

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***ORDINARY ORIGINAL CIVIL JURISDICTION*****ARBITRATION PETITION (L) NO. 1932 OF 2015**

**Nirmal Infrastructure Private Limited,)
a company incorporated under the)
Companies Act, 1956 having its Registered)
Office at L.B.S.Marg, Mulund (West),)
Mumbai – 400 080)** **Petitioner**

Versus

**Aanant Developers Private Limited,)
a company incorporated under the)
Companies Act, 1956 having its Registered)
Office at 14, Ground Floor,)
Bhaveshwar Complex, Vidyavihar (West))
Mumbai – 400 086 and having its)
address 107-108, 1st Floor, Sai Infotech,)
Patel Chowk, Ghatkopar,)
Mumbai – 400 077)** **Respondents**

Mr.Pravin Samdhani, Senior Advocate, a/w. Mr.Simil Purohit, Mr.Ashok Paranjape, Ms.Leena Desai-Padhye, Ms.Aparna Wagle, Ms.Radhika Dixit, i/b. MDP & Partners for the Petitioner.

Mr.Virag Tulzapurkar, Senior Advocate, a/w. Mr.Cyrus Ardhesir, Mr. Rahul Dwarkadas, Ms.Prachi Dhanani, i/b. Veritas Legal for the Respondents.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 28th OCTOBER, 2015

PRONOUNCED ON : 26th NOVEMBER, 2015

JUDGMENT :

By this petition filed under section 37 (2) (b) of the Arbitration and Conciliation Act, 1996 (for short the 'Arbitration Act'), the petitioner has impugned

the order dated 5th October, 2015 passed by the arbitral tribunal rejecting the application filed by the petitioner under section 17 of the Arbitration Act. By consent of parties, the arbitration petition is heard finally at the admission stage. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The respondent had acquired development rights in respect of 86 acres of land and additional 34 acres both situated at Taluka Kalyan, District Thane and was in process of acquiring development rights and/or conveyance in respect of further 255 acres situated at Taluka Kalyan, District Thane.

3. On 17th January, 2007, the petitioner and the respondent entered into a Memorandum of Understanding whereunder the respondent agreed to acquire and transfer and/or grant development rights to the petitioner in respect of the land aggregating to 375 acres at an agreed consideration of Rs.20 lacs per acre. It is the case of the petitioner that prior to the execution of the said MOU, the petitioner paid to the respondent an amount of Rs.5.00 crores on 25th November, 2006 and Rs.10.00 crores on 17th January, 2007. It is the case of the petitioner that the petitioner also made payment of more than Rs.17.00 crores calculated at the rate of Rs.20 lacs per acre to the respondent for the additional lands.

4. On 31st March, 2008, the petitioner and the respondent executed the development agreement duly stamped and registered in respect of the lands being an aggregate area of 173.91 acres comprising of two plots admeasuring 86 acres (Part I) and 87.91 acres (Part II) respectively. Part I was owned by Premier Ltd (earlier known as Premier Automobiles Ltd.). Under a development agreement 9th July, 2004 between the said Premier Automobiles Ltd. and the respondent, the respondent was granted development rights in respect of Part I lands. In clause (H)

of the said development agreement, it was provided that the respondent had agreed to grant and/or transfer the development rights in respect of the said two lands to the petitioner and had handed over copies of all the documents relating to the said two lands. In clause (I) of the said agreement, it was provided that the respondent had delivered copies of the said agreement in respect of the said two lands. The petitioner agreed to pay to the respondent as and by way of interest free deposit an amount aggregating to a sum of Rs.49,78,20,000/-.

5. Out of the said amount of Rs.49,78,20,000/-, the petitioner had already paid aggregate sum of Rs.30.00 crores as and by way of interest free deposit and further agreed to pay interest free deposit of Rs.19,78,20,000/- towards assignment of development rights of the said property. It is the case of the petitioner that the petitioner has already paid aggregating to Rs.49,78,20,000/- to the respondent. Clause 1(a) of the said agreement provided that the respondent thereby transferred and/or assigned to the petitioner, the right, title, interest and benefit of the respondent in respect of the development agreement dated 9th July, 2004 between the respondent and the said Premier Automobiles Ltd. in respect of 86 acres i.e. Part (I) plot and development agreement of various dates in respect of the land Part (II).

6. In clause 3(m) of the said agreement, it was provided that there was pending claim of unearned income, pertaining to an area of approximately 57 acres, out of the said 86 acres and the same had been brought to the attention of the petitioner and would be resolved by the respondent in due course at the cost and expenses of the respondent. However it was clarified that if any unearned income was payable on any future sale done by the petitioner subsequent to the said sale, the same shall be responsibility of the petitioner. The respondent agreed to

indemnify and keep indemnified, save, defended and harmless the petitioner from and against losses, damages, litigation, claims, demands and costs that may be made and/or raised by any third party in respect of the said property for the period prior to the execution of the said agreement.

7. Under clause 8 of the said development agreement, it was provided that the obligations of the respondent in respect of the said agreement to provide unencumbered development rights of the said property to the petitioner so as to enable the petitioner to do the development of the rights of the said property and to obtain title certificate from its advocates and/or solicitors certifying its title of rights in respect of the said property.

8. Under clause 14(c) of the said agreement, it was provided that the petitioner shall adhere to the schedule for development of the said property. It was provided that in respect of the said 86 acres, i.e. Part (I) land, the development shall start within two years from the date of signing of the said agreement. In respect of 87.91 acres, i.e. Part (II) land, the development shall start within one year from the date of passing of layout plans, obtaining all approvals, clearances, orders including township approval/ULC/NA/Environment Clearance etc. The respondent agreed to execute the power of attorney in favour of the petitioner. On 31st March, 2008, the respondent accordingly executed a power of attorney in favour of Mr.Dharmesh S.Jain in respect to 173.91 acres which was duly registered. The respondent also executed a deed of indemnity cum declaration in favour of the petitioner on 31st March, 2008. According to the petitioner, the respondent had executed a possession letter in favour of the petitioner through Mr.Nitin Mansukhlal Sanghavi on 31st March, 2008. The respondent has disputed the execution of the said alleged letter of possession dated 31st March, 2008.

9. On 17th June, 2008, the said Sub Divisional Officer, Kalyan passed an order confirming order dated 3rd September, 2007 passed by the Tahsildar, Kalyan confirming Mutation Entries entering the remarks “Occupancy Class II” in the 7/12 extract of 57 acres i.e. Part I lands. It is the case of the petitioner that in view of the said order passed by the Sub Divisional Officer, the unearned income was liable to be paid.

10. During the period between 2nd November, 2009 and 8th November, 2010, the petitioner exchanged various letters with the respondent seeking details of the property including inter alia title certificate, possession receipts, etc. On 5th January, 2010, the petitioner addressed a letter to the respondent recording inter alia the appointment of surveyor and the date of commencement of fencing of the land. On 26th March, 2010, the Labour Commissioner to MIDC and Municipal Corporation of Dombivli with respect to Part I lands i.e. 86 acres of land obtained from Premier Automobiles Ltd. calling upon them not to grant any sanction with respect to the reference land.

11. It is the case of the petitioner that since June, 2010 till date, the petitioner had deployed the security 'Solaris Corporation Security Services' on the said lands and has made substantial payments towards security.

12. On 15th October, 2010, the respondent and Premier Automobiles Ltd. filed consent terms in the suit i.e. Special Case No. 200 of 2010 in the Kalyan City Civil Court.

13. During the period between 24th February, 2011 and 23rd November, 2012, the petitioner sent various e-mails to the respondent following up for details

and documents as also calling upon the respondent to comply with its outstanding obligations regarding unearned income, labour NOC. It is the case of the petitioner that the respondent however did not comply with that part of the obligation.

14. It is the case of the petitioner that during the period between 14th February, 2013 and 18th April, 2013, the petitioner and/or their advocates addressed various letters to MSEDCL/ MSRDC with respect to illegal erection of electricity Feeder Towers and illegal encroachments on the said lands in the possession of the petitioner.

15. On 3rd July, 2013, the petitioner sent another e-mail to the respondent thereby seeking performance of obligations under the development agreement inter alia including clear and marketable title, labour NOC, unearned income and for approval under section 32(G) of the Bombay Tenancy Agricultural Act. On 30th January, 2014, the respondent forwarded a list of land pending approval under sections 43 and 32(G) of the Bombay Tenancy Agricultural Act. It is the case of the petitioner that during the period between 13th November, 2009 and 6th May, 2014, the petitioner paid additional sum of Rs.17,97,79,010/- to the respondent.

16. On 10th May, 2014, the respondent sent an e-mail to the petitioner attaching list of land to be conveyed and calling upon the petitioner to check 7/12 extracts and make conveyance deeds for all documents. On 22nd May, 2014, the respondent sent an e-mail to the petitioner confirming receipt of Rs.67,09,99,010/-. It is the case of the petitioner that in the month of August 2014, two group of shareholders in the respondent company sold their 52% shares to Lodha Group Company viz. M/s.Palava Dwellers Pvt. Ltd. and M/s.Lodha Properties Development Pvt. Ltd. It is the case of the petitioner that the said M/s.Lodha

Properties Development Pvt. Ltd. has subsequently purchased the balance 48% shareholding of the respondent company.

17. On 2nd February, 2015, the petitioner through their advocates issued a public notice in the newspaper informing the public at large of the rights created in favour of the petitioner by the respondent. On 3rd February, 2015, the respondent issued a notice of termination of the development agreement, power of attorney, MOU and claimed to be in possession of the said lands. On 6th February, 2015, the petitioner through their advocates issued a public notice informing the public at large of the purported termination whilst requesting the general public not to deal with the respondent with respect to the reference land.

18. On 12th February, 2015, the petitioner filed an arbitration petition (447 of 2015) under section 9 of the Arbitration Act against the respondent in this court. On 16th February, 2015, the petitioner through their advocates addressed a letter to the Senior Police Inspector, Dombivli seeking public protection from dispossession by the respondent. On 17th February, 2015, the petitioner made an application for ad-interim measures in the said Arbitration Petition No.447 of 2015. The respondent through their advocates addressed a letter to the advocates representing the petitioner stating that the respondent would not create third party interest on the said lands. On 24th February, 2015, this court appointed a Court Commissioner to ascertain status of the said land. On 24th February, 2015, the Court Commissioner visited the said land and submitted a report to the court. On 24th February, 2015 this court passed an order on the said Commissioner's report.

19. On 2nd May, 2015, the arbitral tribunal came to be constituted. On 30th July, 2015, by consent of parties, the said arbitration petition which was filed under

section 9 of the Arbitration Act was converted and treated as an application under section 17 of the Arbitration Act and statement recorded in the order dated 24th February, 2015 of the respondent came to be continued to operate.

20. On 5th October, 2015, the arbitral tribunal dismissed the said application under section 17 of the Arbitration Act which was filed by the petitioner and directed the respondent to return the sum of Rs.68.00 crores or so lying with it as interest free deposit within four weeks from the date of this order. It was however made clear that such interim arrangement shall be without prejudice to the rights of the parties in the main disputes which were yet to be adjudicated upon. It was also clarified that any finding recorded in the said order passed under section 17 was only a prima facie opinion which would have no bearing whatsoever on consideration and final adjudication of the principal disputes.

21. On 8th October, 2015, the arbitral tribunal passed an order on the application of the petitioner for staying the operation of the said order dated 5th October, 2015 and for continuation of the order dated 24th February, 2015 passed by this court. The arbitral tribunal directed that the order dated 5th October, 2015 passed by the arbitral tribunal shall not operate for a period of one month from the date of the said order and till the order dated 24th February, 2015 passed by this court to continue to remain in operation.

22. Mr.Samdhani, learned senior counsel for the petitioner invited my attention to various provisions of the development agreement, various correspondence more particularly annexed in the convenience compilation of documents tendered across the bar and also to the impugned order passed by the

arbitral tribunal. It is submitted by the learned senior counsel that the petitioner has already paid a sum of Rs.49.78 crores to the respondent under the said development agreement. He submits that under the said development agreement, the respondent had already assigned their right, title and interest in the development rights in respect of the said land which were derived by them from Premier Automobiles Ltd. and other owners of Premier Automobiles Ltd. in respect of Part I lands and other owners of Part II lands. He submits that the petitioner had full unfettered rights to develop the said land and also to pay outgoings in respect thereof under clause 8(c) of the said agreement. The petitioner was given right to enter upon the said property and will have irrevocable right/authority to develop the said lands. He submits that under clause 4(a), the petitioner had agreed to pay to the respondent 21.6% of the gross receipts received, directly or indirectly, on development of the sold property using available FSI/TDR as well as any additional FSI/TDR or any other rights etc.in consideration of the respondent conferring the petitioner development rights in respect of the said property.

23. It is submitted that the petitioner had addressed large number of letters to comply with their part of the obligation. The respondent however did not sort out the issue of unearned income and did not obtain any NOC from the Labour Commissioner. The respondent did not clear the obstruction in carrying out the development by the petitioner. He submits that only after controlling interest of the respondent was transferred to Lodha Group Company, it immediately terminated the development agreement without any basis and illegal. He submits that there was a dispute between the Premier Automobiles Ltd.and the respondent in respect of the marketable title. It is submitted that ownership in an immoveable property comprises of a bundle of rights and each of such rights is an immoveable property. Right to develop a property is a specie of right in an immoveable

property. In respect of this submission, learned senior counsel placed reliance on the judgment of Allahabad High Court reported in 1885 Vol.(VII) ILR 553 at pages 556 and 557.

24. Learned senior counsel submits that since the respondent had already transferred the development rights in respect of the said land in favour of the petitioner, it was no longer an executory contract. The transfer of development right was complete. He invited my attention to an alleged letter of possession dated 31st March, 2008 and submits that the petitioner has been in exclusive possession of the said lands. In the alternate, it is submitted that the petitioner was already given a right to enter upon the said lands for the purpose of development and the security guards appointed by the petitioner are on the said lands and the petitioner has been paying their charges since the date of the respondent handing over the possession thereof to the petitioner. It is submitted that the Court Commissioner appointed by this court also found security appointed by the petitioner on the said land and such security guards are guarding the said property from the encroachment. He submits that the power of attorney executed in favour of the petitioner is an agency coupled with interest and for consideration and is thus irrevocable. Insofar as other consideration payable to the respondent is concerned, he submits that the same could be paid only after completion of the development and sale of the structures which stage did not arise in this case.

25. It is submitted by the learned senior counsel that it was a pre-condition for development of the said lands which were to be complied with by the respondent *inter-alia* the resolution of the issue relating to unearned income and NOC from the Labour Commissioner. He submits that unless to both these conditions were satisfied by the respondent and its obligation were complied with

the development of the property was admittedly not possible.

26. It is submitted by the learned senior counsel that on one hand the arbitral tribunal has recorded the prima-facie finding that the petitioner has made out a prima-facie case and have found an arguable bona-fide case against the termination and on the other hand the arbitral tribunal has observed that the petitioner was not entitled to relief of specific performance. He submits that the arbitral tribunal has erroneously held that the relief sought by the petitioner is unavailable to the petitioner and he placed reliance on the judgment of the Supreme Court in case of ***Zenit Mataplast P.Ltd. vs. State of Maharashtra and others 2009 (10) SCC 388*** and in particular paragraphs 29 to 31.

27. It is submitted by the learned senior counsel that a prima-facie view of the arbitral tribunal that development agreement was not capable of specific performance under section 14 is contrary to the consistent view taken by this Court and in particular in case of ***Shapoorji Paloonji & Co.Ltd. vs. Jignesh Shah & Ors. reported in 2013 (6) BCR 575*** and in case of ***Chheda Housing Development Corporation vs. Bibijan Shaikh Farid***, reported in ***2007(3) Mh.L.J. 402***.

28. It is submitted by learned senior counsel that the arbitral tribunal has proceeded with mini trial and have converted claim of specific performance made by the petitioner into a claim for damages. He submits that in case of specific performance of an agreement with respect to an immovable property, compensation in terms of money is not an adequate relief. There is a presumption in law. He placed reliance on section 10 of Specific Relief Act and placed reliance on the judgment of Supreme Court in case of ***M.L.Devender Singh vs. Syed Khaja***

AIR 1973 SC 2457 and in particular paragraphs 19 to 21 and the judgment of this Court in case of **Ambalal Kesharbhai vs. Ranchhodbhai Jerbhai & Ors. AIR 1956, Bombay 120** (paragraph 8). It is submitted by learned senior counsel for the petitioner that the arbitral tribunal has erroneously shifted the burden to the petitioner to establish that the compensation would not be an adequate relief in favour of the petitioner and has totally over looked the presumption in law in favour of the petitioner without the respondent even given rebutting the presumption.

29. It is submitted that till the year 2015, the respondent had not even disputed the rights of the petitioner to develop nor had even alleged any delay / default on the part of the petitioner in commencing the development. He submits that the respondent had on the contrary acknowledged that it was under an obligation to clear several pre-conditions including the condition relating to unearned income and obtaining labour NOC. Learned senior counsel for the petitioner submits that the arbitral tribunal has also recorded erroneously prima-facie finding on the issue of balance of convenience and irreparable loss.

30. It is submitted that the prima facie finding of the arbitral tribunal that the specific performance of the development agreement cannot be granted under section 14 and that compensation under money is an adequate relief is totally erroneous and contrary to section 14 of the Specific Relief Act. He submits that the arbitral tribunal having found that the petitioner having entered the property as a licensee and which possession was further established by the report of the Court Commissioner, the arbitral tribunal ought to have granted interim measures in favour of the petitioner by protecting such possession as an assignee and / or even

as an licensee. Reliance is placed on the judgment of the Supreme Court in support of this submission in case of ***The Corporation of Calicut vs. K.Sreenivasam 2002 (5) SCC 361.***

31. Insofar as prima-facie observation about delay on the part of the petitioner recorded by the arbitral tribunal is concerned, it is submitted that the finding is contrary to two other findings recorded by the arbitral tribunal i.e. that the petitioner had been able to raise argument without payment of unearned income of the respondent and the commencement of the development of the land was not possible and that there was a bona-fide dispute raised by the petitioner in respect of the termination of the development agreement. It is submitted that delay, if any, was on the part of the respondent and not the petitioner. He submits that in case of specific performance of an agreement relating to immovable property, time is not essence of the contract. In support of this submission, learned senior counsel for the petitioner placed reliance on judgment of this Court in case of ***Volition Investments P.Ltd. vs.Madhuri J.Mashroo & another 2003 (5) BCR 262*** and in particular paragraphs 11(a), 12, 13 and 15.

32. It is submitted by the learned senior counsel that the other obligations under the development agreement such as development of the property and sale of the tenements was post transfer of the property. The respondent has not denied the statement made by the petitioner in its e-mail sent on 3rd July, 2013 alleging that the petitioner was in possession of the property. It is submitted that the respondent could not terminate the development agreement in view of the fact that assignment of the rights of the respondent to develop the said property in favour of the petitioner was already complete, such assignment could not be terminated by a

letter. The petitioner had spent large amount on the plot under the said development agreement.

33. Mr.Tulzapurkar, learned senior counsel appearing for the respondent on the other hand submits that the petitioner had violated various terms and conditions of the contract. The petitioner was not ready and willing to comply with its part of obligation. He submits that though the development agreement was executed as far back as on 31st March, 2008 and the petitioner was under an obligation to commence the development within two years from the date of signing of the agreement insofar as part-I land is concerned and within one year from the date of passing of layout plans etc. insofar as part-II is concerned, till the date of termination in the year 2015, the petitioner did not commence the development of any of the plots. He submits that since the petitioner had not shown its readiness and willingness to comply with its part of compliance and had committed these breaches, the relief of specific performance would be barred under section 16(b) of the Specific Relief Act.

34. Learned senior counsel for the respondent led emphasis on clause 12 of the development agreement and more particularly on the words “Notwithstanding what is contained in this Agreement” and would submit that irrespective of the alleged non-compliance of the condition regarding unearned income and labour NOC, the petitioner was under an obligation to carry out the entire development of the said property at its own costs and risks. He submits that the petitioner thus could carry out development on the said property even without the respondent resolving the issue of unearned income or without obtaining the NOC from the Labour Commissioner. He submits that in any event from the date

of execution of the development agreement, the respondent had admittedly executed the power of attorney in favour of the petitioner for all purpose mentioned therein, including the power to apply for various permissions and to represent the petitioner before the authorities. The petitioner thus could have exercised its powers under the power of attorney, which was in force from 31st March, 2008 till the date of termination. He submits that the arbitral tribunal has rightly considered this crucial document in the impugned order and has rightly rejected the application for interim measures filed under section 17 of the Arbitration Act.

35. Mr.Tulzapurkar also placed reliance on clause 12(ix) of the development agreement and would submit that the petitioner had agreed to strictly adhere to the development schedule specified in clause 14(c) subject to force majeure conditions and the respondent assigning / transferring the development rights to the petitioner. He submits that it is not the case of the petitioner that there was any force majeure conditions due to which the petitioner could not strictly adhere to the development schedule or that the respondent had not assigned and/or transferred the development rights. It is the case of the petitioner itself that the respondent had transferred the rights of development in favour of the petitioner. It is submitted by learned senior counsel that under clause 14, commencement of the development of part-II land was to be within one year from the date of condition. He submits that there was no completion of assignment of rights in favour of the petitioner as alleged by the petitioner. It is submitted that the respondent was entitled to revenue of 21.86% which was to be paid by the petitioner after completion of the entire development and sale of components. The petitioner did not take any steps for last several years for commencement of the development and thus the petitioner could not have waited for further indefinite period to enable the

petitioner to commence the development. He submits that there was no provision in the contract linking permission of the Labour Commissioner with commencement of the development. For seven years the development did not begin.

36. It is submitted by the learned senior counsel that in any event the issue of unearned income was only for 57 acres of part-I land which was pending before the authority and not the entire 86 acres of land. The petitioner did not take any steps for development even in respect of 29 acres which were admittedly available to the petitioner without any hindrance. The petitioner did not apply for any permission for the development of 29 acres. It was not the case of the petitioner that even 29 acres could not be developed.

37. Learned senior counsel for the respondent invited my attention to an application dated 9th June, 2014 made by the petitioner to the authority for seeking locational clearance for the proposed special township project. He submits that if the petitioner could make such an application for locational clearance for the proposed special township project, which was one of step for development of the property, the petitioner could have taken such steps immediately upon execution of the development agreement as far back as on 31st March, 2008. He submits that the fact that the petitioner applied for such clearance from the authority on 9th June, 2014 clearly indicates that the development of the property could be commenced even without clearing issue of unearned income by the respondent or without obtaining the NOC from the Labour Commissioner. He submits that in any event the petitioner ought to have applied for clearing this issue by exercising powers under the power of attorney given to the petitioner by the respondent since 2008. He submits that this itself shows that the petitioner was not ready and willing to

comply with its part of obligations and thus was not entitled to seek any interim measures. He submits that under the development agreement, all the approvals were to be obtained by the petitioner which were required before commencement of the development. The respondent did not prevent the petitioner from applying for permission before the Labour Commissioner or to clear the issue of unearned income.

38. Insofar as the issue of the marketable title raised by the petitioner is concerned, learned senior counsel for the respondent submits that the respondent had already provided title certificate to the petitioner which was duly recorded in the development agreement itself and more particularly in recital “F”. The respondent was not required to carry out any other obligation under the said development agreement insofar as the title is concerned. He submits that even in the application for seeking locational clearance made by the petitioner, the petitioner had already annexed a copy of title certificate.

39. Insofar as the alleged possession letter is concerned, it is submitted by learned senior counsel for the respondent that the alleged possession letter was forged and was not signed by the respondent or its authorized representative. Learned senior counsel for the respondent states that by a letter dated 23rd October, 2010 and in other correspondence, in which the petitioner had requested the respondent to resolve the issue of taking over possession and for erecting board of the petitioner on the site.

40. Insofar as the submission of learned senior counsel for the petitioner that the petitioner was granted license to entertain the land under clause 8(c) of the development agreement is concerned, he submits that the said license was with a

view to perform obligation under the said development agreement and cannot be read in isolation. Similarly the power of attorney was also given to the petitioner in connection with the development agreement. He submits that since the rights under the development agreement did not subsist, the petitioner cannot rely upon the license given under the agreement.

41. It is submitted by learned senior counsel that the plot of land is an open land admeasuring 170 acres. The Commissioner's report showed the cabin of security guards, where the security guards of both the parties were present in cabin, which would not indicate possession of the petitioner on the entire land.

42. Insofar as the submission of learned senior counsel for the petitioner that the assignment of the development rights was completely in favour of the petitioner under the said development agreement is concerned, learned senior counsel for the respondent submits that the petitioner did not raise any such plea either in the petition filed in this Court under section 9 of the Arbitration Act and even did not argue this issue before the arbitral tribunal or even did not raise in the rejoinder filed by the petitioner. The petitioner has not even raised this issue in the ground of appeal in the present proceedings. The arbitral tribunal therefore, rightly did not consider this allegation not having been raised in the pleadings before the arbitral tribunal and not having been argued. Learned senior counsel invited my attention to the valuation of the property adjudicated upon by the stamp authority on the said development agreement and would submit that the petitioner has paid the stamp duty at the rate of 1% under clause 5(g)(a) of the schedule to the Maharashtra Stamp Act and has not paid stamp duty on the basis of conveyance of the immovable property which would have been at the rate of 5% under Article 25 of the schedule to the Maharashtra Stamp Act.

43. Insofar as the issue as to whether termination of the development agreement was valid or not is concerned, it is submitted by learned senior counsel that there was no occasion for the arbitral tribunal to consider the defence of the respondent in view of the present bar under section 16(b)(c) of the Specific Relief Act. The petitioner did not fulfill the conditions under section 16 and thus no specific performance of the development agreement can be granted in favour of the petitioner. He submits that since the relief of specific performance cannot be granted in favour of the petitioner, the arbitral tribunal rightly rejected the relief of interim measures.

44. Learned senior counsel appearing for the respondent submits that the arbitral tribunal has rightly rendered a *prima-facie* finding that the petitioner had not made out *prima-facie* case or that the petitioner would suffer irreparable injury if interim relief was disallowed or whether the balance of convenience was in favour of the petitioner. The petitioner also did not satisfy mandatory requirement of the readiness and willingness to comply with its part of obligation for seeking the relief of specific performance. He submits that to the knowledge of the petitioner, there was no demand for any unearned income from any authority on the said land under part-I from 2008 till date. The petitioner had not shown any refusal to the grant of development permission from the authority on the ground that the permission to the development was refused on the ground of unearned income. Learned senior counsel invited my attention to the letter dated 30th June, 2014 from the Town Planning Department in response to the application of the for locational clearance raising various queries however, no issue in respect of any unearned income was raised therein.

45. Learned senior counsel invited my attention to the claims made by the petitioner in the statement of claim filed before the arbitral tribunal and more particularly the claim for damages against the respondent in the sum of Rs.3042.00 crores. He submits that the remedy of the petitioner thus would be claim for damages and not specific performance.

46. Mr.Samdani, learned senior counsel for the petitioner in rejoinder submits that it was not the case of the respondent that there was no readiness and willingness on the part of the petitioner and thus reliance placed on section 16(b) (c) of the Specific Performance Act is totally misplaced. He submits that there was lengthy correspondence addressed by the petitioner during the period 2008 and 2015 pointing out the breaches of various obligations of the respondent under the development agreement. He submits that no time limit was provided under the development agreement for resolution of the issue of unearned income and thus it has to be within the reasonable time i.e. before the petitioner could begin with the development of the lands. He submits that the respondent did not allege any delay on the part of the petitioner from the year 2008 till 2015. He submits that though the petitioner had applied for locational clearance on 9th June, 2014, the Collector has not granted any permission till date.

47. It is submitted by the learned senior counsel for the petitioner that after execution of the development agreement, the Labour Commissioner had directed the authorities not to grant any development permission without permission of the Labour Commissioner. The said order was not vacated till the date of termination. The respondent did not take any steps to get the said order vacated. He submits that the time was not an essence of the agreement and it was not so specific in the agreement. Learned senior counsel placed reliance on the

judgment of this Court in ***Volition Investment Pvt. Ltd. vs. Madhuri Jitendra Mashroo & Anr., 2003(5) Bom. C.R. 262.*** He submits that the party who has committed breaches cannot be allowed to take advantage of its own breach. Insofar as the correspondence exchanged after 31st March, 2008 regarding possession is concerned, it is submitted by learned senior counsel for the petitioner that the parties were contemplating formalities of handing over / taking over possession for getting the plot fenced etc. and that would not indicate that possession was not given on 31st March, 2008. He submits that the letter of the petitioner regarding possession of the petitioner was not denied by the respondent.

48. Insofar as the issue of stamp duty raised by the respondent is concerned, it is submitted by learned senior counsel for the petitioner that the petitioner had paid the stamp duty as adjudicated upon by the authority. The respondent cannot dispute the correctness of the stamp duty adjudicated upon by the authority at this stage. The remedy of the respondent would be to challenge the said order of the authority by filing an appeal under section 37 of the Maharashtra Stamp Act.

49. Insofar as the submission of learned senior counsel for the respondent that the petitioner could have developed at least 29 acres is concerned, it is submitted that the said project was a township project and minimum size of plot required was 100 acres and not 27 acres and thus the petitioner could not have commenced any construction on 29 acres.

50. Insofar as the claim for damages made by the petitioner in the arbitral proceedings is concerned, it is submitted that merely because the petitioner has made claim for damages as and by way of alternate relief, no relief for specific performance on that ground can be rejected.

REASONS AND CONCLUSIONS :

51. There is no dispute that under the development agreement entered into between the parties and more particularly under clause 14(c), it was provided that the developer shall start construction within two years from the date of signing of the said agreement insofar as 86 acres of the land is concerned and within one year from the date of passing of the lay out plans etc insofar as the land admeasuring 87.91 acres is concerned. The said development agreement was entered into on 31st March, 2008. There is no dispute that the petitioner applied for locational clearance which was one of the step for the purpose of development of the said plot only on 9th June, 2014 i.e. after more than six years of the execution of the development agreement. Learned senior counsel for the respondent invited my attention to a letter addressed by the authority in response to the said application for locational clearance raising various queries which indicates that there was no requisition made by the authority for payment of any unearned income.

52. It is also not the case of the petitioner that at any point of time after execution of the development agreement with the respondent, there was any demand made by any authority for the said alleged arrears of unearned income. Even according to the petitioner, the said application for locational clearance is still pending and there was no further progress in the matter. Except writing few letters in last more than six years by the petitioner to the respondent, no further steps were taken by the petitioner for the purpose of carrying out development on the said plots.

53. The question that arose before the arbitral tribunal was whether in absence of the respondent solving the issue of unearned income whether the

petitioner could have proceeded with the development of the lands in question or not and whether the development was stalled in view of the respondent not having obtained the NOC from the Labour Commissioner.

54. It is not in dispute that the respondent had already executed a power of attorney in favour of the representative of the petitioner by which the said constituted attorney was given a right to represent the respondent before all the authorities in respect of the said plots which were subject matter of the development agreement and to do various acts required to be initiated for the purpose of carrying out development on the said plots. Though the said power of attorney was executed by the respondent simultaneously with execution of the development agreement, the petitioner never exercised that power of attorney and did not apply for resolving the alleged issue of the unearned income or for obtaining any NOC from the Labour Commissioner. If according to the petitioner, the respondent was not complying with its part of obligation i.e. resolving unearned income issue and by obtaining NOC from the Labour Commissioner, in my *prima-facie* view the petitioner could have exercised that right by exercising the powers under the said power of attorney and ought to have taken such steps. A perusal of the record prima-facie indicates that the authority has not refused to grant permission in favour of the petitioner on the ground that unearned income was not paid by the respondent. There is no dispute that except the said issue of unearned income, all other obligations for carrying out development on the suit plots were that of the petitioner. In my view, the arbitral tribunal has thus rightly rejected this contention urged by the petitioner.

55. Insofar as the submission of the learned senior counsel for the petitioner that there is some inconsistency in the impugned order i.e. on one hand

the arbitral tribunal has prima-facie observed that the petitioner had made out a case in respect of termination effected by the respondent that that without resolving the issue of unearned income, development could not be commenced by the petitioner and on the other hand the arbitral tribunal has rejected the application under section 17 of the said Arbitration Act on the ground that no case was made out by the petitioner is concerned, in my view, the Court has to read the entire order passed by the arbitral tribunal in right prospective and cannot consider any isolated paragraph of the impugned order.

56. Insofar as the submission of the learned senior counsel that the arbitral tribunal has while rejecting the application under section 17 filed by the petitioner has committed mini trial without any oral evidence and has rendered various conclusions is concerned, a perusal of the order passed by the arbitral tribunal does not indicate any such mini trial alleged to have been conducted by the arbitral tribunal. In my view, even while considering the interim measure by the arbitral tribunal whether under section 17 or by the Court under section 9, the arbitral tribunal or by the Court as the case may be, the arbitral tribunal or Court has to take a prima-facie view in the matter before granting or refusing to grant any relief of interim measures under section 17 or section 9 respectively. The arbitral tribunal under section 17 or the Court under section 9 cannot draw any final conclusion while dealing with the issue of interim measures. The judgment of the Supreme Court in case of ***Zenit Mataplast Private Limited vs. State of Maharashtra & Ors.*** (supra) relied upon by learned senior counsel for the petitioner thus does not assist the case of the petitioner.

57. Insofar as the issue as to whether the power of attorney granted by the respondent in favour of the petitioner is coupled with interest and whether could be

revoked or not is concerned, the said issue can be considered by the arbitral tribunal at the hearing of the arbitral proceedings on interpretation of the said document and this Court need not decide this issue at this stage. The petitioner does not appear to have raised such issue before the arbitral tribunal at the time of hearing of the said application filed under section 17.

58. Insofar as the issue as to whether the said development agreement is executory contract or not raised by learned senior counsel for the petitioner or that whether under the said development agreement the respondent had already assigned its rights of development to the petitioner or not is concerned, Mr.Samdani, learned senior counsel for the petitioner could not point out any such plea raised by the petitioner before the arbitral tribunal in pleadings or as to whether the same was at all raised at the time of hearing of the application under section 17 before the arbitral tribunal. There is no such ground raised in the petition to contend that such plea was raised by the petitioner in the pleadings filed before the arbitral tribunal or that the same was though urged across the bar but was not considered by the arbitral tribunal.

59. Mr.Tulzapurkar, learned senior counsel invited my attention to the development agreement which was stamped and registered in support of the submission that the stamp duty paid by the petitioner was under Article 5(g)(a) of the Maharashtra Stamp Act and not under Article 25 of the Schedule to the Maharashtra Stamp Act and would submit that the same would itself indicate that there was no assignment of development rights under the said development agreement itself. Since the said issue was not raised before the arbitral tribunal or urged before the arbitral tribunal, this Court need not deal with the said issue raised across the bar for the first time in the present proceedings.

60. Insofar as the issue of possession raised by Mr.Samdani, learned senior counsel for the petitioner relying on the alleged letter of possession issued by he respondent and on a provision of the development agreement granting permission to the petitioner to enter upon the suit lands is concerned, the respondent has seriously disputed the execution of any such alleged letter of possession relied upon by the petitioner and has alleged forgery. Mr.Tulzapurkar, also placed reliance upon some of the subsequent correspondence exchanged by the petitioner with the respondent requesting the respondent to resolve the issue of possession. He submits that subsequent correspondence would clearly indicate that the said alleged letter of possession relied upon by the petitioner was forged and possession was not handed over to the petitioner. In my view, this Court cannot draw any conclusion on the allegation of forgery made by the respondent of the said alleged letter of possession at this stage. A perusal of the subsequent correspondence relied upon by Mr.Tulzapurkar, learned senior counsel for the respondent however would prima-facie indicate that at least on the date of the said alleged writing i.e. letter of possession, the petitioner was not placed in possession of the suit property. Even if the permission referred in the development agreement to enter upon the suit lands is considered, the said permission was for the purpose of carrying out development on the suit lands and did not create any right.

61. Insofar as reliance on the Commissioner's report by learned senior counsel for the petitioner is concerned, there is no dispute that the lands which were subject matter of the development agreement were open land admeasuring 170 acres. Both parties had contended before the arbitral tribunal and also before this Court that they have deployed their respective security guards to protect the lands. A perusal of the Commissioner's report only indicates that the learned Commissioner found some of the security guards of both the parties in the cabin

put up on the portion of the said big plot of land. In my prima-facie view merely because few security guards which were found in the cabin and that also security guards of both the parties during the visit of the Court Commissioner, that would not be a conclusive proof of the possession alleged to have been handed over to the petitioner by the respondent. A perusal of the order passed by the arbitral tribunal on the issue of possession indicates that the arbitral tribunal has taken a view that whether the document of possession was forged or not should be decided only after evidence is led by the parties but under the said development agreement, the petitioner was given right to enter upon the said land only as a licensee of the respondent.

62. As far as the issue as to whether the petitioner could have commenced the development at least on 27 acres in respect of which there was no issue of unearned income raised by the respondent is concerned, or whether the petitioner could not have carried out construction only on 27 acres is concerned or not, this Court need not go into this issue at this stage and the same can be decided by the arbitral tribunal.

63. Insofar as the issue raised by learned senior counsel for the petitioner that there was no delay on the part of the petitioner in carrying out development and no such allegation of delay made by the respondent till 2015 is concerned, a perusal of the record prima-facie indicates that except writing few letters by the petitioner to the respondent, the petitioner did not take any steps for the purpose of carrying out development on the said plots. Even if the respondent had not alleged any breaches as canvassed by the petitioner is accepted, the petitioner could have complied with its part of obligation under the development agreement and could not have waited for more than six years to commence construction on the land in

question.

64. Insofar as the issue as to whether the time was an essence of contract or not in this case is concerned, admittedly the construction was to be commenced within two years and one year respectively in respect of two lands under clause 12 of the development agreement. Even if the argument of the petitioner is accepted that the time was not the essence of the contract, the time to commence the construction could not have been postponed indefinitely. The petitioner had admittedly not commenced the construction till the date of termination of the development agreement. There is thus no merits in this submission of learned senior counsel for the petitioner. The judgment of this Court in case of ***Volition Investment Pvt. Ltd. Madhuri Jitendra Mashroo & Anr.*** relied upon by the learned senior counsel for the petitioner does not assist the case of the petitioner. Even in the said judgment, this Court has held that the period for the purpose of implementing the contract has to be a reasonable period.

65. The next question that arises for consideration is whether the petitioner had made out a case for grant of interim measures on the basis that the petitioner has good chances of succeeding in obtaining the relief of specific performance of the development agreement before the arbitral tribunal. This Court also has to consider whether balance of convenience was in favour of the petitioner or the respondent and whether any irreparable loss would be suffered by the petitioner if the interim measures as prayed were not granted.

66. A perusal of the order passed by the arbitral tribunal indicates that the arbitral tribunal has held that though there is a bona-fide and triable issue raised by the petitioner in respect of the termination of the development agreement, however,

that is not enough. The petitioner is required to show at threshold that the damages will not give adequate relief to the petitioner. The arbitral tribunal has considered the fact that the development agreement entered into between the parties was of commercial nature and thus even if any breach is committed by the respondent, the petitioner can be compensated in terms of money for non-performance of the contract. The arbitral tribunal has also considered section 14 of the Specific Relief Act.

67. Insofar as the issue as to whether the petitioner has made out a prima-facie case in respect of specific performance claimed by it is concerned, the arbitral tribunal has prima-facie come to the conclusion that the petitioner had not been able to make out a prima-facie case in respect of the specific performance claimed by it. Insofar as the issue of irreparable loss is concerned, it is held by the arbitral tribunal that if the petitioner could have made an application before the State Government on 9th June, 2014 for locational clearance, such application could have been made much earlier also rather within two years of the execution of the development agreement as nothing had changed in the meanwhile. The arbitral tribunal has also considered the fact that along with the said application for development permission, the petitioner had annexed all necessary documents, including document of title which would indicate that the plea of lack of verification of title of the subject lands raised by the petitioner had no substance. The arbitral tribunal also held that there was nothing on record to indicate that the petitioner could not take any steps for preparing lay out plan, getting ready the building plans, obtaining required development permission until 9th June, 2014. Considering all these facts, the arbitral tribunal was of the view that no irreparable loss would be caused to the petitioner if the prayer for interim relief was refused.

68. Insofar as the issue of balance of convenience is concerned, a perusal of the impugned order indicates that after considering all the relevant aspects, including the nature of contract, commercial transaction between two developers to make profits, it is held that the petitioner had failed to prima-facie satisfy any adequacy test, inaction for years together by the petitioner to act upon the power of attorney by taking steps for commencement of the work. The arbitral tribunal was of the opinion that the balance of convenience tilted in favour of the respondent. The arbitral tribunal also considered the fact that the petitioner had not commenced the development work within two years and did not take any steps for commencement of the work for more than six years. The said land was estimated to be of two thousand crores, whereas the petitioner has only deposited Rs.68.00 crores by way of interest free deposit with the respondent. It is held that it would not be in the interest of justice if such vast track of land remains frozen indefinitely when on establishing breaches by the respondent, the petitioner could be adequately compensated by way of damages. It is also held that if ultimately it is found that the termination was bad in law or contrary to the terms of the agreement or for any other reason, the petitioner can be compensated for wrongful termination and accordingly held that balance of convenience was in favour of the respondent and not the petitioner.

69. There is no dispute that the suit contract was determinable. The respondent, in my view, could not have waited indefinitely for the petitioner to commence the development in the suit lands. The petitioner did not take any steps for more than six years for commencing the development on the suit lands. In my view, the arbitral tribunal is right in holding that the plots worth rupees two thousand crores could not be frozen merely on advance payment of Rs.86=00 crores made by the petitioner when the petitioner itself was responsible for delay

and breaches. I do not find any infirmity in the impugned order passed by the arbitral tribunal.

70. Before seeking any interim measures under section 17 read with order 39, the applicant has to make out a prima-facie case and to show that the balance of convenience is in favour of the applicant and not the respondent. The petitioner also has to prove that irreparable loss suffered by the petitioner, if any, cannot be compensated in terms of money. A perusal of the impugned order passed by the arbitral tribunal indicates that all these issues have been dealt with in detail by the arbitral tribunal and having found that the petitioner having failed to satisfy all the three tests for grant of interim measures, has rightly rejected the application filed under section 17.

71. The arbitral tribunal, in my view, is also right in rejecting the application under section 17 in view of the fact that the petitioner did not show its readiness and willingness to comply with its part of obligation by commencing construction within two years and one year respectively as observed by the arbitral tribunal. If the petitioner was not ready and willing to perform its part of obligation which is a mandatory condition for considering prayer for specific performance of the contract under section 16, the arbitral tribunal, in my view, has rightly rejected the application for interim measures.

72. Insofar as the issue raised by learned senior counsel for the petitioner that the arbitral tribunal has rejected interim measures on the ground that the development agreement was not being capable of specific performance and reliance on the judgment of this Court in case of *Shapoorji Pollonji & Co. Ltd. vs. Jignesh Shah & Ors.* (supra) and in case of *Chheda Housing Development*

Corporation vs. Bibijan Shaikh Farid & Ors. (supra) is concerned, a perusal of the impugned order does not indicate that the arbitral tribunal has taken any such view that the development agreement is incapable of specific performance. Be that as it may, whether it is capable of specific performance or not the same has to be conclusively decided at the time of hearing of the arbitral proceedings. There is no dispute about the proposition laid down in the said two judgments referred to and relied upon by learned senior counsel for the petitioner.

73. The next submission urged by learned senior counsel for the petitioner is that there is presumption in law that compensation is not an adequate relief. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in case of **M.L. Devender Singh & Ors. vs. Syed Khaja**. It is held by the Supreme Court in the said judgment that the jurisdiction of the Court to decree for specific performance is discretionary and must be exercised on sound and reasonable grounds “guided by judicial principles and capable of correction by a Court of appeal”. It is held that merely because in the contract the parties had fixed a sum as liquidated damages, the same would not curtail the jurisdiction of the Court to grant specific performance. In this case, there is no such provision of liquidated damages. In the said judgment the issue was whether specific relief can be granted if there was already a provision for liquidated damages in the agreement entered into between the parties. The Supreme Court considered the explanation to section 12 of the old Act and also the provisions of section 21 of the old Act and held that the effect of presumption is that the party coming to Court for the specific performance of a contract for sale of immovable property need not prove anything until the other side has removed the presumption. In my view, the said judgment does not assist the petitioner in any manner whatsoever. Similar was the view taken by this Court in case of **Ambalal vs. Ranchhodbhai** (supra) relied upon by

learned senior counsel for the petitioner. In my view, even the said judgment does not assist the petitioner and is clearly distinguishable in the facts of this case.

74. In my view, Mr. Tulzapurkar, learned senior counsel for the respondent is right in his submission that the respondent would have received consideration out of the sale proceeds of the structures only after construction thereof by the petitioner within the time prescribed in the development agreement at the rate of 21.86%. Since the petitioner even did not commence any construction for more than six years, the respondent was not able to receive any consideration in the sale proceeds of the structure. The respondent thus could not have waited indefinitely to enable the petitioner to commence the construction and after completion of the construction to sell such tenements and thereafter to pay consideration to the respondent to the extent agreed under the development agreement.

75. This Court in ***Chaurangi Builders & Developers Pvt. Ltd. Vs. Maharashtra Airport Development Co. Ltd.*** in its judgment dated 29th November, 2013 in Arbitration Petition (Lodging) No.1999 of 2013 after adverting to the judgment of the Supreme Court in case of ***Cox & Kings India Limited Vs. Indian Railways Catering & Tourism Corporation Limited, (2012) 7 SCC 587*** and the judgment of this Court in ***Maytas Infra Limited Vs. Utility Energytech & Engineers Pvt. Ltd. & Ors. 2009(4) Bom. C.R. 143*** and several other judgments has held that though a party had invested a large sum of money in the project, but that cannot entitle it to pray for a mandatory order to operate the contract once it is noted that the remedy of the petitioner would be if any in action for damages against the respondent for breach of any of the terms and conditions of the contract. This Court in that judgment refused to grant stay of termination of the agreement. Special Leave Petition filed by the petitioner against the said order is

dismissed. This Court has also considered the judgment of the Supreme Court in case of ***Indian Oil Corporation Vs. Amritsar Gas Services, 1991(1) SCC 533***. In my view, the principles laid down by this Court in the said judgment squarely applies to the facts of this case.

76. In my view, if the petitioner succeeds in the arbitral proceedings and even if it is proved that the respondent had failed to comply with its part of obligation under the development agreement or that the termination of the development agreement by the respondent was bad and illegal, the petitioner would be compensated in terms of money. In my view, there is thus no merit in the arbitration petition. The observations made by the arbitral tribunal in the impugned order are prima-facie. I therefore, pass the following order :-

- a). Arbitration Petition (Lodging) No.1932 of 2015 is dismissed. Interim order passed by this Court on 24th February, 2015 which is continued by the arbitral tribunal and continued by this court to continue for a period of eight weeks from today.
- b). No order as to costs.

(R.D. DHANUKA, J.)