

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

IN ITS COMMERCIAL DIVISION

**NOTICE OF MOTION NO. 147 OF 2013
IN
COMMERCIAL SUIT NO. 62 OF 2013**

Aurora Properties & Investments .. Plaintiff

Vs.

1) Bombay Slum Development Corpn. Ltd.

2) Samir Narayan Bhojwani .. Defendants

Mr. Snehal Shah a/w Ms. Deepti Panda, Mr. Sanmish Gala and Ms. Aditi Bhat i/b Markand Gandhi and Co. for Plaintiff/Applicant

Mr. V. K. Ramabhadran, Senior Advocate a/w Ms. Sneha Vani i/b Law Charter for Defendant No. 1;

Mr. Chirag Balsara a/w Mr. Parimal K. Shroff, Mr. D. V. Deokar, Mr. Sachin Pandey and Mr. D. Parikh i/b M/s. Parimal K. Shroff and Co. for Defendant No. 2.

**CORAM : K.R.SHRIRAM, J.
RESERVED ON : 22ND SEPTEMBER 2017
PRONOUNCED ON : 9TH OCTOBER 2017.**

P.C.

1 One Andheri Kamgar Nagar Co-operative Society was registered as a Society (Society) under the Maharashtra Co-operative Societies Act, 1960. 237 members of the Society were paying pitch rent to Maharashtra Housing Area Development Authority (MHADA) which was declared as a slum under the Slum Development Scheme. The Society appointed Plaintiff as Developer. By a letter dated 1st August 1999, the Society accorded their

consent to Plaintiff granting sub-development rights to defendant no.1 and further confirming that they would execute a fresh Power of Attorney (POA) in favour of defendant no.1 upon Plaintiff surrendering the POA executed by the Society in their favour. On 22nd September 1999, a sub-development agreement between Plaintiff and defendant no.1 was entered into under which defendant no.1 was to utilize 80,000 sq.ft. built-up area in the construction of the building for rehabilitating the eligible members of the society, 15,000 sq.ft. built-up area to be retained by Plaintiff and balance 1,30,000 sq.ft. built-up area available for construction of building and sale of flats on ownership basis and the sale proceeds were to be appropriated by defendant no.1.

2 Defendant no.1 constructed a building of Ground plus 7 upper floors for rehabilitation of 97 members of the Society and on 10th May 2002 obtained occupation certificate (OC). On 10th March 2003, an agreement between defendant no.1 and defendant no.2 was entered whereby defendant no.1 retained for itself the right to construct 45% of the total area for construction utilizing the FSI of the property towards free sale component and was entitled to independently sell, transfer, lease or grant on leave and license basis or otherwise deal with 40% of the total area available to defendant no.1. Defendant no.1 was entitled to deal with balance 5% once

defendant no.1 refunded the amount of refundable deposit paid by defendant no.2 to defendant no.1 and enter into agreement for sale thereof to persons of his choice on ownership basis and to recover, realize and appropriate to itself the entire sale proceeds without accounting for the same to defendant no.2. Similarly, defendant no.2 was entitled to deal with and dispose of 55% of the total available area without accounting for the same to defendant no.1.

3 On 7th July 2005, defendant no.2 issued a power of attorney (POA) in favour of defendant no.1 authorizing defendant no.1 to execute agreements for sale on ownership basis and/or leave and license basis of flats and car parking spaces in respect of identified flats in Wing A, identified flats in Wing B, identified flats in Wing C and identified car parking spaces as per plans. In other words, 45% of flats and car parking space of defendant no.1 were identified. Similar POA was executed by defendant no.1 in favour of defendant no.2. In the agreement between defendant no.1 and defendant no.2, rights of Plaintiff were recognized but consent of Plaintiff had not been obtained. Therefore, a Tripartite Agreement dated 11th September 2009 was entered into between Plaintiff, defendant nos.1 and defendant no.2 whereby it was mutually agreed that Plaintiff would be entitled to 22,500 sq.ft. of constructed area instead of 15,000 sq.ft. that was agreed earlier

between Plaintiff and defendant no.1 and proportionate increase in car parking space. This entire 22,500 sq.ft. was to form part of the 45% area that defendant no.1 was entitled to. Construction in A Wing and B Wing were completed and occupation certificate in respect of these two wings were also issued. Since certain disputes arose, Plaintiff filed the present suit seeking :

- (a) Declaration that the Agreement dated 22nd September 1999 read with Agreement dated 11th September 2009 are valid, subsisting and binding;
- (b) For specific performance of the agreements dated 22nd September 1999 and 11th September 2009 including handing over to Plaintiff constructed area of 22,000 sq.ft. in the free sale building along with proportionate car parking space in the form of 12 flats in A and B Wing and 24 car parking space;
- (c) In the alternative to prayers (a) and (b), damages in the sum of Rs.1,73,47,53,425/-;
- (d) In the alternative, directing defendants to refund sum of Rs.75 crores with interest;
- (e) Injunction restraining defendants from dealing or disposing or parting with possession of the premises and car parking and other orders.

4 By an order dated 3rd December 2012, both defendants were restrained from selling, disposing of, alienating, encumbering or creating third party right in respect of four flats in Wing A and 4 flats in Wing B in respect of which OC has already been issued and in respect of four flats in

Wing C which were identified on the plan tendered. Ad-interim order was modified on 17th December 2012 whereby injunction was against 5 flats in Wing A and 3 flats in Wing B. There was no change regarding Wing C. Wing C is not yet completed for which there is an arbitration proceeding going on between defendant no.1 and defendant no.2.

5 On 30th March 2013, defendant no.2 filed petition under Section 9 of the Arbitration and Conciliation Act, 1996 (The said Act) against Plaintiff and defendant no.1 for an order that pending the arbitral proceedings and passing of the Award, defendant no.1 be restrained from in any manner dealing with or disposing of or creating third party rights or encumbering the flats and car parking slots coming to their share as their entitlement under the agreement for development dated 1st March 2003. Defendant no.2 also prayed for directing defendant no.1 to deposit a sum of Rs.6.40 crores as security and furnish bank guarantee for Rs.30 crores of any nationalized bank. Defendant no.2 also filed a notice of motion for stay of this suit. The notice of motion was dismissed and the Court refused to grant any relief in the petition filed under Section 9 of the said Act holding that Plaintiff was not a party to the arbitration proceedings. This order was impugned in the Supreme Court and the Special Leave Petition was also dismissed. Section 9 petition was withdrawn by defendant no.2.

6 Defendant no.2 thereafter commenced arbitration proceedings against defendant no.1. Plaintiff is not a party thereto.

7 By an Order dated 12th October 2016 (“*Arbitrator's Order*”) passed in an application filed under Section 17 of the said Act, the Learned Arbitrator was pleased to direct Defendant No. 1 herein (Respondent thereto) to refund the deposit of Rs. 3,90,00,000/- to Defendant No. 2 herein (Claimant thereto) within 2 months of getting keys and possession of the 16 flats in Wing 'B'. Under the said interim Order, the Learned Arbitrator held that 45% of Defendant No. 1's entitlement in the constructed flats (Wings 'A' and 'B') equaled 39.6 flats. However, under the High Court Order 8 flats were enjoined in favour of Plaintiff and balance of 31.6 flats were available which were to come to the share of Defendant No. 1. The Learned Arbitrator was pleased to hold that only 88 flats have been constructed being 72% of the total construction in the said project. In the circumstances the Learned Arbitrator was pleased to hold that entitlement of Defendant No.1 is 45% of the 72% which works out to 32.4%. The Learned Arbitrator held that in equity, taking 32.4% of 88 constructed flats on the said property, Defendant No. 1 was expected to get 28.5 flats at this stage of the project and at this stage of the arbitral proceedings. The Learned Arbitrator further held that since by the Order passed by the Hon'ble High Court on 3rd December 2012,

12 flats have been kept aside awaiting the outcome of the suit, the said 12 flats cannot be distributed or diluted at this stage in the absence of Plaintiff in the present proceedings. The Learned Arbitrator held that for the present, 12 flats in Wings 'A' and 'B' from out of the 28.5 flats, would have to be kept out of consideration for the time being. The Learned Arbitrator held that 28.5 flats less 12 flats equals to 16.5 flats which Defendant No. 1 can look forward to at this interim stage of the arbitral proceedings. Since the claim of Defendant No. 2 before the Learned Arbitrator is that of damages, it was held that even on succeeding finally in the arbitral proceedings Defendant No. 2 if gets a decree of specific performance plus compensation the same could be realised from the flats in Wing 'A', i.e., the 15 flats that had been left aside or otherwise earmarked for Defendant No. 1. The said 15 flats in Wing 'A' are to remain so that Defendant No. 2 can look to these flats for making recovery of its dues in case Defendant No. 2 succeeds in the arbitral proceedings and it is held that Defendant No. 2 is entitled to some compensation.

8 Defendant No. 2, preferred an appeal against the Arbitrator's Order under Section 37 of the said Act before this Hon'ble Court. By an Order dated 21st November 2016, the Arbitrator's Order was upheld by this Hon'ble Court. This Court was pleased to reproduce the entitlements of the

Defendants in a table set out in the said Order. This Court was pleased to observe that *“the Learned Arbitrator has come to a conclusion that taking 32.4% of 88 flats, in equity, the Respondent can expect to get 28.5 flats at this stage of the project and at this stage of the arbitral proceedings. The Learned Arbitrator has then kept aside the 12 flats to be given to Plaintiff and observed that it would leave 16.5 flats for the respondent at this stage of the arbitral proceedings.”*

9 This Court further observed that *“the Learned Arbitrator has also observed that even on succeeding finally in the arbitration proceedings, if the petitioner gets a decree for a specific performance plus some compensation amount, the petitioner would be able to realise the same from the flats in 'A' Wing which are otherwise earmarked for the respondent to which keys are not being directed to be handed over at this stage. The flats in “A” wing earmarked for the respondent has been directed to remain as they are, so that the petitioner can turn to those flats for making recovery of his dues in case the petitioner succeeds in the arbitral proceedings and it is held that the petitioner is entitled to some compensation in addition to the relief of specific performance of the development agreement dated 10 March 2003.”* This Hon'ble Court held that the Order of the Learned Arbitrator is fair, just and equitable especially after noting that Defendant No. 2

(Petitioner under Section 37 application) has already disposed of his share of 55% of the said flats. This Court further noted that Defendant No. 2 had by a letter dated 14th August 2012 written to Defendant No.1 asking Defendant No. 1 to take possession of the flats in Wings 'A' and 'B'. The Learned Arbitrator held that Defendant No. 2 has confirmed Defendant No. 1's entitlement by offering to handover possession of the flats in Wings 'A' and 'B'.

10 Defendant No. 2 hereto preferred a SLP impugning the Order dated 21st November 2016 passed by this Hon'ble Court. By an Order dated 14 December 2016 the SLP was dismissed with the clarification that any observations made by the arbitrator or by the High Court in the matter shall not stand in the way in deciding the matter finally between the parties.

11 In response to the above Notice of Motion Defendant No. 1 filed its affidavits in reply raising various contentions. In the meantime, however, disputes and differences that had arisen between Plaintiff and Defendant No. 1 have been mutually settled. The parties have executed and filed consent terms on 25th September 2017. In the circumstances, Shri Ramabhadran, counsel for Defendant No. 1 in fact did not oppose this notice of motion, instead supported Plaintiff.

12 Plaintiff states and submits that Plaintiff is entitled to 12 flats in Wings A and B along with 24 car parking spaces (the said premises). Defendant No. 1 is bound and liable to hand over possession of the said premises to Plaintiff in performance of its obligations under the Agreement dated 22nd September 1999 (the said agreement). Plaintiff has agreed to accept in full and final settlement of all its claims against Defendant No. 1, 8 flats and 16 car parking spaces which have been identified by and between the parties. Further, POA dated 7 July 2005 also, *inter alia*. authorises Defendant No. 1 to execute agreements for sale on ownership basis of flats, car parking spaces and other areas in the said building constructed on the said property in respect of Defendant No. 1's areas defined in the said POA in its own name and appropriate the same in its own right as Defendant No. 1 may deem fit.

13. Since the conclusion of the arguments on the notice of motion, formal consent terms, *inter alia* incorporating the Terms of Settlement which are already on record, are arrived at and signed as between Plaintiff and Defendant No. 1 and in terms of which the parties will seek indulgence of this Court for passing the necessary Decree and orders in terms thereof.

14 Shri Balsara appearing for defendant no.2 submitted as under :

A. Defendant No.2 is entitled to 55% of the free sale component of the entire project :

(i) Under the Agreement for Development dated 10th March 2003 entered between Defendant No.1 and Defendant No.2, under Clause 3(b), Defendant No.2 is entitled to 55% of the area available from free sale building and car parking and Defendant No.1 is entitled to 45% of the total area and car parking.

(ii) Though Wing 'A' and Wing 'B' have been fully constructed and Occupation Certificates have been issued by the Slum Rehabilitation Authority, Defendant No.2 has not handed over possession of the 45% of the entitlement of Defendant No.1 in Wing 'A' and Wing 'B' in view of failure on the part of Defendant No.1 in performing their part of obligations under the said Development Agreement dated 10th March 2003.

(iii) The Agreement dated 10th March 2003 clearly casts an obligation on the part of Defendant No.1 to ensure that Defendant No.2 would exploit the entire free sale component on the said Plot which admeasured 1,875 sq. mtrs. For complying with the said obligation Defendant No.1 was to construct 107 tenements for Housing Project Affected Persons (PAP) and only thereafter would the Special Planning Authority (Slum Rehabilitation Authority in the present case) grant permission to exploiting the balance FSI which is at present 3 in respect of Slum Plots. Hence, Defendant No.2 has

a substantial Claim before the Arbitrator which is pending.

(iv) The fact is that Defendant No.2 is entitled for 55% of the free sale component has been admitted by Defendant No.1.

(v) It is therefore clear that Defendant No.1 is not entitled to 45% of the constructed area.

B. Admittedly Plaintiff is claiming their share from the 45% of Defendant No.1 in the entire project.

(i) There is no lis between Plaintiff and Defendant No.2. It is an admitted fact that Plaintiff are seeking 22,500 sq. ft. constructed area with proportionate car parking spaces in the form of 12 flats in Wings “A” and “B” from out of the share of Defendant No.1 under the Agreement for Development between Defendant Nos. 1 and 2.

(ii) Defendant No.2 has already handed over 16 flats to Defendant No.1 under the Order dated 12th October 2016 passed by the Arbitral Tribunal. The possession of the 16 flats are with Defendant No.1. Defendant No. 2 has no objection to Defendant No.1 handing over 8 flats therefrom to Plaintiff as per the purported arrangement arrived at between Plaintiff on the one hand and Defendant No.1 on the other hand.

C. The right of Defendant No.1 has been crystallized only in respect of 16 flats. However, the issues are still at large before the Arbitral Tribunal hearing the arbitration dispute between Defendant No.1 and Defendant No.2. Defendant No.1 could have executed the Interim Award only in respect of 16 Flats.

(i) The Order dated 12th October 2016 directs Defendant

No.2 to hand over the physical possession of 16 flats in Wings 'A' and 'B' to Defendant No.1.

(ii) The Order dated 12th October 2016 does not direct Defendant No.2 for handing over the possession of the 12 flats to Defendant No.1 and therefore, the flats now sought for by Plaintiff is in fact not subject matter of the Order dated 12th October 2016. The Arbitral Tribunal prima facie found that Defendant No.1 have failed to comply with the obligations under the Agreement for Development dated 10th March 2003 and in particular failure on the part of Defendant No.1 in not handing over 107 Project Affected Persons tenements ("PAP Tenements") to SRA which prevented the issuance of Commencement Certificate for 6th to 22nd floors of Wing 'C' of the subject project.

(iii) Defendant No.1 has not filed an Appeal against the Arbitrator's order disallowing the Application to the extent of not directing Defendant No.2 to hand over possession of the remaining 12 flats to Defendant No.1. Therefore, Plaintiff cannot seek physical possession of the 8 flats from Defendant No.1 and in turn seek directions against Defendant No.2 to deliver 8 flats from and out of the 45% of the entitlement of Defendant No.1.

(iv) The project, the subject matter of the Development Agreement between Defendant No.1 and Defendant No.2, covers an area of more than 12,000 sq. mtrs. and from the entire project, Defendant No.1 is entitled to 45% of the constructed area together with car parking. Admittedly, though the Building 'A' and Building 'B' are constructed and the

Occupation Certificates are issued by MCGM, however, Wing 'C' has not been constructed by Defendant No.2. Thus, the project, the subject matter of the Development Agreement between Defendant No.1 and 2 is not completed and substantial FSI / Construction is still to be carried out in the project. In the circumstances, Plaintiff cannot seek the physical possession of 8 Flats from and out of the entitlement of Defendant No.1 being 45% in the project and on this ground alone the Notice of Motion taken out by Plaintiff is liable to be dismissed with costs.

D The Findings of the Arbitration Tribunal while passing the Order dated 12th October, 2016 on the Application under Section 17 of the Arbitration and Conciliation Act, 1996 clearly show that the claim of Defendant No.2 against Defendant No.1 is sustainable in the Arbitration proceeding :

(i) The Arbitrator's Order categorically observed that the Order dated 3rd/17th December 2012 passed by this Court in the above Notice of Motion was on the basis of the Tripartite Agreement and that Defendant No.1 shall provide 22,500 sq. ft. constructed area to Plaintiff out of 45% built-up area coming to the share of Defendant No.1 under the Agreement dated 10th March, 2003. The Arbitrator has observed that the High Court Order for keeping aside the 12 flats for Plaintiff cannot be disturbed or diluted at this stage in the absence of Plaintiff in the arbitration proceedings. In fact, the Arbitrator has observed that the Tribunal does not give any finding in favour of Plaintiff that it is entitled to 12 flats in Wings 'A' and 'B'. The Arbitrator has further observed that the issue cannot

be foreclosed at this stage nor the Arbitral Tribunal pre-empt any clarificatory orders which the High Court may pass on this issue in future.

E. The Scope of Order under Section 17 of the Arbitration and Conciliation Act, 1996 dated 12th October 2016 of the Sole Arbitrator is limited and is interim in nature and all other issues (outside the said Order) are at large pending before the Arbitrator.

(i) The Arbitrator passed Order dated 12th October 2016 and has decided about the application of Defendant No.1 under Section 17 of the Arbitration and Conciliation Act, 1996 and passed the Order in respect of 16 flats. The said Order dated 12th October 2016 is by its very nature an interim order. All other issues raised in Arbitration proceedings by Defendant No.2 against Defendant No.1 are at large and pending before the Sole Arbitrator. By virtue of the said Order dated 12th October 2016 no issue in arbitration is finally decided. Therefore, Plaintiff are not entitled to rely upon the Arbitrator's Order and seek any relief in support of this Notice of Motion for claiming 8 flats against Defendant No.2 at the interim stage.

(ii) The Interim Order and/or Interim Award under Section 17 of the Arbitration and Conciliation Act, 1996 dated 12th October 2016 makes observations which are prima facie and cannot be considered as "final adjudication of issues" and cannot be the basis for passing Order in this Notice of Motion in respect of 8 flats claimed by Plaintiff against Defendant No.2.

(iii) The Order of the Sole Arbitrator dated 12th October 2016 passed under Section 17 of the Arbitration and Conciliation Act, 1996 which was confirmed by this Court by its Order dated 21st November 2016 was taken up by Defendant No.2 in the Special Leave Petition (C) No. 35563 of 2017 before the Hon'ble Supreme Court under Article 136 of the Constitution of India. The Order passed by this Court on 21st November 2016 continuing the Order dated 12th October 2016 does not raise the said interim Order dated 12th October 2016 to a higher pedestal. The Hon'ble Supreme Court while dismissing the SLP of Defendant No.2 vide its Order dated 14th December 2016 categorically observed

“We make it clear that any observation made by the Arbitrator or by the High Court in the matter shall not stand in the way in deciding the matter finally between the parties.”

In view of these observations of the Hon'ble Supreme Court none of the observations made in the Arbitrator's Order or of this Court in its Order dated 21st November 2016 would assist Plaintiff in support of the above Notice of Motion. Any effect of observations made in the Arbitrator's Order are prima facie and cannot be relied upon for the purpose of passing any relief in favour of Plaintiff in the above Notice of Motion which has far reaching effect on the merits in the above Suit and the case of Defendant No.2 in pending and ongoing arbitration proceedings before the Sole Arbitrator.

(v) In view of the reliefs sought by Defendant No.2 in arbitration, Defendant No.1 being in default of carrying out

reciprocal obligations and Defendant No.1 being entitled to 45% constructed area only upon Defendant No.1 carrying out their obligations under the Agreement for Development dated 10th March 2003, Plaintiff will not become entitled to 8 flats at this stage from 45% entitlement of Defendant No.1 and the same can be decided only upon the final adjudication of claims and/or matter in arbitration between Defendant Nos.1 and 2.

(vi) Plaintiff who is admittedly claiming 22,500 sq. ft. constructed area and now 8 flats as per the purported settlement between Plaintiff and Defendant No.1 dated 4th November 2016 comes out of 45% entitlement of Defendant No.1 in the said project. Therefore, unless Defendant No.1 becomes entitled to 45% constructed area and/or entitlement under the Agreement for Development dated 10th March 2003 upon final adjudication of rival claims and/or matter in arbitration, Plaintiff cannot stake any claim to the 8 flats or seek any relief in respect of 8 flats in the above Notice of Motion against Defendant No.2 at the interim stage.

F. Ad-interim Order dated 3rd December 2012 read with Order dated 17th December 2012 passed by the Hon'ble Mr. Justice S.J. Kathawalla are subject to the observations made therein.

(i) The Order dated 3rd December 2012 read with order dated 17th December 2012 are consent orders passed in the above Notice of Motion keeping all the contentions of the parties open. It is also relevant to note that the Hon'ble Court in fact clarified at the time of passing of the Order dated 3rd December 2012 that the subject 12 flats pertains to 45% share

in the possession of Defendant No.1 as per the agreement entered by and between Defendant Nos.1 and 2 and that Defendant No.2 will be contending that Defendant No.1 is not entitled to their 45% share in the flats so constructed on the ground that Defendant No.1 has allegedly not complied with their obligations under the Agreement.

G. No decree can be passed against Defendant No.2 based on the purported admission on the part of Defendant No.1.

(i) This Notice of Motion has been filed by Plaintiff, *inter alia*, seeking injunction against Defendants qua 22,500 sq. ft. constructed area in the Wings A and B and for appointment of Receiver. The alleged admission on the part of Defendant No.1 to deliver possession of 8 flats from and out of its entitlement of 45% under the Agreement for Development dated 10th March 2003 cannot bind Defendant No.2. The prayers in the Notice of Motion cannot be molded to pass the decree on admission between Plaintiff and Defendant No.1 when in fact such decree on purported admission under Order XII Rule 6 of the CPC cannot bind Defendant No.2. Defendant No.2 has not admitted either expressly or impliedly to deliver physical possession of 8 flats from and out of the entitlement of Defendant No.1 under the Agreement for Development dated 10th March 2003 to Plaintiff, in fact Defendant No.2 has claim against Defendant No.1 for various breaches committed by Defendant No.1.

(ii) At the highest this Court may continue the ad-interim

order which is passed by consent of parties operating since 3rd December 2012 during the pendency of the Notice of Motion. The appointment of Receiver at the instance of Plaintiff also cannot be passed since the flats, the subject matter of the dispute in this suit, are not being wasted and/or under any danger.

H Plaintiff are not entitled to relief of appointment of Court Receiver under Order XL Rule 1 of Code of Civil Procedure, 1908 in respect of 8 flats or any Order seeking appointment of Court Receiver by way of Agent of the Court Receiver in the above Notice of Motion.

(i) The right of a party to seek appointment of Court Receiver under Order XL Rule 1 of Code of Civil Procedure, 1908 is governed by well settled principles of “just and convenient” which require objective and satisfactory tests to be applied to such prayer for the relief. In the present case, there is no ground made out to satisfy principles of “just and convenient” including any likely waste for appointment of Court Receiver, High Court Bombay. Since 3rd December 2012 when the ad-interim order was passed in the above Notice of Motion by this Court, there is no allegation made by either Plaintiff or Defendant No.1 of any breach of the said ad-interim order by Defendant No.2. There are no allegations made by Plaintiff and Defendant No.1 of any waste or damage to the Suit flats by Defendant No.2. Hence no grounds are set out or no circumstances are made out by Plaintiff for grant of prayer (b) of the Notice of Motion for appointment of Court Receiver, High Court, Bombay as Receiver of the Suit flats.

The Hon'ble Court cannot pass any relief in favour of Plaintiff based on collusive Application made by Plaintiff and Defendant No.1 now in view of the Settlement, which is on the face of it arrived at to defeat the rights of Defendant No.2 in the pending and ongoing arbitration between Defendant No.1 and 2.

(ii) Plaintiff cannot seek reliefs either in terms of the above Notice of Motion or beyond the relief set out in the above Notice of Motion based on "molding relief" amounting to passing decree at the interim stage against Defendant No.2.

(iii) The Notice of Motion seeking injunction and Receiver is under Order XXXIX of the Civil Procedure Code for interim relief. Interim reliefs are always in aid of final relief. In view thereof, no relief in the nature of Decree deciding / adjudicating the right between the parties can be finally passed by way of directing Defendant No. 1 / Defendant No.2 to deliver physical possession of the 8 flats in Wing 'A' and Wing 'B' by molding the relief of Notice of Motion. In any event, the Notice of Motion taken out by Plaintiff is not under Order XII Rule 6 of the Civil Procedure Code seeking decree on admission.

(iv) There is complete change or shift in the stand of Defendant No.1 as taken by Defendant No.1 in their Affidavit in Reply dated 1st December 2012 and now in their Affidavit in Reply of June 2017. Plaintiff who agreed to go to arbitration invoked by Defendant No.2 by his letter dated 2nd January 2013 was opposed by Defendant No.1. The said matter of Defendant No.1 opposing to Plaintiff to be party to arbitration pursuant to

the Agreement for Development dated 10th March 2003 and the Tripartite Agreement dated 11th September 2009 resulted into Order of this Court dated 30th September 2014 and the Order of the Hon'ble Supreme Court of India dated 30th January 2015. Subsequently, the same Plaintiff and Defendant No.1 have now collusively joined hands and arrived at Settlement purely with malafide intentions to defeat and prejudice claims of Defendant No.2 in arbitration based on failure to perform reciprocal obligations by Defendant No.1 vis-à-vis construction of Wing 'C' and obtaining further Commencement Certificate in respect of Wing 'C' which is languishing since 2012. Plaintiff and Defendant No.1 cannot collusively request this Court to pass reliefs or grant prayers in the name of "molding reliefs" to defeat the valuable rights of Defendant No.2 and prejudice and/or scuttle the ongoing arbitration before the Sole Arbitrator and which is at advance stage of cross examination. Plaintiff and Defendant No.1 have made no case for the grant of any relief in the above Notice of Motion and the same ought to be rejected with costs.

I. Plaintiff's Argument on Res-Judicata:

(i) An interim Order under Section 17 can never be treated as Res-Judicata in respect of observation made therein. The Principles of Judicata would be only in respect of a final decision. In the present case, the interim Order of the Arbitrator is only in respect of 16 Flats. Moreover, the observation of the Arbitrator as well as by this Court are only prima facie in nature and are not binding. The same has also

been clarified by the Hon'ble Supreme Court.

FINDINGS :

15 The Learned Arbitrator's Order is in fact in the nature of an interim award. The Learned Arbitrator has concluded that Defendant No. 1 is entitled to 28.5 flats at this stage of the arbitration proceedings as well as at this stage of the project. The only dispute pending between the parties is whether Defendant No. 1 is entitled to further flats in addition to the 28.5 flats or not. However, insofar as 28.5 flats is concerned the dispute has been finally arbitrated upon and the same has attained finality. The appeal against the said Order having been rejected as also the SLP having been rejected, has made finding in respect of the entitlement of Defendant No. 1 to 28.5 flats on the said property as final. The clarification contained in the Hon'ble Supreme Court's Order does not and cannot mean that the Order which has been upheld will be reversed and/or changed and/or modified to the extent of 28.5 flats in the said property. To construe the Hon'ble Supreme Court's Order/clarification to mean otherwise would lead to an absurdity.

16 The Arbitrator's Order has already been acted upon. Defendant No. 1 has paid Rs. 3,90,00,000/- (Rupees Three Crores and Ninety Lakhs) to

Defendant No. 2, who has duly accepted the said amount. The key to 16 flats has been handed over to Defendant No. 1 and Defendant No. 1 is free to deal with the said flats. The Learned Arbitrator has already observed that he is not going to adjudicate on the 12 flats in as much as the same is an issue, which is subject matter of the present suit before this Court. In the circumstances, even at the time of final Award, the Learned Arbitrator will keep the 12 flats outside the realm of the Award / arbitration proceedings. But the fact that these 12 flats and 24 parking spaces form part of Defendant No.1's entitlement has been adjudicated upon and has become final. Therefore, even if Defendant No. 1 is held liable to compensate Defendant No.2 for damages, the same cannot be recovered from the 12 flats. This would be so even if the damages exceed the value of 15 flats which have been kept aside as and by way of security against the claim of Defendant No. 2 hereto (the Claimant in the arbitration proceedings).

17 In the circumstances, as between Defendants, the apportionment of 28.5 flats has become Res Judicata. It is the case of Defendant No. 2 that Plaintiff claims through Defendant No. 1 and either gets through Defendant No. 1 or loses through Defendant No. 1. The issue of alleged breaches has been duly considered by the Learned Arbitrator and after considering the breaches, the Learned Arbitrator has held that Defendant No. 1 is entitled to

28.5 flats. It is from these 28.5 flats that the Learned Arbitrator has thereafter kept aside the 12 flats in view of the injunction Order in favour of Plaintiff in the present suit. If it were not for the injunction Order the Learned Arbitrator would have handed over all 28.5 flats to Defendant No.1. Further, if the Learned Arbitrator had deemed fit to secure more flats in favour of Defendant No. 2, the same would have been secured from the said 16 flats, which have been already released in favour of Defendant No. 1, without affecting the 12 flats which Plaintiff herein is entitled to. In any view of the matter, the 12 flats are out of bounds for Defendant No.2 and belong to Defendant No. 1. This has been affirmed by this High Court and the Hon'ble Supreme Court of India.

18 The issue being final, Defendant No. 2 cannot have a further say on the same matter and is bound by the Arbitrator's Order which is in the nature of an interim award. Therefore, Defendant No. 2 having admitted that Plaintiff claims through Defendant No. 1, cannot re-agitate the alleged breaches of Defendant No. 1 in Plaintiff's suit.

19 Further, the nature of the alleged breaches by Defendant No. 1 have been adjudicated upon by the Learned Arbitrator at the time of hearing and final disposal of the Section 17 application. This Court too has upheld the

said findings. In the circumstances, this Court cannot come to a different finding from the one in the Arbitrator's Order because the issue is res judicata and has attained finality to the extent of entitlement of Defendant No.1 to 28.5 flats.

20 Defendant No. 2 has appropriated 55% of constructed area on the said property. At the relevant time Defendant No. 2 by letter dated 14th August 2012 offered and agreed to give to Defendant No. 1 its 45% share (which includes Plaintiff's areas).

21 Alleged claims of Defendant No. 2 for damages, even if Defendant No. 2, in fact succeeds in its claim, has been protected by keeping aside 15 flats in Wing 'A' from the share of Defendant No.1. Had the Learned Arbitrator concluded that 15 flats are not sufficient to satisfy the claim of Defendant No. 2 for damages, the Learned Arbitrator would not have released 28.5 flats and retained only 15 flats coming to Defendant No. 1's share. In that event the Learned Arbitrator would have naturally retained further flats out of the 16 flats to protect Defendant No. 2 for its alleged claim for damages. However, even in that event the 12 flats coming to the share of Plaintiff would not have been affected nor could Defendant No. 2 have made any claim against the said 12 flats.

22 Defendant No. 2 cannot be permitted to have any say in the matter of release of the 12 flats in favour of Plaintiff from / out of the 28.5 flats released in favour of Defendant No. 1 by the Learned Arbitrator. The finding of the Learned Arbitrator has been upheld by the High Court by rejecting challenge of Defendant No. 2 to the same. The Hon'ble Supreme Court has also rejected the challenge of Defendant No. 2. Defendant No. 2 having exhausted all remedies cannot now be permitted to re-agitate the same issues in the present suit. The said issue has attained finality and cannot be re-opened at the instance of Defendant No.2.

23 Suit is filed by Plaintiff to enforce rights under their agreement dated 22nd September 1999 vis-à-vis Defendant No.1 and under the tripartite agreement dated 11th September, 2009 between Plaintiff, Defendant No.1 and Defendant No.2. So far as Defendant No.2 is concerned this is the only agreement. So far as Plaintiff and Defendant No.2 are concerned, tripartite agreement is the only agreement which would govern the rights and obligations of Plaintiff vis-à-vis Defendant No.2. Rights of Defendant No. 2 to the development and benefits therefrom emanate from the rights of Defendant No. 1 conferred by Plaintiff. Rights of Plaintiff can under no circumstances be denied or defeated by Defendant No. 2 by raising claims on Defendant No. 1.

24 However, so far as Defendant No.2 is concerned, even under the agreement dated 10th March 2003 between Defendant No.1 and Defendant No.2, under clause 6 (2) of the said agreement, the rights to Plaintiff to the extent of 15,000 Sq. Ft. built up area is acknowledged and affirmed. The aforesaid 15,000 Sq. Ft. area was increased to 22,500 Sq. Ft. area under the tripartite agreement dated 11th September 2009. As between Plaintiff and Defendant No. 1, the same are now revised and reduced in the form of a settlement agreement.

25 The only question which falls for consideration before this Court is whether Defendant No.1 is entitled to handover possession of 8 flats to Plaintiff under the settlement agreement dated 4th November, 2016 and consent terms dated 25th September 2017 and whether Defendant No.2 be directed to handover keys of those 8 flats to Plaintiff.

26 Defendant No.1 was always the owner of the identified 39.6 flats in Wing A and Wing B and therefore legally entitled to handover the possession of 8 flats to Plaintiff. This would be obvious from the fact that :-

- (a) Defendant No.1 alone was entitled to develop the entire property as would be evident from the fact that the Letter of Intent from SRA is in favour of Defendant No.1 alone.
- (b) Defendant No.2 is a contractor who is given right to

construct the free sale flats and appropriate to himself 55% of the constructed area and therefore the rights to Defendant No.2 flows from the rights of Defendant No.1 alone.

- (c) By virtue of POA dated 7th July, 2005 executed by Defendant No.2, Defendant No.1 was entitled to execute agreement for sale on ownership basis, Leave & License basis, lease basis of flats and car parking spaces which are identified and earmarked in the 2nd Schedule to the said POA. It is from these identified flats in which Defendant No.1 has been described as owner; Defendant No.1 had agreed to handover possession of 8 flats to Plaintiff including 16 car parking spaces.

27 Defendant No.2 in the Section 9 Arbitration Petition No. 273 of 2013 asserted as hereunder:

“The Petitioner (SNB) submits that under the agreement for development dated 10th March, 2003 the Respondent Nos. 1 & 2 are entitled to receive in all 39.6 flats in Wing A and Wing B and more particularly described Schedule Exhibit-N hereto in the building Bay View constructed by the Petitioners.

In Exhibit-N the very same flats are identified and BSRCL has been identified as the owner in respect of the very same flats in respect of which SNB has executed POA by virtue of which BSRCL is entitled to enter into agreement to sell, dispose of all those flats and appropriate the sale proceeds to themselves. It is from these identified flats which are in Exhibit-N, BSRCL have agreed to handover possession of 8 flats to Aurora Properties”.

28 Similar to the POA executed by Defendant No.2 in favour of Defendant No.1, Defendant No.1 too executed a POA dated 7th July, 2005 in

favour of Defendant No.2 identifying the flats in respect of which Defendant No.2 could dispose his flats and the car parking space. Defendant No.2 by virtue of the same POA has executed sale agreement and disposed of all his flats forming part of 55% of his share. The aforesaid facts are indisputable in as much as Defendant No.2 in his affidavit dated 30th November 2012 in Para 7 (viii) has stated as hereunder:

“By letter dated 14th August, 2012 and addressed by me to Defendant No. 1, I objected to the said 45% area and car parking space to Defendant No. 1 as per letter dated 16th June, 2012 and Defendant No. 1 has not taken possession of the said area to-date. I have dealt with my 55% area and car parking space with the knowledge of Plaintiff (Aurora Properties) and Defendant No. 1 (BSRCL) and third parties are entitled to the same”.

29 In view of the undisputed fact that Defendant No.1 has retained for itself the right to construct 45% of the total area available coupled with the fact that Defendant No.1 was entitled to independently sell, transfer, give on lease all the identified flats in terms of POA dated 7th July, 2005 executed by Defendant No.2 in favour of Defendant No.1 and in view of the fact that Defendant No.2 in Arbitration Petition No. 273 of 2013 has conceded this position, Defendant No.2 is now estopped from objecting or contending against the rights of Defendant No.1 to handover the possession of 8 identified flats along with 16 car parking spaces to Plaintiff. Defendant No.2 is unjustifiably, unlawfully and illegally holding the keys in respect of the

said flats merely because by virtue of the fact that he had undertaken construction of the flats under the agreement dated 10th March 2003.

30 In the circumstances, Defendant No.1 is entitled to handover possession of 8 identified flats to Plaintiff along with 16 car parking spaces under the settlement agreement dated 4th November 2016 and consent terms dated 25th September 2017 with Plaintiff and for an order of this Court directing Defendant No.2 to handover keys of those 8 flats to Plaintiff. Plaintiff and Defendant No. 1 have arrived at Settlement Terms dated 4th November 2016 and filed consent terms dated 25th September 2017 settling the suit as between them and sought a Decree and necessary orders in terms thereof.

31 Further, even the Learned Arbitrator has categorically held in the order dated 12th October 2016 passed under Section 17 of the Arbitration and Conciliation Act, 1996 that Defendant No.1 can, at the interim stage, get 28.5 flats. These 28.5 flats include the 8 identified flats which Defendant No.1 has agreed to handover possession to Plaintiff which are also part of the very same flats under the ad-interim order dated 3rd December 2012 as modified by order dated 17th November 2012. So also, these are the same identified flats under the POA dated 7th July 2005 executed by Defendant

No.2 in favour of Defendant No.1 and the same identified flats reflected in Exhibit-N to the Arbitration Petition No. 273 of 2013 filed by Defendant No.2 in this Court.

32 In the face of POA dated 7th July 2005 executed by Defendant No.2 and in the face of categorical admission of the entitlement of Defendant No.1 of all the 39.6 flats in Wing A and Wing B of Bay View, taking shelter under the pending arbitration proceedings *inter se* between Defendants, and to which Plaintiff is not party to, and the interim order passed by the Sole Arbitrator under Section 17 of the Arbitration and Conciliation Act, 1996, has no merit whatsoever. Defendant No.2 is deliberately trying to confuse the issue as if he is the owner of the identified flats, possession of which is being handed-over by Defendant No.1 to Plaintiff under the settlement agreement dated 4th November 2016 read with consent terms dated 25th September 2017. Since it is an admitted position that Defendant No.2 is not the owner of the identified flats, merely because of holding keys of the flats by virtue of the fact that he had constructed the building, Defendant No.2 is not entitled to prevent Defendant No.1 from handing over possession of the 8 identified flats to Plaintiff. Indeed, by virtue of the settlement and consent terms between Plaintiff and Defendant No.1 and consent decree having been passed by which 8 identified flats and 16 car parking spaces, the possession

of which could be handed over to Plaintiff, Defendant No.2 is hereby directed by a mandatory order to hand over the keys of the said flats. In so far as these identified flats are concerned in the POA dated 7th July 2005, Defendant No.2 is unjustifiably, unlawfully and illegally withholding keys of the said flats and preventing Defendant No.1 from exercising their legitimate rights under the POA executed by Defendant No.2 in their favour in regard to the said identified flats. Therefore, each and every submissions made on behalf of Defendant No.2 by taking shelter under the interim order passed by the Sole Arbitrator has no merits whatsoever.

33 The rights of Plaintiff to the 8 flats and 16 car parking spaces finally agreed as between Plaintiff and Defendant No. 1 are paramount to the rights of either of Defendants. Rights of Defendant No. 2 to the development are derivative rights derived through Defendant No. 1 from Plaintiff. Consideration for the grant of such rights by Plaintiff, *inter alia*, is entitlement of Plaintiff to 8 flats and 16 car parking spaces. Defendant No. 2 cannot claim or enjoy any rights or benefits to the development if Defendant No. 2 denies consideration to Plaintiff for the grant thereof by Plaintiff. Each of Defendants are contractually obliged to discharge their obligations towards Plaintiff under the said development agreement and the supplemental development agreement and provide to Plaintiff the flats and

the parking spaces agreed to be provided as and by way of consideration and cannot dispute or deny the same on the pretext of any dispute *inter se* between themselves and with which Plaintiff is not concerned in any way. Disputes as between Defendants *inter se* and the result thereof cannot in any event prejudice the rights or entitlement of Plaintiff acquired in lieu of the grant of development rights enjoyed by Defendant No. 2.

34 Further, the Power of Attorney dated 7 July 2005 also *inter alia* authorises Defendant No. 1 to execute agreements for sale on ownership basis of flats, car parking spaces and other areas in the said building constructed on the said property in respect of Defendant No. 1's areas defined in the said Power of Attorney in its own name and appropriate the same to itself as Defendant No. 1 may deem fit.

35 In the circumstances aforesaid Plaintiff is entitled to 8 flats on the said property. Defendant No. 2 cannot and/or is not permitted to dispute the entitlement of Plaintiff to the said 8 flats.

36 It is settled law that when the relief otherwise awardable on the date of commencement of the suit would become inappropriate in view of the changed circumstances, the Courts may mould the relief in accordance with

the changed circumstances for shortening the litigation or to do complete justice [*Gaiv Dinshaw Irani & Ors Vs. Tehmtan Irani & Ors.*]¹.

37 Hence, in the peculiar facts and circumstances of the case and in view of the changed circumstances as explained above, the relief as sought by the Plaintiff originally can be and has to be moulded. This would also shorten the litigation and do complete justice.

Defendant No.2 is ordered and directed to handover the keys to the said 8 flats to enable Defendant No.1 to handover peaceful and vacant possession of the said 8 flats along with 16 car parking spaces to Plaintiff.

38 Notice of Motion accordingly disposed.

(K.R. SHRIRAM, J.)

1 (2014) 8 SCC 294

Counsel for Defendant No.2 prays for stay of this order by four weeks. Since this motion has been pending almost for four years, I see nothing wrong to grant order of stay as prayed for by a period of four weeks from today.

(K.R. SHRIRAM, J.)