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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.438 OF 2015

The New Aarti Co-operative Housing Society Limited, a society registered under the provisions of the Maharashtra Co-operative Societies Act, 1960, under Registration No.Bom/HSG/1770 of 1968 and having its registered office at Old Nagardas Road, Andheri (East), Mumbai – 400 069. ...Petitioner

....Versus....

Kabra Estate & Investment Consultants, a firm registered under the provisions of the Indian Partnership Act and having its registered office at Jash Chambers, 2nd Floor, Mumbai – 400 001. ...Respondent

Mr.Praveen Samdhani, Senior Counsel with Mr.Nivit Srivastava, Mr.Nakul Jain ,Mr.Harsh Behany and Mr.Sourav Banerji i/b Maniar Srivastava Associates for the Petitioner.

Mr.Sanjay Jain with Mr.Kunal Dwarkadas and Mr.Suraj Iyer i/b Ganesh & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 23RD JUNE, 2015.

JUDGMENT :-

1. By this petition filed under section 37 of the Arbitration & Conciliation Act, 1996 (for short the said "Arbitration Act"), the petitioner seeks to impugn the order dated 8th January, 2015, passed by the sole arbitrator under section 17 of the Arbitration Act thereby

granting injunction against the petitioner from creating any further third party rights, title or interest of any nature whatsoever in respect of the property of the petitioner society and/or from handing over possession of any part or portion of the said property of the petitioner society to any person save and except the respondent herein. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioner is a tenant co-operative housing society and is the owner of the plot of land admeasuring 3707.2 sq. mtrs. situated at village Gundawali bearing CTS Nos.135 and 136 at Old Nagardas Road, Andheri (East) Mumbai. There are three wings on the said plot. The petitioner has 93 members and there are 93 flats in the said three wings on the said plot. The said buildings were constructed in or around 1967-1968,

3. On 30th April, 2006, the election of the petitioner society was held. Mr.Devendra Shah, Mr.Anil Jogi and Mr.Amit Shah were elected as Chairman, Hon. Secretary and Treasurer respectively. It is the case of the petitioner that since the said three office bearers did not file Form No.20 under the provisions of the Maharashtra Co-operative Societies Act, 1960 within 15 days time prescribed or even thereafter, the office bearers and other managing committee members of the society deemed to have vacated their respective office.

4. On 26th November, 2006, the special general body meeting of the society was held. It was decided to proceed for redevelopment of the property. The petitioner appointed an advisory committee and authorized the Chairman, Hon. Secretary and Treasurer to sign and

execute the documents for the new building project on behalf of the petitioner. In the month of June, 2007, the petitioner invited tenders for the purpose of redevelopment. The proposal of the respondent was accepted for redevelopment in the special general body meeting of the petitioner held on 1st November, 2007. The petitioner issued an appointment letter to the respondent on 24th November, 2007.

5. On 18th April, 2008, the petitioner executed development agreement in favour of the respondent recording various terms and conditions. Under clause 5(a) of the said agreement, the respondent agreed to purchase 100% TDR within 60 days from the date of submission of the municipal plans in the name of the petitioner. Under clause 5(b), the respondent agreed to complete the construction of the new building within 24 months after all the members of the petitioner vacate their flats. It was provided that the grace time may be allowed upto three months. Under clause 9(c) of the said agreement, the respondent had to obtain IOD within a period of 3 months. Under clause 10, the respondent agreed to pay a total sum of Rs.1,000/- per sq. ft. per member of the petitioner as an interest free deposit. The said amount was agreed to be paid to the petitioner on behalf of the members, which was to be kept by the petitioner till the occupation certificate was obtained by the respondent. The respondent also agreed to pay compensation for hardship at the rate agreed therein. The respondent agreed to pay compensation for temporary alternate accommodation at the rate prescribed. Under clause 18(d) of the said agreement, it was provided that the time prescribed for payment of compensation shall be an essence of the said agreement. Under clause 26, it was provided that all future rights of FSI/DRC and all additional benefit shall remain with the society.

6. In the month of November/December, 2008, the respondent sent individual agreement to the petitioner for approval. It is the case of the petitioner that since the draft individual agreement was not consistent with the redevelopment agreement, the petitioner by its letter dated 15th January, 2009 sought certain clarification from the respondent. The respondent vide its letter dated 20th January, 2009 replied to the said letter dated 15th January, 2009. On 7th April, 2009, according to the respondent, it received plan finally approved by the petitioner. On 21st December, 2009, the respondent submitted the plans to the Municipal Corporation and made an application for IOD for construction of the new building with utilization of only land post FSI property of the petitioner and did not include TDR.

7. It is the case of the petitioner that on 2nd March, 2010, the Municipal Corporation issued IOD for construction of a new building of 5th floor only. On 2nd May, 2010, on expiry of the term of the then managing committee, they declared themselves as new managing committee members without holding of election as required in law.

8. On 20th May, 2010, the respondent alleged that it had given cheques for rent and corpus to the petitioner and the said fact was fortified by a circular dated 16th May, 2010. It is the case of the respondent that the petitioner returned the said cheques of rent and corpus by a letter dated 10th July, 2010.

9. It is the case of the respondent that on 29th October, 2010 the Chairman, Hon. Secretary & Treasurer on behalf of the petitioner on the strength of the resolution dated 26th November, 2006, executed a Deed of Rectification with the respondent. It is the case of the petitioner that the Chairman, Hon. Secretary & Treasurer who had

signed the said Deed of Rectification were already ceased to be the members of the committee and the said Deed of Rectification was executed without obtaining approval from the general body.

10. On 21st December, 2010, the respondent addressed a letter to the members of the petitioner for executing the individual agreements on or before 10th January, 2011. It is the case of the petitioner that the respondent had not purchased any TDR in the name of the petitioner society as required under the said redevelopment agreement before addressing any such letter to the members to vacate. During the period between April and July, 2011, according to the respondent, 17 members most of whom were erstwhile managing committee members executed and registered individual agreements with the respondent.

11. On 24th September, 2011, the respondent has alleged to have loaded 1810 sq. mtrs. of TDR.

12. On 24th October, 2011, the Registrar of Co-operative Societies, K (East) Ward, Mumbai appointed an administrator of the petitioner society for failure on the part of the then managing committee to hold monthly meetings of the managing committee, to hold election and as declaring themselves as new committee members and office bearers, non-filing of M-20 bonds etc.

13. On 8th November, 2011, the respondent issued a notice to the members of the petitioner to vacate their flats and for handing over possession to the respondent.

14. It is the case of the petitioner that on 18th November, 2011,

the respondent purchased and loaded TDR of 1810 sq. mtrs for the redevelopment project of the petitioner without obtaining a fresh IOD with loading of the said TDR. On 9th March, 2012, the respondent through its advocate called upon the members of the petitioner to vacate and hand over possession of their flats on or before 15th April, 2012.

15. On 12th April, 2012, 41 members of the petitioner replied to the letter of the advocate of the respondent alleging illegality in the transaction between the petitioner and the respondent and also alleged various breaches on the part of the respondent under the said development agreement.

16. On 7th May, 2012, few members of the petitioner, including the members of the erstwhile managing committee filed Arbitration Petition (No.1144 of 2012) under section 9 of the Arbitration Act *inter-alia* praying for an order and direction against the petitioner and its other members to vacate their flats and to hand over possession of the property to the respondent, for appointment of the Court Receiver etc. On 10th May, 2012, this Court refused to grant any ad-interim relief in the said Arbitration Petition (No.1144 of 2012).

17. On 6th November, 2012, the election of the managing committee was held by the administrator and he declared the managing committee, who is in-charge today as duly elected committee and handed over charge of the petitioner society to the new committee on 8th December, 2012.

18. On 20th January, 2013, the petitioner in its general body meeting passed a resolution for termination of the said development

agreement and other documents executed in favour of the respondent. On 8th February, 2013, the petitioner issued a notice of termination through its advocate on various grounds and terminated the redevelopment agreement dated 18th April, 2008 and also power of attorney and the alleged Rectification Deed. The respondent replied to the said letter vide its advocates letter dated 23rd February, 2013 and protested against the said termination.

19. On 6th March, 2013, the respondent filed a petition under section 9 of the Arbitration Act being Arbitration Petition (Lodging) No.340 of 2013 *inter-alia* praying for appointment of a Court Receiver, injunction etc. On 3rd April, 2013, this Court refused to grant ad-interim relief in favour of the respondent by recording reasons. On 3rd April, 2013, the respondent issued a notice for appointment of an arbitrator which was replied by the petitioner vide its advocate's letter dated 22nd April, 2013.

20. On 9th May, 2013, the Municipal Corporation issued a notice to the petitioner to submit the structural stability report in respect of its three buildings. On 26th June, 2013, the Municipal Corporation issued a notice under section 354 of the Mumbai Municipal Corporation for demolition of the buildings of the petitioner.

21. On 3rd July, 2013, few members of the petitioner, including the members of the erstwhile managing committee, filed a Notice of Motion (Lodging) No.1299 of 2013 *inter-alia* for seeking reliefs in Arbitration Petition No.1144 of 2012. The said Arbitration Petition No.1144 of 2012 was ultimately withdrawn. The said notice of motion was dismissed for default.

22. On 4th July, 2013, the petitioner informed the Municipal Corporation that the petitioner had already commenced repairing work of its buildings and replied to the said notice issued under section 354 of the MMC Act.

23. On 13th August, 2013, the Municipal Corporation issued a caution notice to the petitioner and threatened to disconnect the water supply and electric power of the buildings of the petitioner. The petitioner therefore, filed a Suit (No.2613 of 2013) on 29th August, 2013 against the Bombay Municipal Corporation at Dindoshi for impugning the notices issued by the Municipal Corporation. On 3rd September, 2013, the Bombay City Civil Court granted *ad-interim* injunction in favour of the petitioner against the operation of the notices issued by the Municipal Corporation.

24. The Bombay City Civil court did not grant any relief in the notice of motion filed by the petitioner inter-alia praying for stay of the notices issued by the Municipal Corporation. Being aggrieved by the said order passed by the Bombay City Civil Court, the petitioner has filed an appeal from order in this Court. This Court has granted ad-interim injunction in the said appeal from order and the said appeal is pending.

25. On 20th September, 2013, the petitioner passed a resolution in its special general meeting for inviting tenders for the appointment of a new developer. On 20th September, 2013, the petitioner issued a public notice inviting offers from the prospective developers.

26. On 4th October, 2013, the petitioner appointed Mr.Sharad

Pakdhane as Project Management Consultant.

27. On 23rd October, 2013, the respondent filed Arbitration Application (No.50 of 2014) under section 11 of the Arbitration Act for appointment of an arbitrator. On 18th December, 2013, the petitioner issued a public notice inviting fresh offers from the prospective developers. On 12th February, 2014, the petitioner issued primary letter of intent to M/s.Seth & Sonal Developers. On 7th March, 2014, the petitioner issued a final letter of intent to the said M/s.Seth & Sonal Developers.

28. On 7th May, 2014, the learned designate of the Hon'ble Chief Justice appointed Justice F.I. Rebello, a former Chief Justice of Allahabad High Court as the sole arbitrator and directed that the arbitration petition filed by the respondent under section 9 of the Arbitration Act be treated as an application under section 17 of the Arbitration Act.

29. On 2nd August, 2014, the petitioner entered into a development agreement with M/s.Seth & Sonal Developers. It is the case of the petitioner that the said development agreement with M/s.Seth & Sonal Developers is valid and subsisting.

30. The respondent did not file any statement of claim before the learned arbitrator. The said application under section 17 was however, heard by the learned arbitrator. On 8th January, 2015, the learned arbitrator granted injunction against the petitioner and in favour of the respondent by allowing the said application under section 17 which order is impugned by the petitioner in this petition filed under section 37 of the Arbitration Act.

31. I have heard both the parties at greater length and heard the matter finally at the admission stage. Mr.Samdhani, learned senior counsel for the petitioner invited my attention to various provisions of the development agreement dated 18th April, 2008 and also to the pleading under section 9 of the Arbitration Act and the affidavits filed by both the parties in the said application converted under section 17. It is submitted by learned senior counsel that the respondent applied for modification of the plan on 10th February, 2009 and final approved plan was received by the respondent on 7th April, 2009 from the petitioner. The respondent however, submitted the building plans to the Municipal Corporation only on 21st December, 2009 belatedly. The respondent also committed gross delay in obtaining IOD from the Municipal Corporation and applied only on 21st December, 2009. The IOD was obtained on 2nd March, 2010, and that also only for construction of the building upto 5th floor. The said IOD was liable to be obtained by the respondent within a period of three months from the date of the said development agreement dated 18th April, 2008. He submits that the Deed of Rectification was executed by the three erstwhile managing committee members of the petitioner in favour of the respondent without any resolution of the general body of the petitioner and in collusion with the respondent on 29th November, 2010.

32. Learned senior counsel submits that admittedly under clause 5(a) of the development agreement, the respondent was under an obligation to purchase 100% TDR as per DC Regulations within 60 days from the date of submission of the municipal plans i.e. within 60 days from 21st December, 2009. The respondent however, after lapse of almost two years, purchased TDR, which was not even 100%, as

contemplated under clause 5(a) of the development agreement. On 24th October, 2011, the Registrar of Co-operative Societies had appointed an administrator of the petitioner society. He submits that since the respondent had issued notices to the members of the petitioner without loading 100% TDR, the members of the petitioner society were not required to vacate their respective flats and to hand over possession thereof to the respondent. He submits that the respondent failed to take any steps to commence any construction work though the development agreement was executed as far back as on 18th April, 2008. There was no progress of any nature whatsoever made by the respondent to commence the redevelopment and construction work of their old buildings.

33. Learned senior counsel submits that the petitioner society therefore, could not have waited indefinitely for the respondent to commence redevelopment and construction work. The members of the petitioner society accordingly passed a resolution in the general body meeting held on 20th January, 2013 and resolved to terminate the development agreement and other documents executed in favour of the respondent. He submits that the petitioner has already terminated the said redevelopment agreement along with other documents by a notice dated 8th February, 2013. The said termination notice has not been stayed in any of the proceedings so far. He submits that this Court had already refused to grant any ad-interim relief in favour of the respondent in the petition filed under section 9 of the Arbitration act by the respondent in this Court by recording detailed reasons.

34. Learned senior counsel submits that the petitioner had placed various documents including copy of the development

agreement entered into by the petitioner in favour of M/s.Seth & Sonal Developers and other related documents on record. Though the learned arbitrator referred to such agreement in the impugned award, has granted injunction against the petitioner from creating any third party rights and to hand over possession of the flats to any third party excluding the respondent. He submits that the balance of convenience is in favour of the petitioner. Out of 73 members of the petitioner society, only 17 members i.e. less than 20% of the total members of the petitioner who have colluded with the respondent and have entered into an individual agreement with the respondent and handed over possession of their respective flats to the respondent. He submits that if the respondent ultimately succeeds in the arbitral proceedings, the respondent can be compensated by way of damages. The respondent cannot be granted relief by way of specific performance by the learned arbitrator in the facts of this case and even otherwise under the provisions of the Specific Relief Act, 1963.

35. Learned senior counsel invited my attention to the sanction order issued by the Municipal Corporation while sanctioning TDR in favour of the respondent. He submits that the members of the petitioner company have lost confidence in the respondent and cannot be compelled to get their buildings redeveloped by the respondent, who has done no progress for carrying out any redevelopment or construction since last so many years.

36. Learned senior counsel submits that in the development agreement entered into between the parties, both the parties have admitted that the condition of the buildings of the petitioner was dilapidated on the date of the execution of such agreement. He submits that according to the letter issued by the Municipal

Corporation on the application for TDR, though the respondent could have availed of 100%, the respondent had opted for 0.33 premium FSI and some part of TDR. He submits that the Municipal Corporation had not restricted the use of TDR less than 100% as canvassed by the respondent in its reply before the learned arbitrator.

37. On the issue of balance of convenience, learned senior counsel placed reliance on the judgment of this Court in the case of *Kalpataru Properties Pvt. Ltd. vs. Majithia Nagar Co-operative Housing Society Ltd. & Ors.* delivered by a Division Bench of this Court on 3rd September, 2014 in Appeal (Lodging) No.464 of 2014 and in particular paragraph 25. He submits that in view of the injunction granted by the learned arbitrator, all 93 members or atleast 76 members of the petitioner would be seriously affected. On the other hand, the respondent developer will have a right to claim damages. The members of the petitioner society cannot be denied right to a better living and better facilities. He submits that if this Court vacates interim injunction granted by the learned arbitrator, the development can be proceeded with by the new developer appointed by the petitioner by handing over possession of the respective flats by other members of the petitioner on the terms and conditions agreed upon. Paragraph 25 of the judgment of the Division Bench in the case of *Kalpataru Properties Pvt. Ltd.* (supra) reads thus :-

> "25. The balance of convenience is also in favour of the respondent No.1-Society which comprises of 284 residential flats admeasuring 350 sq. ft. each; 10 shops admeasuring 225 sq. ft. each; two commercial units admeasuring 320 sq. ft. each and one commercial unit i.e. a bank admeasuring 1848 sq. ft. If an injunction is granted, almost 300 members would be deprived the benefit of enjoying their property

> during the pendency of the suit. On the other hand, the appellant always has a right to claim damages. The members of respondent No.1-Society ought not to be denied the right to a better living and better facilities."

38. In reply, Mr.Jain, learned counsel for the respondent submits that the authorized committee members of the petitioner had already executed a Rectification Deed in favour of the respondent on 29th October, 2010. He submits that if according to the petitioner, the respondent was responsible in not commencing the construction and redevelopment of the property of the petitioner prior to 29th October, 2010, the petitioner would not have executed the Rectification Deed in favour of the respondent. He submits that the petitioner thus cannot allege any breach on the part of the respondent prior to the date of execution of the said Deed of Rectification dated 29th October, 2010. He submits that the petitioner illegally terminated the agreement only on 8th February, 2013. The respondent was fully ready to commence the redevelopment of the properties of the petitioner much prior to the date of termination of the development agreement by the petitioner. Since the petitioner did not take any steps in termination of the development agreement till 8th February, 2013, the petitioner had waived their rights, if any, under the development agreement to terminate the development agreement. In support of this plea, learned counsel placed reliance on section 55 of the Indian Contract Act, 1872.

39. Learned counsel for the respondent then submits that 17 members of the petitioner have already entered into individual permanent alternate accommodation agreement with the respondent and have already vacated their respective flats and handed over

possession thereof to the respondent. He submits that under the development agreement, the figure of TDR required to be loaded on the buildings was not mentioned. He submits that the respondent had already entered into an agreement for purchase of 3030 sq. mtrs. of TDR with M/s.HDIL on 24th September, 2011. After purchase of 100% TDR, the respondent had issued notices to the members of the petitioner to vacate their respective flats on 29th September, 2011. The members of the petitioner however, did not vacate their respective flats. The respondent had entered into a revised agreement with the said M/s.HDIL on 18th November, 2011 under which the respondent purchased 1810 sq. mtrs. of TDR for the project. It is submitted that on 17th January, 2012, the Municipal Corporation issued the notices explaining the calculation based on which only 1804.51 sq. mtrs. of TDR could be loaded on the plot of the petitioner due to change in the government policy. He submits that in view of the said clarification issued by the Municipal Corporation, the respondent entered into a Deed of Cancellation on 17th March,2012 with M/s.HDIL dated 24th September, 2011. The respondent issued notices to the members of the petitioner once again to vacate and hand over possession of their flats on 25th April, 2012.

40. Learned counsel for the respondent submits that the respondent has spent more than Rs.6.00 crores on purchasing TDR. He submits that in view of the introduction of premium FSI by the State of Maharashtra, the respondent had agreed to avail off 0.33 premium FSI on payment of premium to the Municipal Corporation which could be loaded along with TDR already purchased. He submits that though no payment of such premium FSI was made by the respondent, the said payment could be made at the stage of the

Municipal Corporation issuing commencement certificate.

41. It is submitted by learned counsel that the balance of convenience is in favour of the respondent and the respondent would not be able to recover any amount from the petitioner if ultimately succeeds in the arbitral proceedings. He submits that the view taken by the learned arbitrator is plausible view and this Court cannot take a different view while deciding this appeal under section 37 of the Arbitration Act arising out of an interim order passed by the learned arbitrator.

42. It is submitted by the learned counsel that insofar as the alleged agreement with the new developer entered into by the petitioner is concerned, the said new developer is not a *bona-fide* purchaser without notice. The said alleged agreement is on the stamp paper of Rs.500/- and the same is not enforceable in law. It is submitted that even against such third party, who is not a *bona-fide* purchaser without notice, specific performance can be granted in view of section 19(b) of the Specific Relief Act.

43. It is submitted by learned counsel that the condition of the buildings of the petitioner is not dilapidated, as canvassed by the petitioner. In support of this submission, learned counsel placed reliance on the reply of the petitioner to the notice under section 354 of the MMC issued by the Municipal Corporation contending that the condition of the buildings of the petitioner is not dilapidated. The petitioner had already carried out repairs to the buildings of the petitioner.

44. Mr.Samdhani, learned senior counsel for the petitioner in

rejoinder submits that the respondent has not even filed the statement of claim so far before the learned arbitrator. The parties have already recited in the development agreement about the dilapidated condition of the buildings of the petitioner. The respondent was under an obligation to obtain 100% TDR before issuing notices to vacate the members of the petitioner and the said TDR was to be obtained in the name of the petitioner. The respondent failed to obtain IOD within three months. He submits that there was no concept of premium FSI when the development agreement was entered into between the parties. He relied upon a clarification letter issued by the Municipal Corporation clarifying that the respondent wanted to avail of the premium FSI to to the extent of 0.33 which could be availed of out of 100% FSI permissible.

45. It is submitted that submits that there was thus no restriction imposed by the Municipal Corporation from using 100% TDR as contemplated under clause 5(a) of the development agreement. There was no agreement between the parties that 100% TDR contemplated under clause 5(a) was to be reduced and substituted by purchase of premium FSI. He submits that the respondent has not produced any documents to show that before notice to vacate was issued to the members of the petitioner, the respondent had already loaded 100% TDR on the plot of the petitioner. He submits that under Regulation XXXII of the Development Control Regulation, additional 0.33 FSI was an option given to the developer and was not mandatory. The respondent had obtained and applied for use of TDR only at 1810 sq. mtrs. and not for 100% TDR on net plot area of 3151.12 sq. mtrs. He submits that the balance of convenience is in favour of the petitioner. Learned senior counsel on instructions submits that without prejudice to the rights

and contentions of the petitioner, the petitioner is ready and willing to deposit a sum of Rs.6.90 crores in this Court within the time prescribed by this Court to show its *bona-fides*. He submits that no prejudice would be caused to the respondent, if the impugned award is set aside and the petitioner is permitted to develop the property and to create third party rights.

<u>REASONS AND CONCLUSION</u>

46. A perusal of the development agreement entered into between the parties dated 18th April, 2008 indicates that the respondent had agreed to purchase 100% TDR within 60 days from the date of submission of the Municipal plans in the name of the petitioner and to complete the construction of the new building within 24 months after all the members vacate their flats under the said clause the petitioner however could give grace time to complete the construction upto period of three months.

47. The respondent had also agreed to pay various compensation to the members of the petitioner. The time prescribed for payment of compensation was to be treated as the essence of the said agreement. It was also provided that all future rights of FSI/DRC and all additional benefits shall remain with the society.

48. A perusal of the record *prima-facie* indicates that the respondent had submitted plans to the Municipal Corporation on 21st December, 2009 though such plans were finally approved by the petitioner on 7th April, 2009. The respondent had made an application for IOD for construction of new building with utilization of land base FSI of the property of the petitioner. The IOD was issued by the

Municipal Corporation on 2nd March, 2010 and that also for construction of a new building of five floors only. The cheques forwarded to the petitioner by the respondent towards rent and corpus were returned according to the respondent by the petitioner. In my *prima-facie* view there was thus gross delay on the part of the respondent in making an application for sanction of the development plan and in obtaining IOD from the Municipal Corporation. The IOD obtained by the respondent was also for not the entire building but only in respect of part.

49. Insofar as purchase of 100% TDR within 60 days from the date of submission of Municipal plans by the respondent under clause 5(a) is concerned, a perusal of the record indicates that it was the case of the respondent themselves that the respondent had entered into an agreement with HDIL on 24th September, 2011 which agreement was cancelled by the respondent on 17th March, 2012. It was the case of the respondent that the said agreement with HDIL was cancelled in view of the change in Government policy. A perusal of the letter dated 17th January, 2012 issued by the Municipal Corporation however clearly indicates that the respondent had not proposed to avail of 100% TDR on the net area of the plot of the petitioner but had subsequently proposed to avail of some area by purchase of TDR and some FSI by payment of premium to the Municipal Corporation.

50. I am thus not inclined to accept the submission of Mr.Jain, learned counsel for the respondent that the respondent had purchased 100% TDR to be loaded on the plot of the petitioner in terms of prayer clause 5(a). Even in the said letter dated 17th January, 2012 issued by the Municipal Corporation relied upon by the

learned counsel for the respondent does not assist the case of the respondent but falsifies the case of the respondent. In my *prima-facie* view thus the respondent had not obtained 100% TDR in compliance of clause 5(a) of the development agreement dated 18th April, 2008 within the time prescribed or otherwise. The stage of the members of the petitioner thus vacating their respective flats and to handover the same to the respondent did not arrive.

51. A perusal of the record further *prima-facie* indicates that the Municipal Corporation has already issued a notice under section 354 of the Mumbai Municipal Corporation Act calling upon the petitioner to demolish its old buildings as the same were stated to be in ruinous condition. The Notice of Motion filed by the petitioner *inter-alia* praying for stay of the operation of such notice has been rejected by the City Civil Court. The Appeal from the Order filed by the petitioner impugning the same order is pending.

52. In the development agreement, it was recited by both the parties that the condition of the building on the date of entering into such development agreement was dilapidated. 17 members of the petitioner society have entered into individual agreement with the respondent and had handed over possession of their respective flats to the respondent. It is not in dispute that no fresh IOD had been obtained by the respondent with loading of 1810 sq.mtrs. for the redevelopment project of the petitioner. It is also not in dispute that the petitioner society has passed a resolution in the General Body Meeting held on 20th January, 2013 resolving to terminate the development agreement and other documents which were executed in favour of the respondent. The petitioner society has already terminated the redevelopment agreement, power of attorney and

rectification deed dated 8th February, 2013. 17 members who have alleged to have been entered into individual agreement with the respondent have not challenged the said resolution passed by the petitioner society in its General Body Meeting resolving to terminate the development agreement. It is not in dispute that the letter of termination issued by the petitioner as far back as on 8th February, 2013 is not stayed by this court or by the learned arbitrator in any of the proceedings.

53. A perusal of the record *prima-facie* indicates that after termination of the development agreement by the petitioner, the petitioner after passing a resolution in its Special General Meeting held on 20th September, 2013 for inviting tenders for appointment of new developer, issued a public notice inviting offers from the prospective developers and thereafter has already appointed Mr.Sharad Pakdhane of Sparc'in Designs, project management consultant. The petitioner has also issued primary letter of intent to M/s.Seth & Sonal on 12th February, 2014 and has already issued a final letter of intent on 7th March, 2014 in favour of the developer. On 2nd August, 2014 the petitioner has already entered into a fresh development agreement with M/s.Seth & Sonal Developers. The said agreement is still valid and subsisting. Admittedly the respondent did not obtain any relief against the said M/s.Seth & Sonal Developers by filing appropriate proceedings. A perusal of the record indicates that though the petitioner has placed these facts on record before the learned arbitrator and though the learned arbitrator noticed about such agreement between the petitioner and the said M/s.Seth & Sonal Developers still granted injunction against the petitioner from handing over possession of the property of the petitioner to any third party except the respondent. In my view the learned arbitrator could not

have granted any such injunction in view of the fact that the petitioner had already entered into the development agreement as far back as on 2nd August, 2014.

54. A perusal of the record further indicates that this court had refused to grant any interim reliefs in Arbitration Petition No.1144 of 2012 which was filed under section 9 of the Arbitration and Conciliation Act, 1996 by few members of the petitioner including the members of the erstwhile managing committee inter alia praying for an order and direction against the petitioner society and its other members to vacate their flats and to handover the property to the respondent, for appointment of the court receiver etc. The said arbitration petition was subsequently withdrawn. Even the Notice of Motion taken out by some of the members of the petitioner in the said Arbitration Petition No.1144 of 2012 who were supporting the respondent is dismissed for default.

55. A perusal of the record further indicates that the respondent had filed a petition under section 9 for interim measures [Arbitration Petition (L) No.340 of 2013] against the petitioner herein. By an order dated 3rd April, 2013 this court observed that the respondent herein was under an obligation to complete the redevelopment within a period of 24 months under the said development agreement dated 18th April, 2008. This court also took note of the serious grievance made by the petitioner society about no concrete steps having taken by the respondent though about five years had been passed from the date of the award to the respondent. This court also made observation that the respondent had also not purchased 100% TDR for use of the redevelopment of the property in question. With this *prima-facie* view taken by this court, ad-interim

relief claimed by the respondent was rejected as far back as on 3rd April, 2013. The said order was not impugned by the respondent by filing any appeal after rejection of such ad-interim relief by this court. The petitioner has already entered into an agreement with M/s.Seth & Sonal Developers. The said arbitration petition was disposed of by an order dated 7th May, 2014 passed by this court. Insofar as Arbitration Petition No.252 of 2014 is concerned, the said petition was allowed to be converted into an application under section 17 of the Act.

56. A perusal of the impugned order indicates that the learned arbitrator did not even consider the *prima-facie* observations made by this court while refusing to grant ad-interim relief in favour of the respondent and also to the fact that no appeal was preferred by the respondent against the said order. The learned arbitrator also did not consider the relevant fact that the petitioner had already entered into agreement with the new developer as far back as on 2nd August, 2014 and had already appointed the project management consultant as far back as on 4th October, 2013.

57. A perusal of the record clearly indicates that except 17 members who were less than 20% in number of total members of the society, other 76 members of the petitioner society have lost confidence in the respondent developer and had after waiting for several years, had proposed to terminate the agreement with the respondent and to proceed with the redevelopment of the property of the petitioner through a new developer. In my view the majority of the members of the petitioner have lost confidence in the respondent in view of no progress on the part of the respondent. In my *prima-facie* view the petitioner cannot be compelled to get their properties for redevelopment through the respondent.

58. In the facts of this case, the petitioner has good chances of succeeding in arbitration proceedings. In the event of the respondent succeeding in arbitration, the respondent can always be compensated in terms of the money. In my *prima-facie* view in the facts and circumstances of this case and in view of section 14 of Specific Relief Act, the respondent may not succeed in obtaining relief of specific performance of the development agreement with the petitioner.

59. In my view the observations of the learned arbitrator that the respondent would not be able to recover any amount of damages from the petitioner or that the compensation would not be adequate reliefs in the facts of this case is totally erroneous and *ex-facie,* contrary to the facts on record. Be that as it may, in my view the interest of the respondent would be protected if the statement made by the petitioner through their learned senior counsel to deposit a sum of Rs.6.90 crores is accepted and is deposited by the petitioner in this court without prejudice to their rights and contention.

60. Insofar as submission of the learned counsel for the respondent that the inaction on the part of the petitioner amounted to waiver is concerned, in my *prima-facie* view there is no merit in this submission. The respondent on the other hand did not comply with their part of the obligation under the said development agreement and committed gross delay. The Registrar had appointed an administrator of the petitioner society who was in office for quite sometime during that period.

61. Insofar as submission of the learned counsel appearing for the respondent that it was not the case of the petitioner that with

based FSI and TDR on 1818 sq.mts. purchased by the respondent, the flats alloted to the members of the petitioner could not have constructed and thus no prejudice would have been caused to the petitioner is concerned, in my view there is no merit in this submission of the learned counsel. If the respondent would not have constructed the building in accordance with the plan, the Municipal Corporation would not issue any occupation certificate even in respect of the flats which were to be alloted to the petitioner.

62. Insofar as submission of the learned counsel for the respondent that the respondent had already availed of the premium FSI and it could be loaded at the later point of time is concerned, in my view, there is no amendment to the development agreement permitting the respondent to purchase the premium FSI in place of 100% TDR or any part thereof. The petitioner never agreed for any such proposals made by the respondent to avail of premium FSI in lieu of part portion of TDR. Be that as it may, the respondent could not produce any proof to show this court that the respondent had already paid any premium for such FSI and the same was available when the respondent issued notice to vacate to the members of the petitioner society.

63. Insofar as submission of the learned counsel for the respondent that the condition of the building is not dilapidated is concerned, a perusal of the development agreement clearly indicates that both parties had admitted that the condition of the building of the petitioner was dilapidated when the said development agreement was executed.

64. In my view, the observations made by the learned

arbitrator in the impugned award that the balance of convenience is in favour of the respondent and the respondent may be entitled to get the specific performance of such development agreement is contrary to and in ignorance of the documents produced by both parties and also over looking the obligation of the respondent under the said development agreement. The impugned order is made also over looking subsequent event having taken place after termination of the agreement by the petitioner.

65. It is not in dispute that though the learned arbitrator was appointed by this court as far back as on 7th May, 2014, the respondent has not filed any statement of claim before the learned arbitrator so far. The arbitration proceedings thus would take its own time. The members of the petitioner thus cannot be restrained from carrying on any redevelopment of the property of the petitioner through another developer and to create third party rights in respect thereof. In my view the order passed by the learned arbitrator deserves to be set aside. I, therefore, pass the following order :-

(a) Arbitration Petition is made absolute in terms of prayer clause (a).

(b) Impugned order dated 8th January, 2015 passed by the learned arbitrator under section 17 of the Arbitration and Conciliation Act, 1996 is set aside. Application under section 17 filed by the respondent is dismissed.

(c) No order as to costs.

(R.D. DHANUKA, J.)