Attorney holder of defendants 1 and 2 and those Power of Attorney could not have been acted upon as they were not on sufficient stamp papers and as such by virtue of Section 34 of Karnataka Stamp Act, it could not have been acted upon. Hence, the award is perverse and liable to be set aside under Section 34 (2) (b) (ii) of the Act.

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4) The Arbitral tribunal has adjudicated the matter which was not referred to it in as much as the claim in pursuance of Ex.P2 Memorandum of understanding regarding which dispute the matter was not referred. Monetary claim was not mentioned either in legal notice or in rejoinder or CMP, as such said dispute was not a matter which was referred to. On these grounds, the award is perverse and is liable to be set aside under Section 34(2) (b) (ii) of the Act.

5) The Arbitral tribunal has dealt with the matter which was not the subject matter referred to it. Hence, the impugned award is not valid and liable to be set aside under Section 34(2) (a) (iv) of the Act.

6) When Ex.P6 and Ex.P7 e-mails showed that defendants 1 to 3 had agreed to pay Rs.25,00,000/- initially and thereafter Rs.50,00,000/- to the plaintiff, the award 20 CT0028_A.S._158_2017_Judgment_.doc .

passed for payment of money by the plaintiff to defendants 1 to 3 is without valid reasoning, perverse and liable to be set aside under Section 34(2) (b) (ii) of the Act.

7) In clause 29 of Joint Development Agreement, it is specifically stated that the same is a complete agreement superseding all earlier agreements, however the arbitrator in impugned award has referred to Ex.P8, Ex.P8(a) (b) and (c) which were much earlier to the execution of Joint Development Agreement which resulted in passing an award contrary to contract. The law does not permit passing an award contrary to contract and arbitrator being a creature of the contract cannot annul the contract between the parties and hence the impugned award is perverse and same is 21 CT0028_A.S._158_2017_Judgment_.doc .

liable to be set aside under Section 34(2) (b)

(ii) of the Act.

8) The arbitrator conveniently has not referred to or ignored clause no. 3, 4 and 7 of Memorandum of understanding wherein it is specifically recited that defendants 1 to 3 are entitle to the alleged revenue only after the sale of the units. The passing of the award without considering the clause 3, 4 and 7 of the Memorandum of understanding would amount to acting contrary to the contract which is not permissible. The law does not permit passing an award contrary to contract and arbitrator being creature of the contract cannot annul the contract between the parties and hence the

impugned award is perverse and liable to be set aside under Section 34 (2) (b) (ii) of the Act.

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A perusal of the clauses contained in Ex.P2 Memorandum of understanding would clearly shows that defendants 1 to 3 are entitle for revenue if any in the alleged residual revenue only after sale of units and not prior to that. Admittedly, neither the units have been constructed nor have been sold. Therefore, defendants 1 to 3 are not entitled to any amount in the name of alleged distributable revenue.

The arbitrator has given complete go-bye to the binding clauses of Joint Development Agreement and Memorandum of understanding. In clause 3.4 of the Joint Development Agreement, there was an obligation on the defendants to get the plans, licenses and permissions approved from the competent authority. Inspite of it, the arbitrator holds that plaintiff has committed breach of contract by not getting the plan approved from the competent authorities. The arbitrator has re-written the contract and has acted contrary to the contract. The law does not permit passing an award contrary to the contract and 23 CT0028_A.S._158_2017_Judgment_.doc .

arbitrator being creature of the contract cannot annul the contract between the parties and the impugned award is perverse and is liable to be set aside under Section 34 (2) (b) (ii) of the Act.

The arbitrator has ignored the fact that defendants 1 to 3 have not at all substantiated their claim sought in the claim statement. Except claiming a sum of Rs.21,20,00,000/- in the claim statement, the defendants 1 to 3 have neither pleaded nor proved the basis on which they have claimed the said amount. The award passed by the arbitrator directing the plaintiff to pay the above amount claimed by the defendants in the claim statement shocks the conscience and same is perverse. The impugned award is also in conflict with most basic notions of morality and justice and hence is liable to be set aside under Section 34 (2) (b) (ii) and (iii) of the Act.

The Arbitral tribunal has passed a perverse award in not noting that there was no monetary claim either at the time of exchange of notices or in the 24 CT0028_A.S._158_2017_Judgment_.doc .

CMP, as such it was not a matter referred to and such claim was not possible in view of the very admitted documents of defendants 1 to 3 where they had agreed to pay money to the plaintiff. The impugned award is perverse and is liable to be set aside under Section 34 (2) (b) (ii) and (iii) of the Act and also under Section 34 (2) (a) (iv) of the Act.

The observation at paragraph 482 of the impugned award that the plaintiff would have taken signatures of the defendants 1 to 3 to get the plan sanctioned is contrary to the terms of the contract which required the defendants 1 to 3 to take clearances as such the award is perverse and based on conjunctures and surmises and is liable to be set aside under Section 34(2) (b) (ii) and (iii) of the Act.

The decision of the arbitrator at paragraph 362 and 455 of the impugned award that the plaintiff has not prepared the plans is contrary to the evidence on record and the arbitrator has given complete go-bye to the admissions made by PW.1 in this regard. Ex.P8 25 CT0028_A.S._158_2017_Judgment_.doc .

(B-1) an e-mail communication dated 10/2/2015 addressed by the defendant no.3 to the Architect of the project wherein PW.1 has admitted the contents of the said documents in his deposition at page no.23 and as such, the award passed is perverse and liable to be set aside under Section 34(2) (b) (ii) and (iii) of the Act.

The reason given by the arbitrator to award huge amount to the claimants is that plaintiff had not kept the drawings ready and did not get the plan sanctioned which finding is per se shocks the conscience of the court and it is conflict with the basic notions of morality and justice in the light of admissions that the drawings were ready as long back as in the month of February 2015 as per Ex.R8 (B1) and secondly as per the terms of the Memorandum of understanding the defendants are entitle to the distributable revenue only after the sale of units and not prior to that which admittedly never happened. The reason given for awarding huge amount in favour 26 CT0028_A.S._158_2017_Judgment_.doc .

of the claimant in the award is perverse and liable to be set aside under Section 34(2) (b) (ii) and (iii) of the Act and under Section 34(2) (a) (iv) of the Act.

The arbitrator has framed issue no. 1 to 5 casting burden on the defendants to prove the said issues. Though the arbitrator holds that said issues are proved by the defendants, the arbitrator had not discussed these issues and not given any reasoning and findings on these issues. In the guise of deciding all the issues together, the arbitrator has ignored to deal with issues 1 to 5, issues no. 1 to 5 framed by the arbitrator remained unanswered which is contrary to Section 31 (3) of Arbitration and Conciliation Act, 1996 which requires the Arbitral tribunal to give reasons upon which it is based unless parties otherwise agreed. On this ground also the award is perverse and liable to be set aside under Section 34(2)

(b) (ii) of the Act.

The finding recorded by the arbitrator at para 463 of the award at Ex.P14 General Power of Attorney 27 CT0028_A.S._158_2017_Judgment_.doc .

executed by defendants in favour of the plaintiff is not compulsorily registrable document as per Section 17 of the Registration Act and the finding given that the same is on sufficient stamp paper is perverse and is liable to be set aside under Section 34(2) (b) (ii) and

(iii) of the Act.

The finding recorded by the arbitrator at para 468 of the award that defendants 1 to 3 had furnished all the documents of the property as called for by the plaintiff and his counsel from time to time is

perverse. During the cross-examination of PW.1, he had stated that he would produce documents to show delivery of documents but he had not produced any documents to prove the delivery of the document to the plaintiff and there is no evidence produced on record by the defendants to show that documents were delivered to the plaintiff. On this ground also award is perverse and is liable to be set aside under Section 34(2) (b) (ii) and (iii) of the Act.

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A reading of the award show that arbitrator was biased and arbitrator has not given declaration as per Section 12 of the Act and contract is altered in the award, matters not referred for arbitration are considered by the arbitrator, as such the award is perverse and liable to be set aside under Section 34(2)

(b) (ii) and (iii) of the Act.

The defendants have not cross-examined the plaintiff on Ex.R12 to Ex.R19 documents by denying the payment of amount under the said documents and the payment of amount by the plaintiff referred in the reply notice of the plaintiff was not denied in the rejoinder by the defendant. Under these circumstances, the finding of the arbitrator that the amount being paid by the plaintiff to defendants 1 to 3 is not proved is perverse and is liable to be set aside under Section 34(2) (b) (ii) and (iii) of the Act.

The finding recorded by the arbitrator at para 445 of the award that the plaintiff had abandoned the execution of the work inspite of the opportunity 29 CT0028_A.S._158_2017_Judgment_.doc .

having been given to him to complete the work is not only perverse but illegal, absurd and uncalled for and same was without jurisdiction in the light of the fact that such plea was not even pleaded by either of the parties. On this ground also, the impugned award is perverse and is liable to be set aside under Section 34(2) (b) (ii) and (iii) of the Act.

The observation of the arbitrator at paragraph 440 of the award that the defendant has not invoked clause 31 of Ex.P1 is absolutely contrary to all known aspects of law and is perverse and liable to be set aside under Section 34(2) (b) (ii) and (iii) of the Act.

The arbitrator also had no jurisdiction and has committed an error of law as well as jurisdiction in awarding interest at the rate of 9.5% per annum from pre-reference, pendent lite and post award period and the awarding of interest is perverse and liable to be set aside under Section 34(2) (b) (ii) and (iii) of the Act.

By virtue of the impugned award, the defendants 1 to 3 are not only entitle to the claims made in their 30 CT0028_A.S._158_2017_Judgment_.doc .

claim statement but also to the amounts admittedly paid by the plaintiff and also the property is retained by them. Therefore, the impugned award on the face of it is perverse and shock the

conscience and therefore liable to be set aside under Section 34(2) (b)

(ii) and (iii) of the Act.

Viewed from any angle the impugned award is biased, perverse and based on no evidence, against public policy, patently illegal, shocks the conscience and the arbitrator has assumed jurisdiction not vested in him while passing the award. Therefore, the award is not sustainable and is liable to be set aside under Section 34(2) (b) (ii) and (iii) of the Act.

In para 323 of the impugned award the decision of the Apex Court of the land reported in 2003 (5) SCC 705 was referred where the Apex Court has held that an arbitral award is to be set aside if the arbitration agreement is not valid under law or award deals with dispute not contemplated by or not falling within the terms of submission of arbitration or it 31 CT0028_A.S._158_2017_Judgment_.doc .

contains the decision of matters beyond the scope of submission of arbitration. In paragraph 322 of the award the arbitrator has referred to the decision reported in 2006(1) SCC 68, wherein it was held that arbitrator cannot go beyond the terms of the contract and contrary to the terms of the contract. In paragraph 324 of the impugned award the arbitrator has referred to the decision reported in 2008 (13) SCC 18 wherein the Apex Court of the land has held that award cannot be contravening Section 31 (3) and whether there is difference which is one to which arbitration agreement applies. In paragraph 325 of the impugned award, arbitrator has referred to the decision reported in 2011 (10) SCC 573 wherein the Apex Court of the land has held that arbitrator cannot travel beyond the terms of reference. In paragraph 326 of the impugned award, the arbitrator has referred the decision reported in OMP 507/2015 which deals with effect of non-registration. In paragraph 327 of impugned award the arbitrator has referred to the 32 CT0028_A.S._158_2017_Judgment_.doc .

decision reported in LAWS (BOMBAY) 1942 (4) 10 wherein it was held that when there is an subsequent agreement, arbitrator appointed under the first agreement has no jurisdiction to determine the rights and liabilities under the second agreement. In para 332 of the impugned award the arbitrator has referred the decision reported in 2009 (7) SCC 696 wherein it was held that there is difference between incorporation and referring to one document. In paragraph 334 to 351 of impugned award reference was made to various sections of different enactments including the Karnataka Stamp Act. However, while passing the impugned award the arbitrator has neither applied the ratio of the decisions nor the provisions of the various enactments referred by him. The finding of the arbitrator at paragraph 352 to 358 of the impugned award that plaintiff has not proved the documents were not delivered to him is patently illegal. Plaintiff cannot be expected to prove the negative which is impermissible. There was no 33 CT0028_A.S._158_2017_Judgment_.doc .

evidence available on record to show that documents were delivered to the plaintiff. Hence, the whole finding given by the arbitrator on this aspect is also based on conjuncture and surmises.

The observations made by the arbitrator at paragraph 363 of the award that the details of making alleged payment of RS.41,04,000/- by the plaintiff is not available is wholly perverse as there is no dispute about it in the very rejoinder given to the reply notice by the defendants.

The observations made by the arbitrator at paragraph 364 and 365 of the award that the payment made by plaintiff to M/s Eda Consultancy Services LLP is not proved to be at the instance of defendants is total non-application of mind to the evidence. The observations of the arbitrator at paragraph 366 to 368 that the stamp duty paid is not repayable does not take into consideration that it is a natural consequences. The entire reasoning in para 369 of the arbitration award is perverse as the arbitrator takes 34 CT0028_A.S._158_2017_Judgment_.doc .

into consideration the documents earlier to the Joint Development Agreement, when the Joint Development Agreement itself stated that its contents are final and further it does not refer to non-registration and insufficient stamp duty of Ex.P2. The observation of the arbitrator at para 374 that in consistent stand cannot be taken by the plaintiff is wrong. The observation in the same paragraph stating that Joint Development Agreement and Memorandum of understanding can be looked into together without considering the fact that a registered document being not capable of being altered by an unregistered document is wrong. The acceptance of evidence that Ex.P1 refers to Ex.P2 as found in the paragraph 151 and 376 is perverse.

The observation of the arbitrator at para graph 380 of the impugned award that Ex.P.1 and 2 are registered documents or that Ex.P.2 is pending for registration shows absolute non application of mind by the arbitrator since Ex.P.2 was not pending for 35 CT0028_A.S._158_2017_Judgment_.doc .

registration and is not a registered document. Further, observation of the arbitrator in the said paragraph that the plaintiff is not sure of his case is a perverse reasoning since plaintiff has contended that both Ex.P.1 and 2 are executed but Ex.P.2 is not a valid document as such came cannot be used.

The observation of the arbitrator at para 381 of the award that Ex.P.1 should be read with Ex.P.2 without considering that Ex.P.2 is inadmissible and not a valid document is perverse.

The observation of the arbitrator at paragraph 382(a) of the impugned award that the tribunal having no jurisdiction is not pleaded is not correct since plaintiff has taken a definite contention with regard to same at paragraphs 1, 4 and 5 of his written statement. The observation of the arbitrator at para 399 of the impugned award that a pleading is required to counter the rejoinder is an absolute perverse finding.

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The finding of the arbitrator at pra 400 of the impugned award that the dispute under Ex.P.2 MOU is arbitrable is not valid in since the same is not a registered document and same is not admissible in evidence. Further, finding of the arbitrator that Ex.P.1 and Ex.P.2 should be read together is not

tenable because a registered document cannot be altered or modified by an unregistered document and hence, Ex.P.1 could not have been read with Ex.P.2.

The observation of the arbitrator at para 401 of the impugned award referring to Ex.P.8(a, b and c) which are prior to the date of execution of Ex.P.1 would render the award invalid because clause 29 of the JDA clearly provided that JDA supersedes all other earlier agreements, as such, there was a bar to look into any correspondence earlier to the said JDA.

The observations of the arbitrator from paragraph 404 to 407 and in particular at paragraph 407 that Ex.P.18 was not replied and same would show want of co-operation from the plaintiff are 37 CT0028_A.S._158_2017_Judgment_.doc .

perverse because the power of attorney which is sought to be corrected and already been presented for registration and the same was registered and was impounded and the law does not permit impounded document to be altered. The very evidence given by defendants 1 to 3 that they have obtained certified copy of Ex.P.14 would show that the document admittedly was registered and consequently, there was no possibility of altering a registered document hence, the observations at paragraphs 404 to 407 at the impugned award are perverse and contrary to law. The other averments made in paragraphs 404 to 407 that there was some loan and loan could not be repaid by defendants 1 to 3 and the property was not available for them to exploit were not at all born out in pleadings and the observations are without pleadings as such is perverse. M/s. Connect Builders and Developers was neither party to the JDA nor their name was ever mentioned during the time of transaction at the time of JDA and the observations 38 CT0028_A.S._158_2017_Judgment_.doc .

made by the arbitrator in paragraphs 404 to 407 shows absolute ignorance of difference between general damages and special damages and provisions of Indian Contract Act as such perverse.

The observation of the arbitrator at paragraph 408 of the impugned award that because Ex.P.1 is sufficiently stamped and registered, Ex.P.2 need not be registered and no duty is payable is perverse.

The observation of arbitrator at paragraph 409 that CMP order would provide for looking into Ex.P.2 is not correct and is not tenable.

The observation of the arbitrator at paragraph 409 of the award that it was for the plaintiff to produce MOU is perverse.

The observation of the arbitrator at paragraph 410 that balance stamp duty on Ex.P.14 was to be paid by the plaintiff is a perverse finding.

The observation of the arbitrator at paragraph 411 of the impugned award that no agreement is produced to show that it was the plaintiff who was 39 CT0028_A.S._158_2017_Judgment_.doc .

supposed to pay the stamp duty on Ex.P.14 is contrary to law. Further, observation of the arbitrator at paragraph 412 that defendants 1 to 3 volunteering to pay money did not amount to accepting that

there was no fault on the part of the plaintiff is perverse. Further observation of the arbitrator at para No.413 that the plaintiff did not prepare the plan is contrary to the evidence and is not tenable. The observation of the arbitrator at para 414 that in absence of GPA plaintiff could have proceeded with is perverse. The observation of the arbitrator at para 415 that plaintiff would be liable for liabilities to M/s.Connect Builders and Developers shows basic ignorance of the law regarding general damages and special damages and section 73 of Indian Contract Act.

The reasoning of the arbitrator at para 418 of the impugned award that it was for the plaintiff to have paid stamp duty of Ex.P.2 and plaintiff has not done so and that it is for the plaintiff to have got the documents registered would show that the award is 40 CT0028_A.S._158_2017_Judgment_.doc .

contrary to the other paragraphs. Apart from that, non payment of stamp duty by the plaintiff would not enable the insufficiently stamped document to be marked or an unregistered document to be marked are looked into. Further, observation of the arbitrator at para 419 that plaintiff has not advanced any arguments or to under what provision Ex.P.2 is required to be registered is incorrect because the law is that a registered document cannot be atered by an unregistered document and admittedly Ex.P.2 was altering Ex.P.1.

The observations of the arbitrator at paras 421 and 422 that proper stamp duty paid as per article 5(j) of Karnataka Stamp Act are incorrect because the document was undoubtly a bond within the meaning of section 2(1)(a)(b) read with article 12 of Karnataka Stamp Act.

The observation of the arbitrator at paragraph 424 of the impugned award that merely because Ex.P.14 was submitted for registration, it is treated as 41 CT0028_A.S._158_2017_Judgment_.doc .

being an insufficient stamp paper is incorrect and that any act the entire act of execution of GPA and presenting it for registration was of the defendants 1 to 3 and the law and the contract mandates that it is for the defendants 1 to 3 to give valid power of attorney.

The observation of the arbitrator from paragraph 437 onwards of the impugned award that because the plaintiff did not deliver possession, the amount is not to be refunded does not look into the various lapses which prevented the development and a party in default cannot take advantage of its own defaults.

The observation of the arbitrator at paragraph 442 of the impugned award that plaintiff abandoned the project was not pleaded by any one. The observation at para 454 that minimum revenue guarantee is payable without construction is misreading of Ex.P.2. At paragraph 479 the arbitrator has come to a definite conclusion that defendants 1 to 3 have agreed to pay 25 lakhs and 50 lakhs and this 42 CT0028_A.S._158_2017_Judgment_.doc .

conduct has not been properly explained by the tribunal. The observation at paragraph 486 that because the plaintiff has committed breach, contract become void is perverse. The observation at paragraph 491 and 492 that claimant is entitle to higher amounts is one which was not arbitrable

and perverse. When payments made by the plaintiff to the defendants 1 to 3 and the expenses incurred by the plaintiff are proved and when there was no fault on the part of the plaintiff and entire lapses were on the part of the defendants, the order rejecting the counterclaim with respect to repayment of the amounts paid and with respect to the interest and damages, is perverse and shocks the conscience of any court and is totally opposed to morality and hence liable to be set aside. Further, no reasons are given for rejecting the counterclaim and this ground also award is liable to be set aside.

The appellant/plaintiff further stated that he has compiled the mandatory requirement of issuing notice 43 CT0028_A.S._158_2017_Judgment_.doc .

in terms of section 34(5) of the Arbitration and Conciliation Act by issuing notice to the defendants 1 to 3 by intimating his intention to challenge the impugned award. The suit is filed by him within the period of limitation. On these grounds, the appellant/plaintiff has sought to set aside the award dated 08.09.2017 passed by the defendant No.4 sole arbitrator in A.C.No.21/2017 and direct the counterclaim to be ordered to be paid to him also sought for cost of the proceedings.

3. The defendants 1 to 3 filed a joint written statement by resisting the suit. The defendants in their written statement have admitted the execution and registration of Joint Development Agreement dated 4/7/2014 between them and plaintiff with respect to development of eight items of the properties belonging to them by the plaintiff developer. Defendants have also admitted about receipt of Rs.1,00,00,000/- as refundable security deposit and also admitted that plaintiff has agreed to pay further 44 CT0028_A.S._158_2017_Judgment_.doc .

sum of Rs.1,00,00,000/- to them towards refundable security deposit once they obtain plan sanctioned from the concerned authority. The defendants have also admitted that in terms of the Joint Development Agreement dated 4/7/2014, they have executed General Power of Attorney in favour of the plaintiff company authorizing the plaintiff to deal with the property. The defendants have denied the plaint averments that they have delivered possession of the property to the plaintiff and contended that they have only permitted the plaintiff to enter the suit schedule property by way of license only for the limited purposes of carrying out development on the suit schedule property in accordance with the Joint Development Agreement. The defendants have also admitted the plaint averments that after execution of General Power of Attorney by them in favour of the plaintiff when the same was presented for registration it was impounded by the registering authority for non-payment of proper stamp duty. The defendants have 45 CT0028_A.S._158_2017_Judgment_.doc .

denied the plaint averments that defendants have undertaken to resolve the issue of impounding of GPA with the District Registrar but failed to resolve the said issue.

Defendants 1 to 3 in their written statement have denied the plaint averments that in the absence of Power of Attorney nothing could have been done by the plaintiff in pursuance of Joint Development Agreement and hence it was impermissible to find fault with the plaintiff if some inaction is not taken in pursuance of the Joint Development Agreement. Defendants have also denied the plaint averments that plaintiff has done substantial work in pursuance of the Joint Development

Agreement and for want of General Power of Attorney, plaintiff could not have got any plan sanctioned or to do any act before public authorities. Defendants have also denied the plaint averments that in clause 3.4 of the Joint Development Agreement, it was for the owners of the property to secure sanction of license and plan. The defendants 46 CT0028_A.S._158_2017_Judgment_.doc .

have also denied the plaint averments that plaintiff had prepared the required plans and had given to them to get the plan sanctioned and they did not get the plan sanctioned and also failed and neglected to get the requisite various licenses, norms and permissions required for commencement of the said project in terms of the Joint Development Agreement.

The defendants 1 to 3 in their written statement though admitted the execution of Memorandum of understanding dated 30/12/2014 between them and the plaintiff but have denied the plaint averments that the above mentioned Memorandum of understanding was insufficiently stamped and unregistered document and same do not contain an arbitration clause.

The defendants 1 to 3 in the written statement have also denied the plaint averments that the terms of registered document can be altered rescinded or varied only by subsequent registered document and not other wise and further contended that the ratio of 47 CT0028_A.S._158_2017_Judgment_.doc .

the decision reported in MANU/SC/3374/2000 relied on by the plaintiff is not applicable to the facts of the case. The defendants have also denied the plaint averments that the Memorandum of understanding have the effect of altering the Joint Development Agreement and also denied the plaint averments that Ex.P2 Memorandum of understanding could not have been looked into by the arbitrator since the same was marked subject to the objection of the plaintiff.

The defendants 1 to 3 in their written statement have also denied the plaint averments that in terms of the Joint Development Agreement they have failed to furnish all the documents with regard to their marketable title, right and interest over the suit schedule property thereby committed breach of the contract. The defendants have also denied the plaint averments that they had extracted a sum of Rs.41,04,000/- from the plaintiff towards the meeting the expenses of liasoning work. Defendants have also denied the plaint averments that they have induced 48 CT0028_A.S._158_2017_Judgment_.doc .

the plaintiff to pay a sum of Rs.4,80,994/- to M/s Eda Consultancy Services and also sum of Rs.3,50,000/- to the M/s Slackline Company. Defendants have also denied that they had collected a sum of Rs.24,93,000/- from the plaintiff towards payment of stamp duty and registration fee of Joint Development Agreement and have not submitted accounts to the plaintiff in respect of the above mentioned amount collected from him. Defendants have also denied the plaint averments that they have received a sum of Rs.15,00,000/- from the plaintiff.

The defendants 1to 3 in their written statement have denied the plaint averments that in view of the several breaches committed by them the project itself could not have take of and plaintiff has

suffered both in terms of money and reputation. Defendants further contended that it is the plaintiff who committed multiple breaches and abandoned the whole project and not made even an iota of efforts for commencement of the project as per the agreements 49 CT0028_A.S._158_2017_Judgment_.doc .

and deliberately locked the schedule property as well as the opportunities that were available to them for developing the schedule property.

The defendants 1 to 3 in their written statement have admitted the plaint averments that they have issued notice dated 17/2/2016 to the plaintiff by threatening to terminate the Joint Development Agreement on the ground that he has not commenced the project even after lapse of 18 months of the execution of Joint Development Agreement. The defendants have also denied the plaint averments that in their legal notice dated 17/2/2016, they have not made any monetary claim from the plaintiff but only referred to termination of Joint Development Agreement and calling upon the plaintiff to vacate the said property. The defendants have also denied the plaint averments that they have not disputed the payments made by the plaintiff to an extent of Rs1,89,27,994/- in the notices exchanged between them and the plaintiff thereby impliedly admitted the 50 CT0028_A.S._158_2017_Judgment_.doc .

receipt of the above mentioned sum under the Joint Development Agreement.

The defendants 1 to 3 in their written statement have admitted the plaint averments that after issuing legal notice dated 4/7/2016 by them, the plaintiff has invoked clause 31 of the Joint Development Agreement for appointment of the arbitrator to adjudicate the dispute. defendants have also denied plaint averments that there was no arbitration clause in the Memorandum of understanding dated 30/12/2014 and hence the question of referring the dispute under the Memorandum of understanding do not arise and they have invoked clause 31 of the Joint Development Agreement and sought for adjudication of the dispute that arose only under the said Joint Development Agreement and not under Memorandum of understanding. Defendants have admitted the plaint averments that since the plaintiff did not agree with the nomination made by them for appointment of sole arbitrator, they have approached the Hon'ble 51 CT0028_A.S._158_2017_Judgment_.doc .

High Court of Karnataka under section 11 of the Arbitration and Conciliation Act, 1996 in CMP 194/2016. Defendants have denied the plaint averments that they have not produced Memorandum of understanding before Hon'ble High Court of Karnataka and the Memorandum of understanding not containing arbitration clause was admitted by them in their cross-examination before the arbitrator. Defendants have admitted the plaint averments that Hon'ble High Court of Karnataka has allowed CMP 194/2016 filed by them. Defendants have denied the plaint averments that in the order passed by Hon'ble High Court of Karnataka in CMP 194/2016, the dispute arising under the Joint Development Agreement was only referred for adjudication and the dispute in connection with Memorandum of understanding was not at all referred for adjudication. Defendants have denied the plaint averments that 4th defendant was appointed as the sole arbitrator to 52 CT0028_A.S._158_2017_Judgment_.doc .

adjudicate the dispute arising only under Joint Development Agreement.

The defendants 1 to 3 in their written statement have denied the plaint averments that when a declaration is given that certain document creating a contract is void the Section 65 of the Indian Contract Act comes into force and consequently the only relief that can be given would be to put the parties back to their original position and it was impermissible to ask for payment only on the ground that any default had taken place because there can be no default with respect to a void contract. Defendants have denied the plaint averments that when Ex.P2 being inadmissible for want of registration and stamp duty, their prayer in the claim statement could not have been entertained by the arbitrator in view of the provision of Section 34 of Karnataka Stamp Act which provides that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person 53 CT0028_A.S._158_2017_Judgment_.doc .

having by law or consent of parties, authorities to receive evidence.

The defendants 1 to 3 in their written statement have denied the plaint averments that their claim made before the arbitrator is outside the scope and purview of Joint Development Agreement dated 4/7/2014. The defendants in their written statement have denied the plaint averments that in none of the notices issued by them they have made any monetary claim and all of a sudden for the first time in the claim statement they have made huge monetary claim. The defendants in their written statement have also denied the plaint averments that even in the CMP, there was no contention with regard to payment of any amount and dispute under MOU was not sought to be referred and even the MOU was not produced before Hon'ble High Court of Karnataka.

The defendants 1 to 3 in their written statement have denied the plaint averments that after the exchange of notices between the plaintiff and 54 CT0028_A.S._158_2017_Judgment_.doc .

defendants, the third defendant has addressed an e- mail dated 28/6/2016 offering to pay a sum of Rs.25,00,000/- and subsequently through another e- mail dated 29/6/2016 enhanced the offer from Rs.25,00,000/- to Rs.50,00,000/- as full and final settlement of the claim of the plaintiff and to close the deal which shows that defendants have admitted that they are not entitle for any money from the plaintiff and in turn they are liable to pay money to the plaintiff.

The defendants 1 to 3 in their written statement have also denied the plaint averments that even assuming without admitting their claim the same is maintainable before the arbitrator, the obligation to pay the money in terms of the Memorandum of understanding would arise only after the units that are set up in their said property are sold and admittedly units are neither constructed nor sold therefore question of making payments to the defendants 1 to 3 do not arise.

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The defendants 1 to 3 in their written statement have also denied the plaint averments that arbitrator has not made declaration as his mandatorily required under Section 12 of the Arbitration and Conciliation Act, 1996 and the award is in conflict with public policy of India.

The defendants 1 to 3 in their written statement have specifically denied the grounds stated in the plaint on which the impugned award was challenged by the plaintiff.

The defendants 1 to 3 in their written statement further contended that plaintiff has not made out a case to set aside the award in terms of section 34 of the Arbitration and Conciliation Act, 1996. The allegations, averments and grounds raised by the plaintiff are outside the scope, purview and ambit of section 34 of the Act and plaintiff has not shown any grounds to set aside the award of the sole arbitrator.

The defendants 1 to 3 in their written statement further contended that the jurisdiction of the Court 56 CT0028_A.S._158_2017_Judgment_.doc .

while dealing a arbitration suit is not one of an appellate jurisdiction so as to re-assess or re-examine the materials that were produced before an arbitrator. It is not open for the plaintiff to challenge the award on the ground that the arbitrator has failed to appreciate the facts. Act provides only a supervisory role for the court and intervention is envisaged only in few circumstances like fraud, bias and violation of principles of natural justice. In the case in hand, plaintiff has not pleaded any fraud, bias, or violation of principles of natural justice are the reasons to set aside the award. The Act does not enable the court to go into the merits of the case nor reappraise nor re- examined nor look into the insufficiency of the evidence. The award of the sole arbitrator is well- reasoned award based on careful scrutiny of the evidence available and adduced on the record before the arbitrator. The entire allegations and propositions of the plaintiff in the above case have already been carefully considered, examined, addressed and 57 CT0028_A.S._158_2017_Judgment_.doc .

adjudicated by the arbitrator and the award is speaking and well reasoned.

On the above grounds, the defendants 1 to 3 have sought to dismiss the arbitration suit filed by the plaintiff and sought for further directions to the plaintiff to pay the amount awarded by the arbitrator in A.C.No. 21/2017 to them and also sought for cost of the suit.

4. Based on the above pleadings of the parties, the points that arises for consideration of this Court are:

> (1) Whether the plaintiff proves that the arbitrator has dealt with the dispute with regard to Ex.P2 Memorandum of understanding dated 30/12/2014 not falling within the terms of submission of arbitration?
>
> (2) Whether the plaintiff proves that impugned award contains decision on merits beyond the scope of submission of arbitration?
>
> (3) Whether the plaintiff proves that impugned award passed by 58 CT0028_A.S._158_2017_Judgment_.doc .
>
> the learned Arbitrator is opposed to public policy?

(4) Whether the plaintiff proves that impugned award dated 8/9/2017 passed by the learned Arbitrator in A.C.No.27/2017 required to be set aside under Section 34 of Arbitration and Conciliation Act, 1996?

(5) What order or decree?

5. Heard the learned counsel for the plaintiff and learned counsel for defendants 1 to 3. Perused the materials placed on record.

6. My findings on the above points and are as under:

Point No. 1) ..... In the affirmative; Point No. 2) ..... In the affirmative; Point No. 3) ..... In the affirmative; Point No. 4) ..... Partly in the affirmative; Point No. 5) ..... As per final order;

for the following:

7. POINT NO. 1 TO 4: Since these four points are interconnected with each other, to avoid 59 CT0028_A.S._158_2017_Judgment_.doc .

repetition of facts and findings, these four points are taken up together for consideration.

8. A perusal of the materials on record discloses that there are certain undisputed facts between the parties to the present arbitration suit. The fact that the defendants are the owners of 8 items of landed properties and plaintiff /developer and defendants 1 to 3 owners of the property have entered into a registered Joint Development Agreement dated 4/7/2014 for development of the properties into row houses and apartment is not in dispute. Further fact that in the Joint Development Agreement, the plaintiff developer has agreed to deliver defendants 1 to 3 the owners of the property 22% of the share in the constructed area (super built up area) along with proportionate number of car parking spaces and in common area and the plaintiff developer agreed to retain 78 % of the share in the constructed area is also not in dispute. Further fact that under the Joint Development Agreement, the 60 CT0028_A.S._158_2017_Judgment_.doc .

plaintiff has agreed to pay to the defendants 1 to 3 a sum of Rs.2,00,00,000/- as interest free refundable security deposit and paid a sum of Rs.1,00,00,000/- and agreed to pay the remaining balance of Rs.1,00,00,000/- on obtaining plan sanctioned from the concerned authorities is also not in dispute. Further fact that under the Joint Development Agreement, defendants 1 to 3 have agreed to execute General Power of Attorney in favour of the plaintiff to deal with the process of development of the property and permitted the plaintiff to enter into the property as licensee for the purpose of development of the property is not in dispute. Further fact that on 30/12/2014 the plaintiff and defendants 1 to 3 have entered into unregistered Memorandum of understanding under which both the parties have agreed to share revenue at an agreed proportionin place sharing of super built up area as per the terms of Joint Development Agreement is also not in dispute. Further fact that the defendants have 61 CT0028_A.S._158_2017_Judgment_.doc .

executed General Power of Attorney in favour of the plaintiff authorizing to deal with the property and when the said Power of Attorney was presented for registration, the same was impounded by the registering authority for non-payment of proper stamp duty is also not in dispute. Further fact that on 17/2/2016 the defendants have issued a legal notice to the plaintiff terminating the Joint Development Agreement and Memorandum of understanding with immediate effect is also not in dispute. Due to deadlock between the parties, the defendants 1 to 3 have sought for appointment of a sole arbitrator for referring the dispute for adjudication in terms of the arbitration clause in the Joint Development Agreement and the plaintiff has not given consent for the appointment of arbitrator is not in dispute. Further fact that the defendants have approached the Hon'ble High Court of Karnataka in CMP 194/2016 for appointment of arbitrator to adjudicate the dispute and the same was allowed by the Hon'ble High Court 62 CT0028_A.S._158_2017_Judgment_.doc .

of Karnataka by its order dated 24/1/2017 and the 4th defendan a sole arbitrator by name Sri Vishwanath V. Angadi, Retired District Judge, was appointed is also not in dispute.

9. A perusal of the materials on record discloses that the defendants 1 to 3 / claimants have filed a claim petition before the sole arbitrator by making allegations of breach of contract of Joint Development Agreement and Memorandum of understanding against the plaintiff and sought for declaration to declare that Joint Development Agreement dated 4/7/2014 and Memorandum of understanding dated 30/12/2014 executed between the defendants 1 to 3/ claimants and the plaintiff / respondent as null and void and also sought for direction to the plaintiff / respondent to pay a sum of Rs.34,39,47,926/- with interest at the rate of 18% per annum along with costs of the proceedings.

10. A perusal of the materials on record discloses that plaintiff / respondent appeared before 63 CT0028_A.S._158_2017_Judgment_.doc .

the sole arbitrator and filed his statement of defence by denying the allegations of breach of terms of contract made against him and taken further contention that Memorandum of understanding dated 30/12/2014 is insufficiently stamped and same is not registered and hence not admissible in evidence. The plaintiff / respondent has also taken a defence that the defendants /claimants have committed breach of terms of Joint Development Agreement and hence not entitle for the damages for breach of the terms of Joint Development Agreement. The plaintiff / respondent has also taken a defence that delay in executing the project is solely attributable to the claimants who have failed to get the plan sanctioned and approved. The plaintiff / respondent has also taken defence that the defendants/ claimants have failed to furnish all the documents with regard to the schedule property and also extracted some amount for obtaining various sanctions and permissions and sought for dismissal of the claim petition. Apart from disputing the claim of 64 CT0028_A.S._158_2017_Judgment_.doc .

the defendants 1 to 3 / claimants, the plaintiff / respondent has also sought for counterclaim for refund of sum Rs.1,89,27,994/- paid by him to the claimants/ defendants 1 to 3 and also sought for a sum of Rs.1,50,00,000/- as damages for breach of terms of Joint Development Agreement with interest at the rate of 24% per annum.

11. A perusal of materials on record discloses that in pursuance of counterclaim filed by the plaintiff / respondent before the sole arbitrator, the claimants/ defendants 1 to 3 have filed their written statement to the counterclaim by disputing the counterclaim sought against them.

12. A perusal of the impugned award dated 8/9/2017 passed in A.C. 21/2017 discloses that on the basis of the pleadings of the parties to the arbitration, the sole arbitrator has framed 11 terms of reference. Parties have led evidence before the Arbitral tribunal. The third claimant got himself examined as PW.1 and tendered Ex.P1 to Ex.P29 documents in 65 CT0028_A.S._158_2017_Judgment_.doc .

support of the claim of the claimants. On behalf of the plaintiff / respondent, the respondent /company got examined its Vice President as RW.1 and tendered Ex.R1 to Ex.R23 documents in evidence. After hearing both the sides and perusing the materials placed on record, the learned arbitrator has partly allowed the claim petition of claimants/ defendants 1 to 3. The sole arbitrator has declared Joint Development Agreement dated 4/7/2014 and Memorandum of understanding dated 30/12/2014 executed between claimants and respondents as null and void and not binding on the parties. The learned Arbitrator has directed the respondent to pay a sum of Rs.21,20,00,000/- to the claimants with interest at the rate of 9.5% per annum from the date of filing of claim statement till payment. The learned Arbitrator has dismissed the prayer of the claimants seeking a sum of Rs.98,47,926/- from the respondent. The learned Arbitrator has dismissed the counter claim filed by the respondent. Being aggrieved by the 66 CT0028_A.S._158_2017_Judgment_.doc .

impugned award dated 8/9/2017 passed by the learned arbitrator the respondent / plaintiff has filed the present suit under Section 34 of the Arbitration and Conciliation Act, 1996.

13. The learned counsel for the plaintiff has argued that the arbitrator has not disclosed his interest as mandatorily required under Section 12 of the Act and hence the award is not valid and perverse and same is liable to be set aside. It is further argued that in the order passed by the Hon'ble High Court of Karnataka in CMP 194/2016, what was referred for adjudication to the sole arbitrator are the disputes arising under the Joint Development Agreement and Memorandum of understanding was not at all referred for the adjudication to the sole arbitrator and Memorandum of understanding was not the subject matter of arbitration. The sole arbitrator has adjudicated matter which was not referred to it and allowed the claim petition based on the contents of Memorandum of understanding which was not 67 CT0028_A.S._158_2017_Judgment_.doc .

referred for arbitration, as such the impugned award is perverse and liable to be set aside. It is further argued that the arbitrator has exercised jurisdiction not vested in him by adjudicating the dispute that have been arisen under Memorandum of understanding which was not referred to the arbitrator by virtue of the order passed in CMP 194/2016.

14. The learned counsel for the plaintiff has further argued that in the impugned award the learned Arbitrator had referred Ex.P8, Ex.P8(a) to (c) which came into existence much earlier to the execution of Joint Development Agreement. The learned arbitrator has erred in not considering the fact that Joint Development Agreement dated 4/7/2014 is a complete agreement superseding all the

earlier agreements and the passing of award contrary to the contents of Joint Development Agreement is illegal.

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15. It is further argued that Ex.P2 unregistered Memorandum of understanding was insufficiently stamped and same was marked in evidence subject to the objections of the plaintiff with regard to non- registration and payment on insufficient stamp duty on the said document. Under Section 34 of Karnataka Stamp Act, 1957, instrument not duly stamped is inadmissible in evidence. Under Section 49 of Registration Act, a document which requires compulsory registration under Section 17 of the Registration Act shall not affect any immovable property comprised therein or the same cannot be received as evidence of any transaction affecting such property or confirming such power. The sole arbitrator while passing the impugned award by allowing the claim of the claimants has not considered the effect of payment of insufficient stamp duty and non- registration of Ex.P2 document.

16. The learned counsel for the plaintiff has further argued that it is settled principle of law that 69 CT0028_A.S._158_2017_Judgment_.doc .

the terms of registered document cannot be altered, rescinded or varied only by subsequent registered document and not other wise. The claimants/ defendants 1 to 3 claims that through Ex.P2 unregistered Memorandum of understanding the terms of the Ex.P1 registered Joint Development Agreement were altered and varied which is not permissible under law. While passing the impugned award based on the contents of Ex.P2 unregistered Memorandum of understanding, the learned Arbitrator has failed to consider the well settled legal principle that the terms of Ex.P1 Joint Development Agreement could not be altered or varied by Ex.P2 subsequent unregistered Memorandum of understanding.

17. The learned counsel for the plaintiff has further argued that when a declaration is given to the effect that certain documents creating contract is void, Section 65 of the Indian Contract Act come into force and consequently the only relief that can be given 70 CT0028_A.S._158_2017_Judgment_.doc .

would be to put the parties back to their original position and it was impermissible to ask for payment of any damages on the alleged default taken place. It is further argued that there can be no default with respect to void contract. The arbitrator who had declared Ex.P1 Joint Development Agreement and Ex.P2 Memorandum of understanding executed between the parties are void and not binding, ought not to have directed the plaintiff to pay huge sum of money to the defendants based on the contents of Ex.P2 Memorandum of understanding, which was declared as void document.

18. The learned counsel for the plaintiff has further argued that the learned arbitrator has failed to properly consider the contents of clause 3.4 of the Joint Development Agreement which obligates defendants 1 to 3 to get the plans, licenses and permissions approved from the competent authority,

yet the arbitrator holds that plaintiff has committed breach of contract by not getting the plans approved 71 CT0028_A.S._158_2017_Judgment_.doc .

by the competent authority. The arbitrator has re- written the contract and has acted contrary to the contract. Law does not permit passing an award contrary to contract and arbitrator being creature of the contract cannot annul the contract between the parties.

19. The learned counsel for the plaintiff has further argued that the finding of the arbitrator in paragraph 362, 455,482, 468, 463 to the effect that plaintiff has not prepared the required plans, plaintiff has failed to take the signatures of the defendant to get the sanctioned plan and the plaintiff has failed to kept the drawings ready and defendants have furnished all the documents of the property called for by the plaintiff are contrary to the terms of the contract and contrary to the evidence on record.

20. The learned counsel for the plaintiff has further argued that in none of the notices exchanged between the plaintiff and defendants 1 to 3, the defendants have made any monetary claim. For the 72 CT0028_A.S._158_2017_Judgment_.doc .

first time before the Arbitral tribunal defendants 1 to 3 have sought for huge monetary claim. On the other hand, in the e-mail dated 28/6/2016 and 29/6/2016, the third defendant has offered a sum of Rs.25,00,000/- and a sum of Rs.50,00,000/- as full and final settlement of the claim of the plaintiff. These two e-mails clearly shows that plaintiff is not liable to pay any amount to the defendants 1 to 3 rather defendants are liable to pay amount to the plaintiff. In the absence of defendants 1 to 3 proving the fact that they are entitle for monetary claim of Rs.21,20,00,000/-, the learned arbitrator awarded the said huge amount to the defendants which shock the conscience of the court and the award is perverse.

21. The learned counsel for the plaintiff has further argued that the claim of the defendants 1 to 3 made in the claim statement is outside the scope and purview of Joint Development Agreement dated 4/7/2014, inspite of it the learned Arbitrator has allowed the claim of the defendants. It is further 73 CT0028_A.S._158_2017_Judgment_.doc .

argued that even other wise the obligation to pay the money in terms of the Memorandum of agreement would arise only after the units are put up in the property as sold. Admittedly the units are neither constructed nor sold, therefore the question of making payment by the plaintiff to the defendants 1 to 3 do not arise, inspite of it the arbitrator has allowed the claim petition directing the plaintiff to pay money to the defendants 1 to 3 for the units which were neither constructed nor sold and hence the impugned award required to be set aside.

22. The learned counsel for the plaintiff has further argued that by relying on the Memorandum of understanding, which was not referred for arbitration the arbitrator has not only allowed the claim made by the defendants 1 to 3 in the claim petition but also dismiss the counterclaim made by the plaintiff as a result of which the defendants 1 to 3 are not only entitle for the claim made in their claim statement but also not required to repay the amount received by 74

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plaintiff and also retained the property. The impugned award which was passed on Memorandum of understanding which was not a arbitral document has given unfair advantage to the defendants 1 to 3 over the plaintiff and the award on the face of it is perverse and shock the conscience and therefore liable to be set aside.

23. The learned counsel for the plaintiff has argued that the arbitrator cannot go beyond the terms of the contract and contrary to the contract. The arbitrator cannot travel beyond the terms of reference. In the Joint Development Agreement there is a arbitration clause but in the Memorandum of understanding which was a subsequent agreement there was no arbitration clause. Only the Joint Development Agreement was referred for arbitration. The arbitrator appointed under the Joint Development Agreement which was the first agreement has no jurisdiction to determine the rights and liabilities under the Memorandum of understanding which is 75 CT0028_A.S._158_2017_Judgment_.doc .

the subsequent agreement and on this ground also the impugned award is liable to be set aside.

24. The learned counsel for the plaintiff has further argued that the observation of the arbitrator in the impugned award that the plaintiff / respondent has not advanced arguments as to under what provision Ex.P2 is required to be registered is incorrect because it is settled law that the registered document cannot be altered by unregistered document and admittedly Ex.P2 unregistered Memorandum of understanding was in the nature of altering the contents of Ex.P1 registered Joint Development Agreement. The observation of the learned Arbitrator that proper stamp duty is paid under Article 5J of Karnataka Stamp Act on Ex.P2 Memorandum of understanding is incorrect since Ex.P2 document was a bond within the meaning of Section 2(1) (ab) r/w Article 12 of Karnataka Stamp Act.

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25. In support of his arguments, the learned counsel for the plaintiff has relied on following decisions:

> 1. Between ONGC Ltd., Vs. Garvare Shipping Corporation Ltd., reported in AIR 2008 SC 456 wherein the Hon'ble Apex Court of the land has held that while considering an award passed under Arbitration and Conciliation Act, 1996, there is no proposition of law that Courts could be slow to interfere with award even if conclusions are perverse and even when very basis of Arbitrator's award is wrong.
>
> 2. Delhi Development Authority Vs. R.S.Sharma and Co. New Delhi reported in MANU / SC 3624/ 2008 wherein the Hon'ble Apex Court of the land has stated the scope and permissibility under Section 34 (2) of Arbitration and Conciliation Act, 1996 to set aside the arbitration award. In the said 77 CT0028_A.S._158_2017_Judgment_.doc .

decision, the Apex Court of the land has held that if the arbitrator made a departure from the terms of the contract while granting relief in respect of the claim and if the illegality goes to the root of the matter, the award could be set aside. It is further held that the award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. In para 12 of the Judgment, the Apex Court of the land has laid down the following principles with regard to the consideration of scope and permissibility of Section 34 (2) of the Arbitration and Conciliation Act, 1996 while dealing with an award. In para 12 of the decision, the Apex Court of the land has held that

(a) An Award, which is

(i) contrary to the substantive provisions of law; or 78 CT0028_A.S._158_2017_Judgment_.doc .

(ii) the provisions of the Arbitration and Conciliation Act, 1996 or;

(iii) against the terms of the respective contract; or

(iv) patently illegal, or

(v) 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;

3. Between Hindustan Zinc Ltd., Vs. Friends Coal Carbonisation reported in 2006 (4) SCC 445, wherein the Hon'ble Apex Court of the land has relied on the decision rendered in Oil and natural gas corporation ltd., vs. Saw Pipes Ltd., reported in MANU/SC/0314/2003 has held that an award contrary to the substantive provisions of law or the provisions of Arbitration and 79 CT0028_A.S._158_2017_Judgment_.doc .

Conciliation Act, 1996 or against the terms of the contract, would be patently illegal and if it affects the right of the parties, open to interference by the Court under Section 34 (2) of the Act.

4. Between the Union of India represented by the General Manager and Divisional Manager (works) vs. M.Senthil Kumar and K.M.Natarajan, Arbitrator reported in MANU/TN/2683/2011, the Hon'ble High Court of Madras has held that when the termination of the contract was not subject matter of reference, the award passed by the arbitrator on the aspect of the termination of contract is perverse and required to be set aside.

5. Oil and Natural Gas Corporation Ltd., Vs. SAW Pipes Ltd., reported in MANU/SC/0314/ 2003 wherein the Apex Court of the land has held that under Section 34 of the Arbitration and Conciliation Act, 1996, an award could be set aside if it went against the public policy of India. 80 CT0028_A.S._158_2017_Judgment_.doc .

6. M.R.Engineers and Contractors Pvt. Ltd., Vs. Somdatt Builders Ltd., reported in 2009 (7) SCC 696 wherein the Hon'ble Apex Court of the land has held that arbitration clause contained in main contract would not apply to dispute arising with respect to sub contract.

7. Between Saktivel (Dead) by LRs vs. M. Venugopal Pillai and others reported in 2007 SCC 104, wherein the Apex Court of the land has held that terms of registered document can be altered, rescinded or varied only by a subsequent registered document and not otherwise.

8. In an unreported decision in RFA 828/2009, dated 20/1/2015, rendered between P.V.Krishnappa vs. M.Ramaswamy Reddy, Hon'ble High Court of Karnataka has held that it is well settled that a document which varies the essential terms of an existing registered deed must be registered.

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9. Between Harsha Construction vs. Union of India reported in AIR 2015 SC 270 wherein the Hon'ble Apex Court of the land has held that if non arbitrable dispute was referred to arbitrator and even if the issue was framed by the arbitrator in relation to such dispute, there could not be presumption or conclusion to effect that parties had agreed to refer issue to arbitrator. It was not open for the arbitrator to decide the issues which were not arbitrable and the award so far it relates to dispute regarding non- arbitrable dispute is concerned is bad in law.

10. Between State of Rajasthan vs. Nava Bharath Construction Co. reported in AIR 2005 SC 4430 in para 23 of the Judgment, the Hon'ble Apex Court of the land based on the law laid down in the decision reported between Bharath Cooking Coal Ltd., case has held that an arbitrator cannot go beyond the terms of contract between the parties. In the guise of 82 CT0028_A.S._158_2017_Judgment_.doc .

doing justice, arbitrator cannot award contrary to the terms of the contract.

11. M.S.K.Projects (I) (JV) Ltd., vs. State of Rajasthan and another reported in AIR 2011 SC 2979, wherein the Hon'ble Apex Court of the land has held that it was not permissible for the tribunals to travel beyond the terms of reference. If the award goes beyond the reference or there was an error apparent on the face of the award, it would certainly be open to the court to interfere with such an award.

12. Associated Engineering Company vs. Government of Andhra Pradesh and another reported in AIR 1992 SC 232 wherein the Hon'ble Apex Court of the land has held that an arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties. If he exceeds his jurisdiction by doing so, his award would be liable to be set aside. An arbitrator cannot be allowed to

assume 83 CT0028_A.S._158_2017_Judgment_.doc .

jurisdiction over a question which has not been referred to him. Similarly arbitrator cannot widen his jurisdiction by holding contrary to the fact the matter which he wants to decide is within the submission of the parties.

13. Between M/s Sundaram Finance Ltd., Vs. M/s NEPC India Ltd., reported in AIR 1999 SC 565, in para 9 of the Judgment the Hon'ble Apex Court of the land has held that the Arbitration and Conciliation Act of 1996 is very different from Arbitration Act of 1940. The provisions of 1996 Act therefore to be interpreted and construed independently and in fact reference to 1940 Act may actually lead to mis- construction. It was further held that provisions of 1996 Act have to be interpreted being uninfluenced by the principles underlying the 1940 Act.

14. Between Lion Engineering Consultants vs. State of Madhya Pradesh and others reported in 84 CT0028_A.S._158_2017_Judgment_.doc .

MANU/SC/0313/2018, in paragraph 36 of the Judgment, the Hon'ble Apex Court of the land has held that the scheme of the Arbitration Act, 1996 is thus clear. All objections to jurisdiction of whatever nature must be taken at the stage of the submission of the statement of defence and must be dealt with under Section 16 of the Arbitration Act, 1996. However, if one of the parties seeks to contend that subject matter of the dispute is such as cannot be dealt with by arbitration, it may be dealt under Section 34 of the Act.

15. Associate Builders Vs. Delhi Development Authority reported in AIR 2015 SC 620, in para 31 of the Judgment, the Hon'ble Apex Court of the land has held that the award which is on the face of it is patently in violation of statutory provisions cannot be said to be in public interest. It was further held that binding effect of 85 CT0028_A.S._158_2017_Judgment_.doc .

Judgment of a superior court being disregarded would be equally violative of fundamental policy of Indian Law. It was further held that if an award is against justice and morality it is violative of the fundamental policy of Indian Law.

16. Between Chandrakanth Shankar Rao Machale vs. Parubai Bhairu Mohite reported in MANU/SC/7320/2008, in para 14 of the Judgment, the Hon'ble Apex Court of the land has held that in case of a registered deed of mortgage, the terms of the said document could not have been varied, or altered by reason of an unregistered document so as to change the status of the parties from mortgagee to a lessee.

17. Between the Bengal Paper Mills Company Ltd., vs. The Collector of Calcutta and others reported in MANU/WB/0079/ 1976, the Hon'ble High Court of Calcutta has held that the word 'bond' has to be given widest meaning for the 86 CT0028_A.S._158_2017_Judgment_.doc .

purpose of Indian Stamp Act. 'bond' within the meaning of Indian Stamp Act, 1899 includes the types of instruments mentioned in Section 2(5) of the Act as well as those which are not otherwise

provided for either in the Stamp Act or in the Court Fee Act.

26. On the other hand, the learned counsel for the defendants 1 to 3 has argued that under Section 34 of Arbitration and Conciliation Act, 1996 an arbitral award can be set aside only on the grounds mentioned in the said section. That the plaintiff has not made out a case in terms of the Section 34 of the Act. The grounds raised by the plaintiff in the present suit challenging the arbitral award are totally outside the scope, purview and ambit of Section 34 of the Act and therefore there are no grounds for setting aside the award of the sole arbitrator.

27. The learned counsel for the defendants 1 to 3 has further argued that the jurisdiction of this court 87 CT0028_A.S._158_2017_Judgment_.doc .

while considering a suit under Section 34 of Arbitration and Conciliation Act, 1996 is not one of an appellate jurisdiction so as to re-assess or re-examine the materials that were produced before the sole arbitrator. It is not open for the plaintiff to challenge the award on the ground that the arbitrator has failed to appreciate the facts. The Arbitration Act, 1996 provides for only a supervisory role to this court and intervention is envisaged only in few circumstances like fraud, bias, and violation of principles of natural justice and in the present suit, plaintiff has not pleaded the above mentioned circumstances. It is further argued that the Arbitration and Conciliation Act, 1996 do not enable the court to go into merits of the case or to re-appreciate the evidence. The award of the sole arbitrator is well-reasoned, based on careful appreciation of the evidence produced before him. The entire allegations and propositions of the plaintiff in the above suit have already been carefully considered examined and addressed and adjudicated by the sole 88 CT0028_A.S._158_2017_Judgment_.doc .

arbitrator and hence the plaintiff has not shown any valid grounds under Section 34 of Arbitration and Conciliation Act, 1996 to set aside the award.

28. The learned counsel for the defendants 1 to 3 has argued that the arbitrator has disclosed his interest as required under Section 12 of the Act prior to commencement of the arbitration proceedings. It is further argued that in the absence of imputation of doubt as to the independence and impartiality of the arbitrator. The award cannot be set aside for non- disclosure of statement as required under Section 12 of the Act.

29. The learned counsel for the defendants 1 to 3 further argued that the plaintiff who has challenged the jurisdiction of the arbitrator to consider Ex.P2 Memorandum of understanding as arbitral document has not raised any objections in his objection statement filed to the claim petition before the arbitrator.

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30. The learned counsel for the defendants 1 to 3 further argued that in the CMP 194/2016, the Hon'ble High Court of Karnataka has left the issue whether the claim made falls within the arbitration clause and also the aspect of merits of the claim to be adjudicated by the arbitrator. It is

further argued that the arbitrator based on the material placed on record has rightly came to the conclusion that the claim made by the claimant before the arbitrator comes within the arbitration clause and rightly allowed the claim of the claimant and the arguments of the learned counsel for the plaintiff that in the CMP 194/2016, the Hon'ble High Court of Karnataka has not referred Ex.P2 Memorandum of understanding for arbitration and the said document was not an arbitrable document cannot be accepted.

31. In support of his arguments, the learned counsel for the defendants 1 to 3 has relied on following decisions:

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1. Yashwita Constructions Pvt. Ltd., vs. Simplex Concrete Piles India Ltd., wherein the Hon'ble High Court of Andhrapradesh has held that in absence of justifiable doubts as to the independence and impartiality of the arbitrator, the arbitrator award cannot be challenged under Section 12 of the Act.

2. Narendra Kumar Anchalia vs. Krishnakumar Mundara reported in 2002 SCC Online 485, wherein para 38 of the Judgement, the Hon'ble Apex Court of the land has held that in absence of justifiable doubts with regard to independent and impartiality of the arbitrator, the arbitral award cannot be challenged under Section 12 of the Act.

3. Between Mcdermott International Inc. Vs. Burn Standard Company Ltd., and others reported in 2006 (11) Supreme Court Cases 91 CT0028_A.S._158_2017_Judgment_.doc .

181, the Apex Court of the land has held that the 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitration, violation of natural justice, etc., The court cannot correct errors of the arbitration. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as the parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

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The arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; (c) justice or morality; or (d) if it is patently illegal or arbitrary. 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. Lastly where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or general relief in the matter not in dispute would come within the purview of Section 34 of the Act.

What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would 93 CT0028_A.S._158_2017_Judgment_.doc .

be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government.

In paragraph 51 of the above mentioned Judgment, the Apex court of the land has held that objections with regard to jurisdiction of the arbitrator has to be raised during arbitration proceedings or soon after initiation thereof and the same is required to be determined as a preliminary ground.

4. Between Madhyapradesh Housing Board vs. Progressive Writers' Publishers reported in (2009) 5 Supreme Court Cases 678 wherein the Hon'ble Apex Court of the land has held that it is well settled that the award of the 94 CT0028_A.S._158_2017_Judgment_.doc .

arbitrator is ordinarily final and the courts hearing applications under Section 30 of the Arbitration Act, 1940 do not exercise any appellate jurisdiction. Reappraisal of evidence by the court is impermissible. Interpretation of a contract is a matter for the arbitrator to determine. Even in a case where the award contained reasons, the interference therewith would still be not available within the jurisdiction of the court unless the reasons are totally perverse or award is based on wrong proposition of law. Errors of law as such are not to be presumed.

5. Between S.B.P. Company Vs. Patel Engineering Ltd., and another reported in (2005) 8 Supreme Court Cases 618 wherein the Hon'ble Apex Court of the land has held that in case where an Arbitral tribunal has 95 CT0028_A.S._158_2017_Judgment_.doc .

been constituted by the parties without having recourse to Section 11 (6) of the Act, the Arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

6. Between Sriram Mills Ltd., Vs. Utility Premises Pvt. Ltd., reported in (2007) 4 Supreme Court Cases 599 wherein the Hon'ble Apex Court of the land has held that preliminary matters such as whether claim in question was live one or barred by limitation required to be determined by the Chief Justice or his designate before appointing arbitrator. It is for the purpose of putting the arbitration proceedings in motion by appointing an arbitrator that the finding is given in respect of existence of arbitration clause, territorial jurisdiction, live issue and limitation.

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7. Between G.Venkata Reddy and Company Engineers and Contractors vs. Vice Chairman and Managing Director, AP Mineral Development Corporation Ltd., reported in 2008 SCC Online AP 821, the Hon'ble High Court of Andhra Pradesh has held that when approached with an application under Section 11 of the Act, the Chief Justice designate has to decide his own jurisdiction and

determine whether the applicant has approached the right High Court. He has to decide whether there is an arbitration agreement as defined in the Act, and whether the applicant is a party to such an agreement. He can also decide the question whether the claim is a dead one, or a long barred claim that was sought to be resurrected, whether the parties have concluded the transaction by recording satisfaction of their mutual rights and 97 CT0028_A.S._158_2017_Judgment_.doc .

obligations or by receiving final payment without objection and whether the applicant has satisfied the conditions under Section 11 (6) of the Act for appointment of an arbitrator. It may, however, not be possible for him to conclusively decide whether the claim is one which comes within the purview of the arbitration clause.

8. Between National Insurance Company Ltd., Vs. Boghra Poly Fab Pvt. Ltd., reported in (2009)1 Supreme Court Cases 267, wherein the Hon'ble Apex Court of the land has held that when matter is referred for arbitration with intervention of the court, the Chief Justice / his designate should leave the category no. 3 issues exclusively to the Arbitral tribunal to decide whether the claim falls within the arbitration clause and 98 CT0028_A.S._158_2017_Judgment_.doc .

with regard to merits of any claim involved in the arbitration.

9. Between Nandan Biometrics Ltd., Vs. D1 Oils Ltd., reported in (2009) 4 Supreme Court Cases 495 wherein the Hon'ble Apex Court of the land has held that in case of dispute as to existence of arbitration clause, the same has to be ascertained from intention of the parties as gathered from the correspondence exchanged between them and from the agreement in question and surrounding circumstances.

10. Between A.K.Jaju Vs. Avanikumar reported in 2003 (68) DRJ 523, the Hon'ble High Court of Delhi has held that in case of first agreement continuing arbitration clause and second agreement not in suppression of first agreement dispute referable to arbitration.

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11. Between Gas Authorities of India Ltd., and another vs. K.T. Construction Ltd., and others reported in 2007 (5) Supreme Court Cases 38 wherein the Hon'ble Apex Court of the land has held that with regard to challenging of jurisdiction of arbitrator said plea must be raised at the threshold before Arbitral tribunal and normally not later than in the statement of the defence.

12. Between Rail India Technical and Economic Services Ltd., New Delhi vs. Ravi Constructions, Bengaluru and another reported in 2001 SCC Online KAR 659, the Division Bench of the Hon'ble High Court of Karnataka has held that challenging of the arbitral award under Section 34 of Arbitration and Conciliation Act, 1996 are sustainable only when the challenge is made on the grounds enumerated under 100 CT0028_A.S._158_2017_Judgment_.doc .

Section 34 of the Act. Claim of setting aside of the award on the ground of it being erroneous, illegal and opposed to public policy would not be maintainable under Section 34 of the Act. Scope of the

provisions for setting aside an award under 1996 Act is far less than the scope under Section 30 and 33 of the Arbitration Act of 1940.

13. Between Union of India vs. Mothi Enterprises reported in 2003 (1) RAJ 408 (Bombay), the Hon'ble High Court of Bombay has held that challenge to the award is not sustainable when the same is challenged with regard to the finding of fact arrived by an arbitrator after considering the evidence.

14. Between C.V.Jain and Company vs. Hindustan Fertilisers Corporation Ltd., 101 CT0028_A.S._158_2017_Judgment_.doc .

reported in 2001 SCC Onlilne Delhi 718, the Hon'ble High Court of Delhi based on the various decisions of the Apex Court of the land has held that when legislature has not defined the expression 'opposed to public policy' it would be improper to give a precise meaning. It is not possible to formulate a state jacket formula necessarily the principles governing what would be public policy will have to be construed on each occasion, on facts of each case and with the law as applicable at the relevant time. This expression cannot remain static and has to vary from time to time. It cannot be placed in a fixed mould.

15. Between Triable Co-operative Marketing Development Federation of India Ltd., Vs. Auro Industries Ltd., and another reported in 2002 (3) RAJ 582, Hon'ble High Court of 102 CT0028_A.S._158_2017_Judgment_.doc .

Delhi has held that the award can be held to be conflict with public policy of India if the making of it was induced, or affected by fraud or corruption or was the violation of Section 75 or Section 81.

16. Between BFIL Finance Ltd., Vs. G.Tech Stone Ltd., reported in 2003 (1) RAJ 123, the Hon'ble High Court of Bombay has held that while looking into the question of legality or validity of the award under Section 34 of Arbitration and Conciliation Act, 1996, the court even if it has another view of the matter cannot substitute its own view over that of the arbitrators.

17. Between Paramjeet Singh and others vs. Sathyavathi and others reported in 2002 (64) DRJ 798 the Hon'ble High Court of Delhi has held that while considering the legality or validity of the award under 103 CT0028_A.S._158_2017_Judgment_.doc .

Section 34 of the Arbitration and Conciliation Act, 1996, court is not sitting in appeal over the arbitral award and scope of the power of the court is very limited.

18. Between Flex Engineering Ltd., vs. Antartica Construction Company and another reported in 2007 (96) DRJ 90, the Hon'ble High Court of Delhi has held that when the petitioner has failed to prove that the arbitration award was in conflict with public policy of India, the award cannot be set aside.

19. Between Union of India Vs. Hakamchand and Company reported in 2002 (65) DRJ 400, the Hon'ble High Court of Delhi has held that award to be set aside if it is shown that party applying for its setting aside was under some incapacity or the arbitration agreement was not valid. Court 104 CT0028_A.S._158_2017_Judgment_.doc .

is not sitting in appeal against the award and when the objections raised by the respondent / objector are not covered by Section 34 of the Act, award cannot be interfered.

20. Between Pritpalsingh vs. Delhi Metro Rail Corporation Ltd., reported in 2007 (95) DRJ 21, the Hon'ble High Court of Delhi has held that when the award is patently against the statutory provision or is passed without giving opportunity of hearing or without giving reasons is only liable to be set aside.

21. Between Puri Construction Pvt. Ltd., vs. Union of India reported (1989) 1 Supreme Court Cases 411, the Hon'ble Apex Court of the land and has held that when a court is called upon to decide the objections raised by a party against an arbitration 105 CT0028_A.S._158_2017_Judgment_.doc .

award the jurisdiction of the court is limited as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits with reference to the materials produced before the arbitrator. The court cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the materials.

22. Between Collector of Rangoon vs. Maung Aung Ba reported in 1916 SCC Online LB3, in para no.6 of the Judgment, the Lower Burma Chief High Court has held that a distinction between an obligation under a bond and an obligation under an ordinary contract is that breach of an obligation under a bond does not to use a legal expression, "sound in damages" whereas "damages" is what one who breaks an 106 CT0028_A.S._158_2017_Judgment_.doc .

ordinary contract is subjected to. In the definition of "bond" in the Indian Stamp Act the words "where a person obliges himself"

> are used in every clause; this indicates that what was in the minds of the lawmakers was a document embodying an obligation in the special sense of the word referred to in Leake.
>
> 32. In the light of arguments advanced by the learned counsel for plaintiff and learned counsel for defendants 1 to 3, it is pertinent to note that an arbitral award may be set aside by the Court only on the grounds mentioned under Section 34 of Arbitration and Conciliation Act, 1996. Under Section 34(2) of the Act, an arbitral award may be set aside by the Court only if:
>
> (a) the party making the application furnishes proof that -

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(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, falling 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.

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the 108 CT0028_A.S._158_2017_Judgment_.doc .

arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that -

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

33. In the light of the Section 34 of the Arbitration and Conciliation Act, 1996, a perusal of the grounds urged by the plaintiff in the present suit to set aside the impugned award discloses that the 109 CT0028_A.S._158_2017_Judgment_.doc .

first ground is that the arbitrator has not disclosed his interest as is mandatorily required under Section 12 of the Act inspite of the proceedings having commences in pursuance of notice dated 4/7/2016. However, a perusal of the impugned award discloses that on 30/1/2017, the arbitrator has made a disclosure statement as per VI schedule with reference to Section 12 (1) B of Arbitration and Conciliation Act, 1996. Apart from that a perusal of the memorandum of arbitration suit discloses that no allegations are made with regard to lack of independence or integrity of the arbitrator by the plaintiff. Hence, the contention of the plaintiff that the arbitrator has not disclosed his interest as is mandatorily required under Section 12 of the Act and hence award is liable to be set aside cannot be accepted.

34. A perusal of the grounds urged in the memorandum of arbitration suit filed by the plaintiff discloses that it is alleged that the arbitrator in the 110 CT0028_A.S._158_2017_Judgment_.doc .

impugned award has referred Ex.P8, Ex.P8(a), Ex.P8(b) and Ex.P8(c) which are much earlier to execution of Joint Development Agreement and the Joint Development Agreement has superseded all other agreements. It is also alleged that the arbitrator has not considered the clauses of Joint Development Agreement which obligates the defendants 1 to 3 to get plans, licenses and permissions approved from the competent authority and has given wrong finding that plaintiff has committed breach of contract by not getting the plans approved from the competent authority, thereby arbitrator has re-written the contract. It is further alleged that arbitrator has passed a perverse order by holding that plaintiff has to secure sanctioned plan which is contrary to the terms of the contract. It is further alleged that the finding of the arbitrator that plaintiff could have taken the signatures of the defendants 1 to 3 to get the plan sanctioned is contrary to the terms of the contract. It is further alleged that finding of the arbitrator that 111 CT0028_A.S._158_2017_Judgment_.doc .

plaintiff has not prepared the plans is contrary to the evidence on record and arbitrator has not considered the admissions made by PW.1 in his evidence. It is further alleged that arbitrator has not given any reasons to answer issue no.1 to 5 in favour of the defendants. It is further alleged that in the guise of deciding all the issues together arbitrator has ignored to deal with the issue no. 1 to 5. It is further alleged that the finding recorded by the arbitrator that the defendants had furnished all the documents of the property called for by the plaintiff is perverse in view of the admissions of PW.1 found in his cross- examination that he has not produced these documents. It is further alleged that the finding of the arbitrator that plaintiff has failed to prove the payment of amount to the defendants is perverse. It is further alleged that the finding of the arbitrator that plaintiff had abandoned the execution of work inspite of opportunity given by the defendants to complete the work is perverse.

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35. It is pertinent to note that these grounds and contentions raised in the memorandum of arbitration suit challenging the arbitral award relates to pure question of fact and appreciation of evidence. In the decision reported between State of Rajasthan vs. Puri Construction Company Ltd., reported in 1994 AIR SCW 5061 and in the decision reported between B.V.Radhakrishna vs. Sponge Iron India Ltd., reported in AIR 1997 SC 1324, the Hon'ble Apex Court of the land has held that the arbitrator is the final arbiter for dispute between the parties. It is not open to challenge the award on the ground that arbitrator has drawn his own conclusions or failed to appreciate the facts. Court cannot substitute its own evolution on the conclusion of law and facts. Court cannot examine the reasonableness of the reasons. The arbiter is the sole Judge of the quality and quantity of the evidence and it will not be for the court to take upon itself the task of being the judge on the evidence before the court.

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36. In view of the ratio of the above two cited decisions, considering the fact that grounds urged in the memorandum of appeal pertains to interpretation of terms of Ex.P1 Joint Development Agreement by the arbitrator on the basis of evidence produced on record which relates to pure question of facts and appreciation of evidence it is not necessary for this court to advert to the said contentions.

37. Apart from challenging the award with regard to interpretation of the terms of Ex.P1 Joint Development Agreement dated 4/7/2014 by the arbitrator, the plaintiff has also challenged the impugned award on the following grounds:

> 1. The arbitrator has dealt with the dispute with regard to Ex.P2 Memorandum of understanding dated 30/12/2014 not falling within the terms of the submission of the arbitration.
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>
> 2. The impugned award contains decisions on merits beyond the scope of submissions of arbitration.
>
> 3. The impugned award is conflict with the public policy of India.

38. It is the contention of the plaintiff that in CMP 194/2016, the Hon'ble High Court of Karnataka has referred only Ex.P1 Joint Development Agreement dated 4/7/2014 to the arbitrator for reference and the arbitrator has exercised jurisdiction not vested in him by adjudicating the disputes that have been arisen under Ex.P2 Memorandum of understanding dated 30/12/2014 which were not referred to him by virtue of order passed in CMP 194/2016 and hence the award is liable to be set aside under Section 34 (2) (a)

(iv) of the Act.

39. On the other hand, it is the contention of the defendants 1 to 3 that Ex.P2 Memorandum of understanding cannot be read in isolation with Ex.P1 115 CT0028_A.S._158_2017_Judgment_.doc .

Joint Development Agreement and these documents came into existence at an undisputed point of time. That the terms and conditions stated in Ex.P2 Memorandum of understanding are similar to the contents of Ex.P1 Joint Development Agreement except with regard to sharing of minimum guaranteed revenue in place of sharing of super built up area of the building complex. It is further contention of the defendants 1 to 3 that since Ex.P2 Memorandum of understanding is continuation of Ex.P1 Joint Development Agreement plaintiff cannot seek to escape from the arbitration agreement stating that the said document was not referred for arbitration.

40. To appreciate the rival contentions taken by the parties to the suit, it is relevant to extract Ex.P13 the orders passed in CMP 194/2016, to find out the documents which were referred for arbitration

by virtue of the orders passed in CMP 194/2016. 116 CT0028_A.S._158_2017_Judgment_.doc .

41. Following order is passed by the Hon'ble High Court of Karnataka in CMP No.194/2016:

" The petition is filed seeking the

appointment of the Arbitrator under

Section 11(5) of the Arbitration and Conciliation Act, 1996.

2. The parties have entered into the Joint Development Agreement dated 4/7/2014 (Annexure-A), Clause 31.4 of the said agreement provides for the dispute resolution through arbitration mechanism. The dispute that has arisen is regarding the performance of the obligations of the parties under the said agreement.

3. Heard Sri Harish V.S., the learned counsel for the petitioners and Sri. H. Mujtaba, the learned counsel appearing for the respondent.

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4. On hearing both the learned advocates, I allow this petition. I appoint Sri Vishwanath V. Anagadi, a retired District Judge as the sole arbitrator. He is requested to enter upon the arbitration, arbitrate the dispute and conduct the arbitration proceedings at the Arbitration and Conciliation Centre, Bengaluru (Domestic and International), as per the Arbitration and Conciliation Centre Rules, 2012.

5. All the contentions are left open to be urged before the arbitration."

42. A perusal of the contents of Ex.P13 orders passed in CMP 194/2016 discloses that in the said order, the reference is made only with respect to Ex.P1 Joint Development Agreement dated 4/7/2014 which was produced as Annexure-A before the Hon'ble High Court of Karnataka. In the said order, it is specifically 118 CT0028_A.S._158_2017_Judgment_.doc .

stated that the dispute between the parties has arose in regarding performance of the obligations of the parties under the Joint Development Agreement dated 4/7/2014. The order passed in CMP 194/2016 discloses that the defendants who have filed the said petition have not produced the Memorandum of understanding dated 30/12/2014 before the Hon'ble High Court of Karnataka and have not sought for reference of the said Memorandum of understanding dated 30/12/2014 to the arbitrator for arbitration. The very contents of Ex.P13 orders passed in CMP 194/2016 clearly supports the contention of the plaintiff that Memorandum of understanding dated 30/12/2014 was not referred for arbitration and only Joint Development Agreement dated 4/7/2014 was referred for arbitration.

43. A perusal of the contents of impugned award discloses that though only Joint Development Agreement dated 4/7/2014 was referred for 119 CT0028_A.S._158_2017_Judgment_.doc .

arbitration in virtue of the orders passed in CMP 194/2016, the arbitrator has traveled beyond the terms of reference and materially enlarged the scope of the reference by relying on the contents of Ex.P2 Memorandum of understanding dated 30/12/2014 in passing the impugned award.

44. At this juncture, it is relevant to rely on some of the decisions of the Apex Court of the land on the aspect of jurisdiction of arbitrator to decide an issue not referred to him.

45. In the decision reported between Associated Engineering Company vs. Government of Andhra Pradesh and another reported in AIR 1992 SC 232, the Hon'ble Apex Court of the land has held that an arbitrator cannot widen his jurisdiction by deciding the question not referred to him by the parties. If he exceeds his jurisdiction by doing so, his award would be liable to be set aside. 120 CT0028_A.S._158_2017_Judgment_.doc .

46. Further, in the decision between MSK Projects Ltd., vs. State of Rajasthan and another reported in 2011 (10) SCC 573, the Hon'ble Apex Court of the land has held that it is settled legal proposition that Arbitral tribunals get jurisdiction to proceed with a case only from the reference made to them. It is further held that it is not permissible for the Arbitral tribunal to travel beyond the terms of reference. Arbitral tribunal cannot exercise powers so as to enlarge the scope of reference made. In the decision reported between Harsha Construction vs. Union of India reported in AIR 2015 SC 270, the Apex Court of the land has held that it was not open for the arbitrator to decide the issues which were not arbitrable.

47. A perusal of the impugned award discloses that before the learned Arbitrator the respondent / plaintiff has taken a specific defence that the arbitrator had no jurisdiction to pass an award on 121 CT0028_A.S._158_2017_Judgment_.doc .

Ex.P2 Memorandum of understanding dated 30/12/2014 which was not referred to him for arbitration. A perusal of the impugned award discloses that in para 382-(a) of the impugned award, the arbitrator has given a reasoning stating that in the objection statement filed by the respondent to the claim petition and in counterclaim of the respondent he had not taken a specific defence that the dispute raised on the basis of Ex.P2 Memorandum of understanding dated 30/12/2014 are not arbitrable and tribunal has no jurisdiction and locus standi to adjudicate the dispute pertaining to Memorandum of understanding dated 30/12/2014.

48. However, it is pertinent to note that though the plaintiff / respondent in his objection statement and also in his rejoinder has not taken a specific defence with regard to the jurisdiction of the arbitrator pertaining to Memorandum of understanding dated 30/12/2014 but during the trial, he has taken the 122 CT0028_A.S._158_2017_Judgment_.doc .

said defence. The defence pertaining to the jurisdiction is a legal plea. Hence, mere fact that in his objection statement and in his rejoinder the plaintiff / respondent has not taken any defence pertaining to the jurisdiction of the arbitrator to pass an award on Memorandum of understanding dated 30/12/2014 cannot be ground for the arbitrator to come to a conclusion that the plaintiff / respondent has waived his defence.

49. The Hon'ble Apex Court of the land in the decision reported between Lion Engineering Consultant vs. State of M.P. and others reported in MANU/SC 0313/2018 has held that the scheme of the Arbitration and Conciliation Act, 1996 is clear. All objections to jurisdiction of whatever nature must be taken at the stage of submission of statement of defence and must be dealt with under Section 16 of the Arbitration and Conciliation Act, 1996. However, if one of the parties seeks to contend that subject matter 123 CT0028_A.S._158_2017_Judgment_.doc .

of the dispute as such as cannot be dealt with by arbitration, it may be dealt under Section 34 of the Act.

50. In view of the ratio of the above cited decision, even in absence of specific defence in the statement of objection on the respondent / plaintiff before the arbitrator, there is no legal bar for the plaintiff to raise objections with regard to the jurisdiction of the arbitrator to arbitrate on Ex.P2 Memorandum of understanding dated 30/12/2014 under Section 34 of the Act in the present suit.

51. By considering the orders passed in CMP 194/2016, it was not open for the arbitrator to decide the issues with relating to Ex.P2 Memorandum of understanding dated 30/12/2014 which was not referred for arbitration and which was not arbitrable and to pass an award on the said document. The portion of the award of the arbitrator which relates to the disputes regarding Ex.P2 Memorandum of 124 CT0028_A.S._158_2017_Judgment_.doc .

understanding dated 30/12/2014 which is not a arbitrable dispute is concerned, is bad in law and required to be set aside.

52. The plaintiff though not disputed the execution of Ex.P2 Memorandum of understanding dated 30/12/2014 between him and the defendants has resisted the said document on the ground that the same was not properly stamped and also not registered as required under law and the award passed by the learned Arbitrator based on insufficiently stamped and unregistered document is in violation of the statutory provisions and hence the award cannot be said to be public interest.

53. A perusal of the contents of Ex.P2 unregistered Memorandum of understanding dated 30/12/2014 executed between the plaintiff and defendants 1 to 3 discloses that under the said document, the defendants owners of the property have authorized the developer/plaintiff to sell the 125 CT0028_A.S._158_2017_Judgment_.doc .

constructed area in the residential complex to the prospective buyers and authorized the developer / plaintiff to sell or enter into agreement of sale and sell their 22% of share in the residential complex at the price as determined by the developer. In the said document, the developer / plaintiff and the defendants 1 to 3 owners of the property have agreed to share revenue at the agreed proportion of 22% to the owners and 78% to the developer in place of sharing of super built up area as per the terms of Ex.P1 Joint Development Agreement dated 4/7/2014. In Ex.P2 Memorandum of understanding dated 30/12/2014, Annexure-I was affixed with revenue sharing details between the developer/plaintiff and defendants owners of the property.

54. According to the plaintiff, Ex.P2 document is in the nature of a bond and stamp duty is required to be paid under Article 12 of Karnataka Stamp Act 1957 at the prescribed rate and since the stamp duty 126 CT0028_A.S._158_2017_Judgment_.doc .

is not paid at the prescribed rate under Article 12, the said document is inadmissible in evidence under Section 34 of the Karnataka Stamp Act,1957.

55. A perusal of Section 2 (ab) of Karnataka Stamp Act,1957 discloses that it defines the word "bond" as includes:-

> (i) any instrument whereby a person obliges himself to pay money to another, or condition that the obligation shall be void if a specified act is performed or is not performed as the case may be;
>
> (ii) any instrument attested by a witness and not payable to order or bearer, whereby a persons obliges himself to pay money to another; and
>
> (iii) any instrument so attested, whereby a person obliges himself to deliver 127 CT0028_A.S._158_2017_Judgment_.doc .

grain or other agricultural produce to another.

56. A perusal of the contents of Ex.P2 Memorandum of understanding dated 30/12/2014 discloses that the same do not comes within the definition of "bonds" as defined in section 2(ab) of Karnataka Stamp Act, 1957. Hence, the arguments of learned counsel for the plaintiff that Ex.P2 is in the nature of a bond and required stamp duty is not paid on the said document cannot be accepted.

57. It is pertinent to note that the nomenclature given to the document is not a decisive factor but the nature and substance of the transaction has to be determined with reference to the terms of the document. The admissibility of the document is entirely dependent upon the recitals contained in the document but not on the basis of the pleadings set up by the party who seeks to introduce the document in question.

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58. A perusal of the contents of Ex.P2 Memorandum of understanding dated 30/12/2014 discloses that under the said document the defendants owners of the property have authorized and empower the developer / plaintiff to sell the constructed area in the residential complex to the prospective buyers. The defendants owners of the property have also permitted the developer / plaintiff to enter into agreement of sale and sell their 22% of share in the project at the price determined by the plaintiff / developer. The defendants owners of the properties along with the plaintiff / developer have also agreed to share the revenue arising out of the sale of the constructed units at the ratio of 22 % to the owners of the property and 78% of the developer / plaintiff.

59. With regard to the aspect of the payment of stamp duty on Ex.P2 Memorandum of understanding dated 30/12/2014, it is relevant to extract the 129 CT0028_A.S._158_2017_Judgment_.doc .

provision of Article 5(f) of Karnataka Stamp Act which is amended by Act no. 19/2014 with effect from 1/3/2014 which provides that -

> "If relating to construction or development of immovable property, including a multi unit or multi storied house or building or apartment of flat, or portion of it, executed by and between owner or lessee, as the case may be , and developer, having a stipulation, whether express or implied, that, in consideration of the owner or lessee conveying or transferring or disposing off, in any way, the undivided share or porition of land or immovable property; the developer agrees to convey or transfer or dispose off, in any way, the proportionate or agreed share or portion of the constructed or developed building or immovable property to the owner or lessee, as the case may be.

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Two Rupees for every one hundred rupees or part thereof, on the Market Value of such undivided share or portion of land or immovable property, consideration and money advanced, if any; or On the Market Value of such share or portion of the constructed or developed building or immovable property, consideration and money advanced, if any; Whichever is higher.

Provided that, if the proper stamp duty is paid under clause (ea) of the Article 41 on power of Attorney executed by and between the same parties and in respect of the same property, then the stamp duty payable on the corresponding agreement under clause (f) or article 5, shall not exceed rupees two hundred.

60. A perusal of the recitals of Ex.P2 Memorandum of understanding dated 30/12/2014 discloses that though the nomenclature given to the 131 CT0028_A.S._158_2017_Judgment_.doc .

said document is Memorandum of understanding it is in the nature of Joint Development Agreement by altering the contents of Ex.P1 earlier Joint Development Agreement dated 4/7/2017 with respect to proportionate sharing of revenue with regard to sale of the constructed unit between the plaintiff / developer and defendants owners of the immovable property. In view of the nature of the contents of Ex.P2 Memorandum of understanding same attracts the provision of Article 5 (f) of Karnataka Stamp Act and the required stamp duty is to be paid as stated in Article 5 (f) of Act No.19 of 2014 which came into effect from 1/3/2014. A perusal of contents of Ex.P2 Memorandum of understanding discloses that a stamp duty of only Rs.200/- was paid on the said document and required stamp duty as required under Article 5 (f) of the Karnataka Stamp Act was not paid on it which supports the contention of the plaintiff that Ex.P2 is insufficient stamped document. 132 CT0028_A.S._158_2017_Judgment_.doc .

61. Section 34 of Karnataka Stamp Act, 1957 provides that instrument not duly stamped is inadmissible in evidence. A perusal of the impugned award discloses that though the plaintiff / respondent has raised objections with regard to the insufficiency of stamp duty on the disputed Ex.P2 Memorandum of understanding dated 30/12/2014, the learned Arbitrator has admitted the said document in evidence and has relied on the said document to pass the impugned award by directing the plaintiff/ respondent to pay a sum of Rs.21,20,00,000/- to claimants/ defendants 1 to 3 with interest at the rate of 9.5% per annum.

62. In the present suit, the plaintiff has challenged the impugned award also on the ground that the learned Arbitrator has relied on Ex.P2 Memorandum of understanding dated 30/12/2014 which was an unregistered document required to be compulsorily registrable and passed the impugned 133 CT0028_A.S._158_2017_Judgment_.doc .

award. According to plaintiff, through Ex.P2 unregistered Memorandum of understanding dated 30/12/2014 the contents of Ex.P1 registered Joint Development Agreement dated 4/7/2014 were altered and varied, as a result of which Ex.P2 Memorandum of understanding dated 30/12/2014 required to be compulsorily registered.

63. With regard to the aspect of registration of Ex.P2 Memorandum of understanding dated 30/12/2014 the learned counsel for the plaintiff has drawn the attention of the Court to the two decisions of the Apex Court of the land. The Apex Court of the land in a decision reported between Sunil Kumar Roy Vs. Bhowra Kankanee Colleries Ltd., reported in AIR 1971 has held that a document which varies the essential terms of existing registered deed must be registered. Further the Apex Court of the land in a decision reported between S.Saktivel (dead by LRs) vs. M. Venugopal Pillai and others has held that 134 CT0028_A.S._158_2017_Judgment_.doc .

terms of a registered document can be altered, rescinded or varied only by a subsequent registered document and not otherwise.

64. A perusal of the contents of Ex.P2 unregistered Memorandum of understanding discloses that though in the said document it is stated that the said document is to be read in conjunction and continuation of the Joint Development Agreement dated 4/7/2014 but through Ex.P2 unregistered Memorandum of understanding, the contents of Ex.P1 registered Joint Development Agreement dated 8/9/2017 were altered with respect to sharing of revenue at an agreed proportion in place of sharing the super built up area. Ex.P2 Memorandum of understanding came into existence after a period of four months of execution of Ex.P1 registered Joint Development Agreement dated 4/7/2014. In view of the ratio of the above cited decisions relied on by the learned counsel for the plaintiff, the contents of Ex.P1 135 CT0028_A.S._158_2017_Judgment_.doc .

registered Joint Development Agreement dated 4/7/2014 could have not been varied or altered by Ex.P2 an unregistered Memorandum of understanding dated 30/12/2014. Since through Ex.P2 Memorandum of understanding dated 30/12/2014, the contents of Ex.P1 registered Joint Development Agreement dated 4/7/2014 was altered, Ex.P2 required to be compulsorily registered. A perusal of Section 49 of Indian Registration Act 1908 discloses that it provides that any document

required to be compulsorily registered under Section 17 of the Registration Act unless it has been registered shall effect any immovable property comprised therein and shall be received as evidence of any transaction affecting such property.

65. A perusal of the impugned award discloses that though Ex.P2 Memorandum of understanding dated 30/12/2014 was required to be compulsorily registered in view of its nature, the learned Arbitrator 136 CT0028_A.S._158_2017_Judgment_.doc .

has not considered the said aspect and inspite of the statutory prohibition under Section 49 of the Indian Registration Act, 1908 has received the said document as evidence with regard to transaction affecting the property in dispute.

66. In the present suit, one of the ground on which the impugned award challenged by the plaintiff is that impugned award is contrary to fundamental policy of Indian law since the same is passed in violation of statutory provisions of Karnataka Stamp Act, 1957 and Indian Registration Act of 1908.

67. On the question as to whether an award passed in violation of statutory provisions is considered as award passed contrary to fundamental policy of Indian law, the learned counsel for the plaintiff has drawn the attention of this court to the decisions reported between Delhi Development Authority vs. R.S.Sharma and Company, New Delhi reported in MANU / SC/ 3624 / 2008 137 CT0028_A.S._158_2017_Judgment_.doc .

wherein the Hon'ble Apex court of the land has held that the award which is passed patently in violation of statutory provisions cannot be said to be in public interest. Further, in the decision between Oil and Natural Gas Corporation Ltd., vs. Saw Pipes reported in MANU/SC/0314/2003 wherein the Hon'ble Apex Court of the land has held that an award contrary to substantive provision of law would be patently illegal and if it affects the right of the party, it is open for interference by Court under Section 34(2) of the Act.

68. In view of the ratio of the above decisions, the part of the impugned award passed by the learned Arbitrator based on the contents of Ex.P2 insufficiently stamped unregistered Memorandum of understanding dated 30/12/2014 in violation of statutory provisions is contrary to the fundamental policy of Indian law and required to be set aside under 138 CT0028_A.S._158_2017_Judgment_.doc .

Section 34(2) (b) (ii) of Arbitration and Conciliation Act, 1996.

69. By perusing the materials produced on record, this Court is of the opinion that the plaintiff has not made out any grounds to interfere with the part of the award which has declared that Joint Development Agreement dated 4/7/2014 as null and void and not binding on the parties and also rejected the counter claim sought for by him on the ground that he has committed breach of the terms of Ex.P1 Joint Development Agreement. However, with regard to the part of the award passed by the learned Arbitrator relying on Ex.P2 Memorandum of understanding dated 30/12/2014 which was not referred to him for arbitration by directing the plaintiff / respondent to pay

Rs.21,20,00,000/- with interest at the rate of 9.5% per annum from the date of filing of the claim petition till payment of the amount required to be set aside under Section 34(2) 139 CT0028_A.S._158_2017_Judgment_.doc .

(a) (iv) of the Act and under Section 34(2) (b) (ii) of the Act. With these observations, I answer point no.1 to 3 in the affirmative and point no.4 partly in the affirmative.

70. POINT NO.5: In view of my findings on point no.1 to 4, and the reasons assigned thereon, I proceed to pass the following:

> The petition filed by the plaintiff under Section 34 of Arbitration and Conciliation Act, 1996 is hereby partly allowed.
>
> Only the Relief no.III granted by the learned Arbitrator in the impugned award by directing the respondent/plaintiff to pay claimants /defendants a sum of Rs.21,20,00,000/- with interest at the rate of 9.5% per annum from the date of filing of the claim statement till payment is set aside. 140 CT0028_A.S._158_2017_Judgment_.doc .

The rest of the reliefs granted by learned Arbitrator in the impugned award do not warrants any interference.

Parties are directed to bear their costs.

*** [Dictated to the Judgment Writer directly on computer, Script corrected, signed and then pronounced by me, in the Open Court on this the 23rd day of June 2018.] [S.A.HIDAYATHULLA SHARIFF] C/c XXVII Additional City Civil Judge.

BENGALAURU.

23/6/2017 Plaintiff-RGB D1, D3 - HVS For Judgment....

...Judgment pronounced in the Open Court.... (Vide separate detailed judgment) The petition filed by the plaintiff under Section 34 of Arbitration and Conciliation Act, 1996 is hereby partly allowed.

Only the Relief no.III granted by the learned Arbitrator in the impugned award by directing the 143 CT0028_A.S._158_2017_Judgment_.doc .

respondent/plaintiff to pay claimants /defendants a sum of Rs.21,20,00,000/- with interest at the rate of 9.5% per annum from the date of filing of the claim statement till payment is set aside.

The rest of the reliefs granted by learned Arbitrator in the impugned award do not warrants any interference.

Parties are directed to bear their costs. [S.A.HIDAYATHULLA SHARIFF] C/c XXVII Additional City Civil Judge.

BENGALURU.

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