IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION (L) NO. 979 OF 2016

Horizon Promoters (I) Limited .. Petitioner

Versus

Mulund Hetal CHS Limited & Anr. .. Respondents

Mr. Rohaan Cama alongwith Ms. Shoma Maitra and Mr. Ahunamazda Postvala instructed by M/s. Wadia Gandhy & Co. For the Petitioner

Mr. Abhijeet Marathe for Respondent No.1

Mr. H.S.S. Murthy instructed by Mr. Abhishek Patil for Respondent No.2

Mr. Bharat Doshi, Secretary and Mr. Naresh Doshi, Member of Respondent No.2 present

CORAM: S.J. KATHAWALLA, J.

RESERVED ON: 24th October, 2016

PRONOUNCED ON:27th April, 2017

ORAL ORDER:

1. The present Petition has been filed by the Petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 seeking, inter alia, an order directing Respondent No. 2 to hand over vacant and peaceful possession of the subject shops i.e. Shop Nos. 3 and 4, Ground

Floor, Mulund Hetal Co-operative Housing Society (the “said shops”) and in the event that this is not done, for an order appointing the Court Receiver of this Court to take necessary steps including taking police assistance, if required, for taking over possession of the said shops and handing over the same to the Petitioner.

2. The Petitioner is a developer, who has been in the construction business since 1987. As set out hereafter, the Petitioner was appointed as the Developer to carry out redevelopment of the building of one Mulund Hetal Co-operative Housing Society Limited, Respondent No.1 herein, which comprises 19 members including the owners of three shops, one of which, (being combined Shop Nos. 3 and 4) forms the subject matter of the present Petition. Respondent No. 1 is the Co-operative Housing Society referred to above. The Society is the owner of a building by the name of ‘Hetal’ comprising 15 residential premises and 4 commercial premises held and occupied by its members. Respondent No. 2, a Public Charitable Trust, is a member of the Respondent No.1 Society in respect of the said shops.

3. By an Agreement dated 9th June 1981, Respondent No. 2 purchased the said shops from one Ravi Builders. The Schedule to the said Agreement did not reflect the area of the said shops. However, Respondent No. 2 appears to be relying upon the plans attached to

the Agreement in question to claim a larger area than that agreed to under the Development Agreement, as set out below.

4. In or about 2012, on account of the dilapidated condition of the building the Respondent No. 1 Society ("the Society"), through its members decided to redevelop the said property. Towards this end the Society held a Special General Body Meeting ("SGBM") on 13th May 2012 to discuss the proposal for redevelopment. At this meeting, after recording the discussions between the members, a resolution came to be passed to proceed with and carry out the redevelopment as per the road map provided to the Society by its advocate. It was further *inter alia* resolved that a survey be conducted for measurement of the plot area and individual flats / shops / garages. This resolution was passed unanimously, including by the representatives of Respondent No. 2 in respect of the said shops.

5. It appears that pursuant to the above resolution, on 29th June 2012 a survey was carried out by one 'Uttam Surveyer's' appointed by the Society and the said surveyor prepared a plan giving the area measurement of each of the shops / flats /garages in the said building. The said area measurement plan (at Exhibit 'B' to the Petition) shows the area of the said shops as 865.84 sq.ft. It is the case of the Petitioner that it was informed to the Petitioner by the

Society that the said shops i.e. Shop Nos. 3 and 4 are a mirror image of Shop Nos. 1 and 2, which it was represented by the Society, jointly admeasure 861 sq.ft. It is submitted by the Petitioner that the slight variance in the above areas was in respect of the area under a wall between Shop Nos. 3 and 4, which had been torn down and ought not to have been included while computing the carpet area.

6. On 16th October 2012, sealed tenders were invited by the Society from builders / developers for redevelopment of the said building, by publishing tender notices in the Free Press Journal (in English), Navshakti (in Marathi) and Divya Bhaskar (in Gujarati) newspapers. The notices invited builders / developers to obtain the tender forms from the Society office, on the basis of which thereafter the tender / bids were to be submitted by the interested developers.

7. On 30th October 2012, the Petitioner purchased the tender form from the Society upon making payment of Rs. 5,000/- as stipulated in the above notices. The tender form contained various annexures. The “DETAILS OF PROJECT” at Item 7 thereof refers inter alia to the 'Area Measurement Copy' which is the very same document annexed at Exhibit ‘C’ to the Petition prepared by the Society’s surveyor. Pertinently, in the “PROJECT OFFER”, there is an express disclaimer by the Society to the effect that the area indicated in the

area measurement sheet would be taken into consideration for the purpose of all the offers given by the developer.

8. Based on the above tender form and the area measurement sheet given to the Petitioner, the Petitioner submitted its initial bid on 10th November 2012 (the acknowledgment of receipt erroneously bears the date of 9th November 2012). Pertinently, in the very first paragraph a reference is made to the 'Detail list of carpet area of existing members', which is a reference to the areas as per the area measurement plan prepared by the Society's surveyor.

9. Pursuant to the above invitation of bids, it appears that the Society received 11 offers. On 25th November 2012, a SGBM of the Society was called for and held for discussing the eleven offers received by the Society. The members gave their suggestions and specific demands and agreed to meet after fourteen days for further discussion of the bids submitted and to short list the top three developers. Respondent No. 2 was duly represented at the said meeting as evident from the signature appended to its name in the Minutes of this meeting.

10. Subsequent to the above, the Society entered into negotiations with the Petitioner herein. After negotiations with the Society, the Petitioner furnished its final offer to the Society under cover of its

letter dated 3rd January 2013. The Petitioner had at this stage offered an additional area of 35% for the shops, which subsequently, pursuant to negotiations, was brought on par with the residential premises at 43% additional carpet area.

11. The Society called for a meeting of its members on 5th May 2013 to discuss issues relating to the redevelopment and obtaining a deemed conveyance in respect of the Society's property. In the meeting it was *inter alia* recorded that it was decided unanimously to proceed further with the deemed conveyance through the Petitioner herein. Certain further discussions were held between the members in respect of the terms of the Development Agreement to be entered into. Various issues in relation to the area were also discussed including measurements being as per BMC approved plans and in carpet area only. The Petitioner was not present at this meeting, but Respondent No. 2 was duly represented at the said meeting as evident from the signature appended to its name in the Minutes of this meeting.

12. On the same day i.e. 5th May 2013, a notice was issued by the Society to all the members convening a SGBM on 19th May 2013 in the presence of the Deputy Registrar, 'T' Ward, for the purpose of casting votes to appoint the Developer for implementation of the redevelopment of the Society's property. The said notice was served

upon and received by all 19 members as evident from the signatures appended to their respective names in the list which is placed on record.

13. At the SGBM held on 19th May 2013, 18 of the 19 members of the Society were present and unanimously resolved to appoint the Petitioner herein as the Developer to carry out the redevelopment of the Society building. Respondent No. 2 was duly represented at the said meeting as evident from the signature appended to its name in the Minutes of this meeting.

14. Thereafter, negotiations and discussions ensued between the members of the Society and the Petitioner for the purpose of finalisation of the terms of the Development Agreement. The final draft of the Development Agreement was forwarded to the members of the Society by the Petitioner. The Society convened a SGBM of its members on 20th December 2013, for the purpose of finalising and approving the Draft Development Agreement. The Minutes of this meeting record that the draft of the Development Agreement was finalised and approved by all the members present in the meeting as well as by the Petitioner herein. A resolution was passed unanimously by the members present and voting to appoint certain officers of the Society to execute the Development Agreement. Respondent No. 2 was duly represented at the said

meeting as evident from the signature appended to its name in the Minutes of this meeting.

15. Accordingly, as per the Resolution passed on 20th December 2013 the subject Development Agreement dated 27th December 2013 was executed by and between the Society on behalf of its members, and the Petitioner herein. The Development Agreement, in its body as also in the Second Schedule, expressly recorded the existing carpet area of the said shop as 861 sq.ft. (i.e. 430 sq.ft. for Shop No.3 and 431 sq.ft. for Shop No.4). Further, both in the body as also in the Annexure to the Development Agreement the proposed carpet area of 1231 sq.ft. (enhanced by 43%) was recorded. Hence, it appears that all the parties were clear as to the existing area on the basis of which the bid had been made and the proposed carpet area to be given in the redeveloped building.

16. Certain relevant provisions of the Development Agreement are as under:

<u>Recitals :</u>

“N. The Society in its Special General Body Meeting held on 19.05.2013 has unanimously approved the Developers’ proposal for re-development of the said property.

O. The Society and all its member in its SGM dated 20.12.2013 has verified and confirm the terms and condition of this Development Agreement and Power of Attorney and *authorised the Managing Committee viz (1) Mr. Mahendra P. Patel (Chairman), (2)Mr. Khubilal N. Mehta (Secretary), (3)Mr. Girish M Vora (Treasurer) to finalise the Development Agreement, Power of Attorney and or documents incorporating terms and conditions as finalised in the said Special General Body Meeting. The office bearers are authorised to sign and execute such Development Agreement, Power of Attorney and or documents and admit execution thereof and take necessary actions and steps in pursuance thereof and to sign papers and documents as may be considered necessary action from time to time. (Hereto annexed and marked as "ANNEXURE – D" is the copy of said resolution dated 20.12.2013).*

<u>Clauses :</u>

3(d). No commercial use of any nature whatsoever of any flat or part thereof or any parking space shall be permitted under any circumstances and all incoming members shall be made fully aware of this stipulation and the new building proposed to be constructed shall be only residential except for four commercial premises of existing members the particulars thereof are as under:

Shop No.	*Name of the Member*	*Existing Carpet Area Sq. Ft.*	*Propose d Carpet Area Sq. Ft.*
1.	*Mr. Bharat M. Kakaria*	*861*	*1,231*
2.	*Mr. Mahesh P. Mandot*	*393*	*562*
3.	***Mulund Gogari Visha Shrimali Jain Samaaj***	***430***	***615***
4.	***Mulund Gogari Visha Shrimali Jain Samaaj***	***431***	***616***

4(a).In consideration of the grant of the development rights in respect of the said property by the Society to the Developers, the Developers have agreed to construct and provide to the Society for and on behalf of its 19 Members (called the Members Premises)(comprising 15 residential flats and 4 shops) in the said intended building, in lieu of the existing flats occupied by the Members in the existing building. As per the decision by the Society, in addition to the free carpet area offered by the Developer, the Developer will be providing approximately 43% of the extra/additional carpet area which will be inclusive of the fungible area free of cost and on ownership basis.

4(c). Accordingly the Developers have agreed to provide new Residential Flats & Shops to the Members in the new building, after taking into consideration the requirements of the individual Members of the Society, in lieu of their respective Residential Flats & Shops, in the existing building and as and by way of permanent alternate accommodation. The particulars of the 19 Residential Flats & Shops comprised in the Members Premises in the said intended building, such as the names of the Members, the carpet area of the existing Residential Flats, the free of costs entitlement, is contained in the Statement annexed hereto and marked as Annexure "______".

4(e).The carpet area of the existing Residential Flats of the Members of the Society in the existing building is as per the details contained in Annexure "______" annexed hereto. The Developers and the Society hereby agree and confirm that they have accepted the carpet area therein mentioned as the occupied area of each Member of the Society and the same shall be final and binding upon both the parties and neither party shall challenge or dispute the same.

7.For re-development of the said property, the Developers shall be entitled :

...

(c). to obtain vacant and peaceful possession of the existing premises of the members in their respective occupation within 30 days of receipt of I.O.D.

9(a). Upon Receipt of Intimation of Disapproval (I.O.D.), the Society and all its members shall handover vacant possession of all their respective tenements to the

Developers for its demolition and redevelopment of the said property within 30 days from the date of intimation from the Developers. At the time of vacating the existing premises by the members of the Society, the members are empowered and allowed to take all movable belongings but without damaging the electrical wiring, plumbing, doors, windows, grills, structure, walls. etc. It is further agreed by and between the parties hereto that if any member of the society fails to vacate and handover possession of his /her respective premises within above mentioned time limit of 30 days for unavoidable reasons, then the Developer shall give further 15 days for searching the alternate accommodations.

10(c). Once the certified copies of the sanctioned Plans and IOD is furnished to the Society, the Members shall within 45 days (including grace period) from the date thereof vacate their respective flats, tenements for demolition of the existing building and redevelopment of the said property;

10(e). The Developers shall complete the construction of the entire building with all amenities within 24 months from the date of receipt of Commencement Certificate with grace period of 6 (six) months and hand over new flats/shops/tenements to the respective Members/Society;

13. It is further agreed between the parties hereto that in the event if any of the members does not co-operate or comply with the terms of this agreement and/or do not vacate the existing premises, as referred hereinabove, in that case, such member shall be liable to pay agreed liquidated damages at Rs.50,000/- (Rupees Fifty Thousand only) per month to the Developers and the society shall co-operate the Developers in vacating the premises. The Developer are also eligible for any expenses incurred for such vacating the premises from the erring member. In addition to the above, the Developers and/or the society shall be entitled to take appropriate legal action against such non-co-operating or objecting members of the society, at the cost of such non co-operating member/s."

17. The Petitioner has placed on record a list annexed to the Affidavit in Rejoinder showing the various steps taken by the Petitioner and in particular the expenses incurred for taking the said steps including

but not limited to engaging architects, paying stamp duty, purchasing TDR, paying rental for alternate accommodation to the members of the Society who had vacated their respective premises etc. The Petitioner obtained the IOD for redevelopment on 31st December 2015 along with the sanctioned plans; the same were duly forwarded to the Society by the Petitioner on 5th January 2016.

18. For the first time, vide its letter dated 23rd January 2016, (Exhibit 'F' to the Petition) an issue was raised by Respondent No. 2 claiming that the area of its premises ought to be approximately 953 square feet; [this claim has since been substantially reduced even by Respondent No. 2's own admission]. The Petitioner has placed on record the correspondence exchanged between the parties to the Petition in this regard. The correspondence would show that according to Respondent No. 2, Respondent No. 2 was entitled to a larger area on the basis that its existing area was more than that set out in the Development Agreement. Pertinently, in its letter dated 3rd May 2016, Respondent No. 2 has noted that the Petitioner offered 43% additional carpet area considering the details of the carpet area provided in the tender and has further noted that in such circumstances were any altered area required to be given there could be no objection raised to the Petitioner revising its offer. However, it is not the case of the Respondent No. 2 that the Development Agreement was vitiated by fraud and Respondent No. 2 has at no point in time challenged any of the resolutions or indeed

the terms of the Development Agreement, in any forum. As set out hereafter, it is not the case of Respondent No. 2 that it wishes to oppose the redevelopment, but its main anxiety appears to be that there ought to be an adjudication of the area to which Respondent No. 2 claims to be entitled so that Respondent No. 2’s interest may be adequately protected in this regard, i.e. Respondent No.2 be suitably compensated for the area that it claims to be the existing carpet area, over and above the carpet area of 861 sq. ft. reflected in the Development Agreement.

19. On 9th February 2016, a letter was addressed by the Society raising certain grievances for the attention of the Petitioner, and calling upon the Petitioner to expedite the redevelopment. In this letter, the Society *inter alia* requested the Petitioner to carry out a re-measurement of all the premises. By its reply dated 9th March 2016, the Petitioner dealt with the issues raised by the Society, while expressly rejecting the request for re-measurement. The Society has not raised any dispute to the contents of this letter and has not sought to agitate the submissions / demands made in its letter dated 9th February 2016, thereby clearly having accepted the contents of the Petitioner’s letter dated 9th March 2016.

20. In light of the dispute between the parties by its Advocate’s notice dated 19th July 2016, the Petitioner invoked arbitration.

21. On 29th August 2016, the Petitioner filed the present Section 9 Petition seeking the reliefs set out therein.

22. After hearing the parties, and ascertaining the scope of the dispute, by an order dated 22nd September, 2016, passed by this Court, M/s. Shetgiri Associates were appointed to carry out a measurement, inter alia, of the said shops and to file its report with the Court. M/s. Shetgiri Associates has since filed its report dated 29th September, 2016, in which the area of the said shop nos. 3 and 4 is shown as 396.497 and 510.117 sq. ft. respectively.

23. Mr. Cama, learned counsel for the Petitioner has taken me through the above facts and the documents in support thereto. He has submitted that notwithstanding the report, it was not open to Respondent No. 2 to oppose the reliefs sought in the Petition on the ground that it was entitled to an area higher than the area reflected in the Development Agreement, inter alia, on account of the fact that the Area Measurement Plan furnished by the Society at the time of the Tender, prepared by Uttam Surveyer's, based on which the Petitioner made its offer shows, the area of Shop Nos. 3 and 4 as 865.84 sq. ft. The Petitioner has based its entire offer on the Area Measurement Plan (as modified to 861 sq.ft, in the Development Agreement), and the members of the Society, including Respondent No. 2 herein are estopped from raising any objection to the area set

out in the Development Agreement, particularly as the Petitioner has altered its position to its detriment, by incurring significant expenses, as set out in detail in the Affidavit in Rejoinder.

24. It was submitted that the Petitioner has taken substantial steps in the matter pursuant to the Development Agreement. The Petitioner has incurred considerable costs as per the Table set out in Exhibit 'B' to the Affidavit in Rejoinder. Plans have been sanctioned and the IOD obtained. 15 of the 19 members have vacated and the Petitioner is paying monthly rent to those tenants who have vacated, as set out in the Table at Exhibit ‘B’ to the rejoinder. Every month’s delay increases the above costs on the Petitioner, with no accompanying benefit to the Petitioner. The Petitioner took steps and incurred costs in enabling the Society to obtain a deemed conveyance. The Petitioner has prepared and forwarded to the Society, and in turn to Respondent No. 2 the draft Permanent Alternate Accommodation Agreement. He therefore submits that the Petitioner has altered its position to its detriment and Respondent No. 2 is thus estopped from now seeking any area other than that which is recorded in the Development Agreement.

25. Mr. Cama further submitted that the Petitioner has made a commercial offer of 1,231 sq. ft. This offer was known to Respondent No. 2’s officers, one of whom is himself a builder, and

they have, notwithstanding any purported argument on actual physical area, applied their commercial minds and accepted the offer. Having so accepted the commercial offer (being commercial men and not laymen) it does not lie with Respondent No. 2 to now contend that it is not bound by the terms of the commercial offer.

26. Mr. Cama further submitted that as per the applicable DC Regulations, for commercial premises only 20% fungible FSI is required to be provided, but the Petitioner has assured an additional carpet area of 43% over and above the existing carpet area computed at 861 sq. ft. Even assuming arguendo one was to take Respondent Nos. 2’s claimed area of approximately 907 sq. ft. based on the report of M/s. Shetgiri Associates, the Petitioner is providing approximately 35% more than the existing carpet area.

27. Mr. Cama further submitted that the entire basis of the offer made by the Petitioner was on the representation of the Society/its members as to the carpet area of each of the premises at the time of the tender. The plans have been sanctioned and IOD granted to construct on the basis of the above Area Measurement Plan, as represented to the Petitioner. The commercial offer was made based on the tender documents provided by the Society, with the full knowledge of its members, and the Petitioner cannot now be put to prejudice on account of a belated contention raised in this behalf

by Respondent No. 2. He therefore submits that the Petitioner cannot be made liable for any subsequent alteration in the area, as to do so would be to render the entire project unviable.

28. Mr. Cama submitted that Respondent No. 2 has accepted the area set out in the Development Agreement. He submits that it is specifically set out in recital O that the Society and its members have verified and confirmed the terms and conditions of the Development Agreement, which in turn includes confirmation of the area set out as existing and as proposed in Clauses 3(d) and 4(e). In the meeting of its members on 20th December 2013 the Society, through the members present and voting, including Respondent No.2, expressly approved the draft of the Development Agreement after finalizing the same, including the terms as to area. Respondent No. 2 was duly represented at this meeting on 20th December 2013 and voted in favour of the Development Agreement. Thereafter, Respondent No.2 has not challenged the Development Agreement or objected to the same or to any of the resolutions passed by the Society at any point in time, even till date. Therefore, the Petitioner is deemed to have accepted the above area set out in the Development Agreement, and cannot now seek to stall the redevelopment by belatedly demanding an increased area.

29. Mr. Cama submitted that the building is in an extremely dilapidated condition as evident from the photographs on record. Respondent No. 2 is not residing in the building and will face no hardship whatsoever and is therefore not prejudiced by dragging on the present litigation. The residential occupants are however without houses and are living in alternate accommodation. The members of the Society who have already shifted from their premises and their family members are suffering untold hardship. He further submits that the entire development will get delayed on account of a few obstructive members. He further submits that the Petitioner undertakes that within such time frame as the Court may direct, upon vacation of all the premises in the building and upon clear and vacant possession being offered to the Petitioner, the Petitioner shall furnish the Rupees One Crore bank guarantee referred to in clause 40 and shall purchase the requisite balance TDR.

30. Mr. Cama submitted that the IOD and the sanctioned plan have been finalized and that there is no area whatsoever available on the ground floor to increase the carpet area of the said shops. The Developer / Petitioner has made its offer based on the representation made to it by the Society and its members and on the above documents. No objection has been raised prior to the issuing of the IOD by Respondent No. 2 as to its area. He submits that, without prejudice to the Petitioner's rights and contentions, at

highest the claim of Respondent No. 2 can be for compensation in respect of the area that it claims ought to be considered as the existing carpet area, which dispute/claim can be raised in arbitration keeping all issues open including all submissions and contentions on both sides as to area, compensation, waiver, estoppel, the various reports of architects, etc., but Respondent No. 2 must in the meantime vacate the premises and permit the redevelopment to proceed.

31. Mr. Cama submitted that it is a well settled position in law that the decision of the majority of the members of the Society will bind the minority, including on aspects pertaining to the area proposed to be given by the Developer. This Court has had occasion to consider situations in which a particular representation as to area was made by the Society, and on the basis of such a representation an offer was made by the Developer. It was held that even if the representations as to area made by the Society were wrong, this could not work to the prejudice of the Developer who has made his bid on the basis of the said representations. Mr. Cama submitted that this Court in its several judgments, both in suits and in Arbitration Petitions under Section 9, has directed the Court Receiver to take possession of the premises of the non co-operating members and to hand over vacant possession to developer, on the principle that a few obstructive members could not be permitted to

stall the redevelopment. This Court has held that untold hardship would be suffered by the members who had already vacated and unless it could be shown that a decision of the General Body of the Society was a product of fraud or misrepresentation or was opposed to a statutory prohibition, the Courts would not interfere with the decisions of the majority of the members of the Society at the behest of some members in the minority. He submitted that in the present case there has been absolutely no challenge to the resolutions or the Development Agreement itself and there is no allegation that the same is vitiated by fraud or otherwise. He relies on the judgments of this Court in:

(i) Disha Construction vs. Jaysen S Mastakar & Ors.[1]

(ii) Shailaja S. Godbole and Others vs. Disha Constructions and Others[2]

(iii) Kalpak Property Ventures LLP vs. Sudhir M. Samel and others[3]

(iv) Mahesh Mehta vs. Harini Co-operative Housing Society Limited[4]

(v) Girish Mulchand Mehta vs. Mahesh S. Mehta[5] and

1 2014 (2) Mh LJ 353
2 2014 (1) Bom CR 385
3 Unreported decision in Notice of Motion No. 1444 of 2013 in Suit No. 793 of 2013
4 Unreported decision in Arbitration Petition (L) No. 493 of 2009
5 2010 (1) Bom CR 31

(vi) Bharat Infrastructure and Engineering Pvt. Ltd. vs. Park Darshan CHS Ltd.[6]

32. Mr. Marathe, the learned advocate for the Society has supported the stand of the Petitioner.

33. Mr. Murthy, the learned counsel for Respondent No. 2 in his submissions has fairly stated that it is not the intention of Respondent No. 2 to hold up the redevelopment. He submits that Respondent No. 2 is desirous of the redevelopment process going ahead but its only anxiety is that its rights and interests in respect of the area that it believes reflects the accurate carpet area of the said shop, be protected. He fairly submitted that the main anxiety of Respondent No. 2 was that it be adequately and suitably compensated for the area that it claims to be the existing carpet area, over and above the carpet area of 861 sq.ft. reflected in the Development Agreement.

34. Mr. Murthy submitted that as per the Minutes of the meeting held on 5th May 2013, the area ought to be as per the BMC approved plan and the area in the Development Agreement was not as per the BMC approved plan. He submitted, relying upon clause 24 of the Development Agreement, that the members of the Society had agreed to abide by the resolution dated 19th May 2013 and to

[6] 2013 SCC Online Bom 466

cooperate with the developer for implementation of the redevelopment project.

35. Mr. Murthy relied upon the Society's letter dated 9th February 2016 to suggest that the Society had raised certain issues against the developer, which merited consideration at this stage.

36. It was further sought to be contended by Mr. Murthy that the Agreement by which Respondent No.2 purchased the said shops reflects a larger area than that provided in the Development Agreement. He submitted that there may have been manipulation of the flat area by the Society at the time of the tenders being invited.

37. Mr. Murthy further contended, relying upon clause 35 of the Development Agreement, that there must have been a physical verification carried out by the Petitioner which would have revealed the area of the said shops to be that relied upon by Respondent No. 2.

38. I have heard the learned counsel for the parties, and I have considered the written submissions furnished by them. For the reasons set out hereafter, I find favour with the submissions made on behalf of the Petitioner.

39. The factual matrix set out above, will show that the entire basis of the proposed redevelopment was that the Society building was in a dilapidated condition. As far back as on 13th May 2012, the members of the Society had resolved to redevelop the said building and to take steps in pursuance thereof. Accordingly, the Society had appointed a surveyor, and under the Society's instructions the Surveyor had prepared an area measurement plan setting out the areas of the various premises. Based on this area measurement plan and the other details set out in the tender document which has been placed on record in the Petitioner's Affidavit in Rejoinder, bids were invited from interested Developers. The Society, through its tender document, had represented that the areas of the respective premises were those set out in the area measurement plan, and it was on this basis that the various bidders including the Petitioner made their offers.

40. As aforesaid, eleven offers were received by the Society and placed before the General Body of the Society on 25th November 2012. Respondent No. 2 was duly represented during the discussions in the SGBM, where *inter alia* the proposal given by the Petitioner was discussed. After considering the revised offer given by the Petitioner vide its letter dated 3rd January 2007, the members of the Society including Respondent No.2, at the meeting held on 5th May 2013 proceeded to take further steps for the redevelopment. By a notice

dated 5th May 2013, duly received by Respondent No.2, the Society called for a meeting on 19th May 2013, at which meeting, 18 of the 19 members of the Society present and voting unanimously resolved to appoint the Petitioner herein as the Developer for the purpose of the redevelopment. Pertinently, Respondent No.2 was present at this meeting and voted in favour of the appointment of the Petitioner herein as the Developer.

41. After further negotiations and discussions on the Development Agreement which was to be executed, at its SGBM held on 20th December 2013, the Society members finalised and approved the Draft Development Agreement, which eventually came to be executed one week thereafter on 27th December 2013. **As set out** above, **the Draft Development Agreement in its body as also in the Second Schedule expressly recorded the existing carpet area of the said shops as 861 square feet. Further, both in the body of the Development Agreement as also in the Annexure thereto, the proposed carpet area of 1,231 square feet to be given to Respondent No. 2 was duly recorded. Thus, it is clear that the members of the Society were all aware of the existing carpet area attributed to their respective premises, and the carpet area proposed to be given to them in lieu of the existing area. Respondent No. 2 was duly represented at this meeting and approved the**

Development Agreement with the aforesaid terms as to the area.

42. The Petitioner proceeded to incur various expenses as set out in the Table annexed to the Affidavit in Rejoinder and eventually obtained the IOD and sanctioned plans on 31st December 2015, which was duly forwarded by the Society on 5th January 2016. Till this point in the preceding two years after execution of the Development Agreement, no objection had been raised by the Society or its members, and particularly Respondent No. 2, to the terms of the Development Agreement or the areas set out therein of the respective premises of the members.

43. As apparent from the record and the submissions made by the parties hereinabove, Respondent No. 2 is not opposing the redevelopment and is in fact desirous of proceeding with the redevelopment. Respondent No. 2 has not challenged the execution of the Development Agreement and/or any of the resolutions passed by the Society in its various meetings, which were attended by representatives of Respondent No.2. It is not the case of Respondent No. 2 that its officers were not aware of the contents of the tender invited by the Society or the Area Measurement Plan on the basis of which the tenders were invited. The Petitioner made its bid on the basis of the Area Measurement Plan furnished by the Society, (as modified by approximately 4 feet as stated in paragraph

no.5 above). This bid came to be accepted by the Society and the Petitioner was duly appointed in a meeting attended by 18 of 19 members of the Society, including Respondent No.2's representative, on 19th May 2013. Subsequently, the Development Agreement, which reflects the carpet area of 861 sq.ft. and the proposed carpet area of 1,231 sq.ft. in respect of the said shops, was finalized and confirmed by the members of the Society in a meeting held on 20th December 2013, which was attended by the representative of Respondent No.2 who participated in finalization of the Development Agreement and voted in favour thereof. At no point was any objection raised by Respondent No. 2 either to the resolutions passed or to the execution of the Development Agreement and/or the terms thereof. In fact, as set out above Respondent No. 2 had participated in the redevelopment process at every stage. In response to a query from the Court, there was no cogent explanation as to how Respondent No.2 could raise disputes as to the area in the Development Agreement, at this stage, having attended the meeting on 20th December 2013 and having approved and finalized the Development Agreement with the areas specifically set out therein.

44. In my opinion, prima facie, Respondent No. 2 appears to have been well aware of the area reflected in the tender documents, on the basis of which the Petitioner submitted its bid, as also the terms of the Development Agreement, which both in its body and in the

Annexures thereto, clearly reflect the existing carpet area of the said shops as 861 sq.ft. The Petitioner made a commercial offer of 1,231 sq.ft. proposed carpet area, which commercial offer was accepted by Respondent No. 2 with full knowledge and after its officers applied their commercial minds to the same.

45. Respondent No.2 cannot now be permitted to stall the entire redevelopment process on the basis of a claim, raised belatedly, that it is entitled to a larger area. I find force in the submission made on behalf of the Petitioner that the IOD has been issued, the plan sanctioned and the building being in a residential zone (as a result of which shops can only be provided on the ground floor), there is no question of now altering the plan or providing any further area on the ground floor of the proposed building to any of the shops.

46. As held by this Court on numerous occasions including in the judgments relied upon by the learned Counsel for the Petitioner, the decision of the majority of the members of the Society shall prevail over objections raised by the minority in this manner. The majority of members of the Society in various meetings, which were attended by the representatives of Respondent No. 2, having accepted the Development Agreement, and the terms thereof, the same are binding on Respondent No. 2. As stated above, it is not the

case of Respondent No. 2 that the Development Agreement was vitiated by fraud in any manner whatsoever. Respondent No. 2 cannot be permitted to stall the entire redevelopment process when 15 of the 19 members of the Society have already vacated and are out of their homes. Indeed, it would be in the best interests of Respondent No. 2 as well, if the redevelopment was to proceed expeditiously.

47. The learned Counsel for Respondent No. 2 has fairly submitted that it has no desire to obstruct the redevelopment, and is only concerned with ensuring that it is adequately compensated for the area to which it claims to be entitled. This, coupled with the fact that the Petitioner has expended considerable sums and taken several steps towards the redevelopment process, and as on date 15 of 19 members have vacated their premises and are residing in alternate accommodation for which the Petitioner is paying rent, would lead me to conclude that there is no justification for the Respondent No.2 not vacating the said shops and being permitted to agitate its claim for compensation in arbitration. The balance of convenience is completely in favour of the Petitioner and the members of the society who have vacated their flats and against the Respondent No.2.

48. As regards the contention raised by Respondent No. 2 that in the meeting held on 5th May 2013, it was agreed to provide the area stated in the BMC plans, it is relevant to note that the Petitioner was not present in the meeting and thus nothing claimed to be agreed therein could be said to be binding on the Petitioner. In any event, after that meeting was held, wherein there was a discussion on the areas in the BMC approved plans, the members of the Society proceeded to appoint the Petitioner as the Developer on 19th May 2013 and proceeded to finalize the Development Agreement, containing its present terms on 20th December 2013, with the full knowledge and concurrence of Respondent No. 2. Hence, there is no merit in the suggestion of Respondent No. 2 that there is any violation of what was purportedly agreed in the meeting on 5th May 2013.

49. As regards the Society's letter dated 9th February 2016 and the contentions raised therein, the same has been replied to in detail by the Petitioner vide its letter dated 9th March 2016, which has since not been disputed by the Society, and the Society appears to have accepted the contents of the said letter dated 9th March 2016. Hence, it is not open for Respondent No. 2 to now attempt to rely upon the Society's letter, when the Society has clearly accepted the correctness of the Petitioner's response thereto.

50. It was also contended in the Affidavit in Reply filed by Respondent No. 2 that the Petitioner has reduced the height of the commercial premises from the permissible 12.5 feet to 11 feet. Firstly, this is not the reason given by Respondent No. 2 in its correspondence for not vacating, and is completely extraneous to the present issues. In any event, the Petitioner has explained that this was necessitated on account of the MCGM's directions to ensure that a 6 foot service floor was erected between the outer ceiling of the shops / commercial portion, and the first floor flats, to avoid the first floor flats being given a private terrace which is not permissible in law. All the residential flats have been reduced in height from 10 feet to 9.5 feet and the commercial premises from 12.5 feet to 11 feet. This was reflected in the sanctioned plan, and even prior to sanction of the plans, a copy of the plans were furnished to Respondent No. 2 as far back as on 17th August 2015. Pertinently, no objection was raised to this reduction in height by Respondent No. 2 or any other member at the relevant time or at any time thereafter, till now.

51. As regards the contention raised by the learned counsel on behalf of Respondent No.2 that the Agreement by which Respondent No.2 purchased the said shops reflects a larger area than that provided in the Development Agreement, it is to be reiterated that the offer was given by the Petitioner on the basis of the tender issued by the Society which contained the area measurement plan (as modified from 865.84 sq. ft. to 861 sq. ft. in the manner set out above) and

Respondent No.2, with full knowledge and applying its commercial mind accepted the area recorded in the Development Agreement and cannot now be heard to contend that it is entitled to any other area than that specified in the Development Agreement.

52. As regards the area measurement plan prepared by Uttam Surveyer's and shown as part of the tender document, it was sought to be contended on behalf of Respondent No. 2 that the surveyor had wrongly referred to the subject premises as a 'flat' and it was thus suggested that the plan was infirm in some manner. This contention is misconceived since admittedly there is no 'flat' bearing Nos. 3 and/or 4 in the subject building and the reference to the word 'flat' in the area measurement plan was obviously a reference to the shops insofar as it related to units 1 to 4 set out therein.

53. It was further sought to be contended by the learned Counsel for Respondent No. 2 that there may have been a manipulation of the flat area by the Society at the time of inviting the bids. This contention appears to be clearly speculative and hypothetical. Pertinently, no steps have been taken by Respondent No. 2 against the Society in respect of this alleged manipulation. In any event, the Petitioner cannot be rendered liable in respect of any such alleged manipulation by the Society as the Petitioner submitted its bids on the basis of the representations made by the Society, which bids

were duly accepted and the areas finalized in meetings attended by the representatives of Respondent No. 2.

54. It was further sought to be contended by the Advocate for Respondent No. 2 that at a meeting of the Society, (erroneously referred to as the meeting of 19th May 2013), the Society members agreed that the area of the respective premises of its members would be taken as per the BMC approved plan. Firstly, the meeting in question was a meeting of 5th May 2013 and not 19th May 2013. As set out above, and as evident from the Minutes of the Meeting itself, the discussion in the meeting pertained to fixing of a further meeting on 19th May 2013 for the purpose of appointment of the Petitioner as the Developer. In fact, as set out in the factual narration above, on 5th May 2013 a notice was issued to the members informing the members of the meeting to be held on 19th May 2013. That notice was served upon and received by all the 19 members. It was at this meeting on 19th May 2013 that the Petitioner was appointed as the Developer. The reference in clause 24 of the Development Agreement, which was sought to be relied upon by Respondent No.2, is a reference to the meeting held on 19th May 2013 and not the meeting held on 5th May 2013. Thus, the argument which was sought to be made to the effect that the Development Agreement provides that the Petitioner had agreed to abide by the areas referred to in the BMC approved plans discussed

in the meeting on 5th May 2013 is misconceived; there was no such agreement to comply with the resolutions passed in the meeting on 5th May 2013, in clause 24 of the Development Agreement or elsewhere therein. In any event, as stated above the Petitioner was not present at the said meeting and cannot be bound by the discussions thereat. Even otherwise, the meeting on 5th May 2013 stands superceded by the terms of the Development Agreement which were arrived at, circulated to the members and finalized and approved at the meeting held on 20th December 2013, which meeting was attended by the officers of Respondent No.2. The reference to the meeting in which the BMC approved plans were discussed, as being the meeting of 19th May 2013, in a letter placed on record in the Affidavit in Sur-Rejoinder filed on behalf of Respondent No.2 is clearly a mistake and is contrary to the said Minutes of the Meetings themselves. The Affidavit in Sur-Rejoinder was served on the morning of the arguments and the Petitioner has proceeded with the arguments without admitting the correctness of the contents of the said Affidavit and on the basis of denials.

55. Notwithstanding the above, given that Respondent No.2 has repeatedly sought to contend, through its Advocate, that the area ought to be as per the BMC approved plans, it is relevant to observe that the BMC approved plans provide that the entire ground floor consisting of Shop Nos. 1 and 2 and the mirror image Shop Nos. 3 and 4 (which form the subject matter of the present Petition) all

combined aggregate to an area of 1980 sq. ft. built-up area. Therefore, the area of the said Shop Nos. 3 and 4 would be approximately half of the above area, i.e. 990 sq. ft. built-up area which in turn is approximately 825 sq. ft. carpet area. The existing area of the said shops as stipulated in the Development Agreement is 861 sq. ft. which is 36 sq. ft. more than the area to which Respondent No.2 would be entitled were it to proceed strictly on the basis of the BMC approved plans. Hence, even this contention of Respondent No.2 is misconceived, and cannot assist Respondent No.2.

56. Learned Counsel for Respondent No.2 sought to rely upon clause 35 of the Development Agreement to contend that there must have been a physical verification done by the Petitioner which would have revealed the area as relied upon by Respondent No.2. This contention is misconceived; clause 35 cannot be read out of context and must be read in the context of the various other provisions of the Development Agreement which specifically refer to the existing carpet area of Respondent No.2's premises being accepted as 861 sq. ft.

57. In light of the above, I am thus inclined to grant the relief prayed for by the Petitioner.

58. That being said, in the interest of Respondent No. 2 to enable it to agitate any claim that it may have for compensation in respect of the area that it claims ought to be considered as the base carpet area upon which 43% additional carpet area is to be calculated, Respondent No. 2 is at liberty to raise all claims as it may desire in respect of compensation for the additional area claimed by it in appropriate arbitral proceedings should it choose to institute the same. It is made clear that this Court shall not be deemed to have expressed an opinion on the merits of the claim, if any, is made, for compensation as above. All rights, contentions and submissions of all the parties in respect of the various reports, and the issues forming the subject matter of the present Petition, in so far as they relate to the entitlement of Respondent No. 2 to compensation for a larger area than that provided under the Development Agreement, and to the Petitioner's claim for damages as prayed for, are thus kept open.

59. Further, the Court accepts the Petitioner's undertaking that within one week from the vacation of all the remaining premises in the subject building, the Petitioner will submit the requisite bank guarantee contemplated under clause 40 of the Development Agreement and will purchase the requisite balance TDR as required to give effect to the Development Agreement.

60. In the circumstances, I pass the following order:

(i) The Petitioner shall on or before 12th June, 2017, make all payments to Respondent No.2 as agreed/provided in the Development Agreement

(ii) Respondent No. 2 shall on or before 12th June, 2017, execute Agreement/s for Permanent Alternate Accommodation and hand over quiet, vacant and peaceful possession of the said shops to the Respondent No.1 Society, which in turn shall forthwith hand over the same to the Petitioner to proceed with the redevelopment in accordance with the Development Agreement dated 27th December 2013.

(iii) If Respondent No. 2 fails to hand over possession of the said shops to the Petitioner, the Court Receiver of this Court shall without reference to this court stand appointed as the Receiver of the said shops and the Court Receiver shall forthwith proceed to take physical possession of the said shops from Respondent No. 2, including with police protection if so required, from the appropriate police station having jurisdiction over the area where the said shops are situated, and to handover the same to the Society for being handed over to the Petitioner.

(iv) If Respondent No. 2 refuses to accept payments or to execute the Permanent Alternate Accommodation Agreement, the Petitioner shall deposit the payments with the Court Receiver and the Court Receiver will execute the Permanent Alternate Accommodation Agreement/s on behalf of Respondent No. 2.

(v) Respondent No.2 is at liberty to raise any claims as it deems fit in respect of compensation for the additional area claimed by it in appropriate arbitral proceedings should it choose to institute the same. This Court shall not be deemed to have expressed an opinion on the merits of the claim, if any is made, for compensation as above. All rights, contentions and submissions of the parties in respect of the various reports, and the issues forming the subject matter of the present Petition, in so far as they relate to the entitlement of Respondent No. 2 to compensation for a larger area than that provided under the Development Agreement and to the Petitioner's claim for damages as prayed for, are kept open.

(vi) The Petitioner's undertaking that within one week from the vacation of all the remaining premises in the subject building, the Petitioner will submit the requisite bank guarantee contemplated under clause 40 of the Development Agreement and will purchase the requisite balance TDR as required to give effect to the Development Agreement, is accepted.

(vii) Liberty is granted to the parties to move this Court for further reliefs in case of breach of any direction/s, statement/s and/or undertaking/s recorded in this order or in the Development Agreement.

(viii) The Arbitration Petition is disposed of in the above terms, with no order as to costs.

(S.J. KATHAWALLA, J.)