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

ARBITRATION PETITION NO.1339 OF 2014

Jai Neptune Co-operative Housing
Society Limited, a society registered
under the provisions of Maharashtra
Co-operative Societies Act, 1960,
having its address at Marve Road,
Mith Chowki, Malad (W),
Mumbai – 400 064.

...Petitioner

...Versus...

1. Lotus Logistics & Developers Pvt. Ltd.
214/419, Laxmi Plaza, Laxmi Industrial
Estate, New Link Road, Andheri (W),
Mumbai – 400 053.

2. Slum Rehabilitation Authority,
Through its Chief Executive Officer,
Administrative Building, Anant Kanekar
Marg, Bandra (E), Mumbai – 400 051.

...Respondents

Mr.Ralston Fernandes for the Petitioner.

Mr.Pratik Seksaria with Mr.Gauraj Shah and Mr.Arun Panikar i/b AKS
Legal for Respondent No.1.

Mr.G.D. Utangale with Mr.Akhil Kypade i/b Utangale & Co. for
Respondent No.2.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 6TH AUGUST, 2015
PRONOUNCED ON : 4TH SEPTEMBER, 2015.

JUDGMENT :-

1. By this petition filed under section 9 of the Arbitration &

Conciliation Act, 1996 (for short "Arbitration Act"), the petitioner has prayed for interim measures against both the respondents such as injunction against respondent no.2 from permitting any further construction on S.R. Scheme No.1 on different plots, to forthwith take steps to revoke permissions approved on the three plots, including plot of the petitioner, for appointment of the Court Receiver, injunction, for direction to deposit various amounts, to provide the bank guarantee etc. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The respondent no.1 is the developer with whom the petitioner had entered into an agreement for development of the property of the society. The respondent no.2 is an authority constituted by the State Government.

3. On 25th February, 2008, the petitioner entered into an agreement for development with the respondent no.1. On 13th February, 2009, the petitioner and the respondent no.1 executed a further Writing i.e. Addendum-cum-Deed of Rectification thereby modifying some of the terms of the development agreement dated 25th February, 2008. Under the said development agreement, the respondent no.1 agreed to carry out construction on the plot of land bearing CTS No.310/B on the terms and conditions recorded therein. It is the case of the petitioner under the said development agreement that the respondent no.1 agreed to carry out development by obtaining sanctioned plan from the Municipal Corporation as per the provisions of the Development Control Regulation, 1991 (for short "D.C. Regulation"). It is the case of the petitioner that the respondent no.1 however, without the consent of the petitioner or no objection got approved to the slum rehabilitation scheme now being carried out on

the said plot bearing CTS No.310/B along with two other plots.

4. It is the case of the petitioner that some time in the month of December, 2013, the petitioner came to know that the respondent no.1 had applied for sanction of the slum rehabilitation scheme under regulation 33(14)(D) on the plot bearing CTS No.310/B of the petitioner and other two plots and the same was sanctioned by the respondent no.2.

5. By a letter dated 23rd April, 2013, the petitioner referred to the permanent alternate accommodation agreement sent by the respondent no.1 to the petitioner and objected to clause 17 of the said agreement as suggested by the respondent no.1 to the effect that the developer shall be solely and exclusively entitled to use and utilize the facade, compound and other common areas in the new building for the purpose of advertising, affixing hoardings etc. and contended that the petitioner had exclusive rights to use and utilize the facade, compound and other common areas and not the developer. The petitioner called upon the respondent no.1 to delete clause 17 from the said permanent alternate accommodation agreement.

6. By a notice of its advocate dated 10th February, 2014, addressed to the respondent no.1, the petitioner replied to the letter dated 20th January, 2014 of the respondent no.1 and contended that the respondent no.1 was not entitled to develop the property under the S.R.A. Scheme and alleged that the carpet areas of the flat premises allotted to the Chairman of the petitioner society shown in the plans got sanctioned by the respondent no.1 and in the permanent alternate accommodation areas undertaken by the respondent no.1 to be provided to the existing members of the society

in the new building did not match and that was not in consonance therewith. The petitioner also alleged various breaches on the part of the respondent no.1 of its obligation under the said development agreement and Addendum-cum-Deed of Rectification and called upon the respondent no.1 to comply with the same.

7. The petitioner through its advocate's letter dated 19th December, 2013 to the Chief Executive officer of the Slum Rehabilitation Authority contended that the respondent no.1 was not entitled to develop the said non-slum plot of the petitioner without the consent and knowledge of the petitioner. By the said letter, petitioner called upon the authority to ensure that no further harm, hardship, loss or injury be caused to the petitioner and to the ignorance of third party purchasers and to take urgent appropriate action against the respondent no.1 and its Architect.

8. On 13th March, 2014, the respondent no.1 addressed a letter to the respondent no.2 and replied to the letter dated 19th December, 2013, addressed to respondent no.2 by the petitioner through its advocate and denied the allegations made therein. The respondent no.1 placed various facts on record referring to various permissions granted by the authority from time to time and about permanent alternate accommodation agreements entered by seven members of the petitioner with the respondent no.1, in which also there was a categorical reference to the various approvals obtained by the respondent no.1 from respondent no.2 under regulation 33(14) (D) of the D.C.R. 1991. The respondent no.1 also annexed the copy of some of such documents for reference and record of respondent no.2.

9. On 9th May, 2014, the petitioner addressed a letter to respondent no.1 and invoked arbitration agreement set out in clause 49 of the development agreement and called upon the respondent no.1 to take appropriate steps to initiate arbitration proceedings.

10. Mr.Fernandes, learned counsel for the petitioner invited my attention to some of the provisions from the development agreement and would submit that the respondent no.1 had agreed to carry out development on the plot bearing C.T.S. No.310/B by getting the plan sanctioned from the Municipal Corporation of Greater Bombay as per the provisions of the D.C. Regulation, 1991. The respondent no.1 however, without obtaining any consent and/or no objection from the petitioner society, converted the proposal and submitted under the provisions of the D.C. Regulation, 1991 for construction of the property by obtaining the sanction from the respondent no.2 under Regulation 33(14)(D) on the plot bearing CTS No.3(part) with S.R. Scheme No.2 proposed Regulation 33(10) for its contiguous slum part, bearing CTS No. 210/B of village Vallai, Malad (West) with distant non slum plot of the petitioner bearing CTS No.310/B. He submits that the Slum Rehabilitation Authority has illegally sanctioned such plan in collusion with the respondent no.1 though the consent of 75% of the members of the petitioner society was mandatory before clubbing such plots, including plot of the petitioner which was not obtained.

11. Learned counsel submits that the respondent no.2 has acted *mala-fide* and in absence of good faith while sanctioning the plans in favour of the respondent no.1 in violation of the provisions of D.C. Regulation, 1991 and thus various action of the respondent no.2 shall be stayed by this Court and the sanction granted by the

respondent no.2 shall be revoked. Learned counsel invited my attention to a copy of letter of intent issued by the respondent no.2 in favour of the respondent no.1 and submits that on one hand in the said letter of intent it was recommended that the special general body resolution for the development of the land under Regulation 33(14)(D) from the society was to be insisted before issuing any letter of intent and on the other hand in the same letter of intent, it is stated that since the plot was vacant, the consent of 75% of the occupants was not required.

12. It is submitted by learned counsel that the said letter of intent itself would indicate that various relaxations granted in favour of the respondent no.1 by the respondent no.2 would seriously prejudice the right of the petitioner. He submits that under the said letter of intent, the respondent no.1 will have to execute the deed of conveyance in respect of various portions of the plot of the petitioner in favour of the authority which would seriously affect the rights of the petitioner. He submits that the respondent no.1 cannot execute any conveyance in favour of the respondent no.2 of any portion, including the portion of the permanent transit camps and also sale component.

13. Learned counsel for the petitioner submits that the petitioner has proposed to apply for specific performance of the development agreement and the Deed of Rectification before the learned arbitrator against the respondent no.1. He submits that in addition to clubbing of the plot of the petitioner with other two plots by the respondent no.1 in collusion with the respondent no.2, the respondent no.1 has also committed various other breaches of the development agreement. He submits that the respondent no.1 was required to continue the bank guarantee of Rs.50.00 lacs until the

occupation certificate was issued. The respondent no.1 was also liable to pay Rs.2.00 lacs per month as compensation to the members of the petitioner in terms of clause 1 of Addendum-cum-Deed of Rectification of 2009 on account of delay and was under an obligation to pay rent for the residential and for commercial units to the members of the petitioner.

14. It is submitted by learned counsel for the petitioner that the respondent no.1 is also liable to pay the rent in advance along with increased amount at the rate of 20% for residential and at the rate of 50% for commercial units to the members of the petitioner. He submits that the respondent no.1 shall also be directed to deposit a sum of Rs.36,42,21,948/- towards solvent security so as to secure 30% share of the petitioner society in the additional 0.50 FSI obtained and short fall in the provision of the members retain areas etc. He submits that this Court shall appoint the Court Receiver in respect of three plots on which the development was undertaken by the respondent no.1.

15. Learned counsel for the petitioner placed reliance on the letter dated 1st March, 2015 addressed by the petitioner through its advocate to the respondent no.2 alleging various violations of the development agreement by the respondent no.1 and calling upon the respondent no.2 to take immediate action against the respondent no.1.

16. Learned counsel for the petitioner submits that since the respondent no.2 has sanctioned various plans and granted various permissions illegally to the respondent no.1 by which the petitioner has been affected, the respondent no.2 has been rightly impleaded as

a party respondent no.2 to the present proceedings under section 9 of the Arbitration Act and this Court has power to grant reliefs against the respondent no.2 also as prayed. He submits that the onus is on the respondent no.2 to show that the said authority is claiming an independent rights in the properties in question and not claiming through the respondent no.1. Learned counsel placed reliance on various judgments of this Court in support of the plea that the reliefs as prayed in the arbitration petition against the respondent no.2, including the prayer for revocation of the sanctions can be granted by this Court under section 9 of the Arbitration Act and the petitioner is not required to file any writ petition against the respondent no.2 for revocation of the sanctioned plans and permissions granted by the respondent no.2 in favour of the respondent no.1.

17. Learned counsel also placed reliance on the judgment of this Court in support of his submission that any third parties who have alleged to have purchased any flat and/or commercial tenement in the building constructed by the respondent no.1 on the plot of the petitioner are not required to be impleaded as party respondents to the present proceedings, since those third parties would have an independent rights against the respondent no.1 in case of any dispute between them *inter-se*. He submits that since the respondent no.2 has acted *mala-fide* by colourable exercise of powers, filing of a civil suit against the respondent no.2 would be barred and thus the present petition is the only remedy available to the petitioner.

18. It is submitted by learned counsel for the petitioner that even if the Chairman and Honorary Secretary of the petitioner society had executed certain agreements with the respondent no.1 for purchase of certain tenements from the respondent no.1 in their

individual capacity, the Chairman and the Honorary Secretary of the petitioner society did not inform about the acknowledgement of any letter of the respondent no.1 seeking amendment to modify the plan. He submits that personal knowledge of the Chairman or the Honorary Secretary of the petitioner society cannot be attributed or construed as knowledge of the members of the petitioner society.

19. Learned counsel for the petitioner submits that though the respondent no.1 has offered possession of the flats to the members of the petitioner society and agreed to execute an agreement for permanent alternate accommodation, since the respondent no.1 has carried out illegal construction and has committed various breaches of the development agreement, and since the petitioner has filed a claim for specific performance of the development agreement and Deed of Rectification, the members of the petitioner society did not take possession of the flats offered to the members of the petitioner society. Learned counsel also disputes the factum of completion of construction as canvassed by the respondent no.1 in its affidavit in reply in all respects.

20. Insofar as the reliefs claimed in the arbitration petition are concerned, he submits that since the respondent no.1 has merged three plots, the petitioner is entitled to grant of injunction in respect of all three plots. He submits that whatsoever tenements are not sold by the respondent no.1 on all three plots, the respondent no.1 shall be restrained from selling and/or creating any third party rights in respect of those tenements.

21. Mr.Seksaria, learned counsel for the respondent no.1 submits that the respondent no.1 has already created third party

rights in respect of other tenements which were permitted to be sold under the said development agreement being free sale component. He submits that those third parties who have been already sold various flats and tenements in the building constructed on the plot bearing CTS nos.310/B and 311(C) and on the other plots are likely to be affected if any reliefs as prayed by the petitioner are granted. He submits that no orders can be passed by this Court in respect of those tenements or any part of the plot on which the tenements are sold to them are constructed unless they are impleaded as parties to the present proceedings and are heard by this Court.

22. It is submitted that the respondent no.2 is a statutory authority and the orders, permissions and sanctions granted by the respondent no.2 cannot be subject matter of challenge under section 9 of the Arbitration Act. He submits that respondent no.2 is not claiming through the petitioner or the respondent no.1 and no relief of reservation or protecting the subject matter against the respondent no.2 can be granted by this Court. In support of this submission, learned counsel for the respondent no.1 relied upon the judgment of the Division Bench of this Court in the case of **Girish Mulchand Mehta & Anr. vs. Mahesh S. Mehta & Anr. in Appeal No.338 of 2009 in Arbitration Petition (Lodging) No.493 of 2009,** delivered on 10th December, 2009 and in the case of **Rakesh S. Kathotia Anr. vs. Milton Ghobal Ltd. & Ors.** decided on 22nd September, 2014 in **Appeal No.366 of 2014.** On *mis-joinder* of the respondent no.2 as a party to the present proceedings, learned counsel for the respondent no.1 placed reliance on various judgments.

23. It is submitted by learned counsel for the respondent no.1

that the petitioner has not come to this Court with clean hands and has suppressed various true and material facts. He submits that the Municipal Corporation of Greater Bombay had issued an intimation of disapproval dated 7th May, 2008 in favour of the respondent no.1. Sometime in the month of May, 2008, Mr.Sunil Kantilal Patel filed a suit (No.939 of 2008) in the City Civil Court at Dindoshi *inter-alia* claiming title on 237 sq. mtrs. of the said property. The City Civil Court had granted ad-interim relief in favour of the said plaintiff and restrained the Municipal Corporation from granting any commencement certificate in respect of 237 sq. mtrs. of the subject matter of the said suit. As a result of the said ad-interim order, the entire project had come to a stand still. On 22nd April, 2010, the respondent no.1 paid a sum of Rs.40.00 lacs to Sunil Kantilal Patel and filed consent terms in the said suit. He submits that during the year 2010 due to the proposed policy changes in the D.C. Regulation, all sanctions and permission in the suit of Mumbai got delayed and/or were not being granted. The Municipal Corporation did not issue any further commencement certificate.

24. It is submitted by learned counsel that on 28th February, 2011 and 10th March, 2011, the representative of the respondent no.1 met the Managing Committee members of the petitioner and discussed and proposed alternative course of action which they would propose further for the redevelopment of the subject plot under Regulation 33(14)(D) of the D.C. Regulation. He submits that the Managing Committee members agreed to the said suggestion and accordingly the respondent no.1 submitted a tentative plans under Regulation 33(14)(D) of the D.C. Regulation with the respondent no.2 on 14th March, 2011 for its approval which were approved. He submits that as a token of approval, the petitioner had put through stamp and

signature of the authorized persons on the said plan and forwarded the same to the respondent no.1 along with their letter dated 15th April, 2011.

25. It is submitted that only after such approval of the petitioner, the said proposal was submitted by the respondent no.1 to respondent no.2 on 3rd May, 2011 for grant of sanction under Regulation 33(14)(D) of D.C. Regulation. On 14th November, 2011, the respondent no.2 issued a letter of intent. On 27th December, 2011, the respondent no.2 issued the intimation of dis-approval. On 5th March, 2012, the respondent no.2 issued a commencement certificate under Regulation 33(14)(D) of the D.C. Regulation. He submits that the respondent no.1 thereafter prepared permanent alternate accommodation agreement and forwarded the same to the petitioner for its approval and for execution of the same by its members. The petitioner under the signature of the Chairman / Secretary, forwarded the details of allocation of the flats along with area confirmation to the respondent no.1.

26. Learned counsel invited my attention to a letter dated 19th June, 2012 which was in response to the letter of the respondent no.1 forwarding all the agreements for permanent alternate accommodation. In the said letter, the petitioner though had knowledge of merger of the scheme under the SRA, only requested respondent no.1 to ensure that no permanent transit camps were constructed on the plot of the petitioner. He submits that in the month of June and July, the Honorary Chairman of the petitioner society negotiated with the respondent no.1 for purchase of commercial unit No.201/C of the building under redevelopment from the free sale component and entered into an agreement for sale dated 9th August,

2012 for the said commercial unit on the terms and conditions set out therein. The said agreement was duly registered with the Sub Registrar of Assurance, Borivali. He invited my attention to the relevant clauses of the said agreement and would submit that it was clearly disclosed in the said agreement about the fact that the redevelopment of the building was being done pursuant to the SRA scheme under Regulation 33(14)(D) of the D.C. Regulation. He submits that the sanctions and permissions issued by the respondent no.2 were forming part of the agreement for sale.

27. It is submitted by learned counsel that on 28th August, 2012, the Honorary Secretary of the petitioner society also executed and registered a permanent alternate accommodation agreement in respect of three units. The said agreement was duly confirmed by the petitioner through their Honorary Secretary/Chairman. It is submitted that even the said agreement included all the sanctions and permissions issued / granted by the respondent no.2.

28. Learned counsel for the respondent no.1 submits that in the month of March, 2013, the respondent no.1 had forwarded the drafts of the modified permanent alternate accommodation agreement for execution by the members of the petitioner which contained a clause authorizing the respondent no.1 to advertise on facade of the building. He submits that the only objection raised by the petitioner was by its letter dated 23rd April, 2013 against insertion of clause 17 in the draft permanent alternate accommodation agreement. No objection was raised in respect of the terms and conditions of the scheme of redevelopment of the building under SRA scheme. He submits that on 23rd April, 2013 six permanent alternate accommodation agreements were executed by the members of the

petitioner society with the respondent no.1 in respect of flat nos.601, 904, 602, 901, 504 and 804 respectively which agreements were duly confirmed by the Honorary Chairman and the Secretary for and on behalf of the petitioner society.

29. Learned counsel for the respondent no.1 also invited my attention to the correspondence exchanged between the petitioner and the respondent no.1 and submits that the allegations made by the petitioner were after thought and the change in the plan was with the approval and knowledge of the petitioner. He submits that even after making the allegations by the petitioner through its advocate's letter, the petitioner executed two permanent alternate accommodation agreements on 19th March, 2014 with the respondent no.1 which were executed by the Honorary Secretary of the petitioner and confirmed by the Honorary Chairman and Secretary both for and on behalf of the petitioner, which agreements were duly registered. He submits that all these documents were suppressed by the petitioner from this Court in the arbitration petition.

30. It is submitted by the learned counsel for the respondent no.1 that in the development agreement, the society had granted authority to the Honorary Chairman and Secretary to sign various documents on behalf of the petitioner. He submits that under the said development agreement, the respondent no.1 could have approached not only the Municipal Corporation of Greater, Mumbai but also any other authority for the purpose of redevelopment and to get the maximum available benefits, permissible under the D.C. Regulation.

31. Learned counsel for the respondent no.1 invited my attention to some of the allegations made in the affidavit in rejoinder

which were made in reply to the allegations of suppression made by the respondent no.1 against the petitioner of various agreements and facts alleged therein. He submits that though the petitioner has now alleged belatedly that clubbing of the plot by the Chairman or the Honorary Secretary could not be attributed to as the knowledge of the members of the petitioner society and the members were not informed by the Honorary Chairman or the Secretary of any such application of the respondent no.1 for seeking permission for modification of the plan, no action has been initiated by the petitioner against its Honorary Chairman or Secretary.

32. It is submitted that various affidavits are filed by the Honorary Chairman even after such allegations are made by the respondent no.1 attributing the knowledge that of the petitioner through Honorary Chairman and/or Secretary or directly to the knowledge of the members of the petitioner. He submits that the allegations of the petitioner that the plans were not approved by several members of the society, cannot be accepted at this stage. No meetings were alleged to have been held by the petitioner between 15th June, 2009 and 22nd April, 2013. He submits that even after making such allegations against the Honorary Secretary and Chairman, the petitioner has signed various permanent alternate accommodation agreements with the respondent no.1 even in the recent past.

33. It is submitted by learned counsel for the respondent no.1 that the petitioner had signed various permanent alternate accommodation agreements unconditionally and with free consent. He submits that the respondent no.1 has already completed construction of the building upto 10th floor which entitled the members

of the petitioner to occupy their respective premises. Learned counsel invited my attention to a copy of the part occupation certificate dated 9th June, 2015, issued by the respondent no.2 and also to the recent photographs of the said building. He submits that the building constructed on the said property comprises of 20 floors.

34. My attention is invited to a letter dated 12th June, 2015 addressed by the respondent no.1 to the petitioner intimating about the receipt of part occupation certificate from the respondent no.2 and calling upon the petitioner to take possession of the flats allotted for the members of the petitioner. In the said letter, the respondent no.1 also showed its willingness to execute permanent alternate accommodation agreements with the remaining members of the petitioner with whom execution of permanent alternate accommodation agreements were pending. My attention is also invited to a letter dated 15th June, 2015 from the petitioner to the respondent no.1 refusing to take possession of the flats of its members.

35. Learned counsel for the respondent no.1 also invited my attention to two Deed of Rectification dated 8th July, 2015 which were executed by the Honorary Chairman and Secretary on behalf of the petitioner. He submits that the petitioner has suppressed the execution of these two Deeds of Rectification dated 8th July, 2015. He submits that the allegations now made by the petitioner that the Honorary Chairman and/or Secretary was not granted authority in all respects is totally false and misleading.

36. Learned counsel for the respondent no.1 placed reliance on the judgment of the Supreme Court in the case of **Transmission**.

Corpn. Of A.P. Ltd. & Ors. vs. Lanco Kondapalli Power (P) Ltd., (2006) 1 SCC 540 and in particular paragraphs 47 and 49 and in the case of **Arvind Constructions Co. (P). Ltd. vs. Kalinga Mining Corporation & Ors., (2007) 6 SCC 798** and in particular paragraphs 12 and 13 and would submit that ultimately the effect of the agreements entered into between the parties will have to be considered and interpreted by the learned arbitrator.

37. It is submitted by the learned counsel for the respondent no.1 that the consent of 75% of the members of the petitioner was not contemplated under Regulation 33(14)(D) of the D.C. Regulation. The respondent no.1 has already shifted permanent transit camp from the plot bearing CTS No.310/B to another plot forming part of the scheme. He submits that at the request of the petitioner, the respondent no.1 had requested the State Bank of India to extend the bank guarantee to the tune of Rs.35.00 lacs until 31st May, 2015 and was accordingly extended until 31st May, 2015. The petitioner however, illegally encashed the said bank guarantee though no breach was committed by the respondent no.1.

38. Insofar as the payment of rent is concerned, it is submitted by the learned counsel for the respondent no.1 that the respondent no.1 has already paid the rent required to be paid under the development agreement to the members of the petitioner till the date of the respondent no.1 offering possession of the respective tenements to the members of the petitioner society. He submits that since the petitioner has refused to take possession of the respective tenements, the respondent no.1 is not liable to make any further payment of rent to the members of the petitioner society. He submits that in any event the said issue has to be decided by the learned

arbitrator.

39. It is submitted by learned counsel for the respondent no.1 that if any reliefs as prayed in the present petition are granted at this stage, it will seriously prejudice to the respondent no.1 and innocent third parties, who have purchased various flats and tenements constructed on the plot in question and on other two plots. He submits that this Court has already appointed an arbitrator and the proceedings have commenced before the learned arbitrator.

40. Learned counsel for respondent no.1 submits that under the letter of intent issued by the respondent no.2, the respondent no.1 is required to execute the conveyance for only permanent transit camp in favour of the respondent no.2. The respondent no.1 would execute the deed of conveyance in favour of the petitioner in respect of the entire plot excluding permanent transit camp, which is shifted on another plot. He submits that there is no permanent transit camp constructed in the plot claimed by the petitioner. On instructions, learned counsel also submits that the respondent no.1 would furnish a list of all third parties who have purchased various flats/tenements in the building constructed on the plot claimed by the petitioner within two weeks from the date of the order that would be passed by this Court. He submits that the commercial premises are also ready and part occupation certificate is granted in respect thereof. He submits that the respondent no.1 is ready and willing to execute the permanent alternate accommodation agreements with the remaining members of the petitioner within such time as this Court directs.

41. Mr. Utangale, learned counsel for the respondent no.2 submits that no relief can be granted against the respondent no.2 as

prayed or otherwise. He submits that under the provisions of the D.C. Regulation, clubbing of various plots is permitted on compliance of the terms and conditions. He submits that the Slum Rehabilitation Authority is also the planning authority under section 19 of the Maharashtra Regional Town Planning Act. He submits that three schemes were sanctioned by the respondent no.2 on three different plots and were clubbed together. The plot claimed to be owned by the petitioner is far away from other two plots. He submits that the petitioner is not even the owner of the plot in question. No conveyance has been executed in favour of the petitioner so far. He submits that Regulation 33(14)(F) is not applicable since there was no consumption of full or part of FSI. The Architect appointed by the petitioner had applied for sanction of the plan before commencement of construction. Reliance is also placed on Regulation 33(14)(N) and it is submitted that under such provision the developer is permitted to utilize the FSI on the plot. Mr.Utangale placed reliance on some of the judgments of this Court in support of the aforesaid submission.

42. Learned counsel for the petitioner in rejoinder submits that the plot of the petitioner was not a slum plot and thus could not have been clubbed along with other two plots. He submits that for availing of the benefit of clubbing of two plots, it has to be contiguous plots. The plot of the petitioner would not fall under any of those categories. He submits that the petitioner society was formed in the year 1994 and thus whether the property was conveyed in favour of the petitioner or not is not relevant. He submits that even in the letter of intent issued by the respondent no.2, it was stated that the construction had commenced on the plot in question, the respondent no.2 thus could not have issued any letter of intent on the premise that the plot was vacant.

REASONS AND CONCLUSIONS :

43. The main grievance of the petitioner in the present proceedings is that the respondent no.1 has alleged to have converted the original proposal submitted for sanction to the Municipal Corporation of Greater Mumbai into the scheme under the provisions of the D.C. Regulation and more particularly under Regulation 33(14)(D) to the Slum Redevelopment Authority without the consent of the members of the petitioner society. Though the petitioner has applied for specific performance of the development agreement entered into with the respondent no.1, the petitioner seeks a direction against the respondent no.1 to develop the property in accordance with the plans sanctioned by the Municipal Corporation of Greater Mumbai and not by the Slum Rehabilitation Authority. The petitioner has contended that the respondent no.1 has unilaterally applied for sanction of the plans under Regulation 33(14)(D) of the D.C. Regulation though the plans were originally sanctioned by the Municipal Corporation of Greater Mumbai in accordance with the development agreement.

44. It is the case of the petitioner that by virtue of such conversion, the interest of the petitioner is seriously prejudiced. As against this case of the petitioner, the respondent no.1 has contended that under the development agreement entered into between the parties, the respondent no.1 was authorized to proceed with construction on the basis of the plans sanctioned not only by the Municipal Corporation of Greater Mumbai but also by any other authority, including the respondent no.2 herein. It is the case of the respondent no.1 that in any event the respondent no.1 had applied for permission of the society for conversion of the development plan duly

sanctioned by the Municipal Corporation of Greater Mumbai by making an application to the respondent no.2 under Regulation 33(14)(D) of the D.C. Regulation and only after such approval granted by the petitioner, the respondent no.1 applied for such conversion and only after obtaining appropriate permissions from the respondent no.2, the respondent no.1 has carried out construction to the knowledge of the petitioner.

45. A perusal of the record which is brought to my notice *prima-facie* indicates that the respondent no.1 had applied for permission of the petitioner to apply to the respondent no.2 for sanction of the plan under Regulation 33(14)(D) of the D.C. Regulation. The respondent no.1 has invited my attention to the correspondence exchanged between the respondent no.1 and the petitioner in support of this submission. The petitioner has acknowledged the receipt of the letter addressed by the respondent no.1. I am not inclined to accept the submission of the learned counsel for the petitioner that though the said letter was received by the office bearers of the petitioner, the same was not disclosed to the other members of the petitioner society by the Honorary Chairman or by the Honorary Secretary.

46. A perusal of the record also clearly indicates that in every agreements entered into between the members of the petitioner society, including the Honorary Chairman and the Honorary Secretary with the respondent no.1 by way of permanent alternate accommodation agreements or Deed of Rectification in which the petitioner was also a party, there was a reference to the sanction granted by the respondent no.2 under Regulation 33(14)(D) of the D.C. Regulation. In my *prima-facie* view, the petitioner was fully

aware of the conversion of the plan by the respondent no.1 which were initially sanctioned by the Municipal Corporation of Greater Mumbai to the plan sanctioned by the respondent no.2 under Regulation 33(14)(D) of the D.C. Regulation. For several years the petitioner never raised any objection about the respondent no.1 proceeding with construction of the building under the provisions of Regulation 33(14)(D) of the D.C. Regulation.

47. Upon making an enquiry with learned counsel for the petitioner that the same office bearers i.e. Honorary Chairman and Honorary Secretary representing the petitioner society even till the date of conclusion of the arguments before this Court and if according to the petitioner the office bearers had not informed about the permission applied by the respondent no.1 for conversion of the plan or that the building was being constructed under various permissions granted by the respondent no.2, whether any action was taken by the members of the petitioner society against the Honorary Chairman or Honorary Secretary, learned counsel for the petitioner made a statement that no such action was initiated by the petitioner against the office bearers. The only explanation sought to be tendered across the bar is that the knowledge of the Honorary Chairman or the Honorary Secretary of the petitioner cannot be construed as the knowledge of the petitioner. The Honorary Chairman as well as the Honorary Secretary of the petitioner were authorized to represent the petitioner and to sign various documents on behalf of the petitioner and to file the present proceedings.

48. Learned counsel for the respondent no.1 invited my attention to various such agreements entered into between the members of the petitioner society which refers to the plans sanctioned

by the respondent no.2 under Regulation 33(14)(D) of the D.C. Regulation.

49. A perusal of the record *prima-facie* indicates that the respondent no.1 has already constructed flats upto 10th floor out of which all the members of the petitioner society were allotted flats and also commercial premises. The respondent no.2 has already granted partial occupation certificate in respect of the construction already carried out by the respondent no.1. The respondent no.1 has already called upon the petitioner to take possession of the respective flats allotted to the members of the petitioner society. The respondent no.1 has also agreed to execute permanent alternate accommodation agreements with the remaining members of the petitioner society. The petitioner however, did not agree to take possession of the tenements allotted to the members of the petitioner society and did not show its readiness and willingness to execute permanent alternate accommodation agreements in respect of the remaining members who have not signed such agreements so far. There is no ad-interim reliefs granted in favour of the petitioner by this Court in the present proceedings. There is gross delay on the part of the petitioner in approaching this Court in this petition filed under section 9 of the Arbitration Act.

50. It is not in dispute that the respondent no.2 has sanctioned the plan which was in respect of three plots including the plot on which the building has been constructed by the respondent no.1 for the members of the petitioner society. It is the case of the respondent no.1 that it has already created third party rights in respect of the remaining tenements in the building in question. The petitioner has not impleaded such third parties in the present proceedings and has

applied for injunction against the respondent no.1 in respect of the remaining tenements also. In my view, no such interim measures can be granted by this Court against those third parties, who are not parties to the present proceedings, whose interest may be affected, if any, such interim measures are granted in favour of the petitioner in respect of those tenements.

51. The owners of the other two plots are also not the parties to the present petition whose interest may be seriously prejudiced if the reliefs as claimed by the petitioner are granted in the present proceedings. This Court thus cannot grant any such reliefs against those third parties in the present proceedings, who are not parties. It is not in dispute that the permanent transit camp which was earmarked on the plot claimed by the petitioner has been shifted to other plot, which is part of the common letter of intent issued by the respondent no.2. In my *prima-facie* view, the claim for specific performance in these circumstances, where interest of various third parties are involved and the building has already come up substantially in accordance with the plans sanctioned by the respondent no.2 itself is doubtful. The interim relief is in the aid of final relief. In my *prima-facie* view since the petitioner has no chances of succeeding in the final relief, the petitioner can't get interim relief also.

52. Learned counsel for the respondent no.1 has relied upon the photographs showing the status of the building constructed by the respondent no.1 which *prima-facie* indicates that the construction upto 10th floor is completed by the respondent no.1 and are ready for occupation by the allottees of various flats who are the members of the petitioner society.

53. The next contention of learned counsel for the petitioner is that the respondent no.2 have acted illegally and in collusion with the respondent no.1 and have granted various sanctions contrary to Regulation 33(14)(D) of the D.C. Regulation, and such illegal sanctions granted by the respondent no.2 shall be thus quashed by this Court in this proceedings under section 9 of the Arbitration Act. The contention of the respondent nos.1 and 2 on the other hand is that the respondent no.2 is not a party to the arbitration agreement and thus no such orders can be granted by this Court against the respondent no.2 in this proceedings under section 9 of the Arbitration Act. It is also the case of the respondents that the respondent no.2 is not claiming through respondent no.1. In support of their rival contentions, both the parties have relied upon number of judgments.

54. It is not in dispute that the respondent no.2 is not a party to the development agreement entered into between the petitioner and the respondent no.1. The respondent no.2 is admittedly a planning authority appointed by the State of Maharashtra for the purpose of carrying out the provisions of the Development Control Regulations and the Maharashtra Regional Town Planning Act. This Court has no power to quash and set aside the sanctions granted by the authorities in these proceedings under section 9 of the Arbitration act. The petitioner may have an independent remedy available in law against the respondent no.2 for impugning the orders and sanctions granted by the respondent no.2. The judgments relied upon by learned counsel for the petitioner in support of this submission is that the writ petition would not be efficacious remedy for impugning the orders passed by the respondent no.2 and such orders can be passed by this Court under section 9 of the Arbitration Act though the

respondent no.2 is not a party to the arbitration agreement do not assist the case of the petitioner.

55. None of those judgments relied upon by learned counsel for the petitioner apply to the facts of this case. In none of the judgments relied upon by the petitioner, the Court has considered the powers to the Court under section 9 of the Arbitration Act for grant of interim measures against a third party, who is not a party to the arbitration agreement and who is not claiming through party to the arbitration agreement. In my view in no circumstances, the respondent no.2 who has sanctioned the plans by exercising powers as an authority can be considered as a party claiming through the respondent no.1 – developer.

56. On the contrary, the judgments relied upon by the respondent nos.1 and 2 referred to aforesaid clearly indicate that no such order under section 9 of the Arbitration Act can be passed by this Court against a third party, not being a party to the arbitration agreement and who is not claiming through a party to the arbitration agreement. The reference to the judgments of the Division Bench in the case of **Girish Mulchand Mehta** (supra) and **Rakesh S. Kathotia** (supra) is useful and squarely apply to the facts of this case. I am respectfully bound by those judgments.

57. Insofar as the submission of learned counsel for the petitioner that there is inconsistency in the order passed by the respondent no.2 on the issue whether the consent of 75% members of the petitioner society was required or not, a perusal of the record *prima-facie* indicates that the respondent no.1 had applied for permission to the petitioner before making the application to the

respondent no.2 for sanction of the plan under Regulation 33(14)(D) of the D.C. Regulation. In my *prima-facie* view the petitioner had approved such plan and had granted permission to the respondent no.1 to submit the same as revised plan to the respondent no.2 for approval and was also aware of various sanctions granted by the respondent no.2 for carrying out construction. In my view, there is no substance in the submission of learned counsel for the petitioner that there was any inconsistency in the letter of intent issued by the respondent no.2.

58. A perusal of the record indicates that the respondent no.1 has taken various steps under the said development agreement entered into between the petitioner and the respondent no.1 and has already constructed substantial part of the building and at least portion of the building in which the members of the petitioner can be accommodated and has obtained partial occupation certificate. No interim measures in my view can be granted by this Court at this stage in favour of the petitioner.

59. The letter of intent was issued on 14th November, 2011. IOD was issued by the respondent no.2 on 27th December, 2011. The commencement certificate was issued on 5th March, 2012. The respondent no.1 had forwarded all the agreements for permanent alternate accommodation to the petitioner on 19th June, 2012. A perusal of the record indicates that the only objection of the petitioner to the agreement was that clause 17 of the draft permanent alternate accommodation shall be deleted. The petitioner did not raise any objection on the permissions granted by the respondent no.2 referred in various documents executed by and between the parties. Last of such documents entered into between the parties are in the month of

July,2015.

60. Insofar as the reliefs claimed in prayer clauses (a) and (b) of the petition are concerned, injunction claimed against the respondent no.2 from permitting any further construction on three plots and for rectification of such permissions is concerned, no such reliefs can be granted in the present proceedings in view of the fact that the respondent no.2 is not a party to the arbitration agreement and the respondent no.2 is not claiming through the respondent no.1. This Court cannot revoke the permissions granted by an authority in the proceedings under section 9 of the Arbitration Act. These two prayers also cannot be granted for the reason that several third parties who are claiming interest in the other two plots and structures constructed thereon would be seriously prejudiced and who are not the parties to the present proceedings.

61. Insofar as prayer clauses (c) and (d) of the petition are concerned, the said reliefs by way of mandatory order and injunction against the respondent no.1 from creating any third party rights in respect of three plots also cannot be granted in the present proceedings also for the reasons that it is the case of the respondent no.1 that the respondent no.1 has already created third party rights in respect of the remaining tenements in the building in question and those third parties on the plot in question as well as other two plots are not the parties to the present proceedings. Be that as it may, no case is made out by the petitioner for grant of such interim measures in the present proceedings.

62. No case is similarly made out in respect of the reliefs claimed in prayer clauses (e), (f) and (g). The respondent no.2 has

already granted partial occupation certificate and the flats of the petitioner's members are ready. No amount for payment of compensation can be granted at this stage in this proceedings under section 9 of the Arbitration Act. The respondent no.1 in my view, thus cannot be directed to provide any bank guarantee as prayed in prayer clause (f).

63. Insofar as prayer clause (h) is concerned, it is the case of the respondent no.1 that till the date of the respondent no.1 handing over possession of the tenements to the members of the petitioner society, all rent payable under the development agreement has been already paid. I am inclined to accept the submission of learned counsel for the respondent no.1 that since the petitioner's members have not taken possession of their respective flats, the respondent no.1 cannot be compelled to pay rent as demanded or otherwise from the date of the respondent no.1 offering possession of the flats.

64. Insofar as the relief in terms of prayer clause (i) is concerned, no case is made out by the petitioner for a direction to deposit the amount as prayed or otherwise. The proceedings are pending before the learned arbitrator. If the petitioner succeeds in the arbitral proceedings, the petitioner can be compensated for the loss suffered, if any, by the petitioner.

65. Insofar as prayer clause (j) is concerned, the petitioner is at liberty to seek such relief in the arbitral proceedings before the learned arbitrator and no such relief is warranted at this stage in the present proceedings. In any event, the respondent no.1 has already agreed to furnish the list of such third parties to whom various tenements are sold by the respondent no.1.

66. Insofar as prayer clause (k) is concerned, in view of the respondent no.1 already having completed the construction upto 10th floor and in view of the interest of several other third parties involved, who are not parties to the present proceedings, no case for appointment of the Court Receiver is made out by the petitioner and thus no such relief can be granted.

67. The respondent no.1 has already made a statement before this Court that the respondent no.1 is ready and willing to execute permanent alternate accommodation agreements with the remaining members of the petitioner society and is ready and willing to furnish a list of third parties, who have purchased various tenements in the building constructed by the respondent no.1 to the petitioner. The statements made by the learned counsel for the respondent no.1 are accepted and the same shall be complied with.

68. In my view, the petition is totally devoid of merits and is accordingly dismissed. No order as to costs.

(R.D. DHANUKA, J.)

CERTIFICATE

"I certify that this Judgment uploaded is a true and correct copy of original signed Judgment."

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