IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7746 OF 2015

Malad Sundaram CHS Ltd.,	**]**
A co-operative Housing Society registered	**]**
under the Maharashtra Co-operative	**]**
Societies Act, having its registration No.	**]**
BOM/HSG/5321/1978 situated at	**]**
Survey No.32, Hissa No.2, CTS No.662,	**]**
Ramchandra Lane, Malad (West),	**]**
Mumbai-400 064.	**].. Petitioners**

Versus

M/s. Chandrakosha Konstruction Pvt. Ltd.,	**]**
(previously known as M/s. Kosha Konstruction	**]**
Pvt. Ltd.) a partnership limited Company	**]**
incorporated under Companies Act, 1956,	**]**
having its Registered office at 8, Jain Mansion,	**]**
Daftary Road, Opp. Dena Bank,	**]**
Malad (East), Mumbai-400 097.	**].. Respondents**

Mr. Shreepad Murthy a/w Mr. D. S. Jain, for the Petitioners.
Mr. D. H. Mehta a/w Mr. P. N. Shah, for the Respondents.

CORAM : R.M. SAVANT, J.
DATE : 14th OCTOBER, 2015

ORAL JUDGMENT

1. Rule, having regard to the nature of the challenge raised in

the above Petition made returnable forthwith and heard.

2. The Writ Jurisdiction of this Court is invoked against the order dated 10.06.2015 passed by the Learned Judge of the City Civil Court, Bombay. By the said order the Chamber Summons No.1790 of 2014 filed by the Respondents/Plaintiffs for amendment of the plaint so as to enhance the damages claimed in the suit came to be allowed and plaint was accordingly allowed to be amended in terms of the schedule to the Chamber Summons.

3. It is not necessary to burden this order with unnecessary details. Suffice it would be to state that a Development Agreement was entered into between the Respondents/original Plaintiffs and the Petitioners/original Defendants for utilizing the FSI of the balance land of the Petitioner Society as well as utilize TDR thereon. The said Development Agreement is dated 20.07.1999. The said agreement came to be terminated by the Defendants on 21.04.2003, pursuant to which the instant suit being Suit No.4067 of 2010 came to be filed in this Court on 23.06.2010. The substantive relief sought was of specific performance of the said Development Agreement and in the alternative damages to the tune of Rs.71 lakhs were claimed together with interest at 12% per annum. On the pecuniary jurisdiction of the City Civil Court being

enhanced in September 2012, the suit came to be transferred to the City Civil Court, Bombay. It is thereafter that the instant Chamber Summons No.1790 of 2014 came to be filed in July 2014 for amendment of the plaint so as to incorporate the amendments which were mentioned in the schedule to the Chamber Summons. The sum and substance of the amendment is that the damages were sought to be enhanced from Rs.71 lakhs to Rs.14 crores and the justification for the same was that the Plaintiffs would have been entitled to use of TDR and fungible FSI and if the rate of Rs.5000/- per square feet is applied the loss to the Plaintiffs would have been Rs.14 crores. The said application for amendment of the plaint was opposed to on behalf of the Defendants inter-alia on the ground that the facts sought to be incorporated by way of amendment were within the knowledge of the Plaintiffs and that the nature of the suit would change and that if the amendment is allowed, the suit would go out of the pecuniary jurisdiction of the Trial Court. The said Chamber Summons No.1790 of 2014 came to be considered by the Learned Judge of the City Civil Court who by the impugned order dated 10.06.2015 has allowed the same. The Learned Judge was of the view that even if by allowing amendment the suit goes out of the pecuniary jurisdiction of the Trial Court, the same would have to be allowed and that the said fact would not be an impediment in allowing the amendment application. The Learned

Judge has also held that the enhanced damages are sought on the basis of the TDR and fungible FSI and therefore the Plaintiffs are entitled to incorporate the enhanced damages claimed in the suit and that the same would not cause any prejudice to the Defendants. As indicated above, it is the said order dated 10.06.2015 which is taken exception to by way of the above Petition.

4. The Learned Counsel for the parties Mr. Shreepad Murthy for the Petitioners/original Defendants and Mr. D. H. Mehta for the Respondents/original Plaintiffs would seek to reiterate the case of the parties before the Trial Court for and against the amendment being allowed.

5. The Learned Counsel Mr. D. H. Mehta relies upon the order dated 13.10.2014 passed in Writ Petition No.7581 of 2014 passed by this Court, wherein identical amendments sought seeking enhancement in the claim which were rejected by the Trial Court was confirmed by this Court by the said order dated 13.10.2014 which has been confirmed by the Apex Court by the dismissal of the Special Leave Petition No.34656 of 2014 by order dated 27.03.2015. The Learned Counsel Mr. Shreepad Murthy relies upon the order of the Apex Court reported in ***2008(17) SCC 671*** in the matter of ***Lakha Ram Sharma Vs. Balar Marketing Pvt. Ltd***. in support

of his contention.

6. Having heard the Learned Counsel for the parties, I have considered the rival contentions. As indicated above, the suit as originally filed was seeking in the alternative, damages to the tune of Rs.71 lakhs. The said amount is sought to be enhanced now to Rs.14 crores and the justification for the same is that the Plaintiffs would have been entitled to the use of TDR and fungible FSI. In so far as the concept of fungible FSI is concerned, the same has come into force sometime in the year 2012 by virtue of the amendment to Regulation No.33 of the Development Control Regulations applicable to Mumbai. In the instant case, the termination of the agreement is on 21.04.2003 and obviously on the said day the concept of fungible FSI was not in existence. In so far as the TDR is concerned, at the time of filing of the suit, the Plaintiffs have claimed an amount of Rs.71 lakhs as damages and it would therefore have to be presumed, the said calculation was on the basis of the utilization of the TDR. The Trial Court glossed over the aforesaid facts and by merely observing that allowing the amendment application would not cause prejudice to the Defendants has allowed the said Chamber Summons. The Trial Court ought to have considered whether the amendment application seeking enhancement of damages from Rs.71 lakhs to Rs.14 crores could be allowed in the year 2014 in respect of the termination of the agreement

which has taken place in the year 2003. In my view, therefore, the Trial Court has erred in exercising jurisdiction by allowing the amendment application i.e. Chamber Summons No.1790 of 2014. In a similar case being Writ Petition No.7581 of 2014 this Court had upheld the rejection of the amendment application by the City Civil Court which order was confirmed by the Apex Court. The judgment of the Apex Court in *Balar Marketing*'s case (*supra*), does not further the case of the Plaintiffs in seeking the enhancement as the facts of the said case stand apart from the facts of the present case. In that view of the matter, the impugned order would have to be quashed and set aside and is accordingly quashed and set aside. Resultantly, the amendments even if incorporated in the plaint would have to be deleted. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute. On the deletion of the amendments, the additional Court fees if any paid by the Plaintiffs would be refunded, on an application made by the Plaintiffs.

[R.M. SAVANT, J]