

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****ARBITRATION APPEAL NO. 17 OF 2015****ALONGWITH****CIVIL APPLICATION NO. 19 OF 2015****IN****ARBITRATION APPEAL NO. 17 OF 2015**

**M/s. Amisha Buildcon Pvt. Ltd.)
 A private Limited Company incorporated)
 and registered under the provisions of)
 Companies Act, 1956 and having its)
 registered office at 111, Industrial Area,)
 Sion (East), Mumbai 400 022)**

..... Appellant**VERSUS**

**1. Jidnyasa Co-operative Housing Society,))
 A Co-operative Housing Society classified)
 as Housing society registered under the)
 provisions of the Maharashtra Co-operative)
 Societies Act, 1960 and having its address)
 at Khidkali-Desai Post Padale, Taluka)
 and District Thane,)
 AND HAVING ITS OFFICE AT)
 Summons to be served on)
 Shop No.1, Trimbakeshwar Society,)
 Ground Floor, Opp.Ashwini Motors,)
 Edulji Road, Charai, Thane (W) 400601)**

**2. M/s.Rajkamal Constructions Pvt.Ltd.,))
 A company registered under the Companies)
 Act, 1956 having its office at 231/233,)
 Big Splash, Vashi, Navi Mumbai)**

**3. Umesh Ramesh Ved,)
 Adult, Indian Inhabitant,)
 Residing at 3C/54, Rustomjee Regency,)
 J.S.Road, Dahisar (West),)**

Mumbai 400 068)

**4. Chandrakant Phatkare,)
Adult, Indian Inhabitant,)
Residing at c/o Anil Devale,)
Laxmi Narayan Mandir, Madhav Baug)
Compound, C.P.Tank Road,)
Mumbai 400 004)**

**5. Ramesh Ved,)
Adult, Indian Inhabitant,)
Residing at Room No.2, Shantibai Chawl,)
Opp.Geeta Bhuvan, 7th Carter Road,)
Borivali (West), Mumbai 400 066)**

**6. Baban Ratnu Ambekar,)
Adult, Indian Inhabitant,)
Residing at C/1, Shanti-Nagar,)
Jaywant Hospital, Dahisar (West),)
Mumbai 400 068)**

..... Respondents

Mr.A.Kumbhakoni, Senior Advocate, a/w. Mr.Shardul Singh, i/b. Mr.Vaibhav Gaikwad for the Appellant.

Mr.R.P.Mudholkar for Respondent no.1.

Mr.Nishant Tripathi, a/w. Mr.Vaibhav Bagour, i/b. M.Tripathi & Co. for Respondent no.2.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 28th JULY, 2016

PRONOUNCED ON : 09th AUGUST, 2016

JUDGMENT :

By this appeal filed under section 37 of the Arbitration and Conciliation Act, 1996, (for short the 'Arbitration Act') the appellant has impugned the judgment

dated 7th April, 2015 passed by the learned Principal District Judge, Thane in Civil Misc. Application No.359 of 2014 dismissing the said application filed by the appellant herein under section 9 of the Arbitration Act inter alia praying for interim measures i.e. (a) for stay of the operation and/or implementation of the resolution dated 14th September, 2014 passed by the respondent no.1 society in the meeting held on 14th September, 2014, for prohibition/restraining the society from acting upon, executing or implementing the said resolution for grant of any construction right to any third party and/or respondent no.2 in respect of Desai property and/or Khidkali property, (b) for injunction restraining the society and its members from dispossessing the appellant without following due process of law from the said property, (c) from injunction from entering into any contract, further documents, registered instrument etc., from dealing with the rights in the larger property i.e. Desai village and Khidkali village.

2. Some of the relevant facts for the purpose of deciding this appeal are as under :-

3. It is the case of the appellant that the respondent no.1 society had represented to the appellant that the society was comprising of 779 members and is the owner of the land bearing Survey nos. 117/1, 6,7,8,9,10, 122/1, 123/1, 124/1, 2,3,4,5, 125/4, 5,6, 205/1A, 1/B, 1/C, 2,4, 5/A, 5/B, 5/C, 6,7, 8/A, 8/B, 206/3/A, 4,5,6, 207, 210/1, 2 in Sector 11 of Village Desai, Taluka and District Thane (Desai property).

4. It is the case of the appellant that the society had represented that the society owns and possess the land situated at Khidkali, Saja Desai, situate within the limits of Municipal Corporation for the city of Thane bearing survey

nos.127/2/A, 4/A/1, 4/A/2, 4/A/3, 129/1/D/1, 129/1/D/2, 129/1/A, 1/B, 1/C, 130/1/1A, 1/B, 1/C, 1/D, 131/1 (Khidkali property), the total area of the said Desai property and Khidkali property was admeasuring abut 55,450 sq.mtrs. The society had commenced the construction of the residential buildings being building nos. A-1 to A-4 consisting of stilt plus seven upper floors and A-5 to A-7 consisting of stilt plus fourteen upper floors and 28 row houses for its members in accordance with the sanctioned plan dated 5th February, 2008.

5. It is the case of the appellant that the said society also intended to construct further 29 row houses as per the said sanctioned plan on some other ear marked portion out of the entire area and that for construction of such members premises, total FSI to be consumed was to the extent of 39,732.16 sq.mtrs. out of said total area. It is the case of the appellant that the society made a representation that the balance area admeasuring 14943.41 sq.mtrs. was available with the society togetherwith the right to consume potential TDR admeasuring 30,869.54 sq.mtrs. in respect of the said entire property.

6. On 19th April, 2011 the respondent no.1 floated a tender notice expressing its intention to grant and assign the FSI of the said balance area and said TDR right for further development of the said larger property to the interested developer on the terms and conditions mentioned therein.

7. It is the case of the appellant that the appellant through its sister concern M/s.Karjat Land Developers submitted its bid vide its letter dated 27th April, 2011 with a caveat that the final offer and agreement would be done in the name of any of their real estate company or nominee. The respondent no.1 vide its letter dated 10th May, 2011 accepted the offer and vide their letter dated 13th

October, 2011 agreed to execute requisite registered agreement in favour of the appellant as nominee of the said M/s.Karjat Lan Developers.

8. It is the case of the appellant that on 20th October, 2011 the respondent no.1 executed a development agreement duly registered with the appellant and assigned and transferred the development rights as defined in clause (d) of the said agreement to and in favour of the appellant at and for a total consideration of Rs.3,50,00,000/- to be in the manner stated therein. It is the case of the appellant that the respondent no.1 society also executed an irrevocable power of attorney dated 20th October, 2011 in favour of the nominee of the appellant which power of attorney was also registered on 21st October, 2011. Under the said agreement dated 20th October, 2011, the appellant paid a sum of Rs.1,75,00,000/- to the society on or before execution of the said agreement. It is the case of the appellant that the balance consideration of Rs.1,75,00,000/- was payable on due performance by the society of all the obligations under the said agreement or on getting the plan approved from the sanctioning authorities for the said balance FSI.

9. In clause 7 of the said development agreement, it was provided that the appellant shall have irrevocable, unconditional, and unrestricted rights, and shall be entitled to develop the said entire property, construct buildings on the portion of the said entire property, construct buildings on the portion of the said property as described in the plan and to own and/or alienate the “developers constructed premises” to the third parties. It is the case of the appellant that the balance consideration of Rs.1,75,00,000/- was subsequently paid by the appellant to the respondent no.1.

10. It is the case of the appellant that in part performance of the said development agreement, the society placed the appellant in peaceful possession of the entire property and particularly the portion which was to be developed by the appellant. The said development agreement contained an arbitration agreement

recorded in clause 30 thereof.

11. It is the case of the appellant that it was decided by and between the appellant and the society that the parties will execute a further agreement under the nomenclature as MOU to record certain other arrangements arrived at between the parties. The appellant and the respondent no.1 accordingly executed a MOU in which the appellant and the respondent no.1 confirmed the development agreement and receipt of Rs.3,50,00,000/-. In the said MOU, the appellant agreed to pay the further consideration of Rs.20,50,00,000/- to the respondent no.1 society in the manner recorded in the said agreement. It is the case of the appellant that the said MOU also contained an arbitration agreement recorded in clause 30 thereof.

12. It was the case of the appellant that pursuant to the said MOU, the appellant had already paid an amount of Rs.11.81 crores on the date of filing of the application under section 9 before the learned Principal District Judge, Thane and had paid a total amount of Rs.15.31 crores under the said two agreements.

13. It was the case of the appellant that a separate bank account was opened in the joint name of the appellant and the respondent no.1 society. The respondent no.1 society was under an obligation to deposit in the said account the contribution of its members. It is the case of the appellant in the application filed under section 9 that the appellant had undertaken the work of completing the unfinished work, made payment to the previous contractor, prepared draft of the unfinished work, forwarded a draft for approval to the respondent no.1 society and did various other works. The said MOU was undated.

14. It is the case of the appellant that since the respondent no.1 society

was not in a position to raise the requisite fund for completing its members' premises, the respondent no.1 floated the tender for granting of balance development right of their another property situated at Khidkali. The sister concern of the respondent M/s.Ajmera Habitat Pvt.Ltd. submitted its tender for the said work whose tender was accepted by the General Body of the society by passing a requisite resolution. The society entered into a fresh development agreement with the said M/s.Ajmera Habitat Pvt.Ltd. together with lock and key agreement for another property of the society situated at Village Khidkali. It is the case of the appellant that in the said agreement with M/s.Ajmera Habitat Pvt.Ltd., it was provided that the balance money payable by the appellant herein to the respondent no.1 under the said MOU between the appellant and the respondent no.1 shall be paid to M/s.Ajmera Habitat Pvt.Ltd. or that its responsibility had been taken over by M/s.Ajmera Habitat Pvt.Ltd. It is the case of the appellant that the society gave up its right to claim balance consideration from the appellant under the said MOU and it was the matter between M/s.Ajmera Habitat Pvt.Ltd. and the appellant to decide about such balance payment.

15. It is the case of the appellant that some of the members of the respondent no.1 society held a meeting on 14th September, 2014 illegally and passed a resolution inter alia for cancelling the agreement executed in favour of the appellant. It is the case of the appellant that the society however did not inform in writing to the appellant about the said resolution till 3rd November, 2014. On 20th October, 2014, the respondent no.1 issued a termination notice to the said M/s.Ajmera Habitat Pvt.Ltd. about the termination of their agreement as well as agreements executed with the appellant. It is the case of the appellant that the appellant subsequently came to know about the termination of the agreement between the society and the appellant and between the society and the said

M/s.Ajmera Habitat Pvt.Ltd..

16. It is the case of the appellant that under the said development agreement entered into between the appellant and the said M/s.Ajmera Habitat Pvt.Ltd., the said M/s.Ajmera Habitat Pvt.Ltd. was to complete and construct members' premises at total cost of Rs.32.09 crores out of which Rs.16,00,00,000/- was to be paid by the members of the society and the balance Rs.15.59 crores was to be paid by the appellant directly to the said M/s.Ajmera Habitat Pvt.Ltd. It is the case of the appellant that M/s.Ajmera Habitat Pvt.Ltd. became entitled to consume FSI plus TDR in respect of the part of the plot B. Some of the office bearers of M/s.Ajmera Habitat Pvt.Ltd. were made shareholders of the M/s.Ajmera.

17. The appellant herein filed an application under section 9 of the Arbitration Act (Misc. Application No.359 of 2014) in the court of Principal District Judge, Thane inter alia praying for various interim measures. The said application was thereafter amended by the appellant. On 28th November, 2014, the learned Principal District Judge, Thane refused to grant any ad-interim relief to the appellant. It is the case of the appellant that in the meantime on 27th September, 2014, the respondent no.1 issued a letter to the respondent no.2 i.e. work order and passed a resolution in favour of the respondent no.2 on 8th November, 2014.

18. The appellant filed Arbitration Appeal (L) No.31471 of 2014 in this court. By an order dated 2nd December, 2014 passed by this court, the said arbitration appeal was directed to be placed on board for admission on 15th December, 2014. In the meantime, the parties were directed to maintain status quo in respect of the suit property as on the date of the said order.

19. By an order dated 16th January, 2015, this court permitted the respondent no.2 herein to intervene in the application filed by the appellant under section 9 of the Arbitration Act and directed the trial court to dispose of the arbitration application filed by the appellant on or before 27th February, 2015 and continued the status quo order of 2nd December, 2014 till disposal of the application by keeping all contentions of the parties open.

20. The learned Principal District Judge thereafter passed an order and judgment dated 7th April, 2015 and finally dismissed the said Civil Misc.Application No.359 of 2014. This order and judgment of the learned Principal District Judge, Thane is impugned by the appellant in this appeal under section 37 of the Arbitration Act.

21. Mr.Kumbhakoni, learned senior counsel for the appellant invited my attention to the various documents annexed to the appeal paper books and also compilation of documents, pleadings and also various provisions of the agreement entered into between the appellant and the respondent no.1 society, the respondent no.1 and the M/s.Ajmera Habitat Pvt.Ltd. and also various observations made by the learned trial judge in the impugned order and judgment.

22. It is submitted by the learned senior counsel that the society had no funds to complete the construction of the building on the part of the plot for the members of their society. On the representation made by the society, the appellant had agreed to enter into the development agreement for enabling the society to complete the construction of the buildings of part of the plot for the members of the society. He submits that the joint account was accordingly opened with a bank

in which the appellant as well as the society agreed to deposit various amounts in terms of the development agreement and MOU. He submits that it was not the obligation of the petitioner to carry out any construction in respect of the incomplete structure which were to be constructed for the members of the respondent no.1 society. He submits that though the petitioner could carry out the construction on the other plot simultaneously, the appellant did not carry out any construction on the other plot in view of the appellant not having completed the construction on the plot of the land which the society had agreed to complete the construction of the premises meant for their members by utilizing part of the money to be invested by the appellant. He submits that though the appellant has already paid and/or incurred more than Rs.15 crores under the said development agreement read with MOU, the appellant has not received any return on the said amount so far already incurred by the appellant by selling any of the portion of the property.

23. Learned senior counsel invited my attention to some of the part of the order passed by the learned Principal District Judge and would submit that the substantial part of the order passed by the learned Principal District Judge is devoted to the incorporation of the pleadings filed by the appellant and the respondents. He submits that none of the submissions made by the appellant were either referred to in the impugned order nor are discussed by the learned judge in the impugned order. He submits that the findings recorded by the learned judge are without reasons. The facts pleaded by the appellant are totally mis-understood in the impugned order and judgment. It is submitted by the learned senior counsel that the amounts deposited by the appellant in the joint account which was opened by the society have been totally misused and misutilised by the society for payment of their own contractors and/or suppliers who were appointed by the

society before entering into the development agreement with the appellant.

24. It is submitted that save and except an area of 39732.16 sq.mtrs. the balance area was given to the appellant by the respondent no.1 society. He submits that the ownership of the land continued to vest with the respondent no.1 society. He submits that the balance consideration of Rs.1.75 crores was paid by the appellant to the respondent no.1 society in installments. He submits that 100 flats were duly completed by the appellant and possession thereof was handed over to the members of the respondent no.1 society under the said development agreement and the MOU entered into between the parties.

25. It is submitted by the learned senior counsel that the balance consideration of Rs.20.50 crores payable under the MOU was payable subject to the compliance of the obligation on the part of the society. It is submitted that in any event the appellant had paid substantial amount i.e. a sum of Rs.15,31,68,313/- to the respondent no.1 society though the said amount was not due when the same was paid by the appellant to the respondent no.1 society.

26. Learned senior counsel for the appellant pointed out that though the appellant had paid the fees of Rs.2,00,000/- to the learned advocate Mr. R.P.Mudholkar, he is now representing the respondent no.1 society. He submits that the appellant had addressed a letter to the society on 10th December, 2012 placing on record various lapses and breaches on the part of the society under the provisions of the said development agreement. He also invited my attention to the letter dated 9th January, 2013 addressed by the appellant to the respondent no.1 society. He submits that the FSI was already received by the appellant to the tune of 50,000 sq.ft.out of 1,60,850 sq.ft. He submits that after the appellant invested

the substantial amount, the respondent no.1 society illegally terminated the development agreement, MOU and also the power of attorney.

27. Learned senior counsel placed reliance on the judgment of this court in case of ***Mangal Milan Co-operative Housing Society Ltd. vs. Sudhir Shah, 2014 SCC OnLine Bom 1732*** and in particular paragraph 34 in support of his submission that the terms and conditions of the development agreement for carrying out construction through the developer and terms and conditions of the self development by the society may be totally different. He submits that normally in case of re-development agreement through the developer, the members of the society are not required to pay any cost for construction of the building and to get alternate accommodation, get compensation for acquiring alternate accommodation from the developer.

28. Learned senior counsel for the appellant placed reliance on the judgment of Supreme Court in case of ***P.D'Souza vs. Shondrilo Naidu, (2014) 6 SCC 649*** and in particular paragraphs 38 to 45 in support of his submission that even if the rates of the property are alleged to have been increased, specific performance of the contract cannot be refused on that ground.

29. It is submitted by the learned senior counsel for the appellant that merely because in the MOU executed between the parties, the parties had contemplated execution of further agreements, the MOU cannot be construed as an agreement to enter into an agreement and specific performance cannot be refused on that ground. He submits that the development agreement as well as the MOU were already concluded in all respect and even if further negotiations were alleged to have been started or were to be discussed after execution of such agreement,

respondent no.1 could not refuse to specifically perform the development agreement as well as MOU which agreements were already concluded. In support of this submission, learned senior counsel placed reliance on the judgment of Federal Court in case of ***Jainarain Ram Lundia and another vs. Surajmull Sagarmull & Others, 1949 Federal Court Reports 379*** and more particularly on the relevant paragraphs at pages 390 and 391.

30. It is submitted by the learned senior counsel that the development agreements entered into between the appellant and the society and between M/s.Ajmera Habitat and the society are for development of two different plots. He submits that both the agreements were illegally terminated by the society and both are capable of specific performance. It is submitted by the learned senior counsel that considering the provisions of the development agreement and the MOU entered into between the parties in this case, the learned arbitrator would be in a position to grant specific performance of both the agreements in favour of the appellant. He submits that this court has already passed an order of status quo in the year 2014 and thus the said status quo granted by this court to be continued till disposal of the arbitral proceedings by appointing an arbitrator by passing a separate order in the application filed by the petitioner under section 11(6) of the Arbitration Act.

31. Mr.Mudholkar, learned counsel for the society invited my attention to various provisions of the development agreement and also the undated MOU executed by and between the parties. He submits that under both these agreements, the appellant was not a financier as sought to be canvassed by the appellant but had undertaken to carry out construction in respect of various portion of the suit property. In support of this plea, learned counsel also invited my

attention to various paragraphs of the application filed by the appellant under section 9 of the Arbitration Act before the learned Principal District Judge. He submits that the arguments now advanced by the learned senior counsel for the appellant that the appellant was not required to carry out any construction activities in respect of part of the suit plot is concerned is totally contrary to the provisions of the development agreement and the MOU and also contrary to their own pleadings before the learned Principal District Judge in the application filed under section 9 of the Arbitration Act.

32. It is submitted by the learned counsel that in respect of Desai property, the structures in A-1 building was already completed to the extent of 95% whereas in respect of A-2 building, the structures were completed to the extent of 85%. The construction of row house was also completed to the extent of 50% when the development agreement was entered into between the parties. He submits that the appellant had not completed the construction of entire 100% of entire 100 flats as canvassed by the appellant. He submits that on one hand it is contended by the appellant that the appellant was not concerned with the construction of the balance portion of the building meant for the members of the respondent no.1 society and on the other hand has alleged that the appellant had completed construction of 100 flats and had handed over possession thereof to the members of the respondent no.1 society.

33. It is submitted by the learned senior counsel for the society that similarly in respect of Khidkali plot, the construction in respect of B-1 building was already completed by the society to the extent of 95% and B-2 building to the extent of 80% and in respect of their other buildings substantially when the society had entered into the agreement with the appellant. He submits that the time was an

essence of the contract under the said two agreements. The consideration amount was to be paid by the appellant to the society within the specified period mentioned therein. The appellant however did not make payment of the substantial amount. It is submitted that whatever payment had been paid by the appellant to the society, the same was not made within the time prescribed under the said two agreements.

34. Learned senior counsel for the society invited my attention to the letters dated 16th March 2012, 2nd April 2012, 30th June 2012, 17th July 2012, 24th November 2012, 11th January 2013, 20th May 2013 and several other letters forming part of the records and would submit that the respondent no.1 society had placed on record from time to time about the breaches committed by the appellant in not carrying out the construction and in not making the payment of consideration amount. The appellant had also forwarded a copy of the draft agreement. It is submitted that it was the obligation of the appellant to obtain the commencement certificate and though the respondent no.1 society had already executed power of attorney in favour of the appellant, no such commencement certificate was obtained by the appellant. It is submitted by the learned counsel that on the contrary, the appellant on 15th January 2013 and by various correspondence started giving the counter offer to the society for introducing another developer for carrying out the balance construction on the suit property. The appellant had also submitted various draft proposals to the society in that regard.

35. It is submitted by the learned counsel for the society that the appellant had also applied for permission of the society to place certain containers on the suit property. He submits that under the development agreement and the MOU,

the appellant was not placed in physical possession of the suit property but was only given a temporary licence for the purpose of carrying out the construction.

36. Learned counsel for the society invited my attention to various minutes of the meeting of the society to show that the meetings of the society were attended from time to time by the directors and authorized representatives of the appellant and M/s.Ajmera Habitat in which various assurances were given by the appellant for carrying out the balance work within the time suggested by the appellant. He submits that in the minutes of the meeting attended by the representative of the appellant, the appellant and also M/s.Ajmera Habitat, the appellant also informed that the financial control of the appellant was already handed over to the Ajmera Group. He submits that the draft of the lock and key agreement was already prepared by the society and was handed over to the appellant on 20th May, 2013. He submits that in various minutes of the meeting of the society, it was also recorded that the appellant should show the progress of construction expeditiously. It was also recorded that if the appellant did not show the progress and did not complete the construction within the time prescribed, the appellant would be responsible.

37. My attention is also invited to the minutes of the meeting of the Annual General Meeting dated 25th August 2013 in which it was recorded that the appellant had given their no objection and that the Ajmera Group would take over the responsibilities. Mr.Shah of M/s.Ajmera Habitat Pvt.Ltd. agreed to complete the construction within 18 months. He submits that it is not in dispute that the directors of the Ajmera Group were inducted as directors of the appellant.

38. Learned counsel for the society invited my attention to the large

number of notices issued by various banks to the members of the respondent no.1 society for recovery of the bank loan which were obtained by the members for buying the flats. He submits that the large number of members who were employees of Thane Municipal Corporation were seriously prejudiced in view of the appellant having committed breaches on their part of the obligation under the said development agreement and the MOU. He submits that the appellant also did not obtain the environmental clearance certificate which was the responsibility of the appellant. It is submitted that though the appellant had agreed to obtain TDR, the appellant did not purchase any TDR at all in last five years.

39. Learned counsel for the society invited my attention to the various provisions of the development agreement and also the MOU and would submit that under those provisions, the parties were to negotiate on various terms and conditions which were not concluded and based on such negotiations, further agreements were to be entered into between the parties which were subject to the approval in the Annual General Meeting of the respondent no.1 society. He submits that since both the agreements were subject to various conditions which were contingent upon various approvals to be granted by the respondent no.1, the development agreement as well as the said MOU being the agreements to enter into further agreements, no specific performance of such development agreement and MOU can be granted even if the matter is referred to arbitration. He submits that since no specific performance can be granted, no interim measures can be granted by this court. He submits that the learned Principal District Judge has passed a detailed reasoned order and judgment and has rightly rejected the application for interim measures filed by the appellant.

40. Learned counsel for the society also placed reliance on section 14 of

the Specific Relief Act, 1963 and would submit that considering the nature of the agreement and the situation of the construction as it stands, no specific performance of the agreement can be granted in view of the provisions of section 14 of the Specific Relief Act. He submits that the respondent no.1 society has already entered into an agreement with the respondent no.2. Before any further steps could be taken by the respondent no.1, the appellant obtained an order of status quo from this court.

41. Learned counsel for the society invited my attention to the various provisions of the undated MOU and would submit that under the said MOU, the parties had contemplated to execute several agreements which were not executed admittedly. The possession of the property was to be handed over to the appellant only after the plots were vacated by the earlier developer. The appellant had agreed to complete the incomplete work. My attention is invited to clause 5 of the said MOU in support of the submission that the appellant had agreed to complete the unfinished work on the said property. The appellant was entitled to withdraw the amounts for payment to be made towards running account bill out of joint bank account. He submits that no work contract agreement was admittedly executed. He submits that since all the agreements contemplated under the MOU were not executed in terms of clause 16 thereof, the question of handing over possession of the suit land to the appellant did not arise.

42. My attention is invited to the statement of expenditure alleged to have been incurred by the appellant at page 253 of the compilation and it is submitted that large number of payments alleged to have been incurred by the appellant were not even related to the construction on the suit plot but were personal in nature and had nothing to do with the expenditure under the development agreement as well

as under the MOU. He also placed reliance on various entries showing the payment made to the advocate representing the appellant in various proceedings. He submits that all the legal fees paid to all the advocates by the appellant were debited to the accounts of the society including the professional bills received from advocate Mr.Mudholkar.

43. Learned counsel for the society also placed reliance on paragraph 13 of the application filed by the appellant under section 9 before the learned Principal District Judge and would submit that it was averred by the appellant in the application under section 9 itself that the appellant had undertaken to complete the unfinished work. He submits that though the appellant placed reliance on the alleged undertaking that the appellant was absolved from making any further payment to the society in view of the alleged execution of the documents with M/s.Ajmera Habitat Pvt.Ltd., no such document was produced on record nor any such further agreement was entered into between the appellant and the society thereby absolving the appellant from making any payment to the society.

44. Learned counsel for the society invited my attention to the prayers sought in the application filed under section 9 and would submit that insofar as stay applied in respect of the resolution passed by the society is concerned, no such relief can be granted by the court hearing application under section 9 of the Arbitration Act. He submits that insofar injunction restraining the society from disturbing the alleged possession of the appellant is concerned, since the appellant was not put in possession of the suit property even such relief could not have been prayed and has been rightly rejected by the learned Principal District Judge.

45. Learned counsel for the society placed reliance on the judgment of

this court in case of ***Gopi Gorwani vs. Ideal Co-operative Housing Society Limited and Ors.*** delivered on 10th June, 2013 in ***Notice of Motion No.1393 of 2012*** in Suit No.762 of 2012 and more particularly paragraphs 8, 9, 14, 23 and 30 in support of the submission that since the society has lost trust, faith and confidence in the appellant on account of various breaches committed by the appellant and did no progress in the last four years, the society cannot be forced to do the re-development work through the appellant.

46. Learned counsel for the society placed reliance on the judgment of Delhi High Court in case of ***Thiess Minecs India Pvt.Ltd. vs. NTPC Ltd.*** delivered on 1st July, 2014 in ***O.M.P. No. 630 of 2014*** and in particular paragraphs 41 and 52 in support of the submission that since the agreement entered into between the parties were determinable, the remedy of the appellant would be to claim the damages and not for specific performance.

47. Learned counsel for the society placed reliance on the judgment of Orissa High Court in case of ***Kiran Mohanty and others vs. M/s.Woodburn Developers and Builders(P) Ltd. and Ors., AIR 2006 Orissa 31*** and more particularly paragraphs 8 and 9 in support of the submission that the remedy of the appellant would be to claim the damages and thus no injunction in respect of the suit property was rightly granted by the learned Principal District Judge. It is submitted that since the learned Principal District Judge has already taken a prima facie view and has held that the balance of convenience is in favour of the respondent no.1 society, this court cannot interfere with the discretion exercised by the learned Principal District Judge while dismissing the application filed by the appellant for the interim measures under section 9 of the Arbitration Act.

48. Learned counsel placed reliance on the judgment of Supreme Court in case of *Speech & Software Technologies (India) Pvt. Ltd. vs. Neos Interactive Ltd., 2009 ALL SCR 1577* in support of the submission that no specific performance can be granted of an agreement to enter into an agreement.

49. It is submitted by the learned counsel for the society that all the members of the respondent no.1 society belong to lower-middle class and have though paid substantial amount of contribution are deprived of the possession of the flats for last more than 4 years because of the breaches committed by the appellant. The balance of convenience is in favour of the respondent no.1 society. The remedy of the appellant would be to claim the damages. He submits that the status quo order granted by this court thus be vacated and the appeal filed by the appellant be dismissed.

50. Mr.Tripathi, learned counsel for the respondent no.2 intervener submits that the learned Principal District Judge has rightly rejected the application filed by the appellant for interim measures. He submits that the respondent no.1 society has already passed a resolution to enter into an agreement with the respondent no.2. He submits that the concluded agreement exists between the respondent no.1 and respondent no.2. He submits that the appellant would not be able to succeed in their claim for specific performance of the development agreement and the MOU which are already terminated by the respondent no.1 society. He submits that if the ad-interim status quo order granted by this court is not vacated, the rights of the respondent no.2 would be seriously prejudiced. Learned counsel for the respondent no.2 adopts the submissions made by the learned counsel for the respondent no.1 insofar as opposition of the appeal filed by the appellant is concerned. Learned counsel also placed reliance on the following

judgments delivered by this court :-

- (a) Judgment of this court in case of ***Suprabhat Co-operative Housing Society Ltd. and Anr. vs. Span Builders and Anr., 2002(6) Bom.C.R.257***
- (b) Judgment of this court in case of ***Mohinder Kaur Kochar vs. Mayfair Housing Private Ltd. & Ors., AIR 2013 Bom.57***
- (c) Judgment of this court in case of ***M/s. Calvin Properties & Housing vs. Green Fields Co-operative Housing Society Limited and Ors. In Arbitration Petition No.638 of 2013*** dated 19th November, 2013.

51. Mr.Kumbhakoni, learned senior counsel for the appellant in rejoinder submits that no reliance can be placed by the society on the condition of the tender as final, conclusive and binding which were not incorporated in the development agreement and/or MOU. He submits that in the development agreement, there was no provision made for construction of the members' premises by the appellant. He submits that the MOU also by itself did not contemplate construction of any members' premises by the appellant. He submits that though the MOU contemplates execution of the further agreement if the parties negotiate and settles various terms of the agreement, that would not make the MOU itself not a conclusive agreement.

52. It is submitted that this court has already granted ad-interim status quo order which shall be continued by this court till the disposal of the arbitration proceedings and an arbitrator be appointed by this court in a separate arbitration

application filed by the appellant. He submits that the respondent no.2 cannot be allowed to make any submission since the respondent no.2 is neither a party to the agreement entered into between the appellant and the respondent no.1 nor to the arbitration agreement entered into between the parties. He submits that the respondent no.2 has not paid any consideration amount under the agreement alleged to have been entered into between the respondent no.1 and respondent no.2.

REASONS AND CONCLUSIONS

53. I have heard learned counsel appearing of the parties at great length and I have given anxious consideration to the rival submissions made by the learned counsel.

54. A perusal of the development agreement dated 20th October, 2011 entered into between the appellant and the respondent no.1 indicates that the society agreed to assign the development rights in favour of the appellant in respect of the entire property including the FSI and TDR right save and except admeasuring 39732.16 sq.mtrs. in respect of Part A mentioned therein on various terms and conditions. Under the said development agreement, it was provided that the appellant shall have irrevocable, unconditional, unrestricted rights and are entitled to develop the said property, construct buildings on the portion of the said entire property i.e. Part A and Part of Part B mentioned therein. The said development agreement also records that the society was in juridictional, physical and actual possession of the said property. Some portion of the said property was reserved for D.P.Road area.

55. A perusal of the undated MOU relied upon by the appellant indicates

that the consideration mentioned in the said MOU was Rs.24 crores. It was mentioned in the said MOU that the society had dispute with the existing contractor and had terminated its contract with M/s.Karan Constructions and was negotiating with the other contractor 'Om Realtors'. M/s.Karan Construction was expected to complete the balance work as mentioned in the deed of settlement entered into by the society with it. It was provided that the negotiations with Om Realtors was going on and the society undertook to settle the said suit.

56. In Recital (J), it was provided that with a view to make tax efficient method and consent of the developer for shortfall and construction for the existing members of the forthcoming in time etc. various options mentioned therein had been discussed upon series of meetings conducted with the committee for consideration and finalization as mentioned therein. The said clause provides for execution of several documents such as development agreement for Rs.3.50 crores, separate agreement for balance of Rs.20.50 crores, the members' contribution for balance of Rs.18.50 crores to be paid against the existing common infrastructural facilities at the rate mutually to be agreed by the parties, the work contract or unfinished work of members' premises or TDR of work contract member's contribution in accordance with the terms mentioned in the MOU. It was further provided that considering the complexity of transaction, arrangements and methodology, it was felt that time would be required to carve out proper draft agreement. It was recorded that till all other agreements were finalized and executed, it was decided to enter into MOU for other agreements as per clause (J) (II) within 21 days from the date of signing of the said MOU so that in the meantime the work could commence as desired.

57. In Recital (L), it was provided that the society had undertaken to see

that the previous contractors will vacate the site and handover peaceful possession. In Recital (M), it was provided that the parties had decided to enter into a MOU till the finalization of the terms and conditions of the agreements i.e. TDR agreement, agreement for payment of contribution towards infrastructure cost by developer and work contract in respect of construction of incomplete work of the members' premises on the said entire property etc. in accordance with Clause (J) as may be mutually agreed upon discussion by and between the parties.

58. In clause (3) of the said MOU, it was provided that in consideration of the society granting the rights of development of the said FSI and said TDR rights the developers have agreed to pay consideration amount of Rs.3,50,00,000/- and balance of Rs.20,50,00,000/- upon the agreements as may be finalized as per Clause -J in terms of preamble.

59. In Clause (7) of the MOU, it was provided that the developers agree to pay balance of Rs.22.25 crores as may be agreed upon in accordance with Clauses (J) and (K) of the said MOU. In clause (9) of the said MOU, it was provided that if the society considers the request of the developer to put up additional construction and/or additional floors on the building at their own costs in which the members' premises were and/or shall be located subject to approval of Thane Municipal Corporation, such additional construction and/or additional floors will be the sole and absolute property of the developers.

60. Clause (10) of the said MOU provides that the society will be entitled to receive Rs.24,00,00,000/-and the developers shall be entitled to claim the amount of running bills for the work done by them for construction of members

premises from time to time through designated account under the work contract agreement which would be executed between the parties, subject to approval of the same by the architect of the society.

61. Clause 16 of the said MOU provided that on execution of all the agreements mentioned in the said MOU, the society shall handover the vacant and peaceful possession of the said property to the developers in pursuance thereto as their licensee. Clause 20 of the said MOU provided that the terms and conditions mentioned therein will be suitably modified/added/altered as may be necessary for the transaction as contemplated with the spirit and understanding of discussions by consent of both the parties. The said clause further provided that the developers shall deposit the said MOU in an escrow with the escrow agent as may be decided mutually. The escrow agent shall hold the said original MOU till other agreements as per clause (J) (II) were finalized and were executed for benefit of both the parties and shall handover to the developers. A perusal of the said MOU Indicates that there is no reference to any resolution passed by the society in the said MOU.

62. A perusal of the pleadings filed by the appellant and also the notices invoking arbitration agreement and from the arguments urged by the learned senior counsel for the appellant it is clear that the appellant proposes to seek specific performance not only of the development agreement but also undated MOU. It is also the case of the appellant that the appellant has acted upon the said undated MOU also and has paid various amounts under the said agreement.

63. A perusal of the MOU and more particularly some of the provisions referred to aforesaid prima facie indicates that the various terms and conditions were yet to be negotiated, settled and finalized between the parties in respect of the

several agreements which were to be executed in future only after such negotiations and settlements between the parties were concluded. The parties had agreed to handover the original of the said MOU to the escrow agent in escrow till all such agreements contemplated under the said MOU were executed. The consideration amount mentioned in the said MOU was also contingent upon various terms and conditions mentioned therein which were not at finally decided and concluded.

64. In my prima facie view, since the appellant had proposed to claim specific performance of the development agreement with the said undated MOU and since the said MOU contemplates execution of various further agreements which were to be executed after negotiations and settlement of various terms, the said MOU is an agreement to enter into various agreements and thus cannot be specifically performed. In my prima facie view, since the original of the said MOU was to be handed over in escrow to an escrow agent till all such agreements contemplated under the said MOU were executed, it indicates that the said MOU was not a concluded and final agreement.

65. I am not inclined to accept the submission of Mr.Kumbhakoni, learned senior counsel for the appellant that even if the further agreements were not executed as referred in the said MOU, the said MOU had to be considered as conclusive and final in the facts and circumstances of this case. The judgments relied upon by the learned senior counsel in case of ***Jainarain Ram Lundia and another*** (supra) would not assist the case of the appellant. In the facts of this case, various terms and conditions which were material for implementation of the said MOU were yet to be negotiated and settled between the parties, followed by the execution of various agreements and thus the facts in the judgment in case of

Jainarain Ram Lundia and another (supra) are clearly distinguishable in the facts of this case and thus reliance placed thereon is misplaced.

66. Insofar as judgment of Supreme Court in case of ***Speech & Software Technologies (India) Pvt. Ltd.*** (supra) relied upon by the learned counsel for the respondent no.1 is concerned, the said judgment was delivered by the learned designate Judge of the Hon'ble Chief Justice of India under section 11(6) and thus the said judgment cannot have precedential value. Be that as it may, this court has in catena of decisions has taken a view that an agreement to enter into an agreement cannot be specifically performed.

67. A perusal of the provisions of development agreement as well as correspondence exchanged between the parties and the pleadings filed by the appellant themselves referred to the aforesaid prima facie indicates that though it was the case of the appellant itself that the appellant was to carry out development in respect of the property which was subject matter of the development agreement and had completed the construction of 100 flats and had handed over the same to the members of the society. The submissions now made across the bar by the learned senior counsel for the appellant that the appellant had nothing to do with the carrying out any construction work insofar as property which was subject matter of the development agreement is concerned, is contrary to the provisions of the development agreement, contrary to the averments made by the appellant themselves and also the correspondence exchanged by the appellant with the respondent no.1 society.

68. A perusal of the record further prima facie indicates that the appellant had not even purchased any TDR though it was an obligation on the part of the

appellant. The appellant did not obtain various permissions from the Municipal Corporation. The appellant has not paid the full consideration amount under the said MOU and whatever have been paid is not paid within the time prescribed. A perusal of the correspondence referred to aforesaid further prima facie indicates that the appellants itself had introduced M/s.Ajmera Habitat Pvt.Ltd. and had made representation in the various meetings in the respondent no.1 society that subsequent work would be carried out by the M/s.Ajmera Habitat Pvt.Ltd. Though it was the case of the appellant that under an arrangement arrived at between the appellant with the said M/s.Ajmera Habitat Pvt.Ltd., the appellants were not required to pay the balance amount to the society but to the said M/s.Ajmera Habitat Pvt.Ltd., the appellant did not produce any such alleged writing and/or arrangement between the appellant and M/s.Ajmera Habitat Pvt.Ltd. duly approved by the respondent no.1 society.

69. A perusal of the correspondence referred to aforesaid prima facie indicates that the appellant had made various assurance to the members of the respondent no.1 society in the correspondence as well as in the meetings attended by the representatives of the appellant that the work would be carried out within the short period. There was however no progress shown by the appellant. It further indicates that the submission of the appellant that the appellant had carried out the construction of 100 flats under the said development agreement and had handed over the same to the members of the respondent no.1 society also appears to be incorrect. The substantial portion of various wings on the suit plots which were subject matter of the development agreement were already completed by the respondent no.1 society through some other developer. In my prima facie view, the respondent no.1 society had rightly terminated the development agreement as well as the MOU entered into with the appellant.

70. There is no dispute between the parties that the said development agreement could be terminated by either party in the event of any breaches committed by the other party. In my prima facie view, upon considering various obligations recorded in the development agreement and without going into the validity of the MOU, it is apparent that the enforcement of the said agreement is contingent upon the happenings of various events. The plan is not sanctioned in respect of the entire property. The earlier developer has not vacated the suit property. The appellant has not paid the entire consideration amount. It is the case of the appellant that the society has not paid the full contribution required to be paid under the said development agreement. The appellant has not purchased any TDR till date. The parties had yet to negotiate several terms and conditions for the purpose of implementation and enforcement of the said development agreement. Similarly the provisions of the said MOU also contemplates the execution of the several agreements not only between the parties inter se but also with the third parties.

71. Under section 14 of the Specific Relief Act, if a contract, for the non-performance of which compensation in money is an adequate relief if a contract which is in its nature determinable or the contract the performance of which involves the performance of a continuous duty which the court cannot supervise cannot be specifically performed. In my prima facie view considering the nature of contract and the provisions recorded therein, the learned arbitrator will not be able to grant any relief of specific performance to the appellant since the said agreements are determinable and are already terminated, the performance of various obligations by both the parties under the said development agreements as well as MOU would involve the performance of continuous duty which the

arbitrator or the court cannot supervise. In my view if the appellant succeeds in the arbitration proceedings, the appellant can be compensated in terms of the money. The judgment of Delhi High Court in case of ***Thiess Minecs India Pvt.Ltd.*** (supra) and judgment of Orissa High Court in case of ***Kiran Mohanty and others*** (supra) would assist the case of the respondent no.1. This court has also taken the similar view in catena of judgments. I am in agreement with the views expressed by the Delhi High Court and Orissa High Court.

72. A perusal of the record further indicates that the case of the appellant about the proposed claims for the specific performance is also inconsistent with the claims proposed to be made by M/s.Ajmera Habitat Pvt.Ltd. A perusal of the correspondence exchanged between the parties in the minutes of the meeting of the society which was attended by the representatives of the appellant and M/s.Ajmera Habitat Pvt. Ltd. prima facie indicates that the obligation of the appellant were to be performed by M/s.Ajmera Habitat Pvt. Ltd. The case of the appellant is prima facie inconsistent in the pleadings and the correspondence exchanged between the parties. The society has also alleged to have entered into an agreement with the respondent no.2 who claims their alleged right,title and interest in the suit property. For these reasons also, in my prima facie view, the appellant may not be awarded claims for specific performance.

73. Since interim measures are in aid on final relief, if the appellant is not likely to succeed prima facie in the final adjudication of the claims, i.e. claim for specific performance, the suit property cannot be freezed by granting an order of status quo. The members of the society have already lost faith, confidence and trust in the appellant developer and who have been waiting for possession of their respective flats cannot be forced to continue the development with the same

developers. In these circumstances, in my prima facie view, the respondent no.1 society had rightly terminated the agreement entered into with the appellant.

74. A perusal of the order passed by the learned Principal District Judge indicates that the learned Judge has dealt with all the submissions and the documents at great length and has taken a prima facie view that the balance of convenience was in favour of the respondent no.1 and its members and not the appellant. No irreparable loss or injury would be caused to the appellant if the interim reliefs as prayed would not be granted. The most of the members of the respondent no.1 society who are employees of the Thane Municipal Corporation belong to the lower-middle class and cannot be asked to wait indefinitely for possession of their shelter.

75. I am not inclined to accept the submission of the learned senior counsel for the appellant that the learned Principal District Judge has not considered the submissions made and the documents relied upon by the appellant in the impugned order. In my view the Principal District Judge has considered the submissions made by all the parties and the documents produced and has taken a prima facie view that no relief could be granted in favour of the appellant by recording a detailed reasons, this court thus cannot interfere with such prima facie findings of fact in this appeal.

76. The judgment of this court in case of ***Suprabhat Co-operative Housing Society Ltd. and Anr.*** (supra), in case of ***Mohinder Kaur Kochar*** (supra) and in case of ***M/s.Calvin Properties & Housing vs. Green Fields Co-operative Housing Society Limited and Ors.*** (supra) squarely applies to the facts of this case and would assist the case of the respondent no.1 society. I am respectfully bound

by the aforesaid judgments.

77. Insofar as the submission of the learned senior counsel for the appellant that since this court had already granted status quo order and the same is in force, the said order be continued till disposal of the arbitration proceedings is concerned, a perusal of the said ad-interim status quo initially passed indicates that the said order was not passed after hearing the parties. This court has heard the learned counsel for the parties at great length and after having perused the records and after considering the rival submissions made by the learned counsel for the parties, is of the view that no case is made out by the appellant for continuation of the status quo order. I am thus not inclined to accept this submission of the learned senior counsel.

78. In my view, in view of the ad-interim status quo order granted by this court, the suit property is already freezed and the entire development of the suit property having been stalled, ad-interim status quo order cannot be continued for the reasons recorded aforesaid.

79. Insofar as submission of the learned counsel for the respondent no.2 is concerned, admittedly the respondent no.2 is not a party to the agreement between the appellant and the respondent no.1. The respondent no.2 is independently claiming their alleged right, title and interest in respect of the suit property against the respondent no.1 and can independently pursue the remedy available in law. The alleged right, title and interest of the respondent no.2 in the suit property cannot be protected in this proceedings. It is made clear that this court has not expressed any views on the right, title and interest claimed by the respondent no.2 in the suit property. No interim relief of any nature whatsoever thus can be granted

in favour of the respondent no.2 in the present proceedings.

80. In my view the appeal is totally devoid of merits. I, therefore, pass the following order :-

- (a) Arbitration Appeal No. 17 of 2015 is dismissed. Ad-interim order passed by this court is vacated.
- (b) In view of the dismissal of the arbitration appeal, Civil Application No.19 of 2015 and any other civil applications pending if any, in the Arbitration Appeal NO.17 of 2015 are also disposed of.
- (c) No order as to costs.

[R.D. DHANUKA, J.]

At this stage Mr.Kumbhakoni, learned senior counsel appearing for the appellant seeks continuation of ad-interim status quo granted by this court for a period of six weeks from today. Ad-interim order granted by this court to continue for a period of six weeks from today. The appellant also shall not create any third party rights in respect of the suit property during this period of six weeks.

[R.D. DHANUKA, J.]