IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.397 OF 2016
IN
ARBITRATION PETITION NO.921 OF 2015
WITH
NOTICE OF MOTION NO.1543 OF 2016

Parinee Realty Private Limited (erstwhile M/s. Green Bird Developers Pvt. Ltd.) and others	…	Appellants
Vs.		
Anand Villa Co-op. Hsg. Soc. Ltd. and others	…	Respondents

WITH
NOTICE OF MOTION NO.1028 OF 2017
IN
APPEAL NO.397 OF 2016

SVC Co-operative Bank Limited	…	Applicant
In the matter between		
Parinee Realty Private Limited (erstwhile M/s. Green Bird Developers Pvt. Ltd.) and others	…	Appellants
Vs.		
Anand Villa Co-op. Hsg. Soc. Ltd. and others	…	Respondents

ALONG WITH
APPEAL NO.418 OF 2016
IN
ARBITRATION PETITION NO.921 OF 2015
WITH
NOTICE OF MOTION (L) NO.3069 OF 2015

Atul V. Madan	…	Appellant
Vs.		
Anand Villa CHSL and others	…	Respondents

Mr. Zubin Behramkamdin a/w. Liz Thanchet i/b. Mr. Arun Panickar for Appellant in Appeal No.397 of 2016.
Mr. Rajdendra V. Pai a/w. Mr. A. R. Pai and Neity Thakkar i/b. Bina Pai for Appellant in Appeal No.418 of 2016.
Mr. Rohan Kadam a/w. Mr. Nikhil Rajani i/b. V. Deshpande & Co. for Applicant in Notice of Motion No.1028 of 2017.
Mr. Mayur Khandeparkar a/w. Mr. Murari Madekar and Mr. Sachin Kudalkar i/b. Madekar and Company for Respondents No.1 to 9.

CORAM : NARESH H. PATIL &
R. G. KETKAR, JJ.
Reserved on : OCTOBER 10, 2017
Pronounced on: NOVEMBER 3, 2017

P.C. :

Heard learned Counsel appearing for the parties at length. Admit. Learned Counsel for the respective respondents waive service. Having regard to the nature of controversy raised in these Appeals and at the request and by consent of the parties, Appeals are taken up for final hearing.

2. These appeals are preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'Act') challenging the judgment and order dated 20.10.2015 passed by the learned Single Judge in Arbitration Petition No.921 of 2014. That Petition was instituted by Anand Villa Co-operative Housing Society Limited and 8 others under Section 9 of the Act inter alia praying for - (a) direction to Parinee Realty Private Limited (appellant in appeal No.397 of 2016) to deposit a minimum amount of Rs.16,46,33,116/- in this Court; (b) pending the hearing and final disposal of the arbitration proceedings between the parties and for a period of 90 days thereafter issue order of injunction restraining Parinee Realty Private Limited and Atul V. Madan (appellant in appeal No.418 of 2016) from in any manner transferring, encumbering, alienating and creating third party right, title and interest in respect of - (I) 3 commercial shops, namely (i) shop No.1, (ii) shop No.2, (iii) shop No.3, Anand Villa CHSL; (II) 4 flats on 10th and 11 flats namely, (i) flats No.1001 and 1002 on the 10th floor and (ii) flats No.1101 and 1102 on the 11th floor of Anand Villa CHSL; (III) 1st floor and service floor of Anand Villa CHSL, among other prayers. By the impugned order, the learned Single Judge issued injunction restraining Parinee Realty Private Limited, their servants, agents and / or representatives and / or any other claiming by, from, through or under

them, in any manner, from transferring, encumbering, alienating, or creating any third party right, title and interest in respect of the first floor and service floor and also basement area, which is alleged to have been transferred in favour of Atul Madan along with 3 shops bearing No.1, 2 and 3 on the ground floor of Anand Villa CHSL. Atul Madan is directed to deposit a sum of Rs.1,00,00,000/- (Rupees One Crore) out of balance consideration payable to Parinee Realty Private Limited under Memorandum of Understanding (for short 'MOU') dated 13.04.2015 in this Court within two weeks from the date of the order on behalf of Parinee Realty Private Limited. Upon deposit of the said amount, the Prothonotary and Senior Master is directed to invest the said amount in a fixed deposit of a nationalized bank initially for a period of two years and to renew it after obtaining further orders from this Court.

3. Respondent No.1, Anand Villa CHSL (petitioner No.1) along with respondents No.2 to 9 (petitioners No.2 to 9) instituted Arbitration Petition under Section 9 of the Act against Parinee Realty Private Limited (appellant in appeal No.397 of 2016) (respondent No.1) and respondents No.10 to 16 (respondents No.2 to 8) claiming the aforesaid reliefs. The parties shall hereinafter be referred to as per their status in Arbitration Petition under Section 9 of the Act. The relevant and material facts necessary for the disposal of the present Appeal, briefly stated, are as under. For appreciating the controversy raised in these appeals, the facts from Appeal No.397 of 2016 are taken into consideration.

4. By registered Deed of Conveyance dated 31.07.1963, petitioner No.1 society became the owner in respect of land along with the building situate on plot No.C3 admeasuring about 1057.7 sq.mtrs. equivalent to 1268 square yards and partly part of plot No.65Z of Santacrus Town Planning Scheme No.IV and partly land immediately

beyond the scheme boundary being partly of Survey No.408 being part of C.T.S.No.360 as 360B and plot No.1 and bearing H Ward No.2987 (1) 65 Part TPS. IV, Santacruz (West) (for short 'said land'). A building known as 'Anand Villa' consisting of ground plus three upper floors came to be constructed in or around the year 1961-62. In all, there were 12 flats and 5 garages in the building which have been in the use, occupation and possession of petitioners No.2 to 9 and respondents No.5 to 7 in their capacity as owners, on the terms and conditions as more particularly set out in their individual sale agreements (for short "the old building"). The said land and old building is hereinafter collectively referred to as the "said property".

5. Since the old building was constructed in or around the year 1961-62, petitioner No.1 and its members were desirous of redeveloping the said property. Respondent No.1, upon coming to know of the intention of the petitioners, expressed their desire to undertake the redevelopment of the said property. On 27.09.2003, respondent No.1 addressed an offer letter to the Secretary of the petitioner No.1 society. The correspondence was exchanged between petitioner No.1 and respondent No.1. By letter dated 22.01.2005, petitioner No.1 made a counter offer which came to be accepted by the first respondent by letter dated 09.04.2005 and further reconfirmed by their letter dated 25.11.2006 with minor changes.

6. In pursuance thereof, a registered development agreement dated 03.11.2007 came to be executed by and between the petitioner No.1 and the respondent No.1 as a developer in respect of the said property upon terms and conditions more particularly contained therein. All the members of the petitioner No.1 being petitioners No.2 to 9 and respondents No.5 to 7 are signatories to the said development agreement.

7. Pursuant to the development agreement, respondent No.1 applied and obtained Intimation of Disapproval (IOD) on 28.11.2007 from the municipal authorities. This was followed by a part Commencement Certificate dated 07.02.2008 upto top of basement level. The said Commencement Certificate was subsequently extended on 06.02.2009, 10.09.2009 and finally on 23.12.2010 upto 11 residential floors. On 10.12.2012, respondent No.1 obtained Occupation Certificate from the municipal authorities. In April, 2013, as per the development agreement, possession of 12 flats was handed over to the petitioner No.1 and petitioners No.2 to 9 and respondents No.5 to 7 (members of petitioner No.1).

8. On 12.05.2015, petitioner No.1 society caused to issue notice to the respondent No.1 and carbon copy was sent to respondents No.2, 3 and 4 inter alia setting out claim aggregating to Rs.16,46,33,116/- with interest under 1 to 12 heads. Petitioner no.1 also requested to concur in appointment of Mr. Pankaj Savant, Senior Advocate of this Court as arbitrator to adjudicate the dispute, differences and claims within 14 days from the date of receipt of the notice, failing which petitioner no.1 will be constrained to adopt appropriate legal proceedings. This was replied on 25.05.2015 by the respondent No.1. On 29.05.2015, petitioners No.1 to 9 instituted Arbitration Petition under Section 9 of the Act.

9. Respondent No.1 filed affidavit in reply dated 17.07.2015 opposing the Petition. Respondent No.8, Atul Madan filed affidavit in reply dated 21.07.2015. Petitioners filed rejoinder dated 24.07.2015. By the impugned order, the learned Single Judge has issued injunction restraining respondent No.1 from creating third party right, title and interest in respect of the first floor and service floor as also basement

area, which is alleged to have been transferred in favour of respondent No.8 along with three shops bearing No.1, 2 and 3 on the ground floors of Anand Villa. Respondent No.8 is directed to deposit in this Court the sum of Rs. 1 crore out of the balance consideration payable to the respondent No.1 under the Memorandum of Understanding dated 13.04.2015, which is to be invested in a fixed deposit of a nationalized bank initially for a period of two years and to be renewed after obtaining further orders from this Court. The controversy before the learned Single Judge was restricted only in respect of - (i) the basement level of three shops, (ii) first floor premises, (iii) service floor premises below the ground level and (iv) deposit of the balance consideration amount payable by respondent No.8 to the first respondent in this Court. It is against this order, respondent No.1 has preferred Appeal No.397 of 2016. Respondent No.8 has preferred Appeal No.418 of 2016.

10. In support of Appeal No.397 of 2016, Mr. Behramkamdin invited our attention to the development agreement dated 03.11.2007, and in particular, the following clauses:

(a) Recital (o) which lays down that petitioner No.1 society confirms that it is entitled to an area emanating from the said property including right to consume basic FSI, free FSI, premium FSI and load TDR/ FSI. Accordingly, the society (petitioner No.1) has given authority and power to the developers (respondent No.1) for development and construction of residential flats, shops / offices. By using and consuming basic FSI, free FSI, premium FSI originating from the said property and by loading TDR / FSI which can be loaded in the said property and in consideration thereof, the developer shall pay to (i) the society an amount of Rs.1,80,79,000/- (Rupees One Crore Eighty Lakhs and Seventy Nine Thousand only) to be paid by the developers as per the Schedule stated in Annexure A6(I); (ii) the existing members (except flat No.3), an amount of Rs.60,21,000/- (Rupees Sixty Lakhs Twenty One Thousand only) in proportion to the area occupied by such existing members as stated in the Annexure A6(II), (iii)the four garage holders listed at Annexure A6(III), a sum of Rs.5,00,000/- (Rupees Five Lakhs only) each, aggregating to sum of Rs.2,61,00,000/- (Rupees Two Crores Sixty One Lakhs only) and construct a new building and hand over to the society free of all costs. 12 flats and 12 car parking spaces for the members listed in Annexure A-3 and demarcated by hatching and shown in Annexure A-5 (I) and A-5(II) in the new building and on other terms and conditions set out therein. The hatched demarcated area in the sectional view as set out in Annexure-A5(IV) of the new building demarcates the commercial area of the developers' share. The lift and common staircase area are excluded from the Developers' share. The chart as set out in Annexure A8 indicates the residential area attributable to the society and the developers. The society has given to the developers right to sell all balance residential flats / shops / offices and appropriate the sales proceeds for themselves, subject to the society being allotted new flats along with associates car parking spaces free of any cost. Clause 1 lays down that the recitals contained above and the annexures thereto form an integral and operative part of the agreement as if the same were set out and incorporated in verbatim.

(b) Clause 10(r) which among other things clarifies that the developers are free to create right, title or interest of any nature in favour of any person or party on its share of the property.

(c) Clause 21(j) which provides that within two weeks of the developers notifying the society that the flats in the new building are ready, the members and the society will take inspection of their respective flats / common facilities and point out any defect including in construction, amenities and facilities and the developers shall remove such defect/s forthwith and in any case before the occupation certificate is received.

(d) Clause 27(a) which lays down that for the obligations undertaken by the developers, the developers shall be compensated by way of right to sell / lease and dispose of flats / shops / offices and allocated car parking spaces as additional amenity, as set out in Annexures-A5(II), (III), (IV) and A(VIII) and appropriate all benefits and sales proceeds thereof to themselves without any ways accountable to the society.

(e) Clause 27(f) which provides that the commercial premises only will in first basement, ground floor, first floor and second floor.

(f) Clause 30 which lays down that the entire proposed construction will be as per the plans, which will be sanctioned by the BMC and other appropriate authorities from time to time.

11. Mr. Behramkamdin invited our attention to the letter dated 02.03.2009 addressed to the Chairperson / Secretary of petitioner No.1 referring to Annexure A-5(iv) of the agreement, copy whereof was enclosed with that letter. The letter sets out constraints and hurdles faced by respondent No.1 in obtaining approval from the Corporation. It further sets out that keeping all constraints in mind, the new design required the floor levels of members to be adjusted as per the enclosed details; the new design involves a separate service floor for the main transfer beam and this has resulted in members flats moving up one floor. However, this did not affect the area planned earlier for each flat in practically all flats above podium level and developers have tried to ensure their commitment of maintaining the area. Members were requested to note their new floor levels and accept the same. Mr. Behramkamdin submitted that clause 30 of the development agreement permitted modification of the plans from time to time subject to approval of the Corporation and other appropriate authorities.

Accordingly, the plans were modified, sanction was obtained from the Corporation and this was brought to the notice of the petitioners by letter dated 02.03.2009. However, no objection was raised by the petitioners.

12. He further submitted that the construction was carried out strictly as per the sanctioned plans by the Corporation and accordingly Occupation Certificate was issued on 10.12.2012. Possession of the flats was handed over to the members of the petitioner No.1 society in April 2013. It is only after taking full benefit under the Development Agreement, petitioner No.1 issued notice on 12.05.2015 raising claim of Rs.16,46,33,1161/-. Petition under Section 9 is instituted on 29.05.2015. He submitted that having regard to the monetary claim made by the petitioners as also further having regard to the delay on the part of the petitioners in approaching the Court, the learned Single Judge failed to take into consideration the conduct of the petitioners. Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively would not be entitled to an order of injunction. The Court will not interfere only because the property is a valuable one.

13. Mr. Behramkamdin submitted that the learned Single Judge committed serious error in holding that the decision of the Apex Court in ***Nahalchand Laloochand Private Limited Vs. Panchali Co-operative Housing Society Limited***, **(2010) 9 SCC 536**, which arose from the decision of this Court in ***N. L. Private Limited Vs. Panchali Co-operative Housing Society***, **2008 (6) Mh.L.J. 47**, squarely applies to the facts of the present case. He submitted that in that case, the questions that fell for consideration were - (i) whether stand alone 'garage' or in other words 'garage' as an independent unit by itself is a 'flat' within the meaning of Section 2(a-1) of Maharashtra Ownership of Flats

(Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short 'MOFA')? (ii) whether stilt parking space / open parking space of a building regulated by MOFA is a 'garage'? (iii) if the answer to the aforesaid questions is in the negative, whether stilt parking space / open parking space in such building is part of 'common areas and facilities'? and (iv) what are the rights of the promoter vis-a-vis the society (of flat purchases) in respect of open parking space(s) / stilt parking space/s?

14. He relied upon the decision in ***Swan Mills Limited Vs. Dhirajlal Babaria***, **2012 (2) Bom.C.R.20** to contend that the learned Single Judge did not record any finding on three aspects namely, (i) existence of strong prima facie case, (ii) balance of convenience is in favour of grant of injunction and (iii) if temporary injunction is not made, petitioners are likely to suffer irreparable loss. He submitted that basically, petitioners have made monetary claim.

15. He also relied upon the decision in ***Raman Tech & Process Eng. Co. Vs. Solanki Traders***, **(2008) 2 SCC 302** dealing with attachment before judgment under Order XXXVIII, Rule 5 of the Code of Civil Procedure, 1908 (for short 'C.P.C.').

16. Mr. Behramkamdin relied upon the decision in ***Balwant Rai Saluja Vs. AIR India Limited*****, (2014) 9 SCC 407** to contend that it is neither desirable nor permissible to take pick out a word or a sentence from the judgment, divorced from the context of the question under consideration and treat it to be complete 'law' declared by the Apex Court. The judgment must be read as a whole and the observations in the judgment have to be considered in the light of the questions which were before the Court. A decision of the Court takes its colour from the

questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of the Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by the Court, to support their reasonings.

17. He also relied upon the decision of the Apex Court in ***Union of India Vs. Dhanwanti Devi***, **(1996) 6 SCC 44** to contend that it is not everything said by a Judge who giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well settled theory of precedents, every decision contain three basic postulates - [i] findings of material facts, is the inference which the Judge draws from the direct, or perceptible facts; [ii] statements of the principles of law applicable to the legal problems disclosed by the facts; and [iii] judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in decision is its ratio and not every observation found therein not what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding between the parties to it, but it, is the abstract ratio decidendi, ascertained on a

consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi.

18. Mr. Behramkamdin has taken us through Petition under Section 9, replies filed by the parties as also provisions of MOFA, Maharashtra Apartment Ownership Act, 1970 (MAOA), Development Control Regulations for Greater Mumbai, 1991 (for short 'D.C.R.') He submitted that basement cannot be called as a common areas and facilities. In fact having regard to the recitals and clauses of the development agreement, respondent No.1 is entitled to sell commercial area which fell to its share regardless of the fact whether FSI is consumed for that or not.

19. Mr. Pai, appearing on behalf of the respondent No.8 substantially adopted the arguments of Mr. Behramkamdin. He submitted that the learned Single Judge committed serious error in holding that the decision of this Court in **N. L. Private Limited** (*supra*) squarely applies to the present case. In paragraph 17, the learned Single Judge of this Court observed that under MOFA, the developer's right is restricted to the extent of disposal of flats, shops and/or garages, which means that any premises which is included in the FSI can be sold by the developer / promoter. The area of the stilt parking space is not included in the FSI

nor is it assessable for the Corporation taxes. He submitted that the reasons given in paragraph 17 by the learned Single Judge are specifically not approved by the Apex Court in paragraph 59 of **Nahalchand Laloochand Private Limited** *(supra)*. In paragraph 59, the Apex Court held that there is some merit in the contention of the appellant that High Court erred in placing reliance on the two aspects-namely, that the area of stilt parking space is not included in the FSI and such area is not assessable to the corporation taxes. In other words, even if the basement is not included in the FSI, still, developer, in the instant case respondent No.1, is entitled to sell the basement, which fell to his share as shown in the hatched portion referred in recital (o) in the development agreement, to the third parties. He submitted that the question that fell for consideration before the Apex Court in **Nahalchand Laloochand Private Limited** (*supra*) was whether the stilt parking spaces or parking areas are covered by the expression “common areas and facilities” under MOFA. In paragraph 53 of that decision, submission as to what could be termed as part of common areas was recorded. In paragraph 54, reference was made to Section 3(f) of MAOA, which defines the expression 'common areas and facilities'. In paragraph 55, the Apex Court observed that clauses (2), (3) and (6) of Section 3(f) as part of 'common areas and facilities' for the purposes of MAOA are what is generally understood by the expression 'common areas and facilities' It was further observed that looking to the scheme and object of MOFA, and there being no indication to the contrary, Apex Court did not find justifiable reason to exclude parking areas (open to the sky or stilted portion) from the purview of 'common areas and facilities' under MOFA.

20. Mr. Pai invited our attention to Section 2, Section 3(a), (f) and (j) of MAOA. He particularly gave emphasis on the words “unless

otherwise provided in the declaration of amendments thereto" in Section 3(f) of MAOA, which defines the expression 'common areas and facilities'. He submitted that in the present case, the recitals and clauses in the development agreement clearly indicate sell of basement and parking space allotted to the share of the respondent No.1 developer.

21. Mr. Pai relied upon the following decisions:

(i) ***Arnit Das Vs. State of Bihar***, **(2000) 5 SCC 488**, and in particular paragraph 20 thereof;

(ii) ***The Divisional Controller, KSRTC Vs. Mahadeva Shetty***, **(2003) 7 SCC 197**, and in particular paragraph 23 thereof;

(iii) ***Municipal Corporation of Delhi Vs. Gurnam Kaur***, **(1989) 1 SCC 101**, and in particular paragraph 11; and

(iv) ***Arun Kumar Aggarwal Vs. State of Madhya Pradesh***, **(2014) 13 SCC 707**, and in particular paragraphs 21 to 31 to contend that the decision in **Nahalchand Laloochand Private Limited** (*supra*) cannot be deemed to be a law declaring to have a binding effect as contemplated by Article 141. That which has escaped in the judgment is not ratio decidendi. This is the rule of sub-silentio, in the technical sense when a particular point of law was not consciously determined.

22. Mr. Pai submitted that the licensees, who are respondents No.2 to 4 are in possession of shops No.1, 2 and 3. He submitted that entries to the basement area in respect of which the learned Single Judge has issued injunction is having approach only through the respective shops. In other words, the basement area in respect of which injunction is issued by the learned Single Judge has no other access. He invited our attention to D.C.R. 38(9) and in particular clause (iv), which deals with uses permitted in the basement. The basement can be put to following uses:

(a) (i) storage of household or other non-hazardous goods;
(ii) store rooms, bank lockers or safe-deposit vaults;
among others.

23. He submitted that the basement put to these uses cannot be said to be property of the petitioner No.1 society as it can be sold or leased out to the third parties. He also invited our attention to Regulation 52, clause (4)(xxxiii) to contend that storage area in the basement attached to these shops are incidental to the permitted principal use, including storage upto 50% of the floor area of the principal use (viz. shops in the present case). He heavily relied upon clause 27(f) which lays down that the commercial premises will be only in the first basement, ground floor, first floor and two floors. Respondent No.8 has agreed to purchase shops and basement area attached to them situate in the first basement. He submitted that the construction carried out by the first respondent is strictly in accordance with the sanctioned plans. As per clause 30 of the development agreement, the plans can be modified from time to time. He submitted that till date, not a single complaint is made by the petitioners to the Corporation alleging that the construction carried out by the first respondent is contrary to the sanctioned plans. He submitted that even the plans were modified and the proposed modification was brought to the notice of the petitioners as far as back on 02.03.2009. It is, therefore, too late for the petitioners to contend that respondent No.1 has deviated from the original proposal and the construction carried out is contrary to the development agreement. He, therefore, submitted that appeal No.418 of 2016 preferred by the respondent No.8 deserves to be allowed.

24. On the other hand, Mr. Khandeparkar supported the impugned order. He submitted that after considering the material on record, the

learned Single Judge has issued injunction, which is purely a discretionary relief. He relied upon the decision in ***Wander Limited Vs. Antox India P. Ltd.***, **1990 (Supp) SCC 727** to contend that the appeals before the Division Bench are against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. He also relied upon the Division Bench of this Court in ***M/s. Meera Housing Private Limited Vs. Khatau Makanji and Co. Pvt. Ltd.*** **(Appeal No.469 of 2016)** decided on 27.10.2016.

25. Mr. Khandeparkar has invited our attention to the development agreement dated 03.11.2007 and in particular following clauses thereof:

a. Clause 25, which provides that "it is specifically agreed that save and except the additional flats / shops / offices i.e. developers unit in the premises to be constructed by use of TDR / FSI as herein provided over and above 12 members flats, the developers will have no share, right, title or interest in the said land, the proposed building and other areas in the said building (except flat No.501).

b. Clause 27 (b), which lays down that only on (i) the developers paying agreed initial consideration and bank guarantee for the performance of the agreement, as provided in clauses 2 and 4 hereof, (ii) grant of sanction by municipality and all other concerned authorities of the plans and proposals submitted for development and reconstruction of the existing building and all required approvals and permissions for utilization of TDR/FSI at site and (iii) obtaining certificate of commencement of work, the developers will be at liberty to transfer any of its rights, or to commence sale on ownership basis and / or enter into any such agreement / arrangement of flats / shops / offices and allocated parking space as added amenity to be constructed in the new building by use of TDR / FSI, at such price and on such terms and conditions as the developers may think fit subject to compliance with all the applicable provisions of law. In short, he submitted that respondent No.1 can sell flats / shops / offices and allocated parking spaces as added amenities, to be constructed in the new building only by use of TDR / FSI. In other words, in respect of basement, service floor, respondent No.1 having not utilized TDR / FSI cannot sell the same to the third parties though that area may have been allotted in commercial area of the first respondent. He submitted that the learned Single Judge in **N. L. Private Limited** *(supra)* has specifically observed in paragraph 17 that "under the MOFA the developer's right is restricted to the extent of disposal of flats, shops and/or garages, which means that any premises which is included in the FSI can be sold by the developer / promoter. The area of the stilt parking space is not included in the FSI nor is it assessable for the Corporation taxes." He submitted that the reliance placed on paragraph 59 of the decision of the Apex Court in **Nahalchand Laloochand Private Limited** (*supra*) does not categorically lay down that area which is free of FSI can be sold by the developers. In any case, the parties have agreed that developers cannot sale flats / shops / offices / parking spaces which are constructed by not using TDR / FSI. In other words, whatever is constructed free of FSI cannot be sold by the developers. He invited our attention to clause 52 of the development agreement, which lays down that developers shall not sell, lease, give on leave and license or any other basis and / or encumber in any manner the common terrace and all common areas, open land, compound, compound wall (inside and outside) as this will remain the property of the society.

26. Mr. Khandeparkar submitted that after obtaining possession of the respective premises as well as the said building, petitioners realized that respondent No.1 have committed several illegalities and irregularities, namely, as per Annexure A-5(IV) of the development agreement, the reconstructed building was to consist of-

(a) two basement parking, one storage basement;

(b) ground floor for 3 commercial shops;

(c) first floor for shops;

(d) second floor for stilt parking (service floor);

(e) third floor for podium and;

(f) fourth to eleventh floor for residential flats.

27. Respondent No.1, by its letter dated 02.03.2009, informed the petitioners that Annexure A-5(IV) of the agreement has undergone the change as a result of which an extra service floor is required to be added to the originally designed service floor. Along with the said letter, the respondent No.1 enclosed the revised plan as well as the revised allocation of the residential premises to the petitioners. However, in the plan enclosed with the said letter, in addition to the extra service floor, respondent No.1 also surreptitiously put a design for extra mezzanine floor. This alteration was without the approval of the petitioners. Respondent No.1 had in fact increased the height of the commercial area of the building by approximately 19 ft. thereby creating extra service floor and mezzanine floor. While completing the redevelopment of the building, respondent No.1 had created extra service floor having additional height of 1.5 mtrs.; and an extra mezzanine floor having height of 4.2 mtrs. from floor level to the slab. The extra mezzanine floor crated by the first respondent has been added to the three shops on the ground floor of the redeveloped building thereby offering the said three shops extra area at the costs of the petitioners. The service floor

with the increased height crated pursuant to the plan enclosed along with the letter dated 02.03.2009 is still in possession of the respondent No.1 and the respondent No.1 continues to enjoy the same in addition to the three commercial shops with added mezzanine floor thereto and first basement.

28. He submitted that in terms of the development agreement, respondent No.1 was bound to install two car lifts and provide an access to the parking at the podium level by way of ramp. After obtaining the Occupation Certificate on 10.12.2012, respondent No.1 dismantled both the car lifts thereby creating a void in the car lift shaft. Respondent No.1 further proceeded to put permanent cement concrete slabs in the void created in the car lift shaft. Respondent No.1 intends to include these areas in the shops and office areas thereby profiting therefrom at the cost of the petitioners. As a result of removal of car lifts, the access of the petitioners' eight cars parking to the podium level has been prohibited.

29. He submitted that in terms of the development agreement, on the second floor, there was clearly a demarcated office area and demarcated provisions for three car parking areas. Subsequently in the year 2013, respondent No.1 through their Architect furnished drawing showing office on the second floor and two car parking coming from the car hoist instead of 3 car parkings. Respondent No.1 has done away with the demarcation wall and amalgamated the car parking area into the office area. In view of the dismantling of the car lift, no cars could come up thereby facilitating the builder to usurp the car parking area for office. He invited our attention to page 218 of paper book in appeal No.397 of 2016. He submitted that if the first respondent restores the position as per that plan thereby maintaining two car lifts and three car parking

spaces as also office premises, petitioners will have no objection for selling the office premises. Respondent No.1 will also have to remove the cement concrete slabs put on the car lifts.

30. Mr. Khandeparkar submitted that respondent No.1 is required to pay the municipal taxes in respect of undisposed off flats, shops, offices on pro-rata basis after one year from the date of Occupation Certificate. The Occupation Certificate was obtained on 10.12.2012. Respondent No.1 is, therefore, liable to pay the taxes in respect of three shops, four flats on 10^{th} and 11^{th} floors, first floor and service floor from 01.04.2013. He invited our attention to clauses 32 and 42 of the development agreement. He submitted that the learned Single Judge directed respondent No.8 to deposit Rs.1 crore. During the pendency of the appeals, respondent No.1 has deposited Rs.60 lakhs with the Corporation. Respondent No.8, therefore, be directed to deposit amount of Rs.40 lakhs in this Court. Mr. Khandeparkar has also invited our attention to the impugned order and in particular paragraphs 46 and 47 which deal with service floor. In paragraph 47, the learned Single Judge has referred to paragraph 8(d)(iv) of the affidavit in reply filed by the respondent No.1 wherein respondent No.1 has admitted that service floor is an area used for common amenities for the entire building. The pipeline and electricity arrangement for the entire building is routed and is required for the benefit of the entire building. The learned Single Judge, therefore, held that the respondent No.1 cannot be allowed to deal with the service floor and / or create any third party rights in respect thereof. As far as first floor and basement is concerned, the learned Single Judge has dealt with this aspect in paragraphs 52 and 54. The learned Single Judge held that the decision of the learned Judge in **N. L. Private Limited** (*supra*) and of Apex Court in **Nahalchand Laloochand Private Limited** (*supra*) squarely apply to the facts of the

present case. Basement is covered in the expression "common areas and facilities". Basement is not counted in FSI. In other words, basement is free of FSI. In view of the development agreement and in particular clause 27(b) and 52, respondent No.1 cannot create third party interest in respect of basement area which are along with three shops bearing No.1, 2 and 3 of the ground floor. He submitted that the learned Single Judge has not issued injunction restraining use of shops 1 to 3. Injunction is restricted only in respect of basement area which respondents No.1 and 8 allegedly claim to be having access only through shops 1 to 3. He submitted that the access is also available other than the access from shops 1 to 3.

31. Mr. Khandeparkar also invited our attention to the D.C.R.38(9) to contend that basement falls in the expression "common areas and facilities" and therefore, the learned Single Judge was fully justified in issuing injunction in respect of the basement area along with shops 1, 2 and 3. He submitted that the view taken by the learned Single Judge is a possible view and therefore, no case is made out for interfering with the impugned order.

32. Mr. Rohan Kadam, appearing in support of Notice of Motion No.1028 of 2017, submitted that respondent No.8, had obtained loan from SVC Co-operative Bank Limited. The applicant in Chamber Summons is vitally affected by the outcome of the present appeals. He, therefore, adopted the submissions on behalf of the respondents No.1 and 8. Mr. Khandeparkar, on the other hand, opposed the Chamber Summons and submitted that as on date, respondent No.8 has not committed any default in repayment of loan amount. As on date, applicant in Chamber Summons, has no cause of action, and therefore, has no locus to maintain the Chamber Summons.

33. We have considered the rival submissions advanced by the learned Counsel appearing for the parties. We have also perused the material on record. We have recorded the above submissions in great details lest, we would be accused of not correctly depicting the submissions as they were canvassed before us. It is no doubt true that the order passed by the learned Single Judge is purely a discretionary order. In the case of **Warden Limited** *(supra)*, the Apex Court has laid down parameters in dealing with appeals before the Division Bench against the exercise of discretion by the learned Single Judge. In paragraph 14, it is observed thus,

> "14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

34. It is equally settled that while considering an application for grant of injunction, the Court has not only taken into consideration the basic element in relation thereto namely, (i) existence of strong prima facie case, (ii) balance of convenience is in favour of grant of injunction and (iii) if temporary injunction is not made, petitioners are likely to suffer

irreparable loss but it must also take into consideration conduct of the parties. Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The Court will not interfere only because the property is a valuable one. In the case of ***Mandali Ranganna Vs. T. Ramchandra***, **AIR 2008 SC 2295**, Apex Court observed in paragraph 18 thus,

> "18. While considering an application for grant of injunction, the court will not only take into consideration the basic elements in relation thereto, viz., existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties.
>
> Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The court will not interfere only because the property is a very valuable one. We are not however, oblivious of the fact that grant or refusal of injunction has serious consequence depending upon the nature thereof. The courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the courts is imperative. Contentions raised by the parties must be determined objectively."

35. Bearing in mind principles laid down by the Apex Court in the above decision, now we will deal with the matter.

36. As noted earlier, Development Agreement was entered into by and between petitioner No.1 and respondent No.1 on 03.11.2007. Respondent No.1 applied and obtained I.O.D. on 28.11.2007. This was followed by a part Commencement Certificate dated 07.02.2008 upto top of basement level. The said Commencement Certificate was subsequently extended on 06.02.2009, 10.09.2009 and finally on 23.12.2010 upto 11 residential floors. Respondent No.1 obtained Occupation Certificate on 10.12.2012. In April, 2013, as per the

Development Agreement, possession of 12 flats was handed over to the petitioners No.2 to 9 and respondents No.5 to 7 (members of petitioner No.1.).

37. It is material to note that it is not the case of the petitioners that the construction carried out by the first respondent is unauthorized or that it is contrary to the sanctioned plan. In fact, till date, admittedly, petitioners have not made any complaint to the Corporation or any other Planning Authority. The grievance of the petitioners is that the construction made by the first respondent is not as per the Development Agreement. Respondent No.1 has deviated from the Development Agreement and carried out construction. It is also evident that for the first time, notice was issued by the petitioner No.1 on 12.05.2015. This was replied by the respondent No.1 on 25.05.2015. Arbitration Petition under Section 9 is filed on 29.05.2015. The controversy between the parties is restricted only in respect of -

(i) service floor premises below the ground level;
(ii) first floor premises, and
(iii) basement level of three shops.

Re.: Service floor premises below the ground level

38. In so far as the service floor is concerned, the learned Single Judge has considered this aspect in paragraphs 46 to 48 of the impugned order. In paragraph 47, the learned Single Judge has referred to paragraph 8(d)(iv) of the affidavit in reply filed by the respondent No.1. Respondent No.1 admitted that service floor is an area used for common amenities wherein pipeline and electricity arrangement for the entire building is routed and is required for the benefit of the entire building. Respondent No.1, therefore, cannot be allowed to deal with the service floor and / or create third party rights in respect thereof. That apart,

during the course of hearing, Mr. Behramkamdin stated that till date, respondent No.1 has not created any third party interest. Respondent No.1 will hereafter neither create any third party interest nor part with possession thereof. Statements made by Mr. Behramkamdin are accepted. In view of the statements made by Mr. Behramkamdin as also categoric finding recorded by the learned Single Judge in paragraph 47, we do not find that the respondent No.1 has made out any case for interfering with grant of injunction qua service floor.

Re.: First Floor

39. During the course of hearing, Mr. Khandeparkar fairly stated that the learned Single Judge recorded findings in paragraphs 52 and 54 as regards first floor. Paragraphs 52 and 54 of the impugned order read thus,

> "52. A perusal of the record clearly indicates that the respondent no.1 has borrowed substantial amount from various banks and has already created mortgage in respect of most of the properties. Even in respect of some of the tenaments in the new building constructed under the development agreement, the respondent no.1 has already created alleged rights by executing leave and licence agreement or other writings. In my view the apprehension of the petitioner no.1 that if the respondents are not restrained from creating any third party rights in respect of some of the properties and atleast in case of service floor and first floor at this stage and the basement, the petitioner no.1 would not be able to recover any amount or such property from the respondent no.1 or from third party. In my prima facie view the petitioner has good chances of succeeding in the arbitral proceedings.
>
> 54. Since the petitioners have good chances in succeeding arbitral proceedings, it would be appropriate if the respondent no.1 is restrained from creating any third party rights in respect of the first floor premises, service floor and the basement, till the disposal of the arbitral proceedings filed by the petitioners and for further period of three months till such award is executed."

40. Mr. Khandeparkar has invited our attention to the second floor plan at page 218 of the appeal paper-book of Appeal No.397 of 2016. He submitted that respondent No.1 has demolished the internal walls. He has also dismantled both the car lifts thereby creating a void in the car lift shaft. Respondent No.1 has put permanent cement concrete slabs in the void created in the car lift shaft. He submitted that after the slabs are removed and the car lifts are restored by reconstructing internal walls, by maintaining car lifts as also 3 parking spaces, petitioners have no objection for the respondent No.1 selling office premises shown therein. After perusing the findings recorded in paragraphs 52 and 54, extracted hereinabove, we are of the opinion that the learned Single Judge has not dealt with this aspect at all. To this extent, the impugned order deserves to be modified thereby requesting the learned Single Judge to consider this aspect in the light of submissions advanced by Mr. Khandeparkar. It will be open for the respondent No.1 to respond to the suggestions made by Mr. Khandeparkar, which are recorded herein.

Re.: Basement Areas

41. In respect of basement areas, the learned Single Judge has dealt with this aspect in paragraph 48 of the impugned order. After referring to the decision of the learned Single Judge in **N. L. Private Limited** *(supra)* as also the Apex Court in **Nahalchand Laloochand Private Limited** (*supra*), the learned Single Judge observed that respondent No.1 cannot be allowed to create third party rights in respect of the service floor and **all other common amenities in the building**. The moot question is whether basement is covered by expression 'common areas and facilities'. This has to be considered in the light of paragraph 17 of the decision of the learned Single Judge in **N. L. Private Limited** (*supra*) as also paragraphs 54, 55 and 59 of the decision of the Apex Court in **Nahalchand Laloochand Private Limited** (*supra*). It is also

necessary to consider the provisions of MAOA, and in particular Sections 2, 3(f) and 6. The Court will have to consider whether basement falls in "commercial areas" and "facilities".

42. The decision of the learned Single Judge in **N. L. Private Limited** (*supra*) was rendered on 25.04.2008. The decision of the Apex Court in **Nahalchand Laloochand Private Limited** *(supra)* was rendered on 31.08.2010. The learned Single Judge and the Apex Court considered provisions of MOFA and MAOA. During the pendency of these Appeals, the Real Estate (Regulation and Development) Act, 2016 was brought in force. In view of the order that we propose to pass, the Court will also have to consider definition of "common areas" under Section 2(n) of the Real Estate (Regulation and Development) Act, 2016, which defines the expression "common areas". In particular, Section 2(n)(iii) lays down that common areas meant, **the common basements**, terraces, parks, play areas, open parking areas and common storage spaces. A perusal of the findings recorded by the learned Single Judge, with respect, does not indicate that the learned Single Judge has held that the basement is covered by the expression "common areas and facilities".

43. Apart from this, the learned Single Judge has also not dealt with the delay on the part of the petitioners in approaching the Court. The learned Single Judge also did not deal with the conduct of the petitioners. The petitioners have taken benefits under the Development Agreement. They were put in possession of their respective flats in April 2013. The petitioners have thereafter approached the Court only in May, 2015. In view of paragraph 18 of **Mandali Ranganna** (*supra*), while considering an application for grant of injunction, the Court has not only to take into consideration the basic elements in relation thereto

namely, (i) existence of strong prima facie case, (ii) balance of convenience is in favour of grant of injunction and (iii) if temporary injunction is not made, petitioners are likely to suffer irreparable loss but it must also take into consideration conduct of the parties. Grant of inunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively would not be entitled to an order of injunction. The Court will not interfere only because the property is a valuable one. The learned Single Judge, with respect, has not dealt with the conduct of the petitioners as also the fact that petitioners have made a monetary claim.

44. In the result, Appeals partly succeed. The findings recorded by the learned Single Judge in relation to the service floor are maintained. In so far as the findings recored in respect of first floor and basement area is concerned, the are set aside. The matter is remitted to the learned Single Judge for deciding these aspects afresh in the light of the submissions recorded herein. Till such time, the Petition is heard, there shall be ad-interim order restricting respondent No.1 from creating third party interest in respect of first floor as also basement area. Respondent No.8 is directed to deposit Rs.40 lakhs towards maintenance charges in this Court, which shall be invested as per the direction issued by the learned Single Judge. By way of abundant caution, it is clarified that the learned Single Judge will deal with the aspect only in respect of first floor and basement area along with the shops 1, 2 and 3. It is further clarified that there is no order of injunction restraining respondents No.1 and 8 from giving shops No.1, 2 and 3 on the ground floor on leave and licence basis as per order dated 23.12.2015 passed by this Court (Coram: V. M. Kanade & Revati Mohite-Dere, JJ.) in Notice of Motion (L) No.3594 of 2015. If leave and licence agreement is entered by respondents No.1 and 8, the same shall be subject to the orders that may

be passed by the learned Single Judge.

45. SVC Co-operative Bank Limited has taken out Notice of Motion for - a) clarification of the impugned order that the said order does not affect the applicant, and in the alternative, b) modification of the impugned order. As the respondent No.1 has not created third party interest in respect of service floor and that we have remitted the matter before the learned Single Judge in respect of the first floor and basement, liberty is reserved to the applicant to take out Chamber Summons before the learned Single Judge. All contentions of the other side are expressly kept open. Order accordingly.

46. In view of the disposal of the Appeals, pending Applications, if any, also stand disposed of.

(R. G. KETKAR, J.) **(NARESH H. PATIL, J.)**

Minal Parab