IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.829 OF 2015

Prajita Developers Pvt.Ltd. .. Petitioners

Vs.

Yusuf Khan alias Dilip Kumar & Anr. .. Respondents

Mr.Zal Andhyarijuna a/w Mr.A.Dasgupta i/b M/s.Narula and Associates for the petitioner

Dr.Milind Sathe, Sr.Advocate a/w Mr.Chirag Shah, Mr.Parag Shah and Ms.Seema Navle i/b M/s.Mahesh Shah and Co. for the respondent no.1

Mr.Navroz H. Seervai, Sr.Advocate a/w Mr.Rahul Chitnis i/b Mr.Akshay Shah for respondent no.2

CORAM : K.K.TATED, J.

DATED : 14/01/2016

P.C.:

1 Heard the learned counsel for the parties.

2 The Arbitration Petition is under section 9 of the Arbitration and Conciliation Act, 1996. The dispute between the petitioners through its predecessor in title and the respondent nos.1 and 2 arises out of the Development Agreement dated 23.6.2006.

3 By this petition, petitioners are seeking relief of injunction restraining the respondent no.1, his servants, agents, assigns or any one claiming through him from dispossessing the petitioners from the property bearing land admeasuring 2,056 sq.mtrs. plot no.16 of Pali Hill Estate in the Village of Danda (Bandra), Taluka-Andheri, Bandra (East), Mumbai 400 051, forming part of Survey No.236, No.3, N.A. No.329 corresponding CTS. No.C/1395, C/1396 and C/1397 (hereinafter referred to as the said Property).

4 The development agreement dated 23.6.2006 was executed between Yusuf Khan alias Dilip Kumar Respondent no.1, M/s.Sharyans Resources Limited (hereinafter referred to as M/s.Sharyans) and respondent no.2 M/s.Gold Beam Construction Pvt.Ltd. whereby respondent no.1 granted development rights to the said M/s.Sharyans and to the respondent no.2 as stated therein in respect of the said property upon terms and conditions and for consideration of Rs.10 crores. The development agreement was duly registered with the Sub-Registrar of Assurance. Power of Attorney executed by respondent no.1 in favour of respondent no.2 and its director to enable the developer to commence the development work. As per the said Development Agreement developers paid sum of Rs.1 crores to the respondent no.1 on execution of development agreement and thereafter paid sum of Rs.3 crores. In all they paid Rs.4 crores to the respondent no.1. Some of the relevant clauses of the said development agreement dated 23.6.2006 are as under:

> "1. (A) For monetary consideration as hereinafter provided to be paid by the Developers to the Owner and other than the consideration of providing to the Owner free of costs the built-up premises desired to be retained by the Owner, in the

buildings to be constructed on the said property the Owner hereby grants to the Developers and the Developers hereby acquired from the Owner the development rights to the extent and in the manner hereinafter provided in respect of the said property more particularly described in the Schedule hereunder written (hereinafter as aforesaid referred to as “the said Property”) by consuming and utilizing the entire permissible F.S.I. in respect of the said Property (including F.S.I. of staircase, lifts, passage, balcony etc.) as well as by consuming and utilizing entire permissible T.D.R. In accordance with the Development Control Regulations of MCGM.

(B) It is estimated that for development of the said Property the total permissible FSI available is about 2056 sq.mtrs. Equivalent to 22130 sq.ft. and further FSI by way of TDR as permissible under D.C.Regulations of MCGM.

(i) The entitlement of the parties in the development potential shall be as under:

Party	**Residential User**	**CPS**
(1)	(2)	(3)
Owner	50%	50%
Developers	50%	50%

(ii) The Owner has retained and/or will be deemed to have retained for his own use and benefit above stipulated entitlement of the Owner out of the total FSI and TDR available for the development of the said property including proportionate entitlement of the total number of car parking slots (CPS) (both stilted and/or open) that may be provided in the complex and the said portion of the FSI (hereinafter collectively referred to as “the Owner's Lot), shall be developed by the Developers at the cost of the Developers in the manner and in accordance with the plans prepared as per the requirement of the Owner and under the supervision of the Architect of the project and in the time frame and in the manner as provided herein.

(iii) The benefit of the above stipulated entitlement of the Developers out of the total FSI and TDR available for development of the said property as also of the total CPS (both stilted and open) that may be provided in the complex (such Developer's entitlement available for development on the said Property and the CPS-both stilted and open) that may be provided in the complex (hereinafter referred to as “the Developer's lot) shall be developed by the Developers at its own costs and shall belong to the Developers and shall be at the disposal of the Developers.

(iv) In case any additional area or potential over and above the present development potential is allowed in future to be constructed on payment of premium, the same shall be divided between the Owner and Developers in the proportion as provided in Clause 1(B) (I) above and then ali pro-rata costs of such premium and the costs of construction of such additional area coming to the share of the Owner shall be borne and paid by the Owner and the remaining pro-rate costs of such premium and the costs of construction coming to the share of the Developers shall be borne and paid by the Developers. Above stipulated entitlement of the Owner of such additional built-up area shall form part of the Owner's lot and above stipulated entitlement of the Developer's lot. It is certified that the purpose aforesaid the term “present development potential” shall means F.S.I. available on the said property for redevelopment and additional 50% thereof by way of T.D.R.

3. The Developer's shall pay to the Owner the sum of Rupees Ten Crore as and by way of lump sum monetary consideration in the manner as provided herein:

(a) a sum of Rs.1,00,00,000/- (Rupees One Crore Only) on execution of these presents.

(b) a sum of Rs.4,00,00,000/- (Rupees four crore Only) before handing over vacant possession of the said property including the Bungalow standing on the said property to enable the Developers to enter upon the said property and commence development.

(c) the balance sum of Rs.5,00,00,000/- (Rupees five crores Only) within six months from the date of this Agreement provided the Developers are not restrained and/or not prevented from carrying on the development of the property as provided thereunder.

17. Upon payment of the balance monetary consideration by the Developers to the Owner as provided in Clause 3(b) the Owner shall permit and the Developers shall have the license to enter upon the said Property to develop the said Property,to carry on construction on the said Property and for that purpose to do all acts, deeds, matters and things as may be necessary exercising the following rights and authorities:

(a) To put and/erect sign boards upon the said Property as also to issue advertisement in the newspapers and other medias as may be deemed fit by the Developers announcing the construction of the buildings on the said Property and the sale of the flats, shops, offices, garages, parking spaces, tenements, etc. (coming to the share of Developers on ownership basis.

(b) After revalidation of the building plans to commence, carry on and complete construction of the buildings on the said Property by the Developers or through its contractors, sub-contractors or any other agent at its costs.

(c) To dispose of in its own name on ownership basis of the flats, shops, offices, garages, parking spaces, tenements, stilts or any other rights in the buildings to

> be constructed on the said Property which comes to the share of the Developers to the person or parties of its choice at the price and upon the terms and conditions as the Developers may deem proper.
>
> (d) To receive the consideration from the purchasers of the flats, shops, offices, garages, parking spaces, tenements, stilts or any other rights in the buildings to be constructed on the said Property which comes to the share of the Developers and the Developers shall be entitled to appropriate the same as it may deem fit and proper.
>
> (e) To enter into agreements for sale of the premises which comes to the share of the Developers comprising of the flats, garages, parking spaces, tenements, stilts or any other rights in the buildings to be constructed on the said Property."

5 Initially, the said M/s.Sharyans applied to the various authorities for permission to develop the suit property. M/s.Sharyans paid an amount of Rs.2,89,900/- on 28.4.2008 to the National Institute of Oceanography to obtain requisite CRZ clearance to load TDR upon the said property. In May 2008, the said M/s.Sharyans applied for height clearance for the building to be constructed to the Airport Authority. The Airport Authority of India granted NOC for height clearance for the building to be constructed on the said property on 22.8.2008. Thereafter the said M/s.Sharyans appointed a Contractor to execute the Development work under the Development Agreement and the said contractor has done demolition of the old bungalow, excavation work necessary to lay foundation of the new building, pilling work, foundation work etc. On 22.9.2008 Municipal Corporation for Greater

Mumbai granted commencement certificate for development of the said property.

6 On 20.4.2010, the deed of assignment came to be executed between M/s.Sharyans and the petitioners by which M/s.Sharyans have assigned their right, title and interest of the development agreement dated 23.6.2006 to the petitioners. As per the said deed of assignment dated 20.4.2010 the petitioners acquired M/s.Sharyans right in development agreement dated 23.6.2006. Pursuant to the said deed of assignment, partnership deed between respondent nos.1 and 2 modified and the petitioners became a partner of the said partnership firm whose aim was to develop the said property as per the development agreement. Because of the dispute between the parties, the petitioners invoked Arbitration Clause of development agreement dated 23.6.2006 calling upon the respondents to appoint the Arbitrator to dissolve their disputes. The Arbitration Clause of the development agreement dated 23.6.2006 reads thus:

> "40 All disputes differences and questions whatsoever arising between the parties hereto and/or the persons claiming by under or through them at any time touching these presents or any matter arising out of this transaction if not resolved mutually between the parties, the same shall be resolved by arbitration of a single arbitrator if both parties agree upon one such, or by two arbitrators one each appointed by each party and third Arbitrator appointed by them, and the decision of the Arbitrator/s shall be final and binding upon the parties. The Venue of such Arbitration shall be Mumbai and subject as above, the same shall be in accordance with the Arbitration and Conciliation Act, 1996."

7 Because of the apprehension, the petitioners filed the present petition under section 9 of the Arbitration and Conciliation Act, 1996 for an order of injunction restraining the respondent from disturbing their possession, and or creating any third party right, title and interest in respect of the said property.

8 The learned counsel for the petitioners submits that the petitioner by deed of assignment dated 20.4.2010 acquired M/s.Sharyans's right, title and interest in development agreement dated 23.6.2006 and started the development of the said property. He submits that as per the instructions of the respondent no.1, they spent sum of Rs.11,80,82,086/- from time to time including the initial amount paid by M/s.Sharyans to the respondent no.1. He submits that as the respondents prevented the petitioners from developing the said property and were trying to disturb the possession, they filed the present petition under section 9 of the said Act to protect their possession as well as rights till the Arbitral award and thereafter. He submits that though the petitioners are ready and willing to complete the project as early as possible, the respondent obstructed them.

9 The learned counsel for the petitioner submits that the erstwhile owner of the suit property filed the suit against the respondent no.1. In that suit, the Small Causes Court passed order of status quo in respect of the said property. Apart from that, the respondent no.1 wrote several letters to the petitioners to slow down the development activities on the said land. He submits that respondent no.1 by his letter dated 17.1.2013 to the Executive Engineer (Building Proposal)

requested re-validation of the plans of the said property. In that letter, the respondent no.1 admitted that there was a delay on his own part. The content of the said letter reads thus:

> "The above mentioned project has been already approved and full Commencement Certificate is granted on 22nd September, 2008 and the work of the project is undertaken by my joint venture partners Gold Beam Construction Pvt.Ltd. and Prajita Developers Pvt.Ltd. and the work could not be finished as I desired the existing bungalow to be retained and that why the speed of the construction work is slow."

10 The learned counsel for the petitioners submits that this itself shows that because of inaction on the part of respondent no.1, development work could not be completed within stipulated time as provided in the development agreement. He further submits that they have already spent more than Rs.11,80,82,086/-. He further submits that during the pendency of the present proceeding, respondent no.1 issued notice dated 8.10.2015 for termination of the development agreement dated 23.6.2006. He submits that this itself shows the intention of the respondent to deprive the petitioners their rights as per the development agreement dated 23.6.2006 and deed of assignment dated 20.4.2010. He submits that as on today, the petitioners are in possession of the suit property for carrying out the development activities. He submits that they appointed staff to look after the development activities and guard the property. He submits that if the respondent evicts the petitioners and or restrain them from carrying out development activity, irreparable loss and injury will be caused to them.

11 The learned counsel for the petitioners submits that the petitioners are entitled for specific performance of the development agreement dated 23.6.2006. In support of this contention, he relies on the section 15 of the Specific Relief Act, 1963. The learned counsel for the petitioners submits that though the development agreement is between the petitioners and respondents, the respondent no.2 being a relative of respondent no.1 is taking contrary view to support the respondent no.1. He submits that though there is a joint venture between petitioners and respondent no.2 to develop the said property, but till now the petitioners only paid the entire expenses and carried out the development activities. Inspite of that, the respondent no.2 is acting against the interest of petitioners. Respondent no.2 accepted the termination letter dated 8.10.2015 issued by respondent no.1. He submits that though the respondent no.2 is not cooperating with the petitioners, the petitioners have right for specific performance in view of section 43 and 45 of the Contract Act, 1872. In support of this contention, the learned counsel for the petitioners relies on the judgment of the Calcutta High Court in the matter of ***Nirmal Infrastructure Private Limited vs. Aanant Developers Private Limited, AIR 1980 Cal 258***. He submits that in this case Calcutta High Court held that if there is a joint promisees then any one can sue the other side for specific performance and or to protect their right. He relies on paragraph 14 which reads thus:

> "14. The second contention of Mr. Samanta, in my view is one of form not of substance. It is of course, essential that when there are joint promisees all of them must be before the Court. But it is not essential that they must join as plaintiffs when one of such joint promisees files a suit for specific performance as they can be made party defendants. In ease

however those of the joint promisees, who have been added as defendants, also intend to assert their right under the contract it may be necessary to transpose them as plaintiffs and the Court may have to give judgment in favour of all of them. But there is nothing in Section 15 of the Specific Relief Act 1963 which forbids one of the joint promisees to institute a suit for enforcing a contract and on the contrary the words "any party thereto" appearing in Clause (a) thereof clearly envisages that one or some of the joint promisees can institute such a suit. If the intention of the legislature was that the joint promisees should have to be clubbed together as plaintiffs it could have read "either party thereto" instead of "any party thereto". In that view of the matter I am unable to accept the contention of Mr. Samanta that in absence of a specific averment in the plaint that the other promisees refused to join the plaintiff and proof of such averment, the suit was liable to be dismissed for non-joinder of parties. In the instant case all the other joint promisees had been made party defendants and nothing prevented them from being added as plaintiffs so as to enable them to assert their right under the contract and to obtain the relief which the plaintiff asked for, jointly with him. Any dispute the purchasers may have amongst themselves in such a case, was not for the Court to decide in the suit, nor was the Court being asked to make a new contract for the parties. On the contrary, the Court was being asked to enforce the contract as it was originally made. The decision of this Court in the case of Smt. Katip Bibi v. Fakir Chandra, reported in AIR 1960 Cal 187, on which Mr. Samanta relied, is of no assistance to him; on the contrary, on reading the same I find that it supports the view I have taken. In that case the promisee was one and after his death all his heirs were not joined as parties. It was in that context that this Court held that one or more of the several heirs of the original promisee, a single individual, could not by himself or themselves institute a suit for specific performance of the contract and reconveyance by making the remaining heirs as defendants to the suit as on the death of the original promisee his heirs did not become themselves several joint promisees. While so deciding this Court specifically pointed out that the position would have been otherwise if there were several joint promisees. Reliance in this connection may also be placed on the following passage from the judgment of Privy Council in the case of Monghibai v. Cooverji Umersey, reported in AIR 1939 PC 170 :--”

> "It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs if they will consent or as co-defendants if they will not. Such cases as (1879) 11 Ch D 121 and (1898) 2 QB 380 are examples of this principle. Nor indeed would it matter that a wrong person had originally sued though he had no cause of action : See (1902) 2 KB 485. Once all the parties are before the Court, it can make the appropriate order and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants."

12 The learned counsel for the petitioners further submits that the Apex Court in the matter of ***Jahar Roy (dead) by L.R.'s and another v. Premji Bhimji Mansata and another, AIR 1977 SC 2439*** held that Suit by one out of two joint promisees making the other as pro forma defendant is maintainable in law. He relies on paragraph 12 and 17 which reads thus:

> “12. It is O. 1 R. 1 of the Code of Civil Procedure, which deals with the procedure in civil actions of this nature and it provides as follows:-
>
> > “1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is

> alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise."

This is a general rule which takes care of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promise and the other promises refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from Biri Singh and another v. Nawal Singh (1902) ILR 24 226 which was decided in 1898 and Pyari Mohan Bose v. Kedarnath Roy, (1899) ILR 26 Cal 409 (FB) which was decided in 1899. It has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promises, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promise has refused to join him as a co-plaintiff. Reference in this connection may also be made to Monghibai v. Cooverji Umersey, 66 Ind App 210 at p.219 : (AIR 1939 PC 170 at p.173), where it has been observed as follows:-

> "It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

> "17 Moreover, as has rightly been held in the impugned judgment of the Calcutta High Court, the two contesting defendants in this case became tenants on sufferance or trespassers on the termination of their licence. A co-owner could in the case of indivisible property, well have maintained a suit for the recovery of the whole from persons holding unlawful possession thereof. Reference in this connection may be made to the decisions in Mahabala Bhatta v. Kunbanna Bhatta etc. (1898 ILR 21 Mad 373, Chandri v. Daji, (1900) ILR 24 Bom 504, Gopal Ram Mohuri v. Dhakeshwar Pershad Narain Singh (1908) ILR 35 Cal 807, Syed Ahmad Sahib Shutari v. The Magnesite Syndicate Ltd. ILR 39 Mad 501 : (AIR 1915 Mad 1214 (1) and Maganlal Bulabhadas v. Bhadar Purshottam, AIR 1927 Bom 192."

13 On the basis of these submissions, the learned counsel for the petitioners submits that in the interest of Justice during the pendency of the outcome of the Arbitral Tribunal, this Hon'ble Court be pleased to allow the present petition in terms of prayer clause (a) i.e. restraining the respondent no.1 by an order of injunction from dispossessing the petitioners from the suit property. He submits that if the present petition is not allowed, irreparable loss and injury will be caused to the petitioners. He submits that petitioner has good chance of success before the Arbitral Tribunal. Hence, petition be made absolute with costs.

14 On the other hand, Senior Counsel Dr.Milind Sathe for respondent no.1 vehemently opposed the present petition. The respondent no.1 filed affidavit in reply and denied the objections raised by the petitioners. He submits that as per the development agreement dated 23.6.2006 the development was supposed to be completed within 24 months from the date of issuance of

commencement certificate of development. He submits that in the present proceeding, the commencement certificate was issued by Municipal Corporation of Greater Mumbai on 22.9.2008 and IOD on 6.10.2008.

15 The learned Senior Counsel for the respondent no.1 submits that though the petitioners acquired and obtained M/s.Sharyans right in development agreement by deed of assignment dated 20.4.2010, they failed and neglected to show the progress in development of the said property. He submits that the petitioners have done only following work i.e. a) demolition of the old bungalow. b) Excavation work necessary to lay foundation of the new building c) pilling work d) foundation work etc. This itself shows that the petitioners are not interested and or are not in a position to develop the suit property as per the development agreement.

16 The learned Senior Counsel for respondent no.1 submits that without prejudice to their rights and contentions even if it is admitted that the respondent no.1 instructed the petitioner to slow down development work during the pendency of the Suit in Small Causes Court and or the letter dated 17.1.2013 written by respondent no.1 to the Executive Engineer for re-validation of the plans and or letter dated 1.10.2013 written by the petitioner to the respondent no.1, then also after 2013 till the date of filing of the present petition, petitioner has not shown any progress in development activities. He submits that the respondent no.1 is Senior Citizen 92 years old. He submits that as the petitioners failed to show any interest in carrying out development of

the suit property, they issued letter dated 8.10.2015 through their advocate to the petitioners as well as respondent no.2 and terminated development agreement dated 23.6.2006. He submits that in view of the termination of the development agreement dated 23.6.2006 by their legal notice dated 8.10.2015, the petitioners are not entitled any relief of injunction in the present proceeding under section 9 of the Arbitration and Conciliation Act, 1996. At the most, if petition succeeds before the Arbitral Tribunal they can ask only compensation and or damages. He further submits that as on today, respondent no.1 is in possession of the suit property. He submits that by development agreement dated 23.6.2006 they only allowed the petitioners to enter the suit property for development. Hence, the petitioners cannot claim possession of the suit property as on today. As the alternate remedy of compensation is available to the petitioners, petitioners are not entitled to any relief in the present petition under section 9 of the said Act. Hence, there is no substance in the present petition and the same be dismissed with costs.

17 The learned Senior Counsel Mr.Navroz H. Seervai for respondent no.2 also vehemently opposed the present petition. He submits that the respondent no.2 accepted the termination notice dated 8.10.2015 issued by respondent no.1 and therefore, there is no question of granting any relief in the present petition in the form of injunction. He submits that as per the partnership deed dated 10.12.2008 between the respondent no.2 and M/s.Sharyans they agreed to develop the said property jointly. He submits that in view of joint venture between the petitioners and respondent no.2 and as respondent no.2 accepted the termination notice issued by respondent no.1, petitioners are not

entitled to any relief in the present petition by way of injunction. He submits that at the most, the petitioners can claim damages and or compensation in appropriate proceeding before the Arbitral Tribunal, if they so entitled. Hence, at this stage there is no question of granting any relief in favour of petitioners.

18 I have heard the learned counsel for the parties at length. I have perused the petition as well as several affidavits filed by the parties. The main issue involved in the present petition is whether the petitioners are entitled to any relief under section 9 of the said Act by way of injunction restraining respondent no.1 from interfering with their possession of the said land till the decision of the Arbitral Tribunal and or thereafter.

19 It is to be noted that the temporary injunction sought by the petitioners could be granted if their case was covered by three well established principles namely a) on making out prima facie case b) on showing balance of convenience in their favour in that the refusal of the injunction would cause greater inconvenience to them and c) whether on refusal of injunction they would suffer irreparable loss. It is to be noted that the object of interim injunction is to keep things in status quo, so that if at the hearing the plaintiff obtains a judgment in his favour, the defendants will have been prevented in the meantime from dealing with the property in such a way as to make that judgment ineffectual. A temporary injunction maintaining the status quo may properly issue whenever the question of law or fact to be ultimately determined in a suit is grave and difficult and injury to the moving

party will be immediate, certain and great if denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if granted. The party who seeks the aid of the Court in that behalf must be as a rule, be able to satisfy the Court on three points; (a) that there is a serious question to be tried at the hearing and there is a probability that he is entitled to the relief sought by him, or in other words, that he has a prima facie case to go to the trial; (b) that the Court's interference is necessary to protect him from that species of injury which the Court calls irreparable before his legal right is established at the trial; and (c) that the comparative mischief or the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it.

20 If a plaintiff of a suit can be compensated by payment of damages, law does not require giving or granting of an injunction in such a case to the plaintiff. Damages would be adequate remedy. In this connection, House of Lords in the matter of American Cyanamid Co. vs. Ethicon Ltd. (1975) 1 All England Law Reports 504 laid down as follows:

> "As to that, the governing principle is that the Court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them,

> no interlocutory injunction should normally be granted, however, strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the Court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial......"

21 Considering the above mentioned principle, this court have to decide the present petition. In the present petition, in development agreement 23.6.2006 it is specifically stated that developer has to complete the construction within 24 months. It is also stated in the development agreement that owner can permit the developer to enter upon the said property for development and to carry on construction and other acts. Bare reading of clause 17 of development agreement as reproduced hereinabove, clearly shows that for the development work, owner permitted developer only to enter the said property. No where it is stated in the said development agreement that the owner handed over vacant and peaceful possession of said property to the developer for carrying out development activities. Therefore, the claim of the petitioners that they are in peaceful possession of the said property, at present, cannot be acceptable. The owner allowed the developer only to enter into the said property for development activities. Injunction can be granted against the true owner unless and until extraordinary case is made out. The authorities cited by the petitioners are not applicable in the facts and circumstances of the present case for deciding grant of injunction. Hence, I do not find that the petitioners

have made out any prima facie case for injunction against respondent about possession of the said property.

22 The next question is whether the petitioners has shown balance of convenience in their favour, in the event of refusal of injunction, would cause great inconvenience to them. In the present proceeding, as per the development agreement dated 23.6.2006 and subsequent deed of assignment dated 28.4.2010 petitioners had right to develop the said property and get their share. Considering the fact on record for last 10 years the developer has carried out only following construction activities i.e. a) demolition of the old bungalow. b) Excavation work necessary to lay foundation of the new building c) pilling work d) foundation work etc., it is very difficult to accept that if injunction is not granted great inconvenience will be caused to the petitioners. Apart from that, if the petitioners succeed before the Arbitral Tribunal, he may demand for specific performance of the development agreement dated 23.6.2006 and or compensation for loss and or damages incurred by them. If injunction is granted at this stage, irreparable loss and injury will be caused to the respondent no.1 who is 92 years old Senior Citizen and whose property remained undeveloped for last more than 10 years. In any case, if injunction is not granted, petitioners will not suffer irreparable loss, same can be compensated by way of money.

23 At the time of hearing the learned Senior counsel Dr.Milind Sathe appearing on behalf of respondent no.1 made a statement that their client is ready and willing to deposit the entire amount paid by

the petitioner to them either in this court or if any order passed by the Arbitral Tribunal. Considering the statement made by the learned Senior Counsel for the respondent no.1, liberty granted to the petitioners to make appropriate application if they so desire for directing respondent no.1 to deposit the amount paid by them to the respondent no.1 before the Arbitral Tribunal if it is constituted. If such application is made, Arbitral Tribunal to decide the same on its own merits.

24 Considering these facts I am of the opinion that the petitioners have not made out any prima facie case for grant of injunction as prayed in petition under section 9 of the said Act. The observation made in the present order is prima facie.

25 Hence, the following order:

a) Petition is dismissed.

b) Ad-interim relief granted by this court by order dated 21.4.2015 to continue for six weeks.

c) Liberty granted to the petitioners to apply before the Arbitral Tribunal if it is constituted for the same relief according to law.

(K.K.TATED, J.)