

**IN THE COURT OF LXXXV ADDL. CITY CIVIL &  
SESSIONS JUDGE, AT BENGALURU (CCH-86)**

**THIS THE 04TH DAY OF APRIL 2022**

**PRESENT:**

**SMT. M. LATHAKUMARI. M.A., LL. M.,  
LXXXV ADDL. CITY CIVIL & SESSIONS JUDGE,  
BENGALURU.**

**Com. A.P. No. 17/2020**

**BETWEEN:**

1. Sri. Mahadeva,  
Aged about 46 years,  
S/o C. Nagappa,
2. Smt. Kavitha,  
Aged about 37 years,  
W/o Mahadeva,
3. Master Shirish Gowda,  
Aged about 13 years,  
S/o Mahadeva,
4. Master Chethan Gowda,  
Aged about 9 years,  
S/o Mahadeva,

No.3 and 4 are minors and they are  
Rep. by their father & natural guardian  
Sri. Mahadeva.

All are residing at Nayanahalli village  
Lingapura Dhakale, Kasaba Hobli,  
Anekal Taluk, Bengaluru District.

**: CLAIMANTS/APPLICANTS**

**(Represented by Sri. A.M. Suresh Reddy - Advocate.)**

**AND**

1. M/s. Arattukulam Developers,  
A Partnership firm having its  
office at No.106/A, 4<sup>th</sup> 'C'  
Cross, Behind Raheja Arcade,  
5<sup>th</sup> Block, Koramangala  
Industrial Area,  
Bengaluru -560 095.  
Rep. By its Partner  
Sri. Tony Vincent,  
S/o. A.P. Kunju Kunju
2. Sri. G. Raghavendra Rao,  
District Judge (Retired),  
Sole Arbitrator,  
Arbitration & Conciliation Centre,  
Bengaluru (Domestic & International)  
Bengaluru.

**: RESPONDENTS**

**(Represented by Sri. K. Suman  
Advocate for Respondent No.1  
to 4).**

<b>Date of Institution of the suit</b>	<b>19.02.2020</b>
<b>Nature of the suit (suit on pronote, suit for declaration &amp; Possession, Suit for injunction etc.)</b>	<b>Arbitration Suit under Section 34 of Arbitration and Conciliation Act</b>
<b>Date of commencement of recording of evidence</b>	<b>---</b>
<b>Date on which judgment was pronounced</b>	<b>04.04.2022</b>

<b>Total Duration</b>	<b>Year/s</b> <b>02</b>	<b>Month/s</b> <b>01</b>	<b>Day/s</b> <b>15</b>
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**(M.LATHAKUMARI)**  
**LXXXV Addl. City Civil & Sessions Judge,**  
**Bengaluru.**

### **JUDGMENT**

This is a commercial arbitration petition filed by the applicants u/S 34 of the Arbitration and Conciliation Act, 1996 ('Act' in brief) Read with Sec. 10(3) of Commercial Courts Act, 2016, against respondent praying to call for the original records from sole arbitrator in A.C. No. 94/2018 and to set aside the award passed by him i.e., the 2<sup>nd</sup> respondent herein as sole arbitrator only in so far as their claims as Sl. No.3 and 4, consequently allow the claim petition with cost and to award such other reliefs as this court deems fit to grant in the facts and circumstances of this case.

The applicants were the claimants before the Arbitral Tribunal and the respondent-1 herein was the respondent. Accordingly parties are referred as applicants/claimants and respondent in this case for the sake of convenience. 2<sup>nd</sup> respondent is the sole arbitrator of A.C.No.94/2018.

**2. FACTUAL BACKGROUND: -**

The applicants/claimants being the absolute owners of land bearing Sy. No.95, 96, 97, 99 in all measuring 9 acres 22 guntas entered into a Joint Development Agreement with respondent on 19.05.2014 (JDA). In pursuance of the same, applicants/claimants also executed registered power of attorney dated 19.05.2014 in favour of respondent and permitted the respondent to develop their land bearing Sy. No.95, 96, 97 and 99 in all measuring 9 acres 22 guntas situated at Lingapura village, Anekal Taluk, Bengaluru District. It is applicants/ claimants further case that as per the terms of the JDA the respondent had agreed to deliver owners share of sital area within a period of 15 months from the date of registration of JDA with a grace period of two months. As per clause 11.2 of the JDA., the respondent agreed and undertook to compensate the applicants/claimants at the rate of Rs.30,000/- per acre of land in the schedule property per month and to pay compensation every month in the event of respondent failed to deliver the sites as agreed to the applicants/claimants in time. Time was the essence of the contract. Since subsequent to Joint Development Agreement and also power of attorney executed between the parties, respondent failed to

comply with the terms of JDA., the applicants/ claimants invoked clause 19 of the JDA., and filed CMP No.60/2017 before Hon'ble High Court of Karnataka, Bengaluru for appointment of sole arbitrator. 2<sup>nd</sup> respondent was accordingly appointed as sole arbitrator to decide the dispute between the parties by order dated 07.03.2019 of Hon'ble High Court of Karnataka. It is applicants/ claimants further case that the learned arbitrator has framed as many as 11 issues, though considered their claim to some extent failed to consider the claim made by them in their claim petition while considering Issue No.3 and 4, rejected the claim under Issue No.4 and partly allowed their claim under Issue No.3. Learned arbitrator failed to appreciate the fact that the investment of the claimants /applicants in the JDA., is their lands. That apart they have already complied all their obligations and respondent developer is responsible for obtaining plan sanction, permissions etc., failed to do so. Hence, claimants/applicants cannot be held liable for negligence of respondents. The learned arbitrator failed to take note of the fact that till today there is no delivery of developed sital area to the claimants/applicants in terms of Joint Development Agreement and hence prays to set aside the award passed by learned arbitrator only in so far as Sl. No.3

and 4 i.e., Issue No.3 and 4 and thereby allow the claim petition filed by applicants/claimants by allowing relief sought by them under Issue No.3 and 4.

3. On issuance of notice the respondent appeared through its counsel and submitted that the petition averments in A.P.No.53/2020 shall be treated as objections in Com.A.P.No.17/2020. Accordingly, petition avrments in A.P.No.53/2020 filed by none other than the very respondent herein as a petitioner in that case is considered herewith. It is the case of respondent that the respondent and applicants/ claimants entered into a registered Joint Development Agreement, in pursuance of the same, applicants/ claimants also executed registered power of attorney dated 19.04.2014 invited the respondent to develop their land bearing Sy. No.95, 96, 97 and 99 in all measuring 9 acres 22 guntas situated at Lingapura village, Anekal Taluk, Bengaluru District. It is respondent's further contention that as per the terms of the JDA the applicants/claimants received a sum of Rs.30,00,000/- towards non-refundable deposit and another sum of Rs.60,00,000/- towards refundable security deposit from respondent and thereby respondent agreed to develop the properties of applicants/ claimants by forming a layout. As per the terms of the JDA, the respondent had to

deliver the applicants/ claimants their share of the sital area within 17 months i.e., by 19.10.2015, whereas due to force majeure and Governmental restrictions as per clause 11.3 of the JDA and also due to the existence of unidentified kharab land to an extent of 27 guntas in the applicants/claimants land, the concerned Town Planning Authority did not approve the plan until 06.02.2016. Apart from that, there was an hindrance from one Sri. P. Venkatesh being the neighbouring land owner in getting the plan sanctioned from the concerned authority and thereby the respondent contended that project could not be executed in time. Time was not the essence of the contract. Since subsequent to Joint Development Agreement and also power of attorney executed between the parties, applicants/claimants also executed a Rectification Deed of Joint Development Agreement dated 19.11.2019, Supplemental Agreement dated 05.05.2016, which establishes that time was not the essence of the contract. The terms and conditions in these agreements establishes that time was not essence of the contract. When such being the case, arbitral tribunal passed an award directing this respondent to pay Rs.1,28,925/- per month from 06.07.2017 till 23.05.2019 along with 12% interest on the amount of compensation due till

the date of claim petition and thereafter at 9% on the same. Being aggrieved by the said award, the respondent has preferred separate petition on the ground that the award passed by the learned arbitrator is capricious, perverse and wholly illegal. The learned arbitrator has not judiciously applied his mind to the facts and circumstances of the case. Without considering the subsequent agreements executed between the parties wrongly held that respondent has not completed the work within 17 months and the learned arbitrator has not considered the version of applicants/claimants in their cross-examination, wherein they have categorically admitted that, no time limit is there for completion of the project. Because of there being kharab land in the property of applicants/claimants, he could not get the plan sanctioned in time. He shall not be made liable for any delay in executing the project. In a case relating to construction contracts, time can never be the essence of the contract. It is further mentioned that learned arbitrator has not at all considered the principles laid down by the Hon'ble Supreme Court in McDermott International Inc. v. Burn Standard Co. Ltd., and others (2006) 11 SCC 181 referred by him before arbitral tribunal. The boundary dispute between the applicants/claimants with the

neighbouring land owners clearly portray that the respondents are not in complete possession of the properties and by suppressing the same entered into registered Joint Development Agreement with respondent. It is also asserted that the learned arbitrator has not considered the huge investment made by the respondent to the tune of Rs. Nine Crores towards formation of residential layout. The very approach of the learned arbitrator to the case of the petitioner at the outset itself was prejudiced and biased and hence pray for set aside the award passed by the 5<sup>th</sup> respondent and thereby reject the claims of the applicants/claimants passed in Arbitration Case No.94/2018. The respondent is entitled for compensation as claimed and hence pray for dismissal of this petition with costs and canvassed that petition filed by him in A.P.NO.53/2020 may be allowed.

4. I have carefully scrutinized entire records before me. Heard arguments.

5. Now the points that arise for my consideration are as follows:

1) Whether the applicants/claimants have made out a ground u/s 34 of the Arbitration and

Conciliation Act to set aside the impugned award passed by the 2<sup>nd</sup> respondent in A.C.No.94/2018?

2. What Order?

6. My finding on the above points are: -

Point No.1 : In the Negative

Point No.2 : As per final Order

for the following:

### **REASONS**

**7. POINT No.1:-** The execution of registered Joint Development Agreement and also power of attorney by applicants/claimants in favour of respondent in respect of their property measuring 9 acres 22 guntas is not in dispute. It is also not in dispute that in the registered Joint Development Agreement there is a clause at clause (8) and clause (11) more particularly 11.1 that respondent shall develop the properties of applicants/claimants after securing the sanction plan from concerned authority and deliver the share of applicants/claimants within a period of 15 months from the date of registration of this JDA with a grace period of two months. It is also not in dispute that respondent has not completed the project within 17 months as agreed

under clause 11 of the Joint Development Agreement. The learned arbitrator while considering the contentions of parties framed as many as 11 issues. While considering Issue No.1, 2, 4 to 7 together, the learned arbitrator at para-4 of his award extracted clause (8) of the Joint Development Agreement and also clause 11 and held that respondent failed to complete the project within the agreed period of 17 months and also failed to establish that the delay was due to force majeure and thereby considered some of the claims of applicants/claimants under Issue No.1 and 3. While adjudicating the matter between the parties, the learned arbitrator has discussed each and every facts and circumstances raised by the parties and also citation relied upon by them. Under such circumstances, contention of applicants/claimants that the impugned award is perverse in respect of Issue No.2 and 4 holds no water. That apart, Hon'ble Supreme Court in **DELHI AIRPORT METRO EXPRESS PVT. LTD., VS METRO RAIL CORPORATION LTD (2021) SCC ONLINE SC 695** in para 26 & para 27 of the judgment laid down the parameters of interference with an arbitral award on the ground of patent illegality as under:

- (i) The patent illegality should be an illegality which goes to the root of the matter and every

error of law committed by an arbitral tribunal would not fall within the expression of 'patent illegality'.

(ii) Erroneous application of law cannot be categorized as patent illegality.

(iii) Contravention of law not linked to public policy or public interest is beyond the scope of expression 'patent illegality'.

(iv) The courts are prohibited to re appreciate the evidence to conclude that award suffers from patent illegality appearing on face of it as court do not sit in appeal against an arbitral award.

(v) An award can be interfered with on the ground of patent illegality when an Arbitrator takes a view which is not even a possible view and interprets a clause in the contract in such a manner that no fair minded or reasonable person would or if the Arbitrator commits an error of jurisdiction by wandering outside the contract and deals with matters not allotted to it.

(vi) An arbitral award stating no reasons for its findings would make itself susceptible to challenge on the ground of patent illegality.

(vii) The conclusions of an Arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Similarly, the consideration of documents, which are not supplied to the other party would render a finding recorded by the Arbitrator perverse and the same would fall within the expression 'patent illegality'.

(viii) Explanation (1) amended by 2015 Amendment Act clarifies the expression 'public policy of India' and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention of fundamental policy of India law or if it is in conflict with most basic notions of morality or justice.

(ix) The contravention of a statute only if is linked to public policy or public interest is ground for setting aside the award as being at odds with the fundamental policy of Indian law.

Further, Hon'ble Supreme Court in National Highways Authority of India vs. M.Hakeem held that "While considering petition u/s 34 there is no power to modify an arbitral award and the court may either dismiss the objections filed and uphold the award or set aside the award if the grounds contained in sub-section (2) and (2A) are made out." When this is settled position of law, the petition filed by the applicants/claimants to set aside portion of the award is not at all maintainable. Even otherwise, the learned arbitrator by framing as many as 11 Issues discussed each and every claim and contentions raised by respective parties and passed the impugned award. Section 34 of the Act does not

contemplate partly setting aside of the award by the modification of the award. If an award is found to be vitiated by any one of the grounds set out in Sec. 34 of the Act, it has to be set aside in its entirety. It does not contemplate partly setting aside of the award or modification of the award. As I have already stated, the learned arbitrator while considering the claim petition filed before him by the applicants/claimants allowed the same in part by discussing the various circumstances that has taken place between the parties. There is no grounds made out by the applicants/claimants herein to separate the award only in respect of the issues which were answered against them. The finding of the learned arbitrator is based on evidence placed by respective parties before him. Accordingly and also relying upon the principles laid down by Hon'ble Supreme Court in the citation of National Highways Authority of India case, I have answered Point No.1 in the Negative.

8. **Point No.2:** - In view of my finding on Point No.1, I proceed to pass the following

**ORDER**

***The petition filed by applicants/  
claimants under Section 34 of the***

***Arbitration and Conciliation Act, 1996  
seeking to partly set aside the award  
passed by the 2<sup>nd</sup> respondent in A.C.  
No.94/2018 dated 09.01.2020 is  
dismissed with cost.***

***Accordingly award passed by 2<sup>nd</sup>  
respondent in A.C. NO.94/2018 is  
confirmed.***

(Dictated to the Judgment Writer, transcribed by him, corrected and pronounced in the open court on **04<sup>th</sup> day of April 2022**).

**(M.LATHAKUMARI)  
LXXXV Addl. City Civil & Sessions Judge,  
Bengaluru.**