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

ARBITRATION PETITION NO.216 OF 2019

L.I.G.-1 Konkan Vasahat Co-op.
Housing Society Ltd. ..Petitioner
Vs.
Patel Group & Co. & Anr. ..Respondents

Mr.S.V. Bane with Mr.Prasad Parab, Ms.Akshata Satam, Ms.Vidita Sawant for Petitioner.
Mr.Joel Carlos for Respondent No.1
Mr.S.R. Page for Respondent No.2.

CORAM : G.S. KULKARNI, J.

DATE : 14th MARCH, 2019

P.C.:

In pursuance of the order dated 7 March 2019, learned Prothonotary & Senior Master has placed on record a note that cheque bearing No.000017 dated 7 March 2019 for an amount of Rs.2,15,04,000/- deposited on behalf of respondent No.1 is returned by the Reserve Bank of India on 11 March 2019 for the reason "funds insufficient". The consequence of the dishonour of the cheque is quite clear that respondent No.1 has no financial ability to clear the amounts due and payable to the members of the petitioner. Rs.2,15,04,000/- was the amount of the agreed compensation payable by respondent No.1 towards temporary alternate accommodation. As also the petitioner is correct in his contention that the respondent would not have the wherewithal/financial ability to undertake and complete the project. On this backdrop and of what was recorded by the Court in the previous orders, this petition is taken up for hearing.

2. This petition is filed by the Co-operative Society which aspired for redevelopment of its old and dilapidated buildings invoking the jurisdiction of this Court under Section 9 of the Arbitration and Conciliation Act, 1996, against the developers praying for the following interim reliefs pending arbitral proceedings:-

> "a. That the pending the hearing and final disposal of Arbitration Petition this Hon'ble Chief Justice and Hon'ble designated Judge may be pleased to direct the Respondent to deposit the outstanding rent and penalty payable to members of the Applicant society i.e. Rs.27,000/- p.m. per member for the period 01.02.2017 to 18.2.2018 i.e. termination of Respondent.
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> b. That pending the hearing and final disposal of the Arbitration petition this Hon'ble Chief Justice and Hon'ble designated Judge may be pleased to direct the Respondent to deposit the penalty amount @ Rs.15,000/- p.m. per member to Applicant starting from November 2016 to Jan 2017 as agreed by the Respondent in the Indemnity bond dated 19/12/2014.
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> c. That pending the hearing and final disposal of the Arbitration Petition this Hon'ble Chief Justice and Hon'ble designated Judge may be pleased to direct the Respondent to deposit the penalty amount @ Rs.15,000/- p.m. per member to Applicant society starting from March 2018 to October 2018 as agreed by the Respondent in the Indemnity bond dated 19/12/2014.
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> d. That pending the hearing and final disposal of the Arbitration Petition this Hon'ble Chief Justice and Hon'ble designated Judge may be pleased to direct the Respondent to pay 21% interest p.a. on the amount payable by him since March 2018 to till date and thereafter.
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> e. That pending the hearing and final disposal of the Arbitration Petition this Hon'ble Chief Justice and Hon'ble designated Judge may be pleased to direct the Respondent

> to handover possession of the plot of land bearing Revenue S. No.22, 41A/1(p) & 2(p), 42A(p) & 42A/2(p), 3(p), 4(p), 9(p) & 24(p) and 47A of the village Chikanghar, Kalyan West on land admeasuring 12,593.13 Sq. Mtr and bearing Revenue S. No. 22, 41A/1(p) & 2(p), 42A(p) & 42A/2(p), 3(p), 4(p), 9(p) & 24(p) and 47A of the village Chikanghar, Kalyan West on land admeasuring 2557.01 Sq. Mtr. to applicant society and restrain Respondent from entering in the said plot as they are not ready and willing to perform their part of the Development Agreement.
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> f. That pending the hearing and final disposal of the Arbitration Petition this Hon'ble Chief Justice and Hon'ble designated Judge may be pleased to allow applicant society to carry out balance construction work through self Development."

3. As seen from the conduct of the respondent in not making payment of the arrears of the rent for temporary alternate accommodation which is a staggering amount of Rs.29 crores. and further that even the cheque of Rs.2,15,04,000/- towards part payment as deposited by the respondent No.1 in this Court, in pursuance of the directions of this Court was dishonoured, it is clear that the respondent No.1 is not in a position to undertake and complete the project. Prayer clauses (a), (b), (c) and (d) are in the nature of a monetary claim of the petitioner for its members and admittedly due and entitled to the members of the petitioner as payable by respondent No.1. Even respondent No.1 has not disputed that these amounts are due and payable and in fact, an attempt on the part of the respondent No.1 to partly make the payment of Rs.2,15,04,000/- has also failed on the dishonour of the cheque so issued by respondent No.1.

4. This petition was heard from time to time. On 25 October 2018, this Court (S.J. Kathawalla, J.) after hearing the parties passed the following order appointing the Court Receiver:-

> "1. The Petitioner Society has 448 members. The Respondent developer in the year 2011 admittedly took possession of the premises/flats which were in occupation of the 448 members of the Society by promising to redevelop the property of the Society and giving new flats with larger areas, free of cost to the said 448 members. The Respondent has in the last seven years not only failed to complete the project, but has since February 2017 also failed to pay compensation in lieu of temporary alternate accommodation to the 448 members of the Society. This is despite the developer having collected Rs.30 Crores from the flat purchasers under the free sale category and further availing a loan of Rs.170 Crores from Dewan Housing Finance Ltd. The members of the Society who were exasperated by the conduct of the Respondent-developer, terminated the development agreement with the Respondent.
>
> 2. The 448 members of the Society along with their family members are therefore, virtually brought on the streets by the Respondent developer who has not only failed to provide them the accommodation as promised, but has also not paid them the agreed compensation towards temporary alternate accommodation as promised, which amounts are desperately needed by them to finance their present stay on leave and license basis. The Respondent developer is even today not ready to forthwith pay to the 448 members of the Society the arrears of compensation towards temporary alternate accommodation upto the date of termination and have left the 448 members of the Society along with their families, completely in the lurch. The developer has therefore, willfully cheated the 448 members of the Petitioner Society. In view thereof, the following order is passed :
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> (i) The Court Receiver, High Court, Bombay is appointed Receiver in respect of the Suit Project.
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> (ii) The Court Receiver shall forthwith take possession of the suit project and submit his report to this Court on the adjourned date.
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> (iii) The Developer undertakes to file an Affidavit disclosing the assets of the partnership firm, the personal assets of the partner of the Respondent as well as their immediate family members (encumbered and

unencumbered), the bank accounts and the income tax returns of the partnership firm as well as the Partners of the Respondent Firm of the last five years.

(iv) The developer shall not deal with the project any further including collecting any monies from any flat purchasers or taking any loans from any financial institutions on the strength of the suit project.

(v) Stand over to 1st November, 2018."

5. Thereafter on 1 November 2018 considering the submission as made on behalf of the respondent, the Court passed the following order:-

"1. The Petitioner Society has 448 members. The Learned Advocate appearing for the Developer states that 350 members out of 448 are even today willing to continue with the Developer, despite the developer having not paid them their compensation towards temporary alternate accommodation since February 2017 and have till date not handed over possession of the rehab portion. In view thereof, Mr. Ketan Trivedi, Additional Prothonotary and Senior Master, is appointed as Court Officer to conduct a meeting of 448 members on Sunday, 11th November, 2018 when the following question will be put to them and they will answer the same by secret ballot.

(i) Whether despite the defaults committed by the present Developer – Patel Group and Co., the members are willing to continue with him ?

2. The Senior Inspector of local Police Station shall ensure that adequate police force including lady police officers is deployed at the site, where the meeting is conducted by the Court Officer.

3. Except for the members, the Contractor and the developer, no other person shall attend the meeting.

3. The developer has agreed that arrears of compensation in lieu of temporary alternate accommodation payable to the members is approximately Rs.29 Crores and that he will deposit four months' compensation with the Prothonotary and Senior Master of this Court within a period of one week from today.

4. If any documents are required by the Developer from where he has stored his documents, they shall approach the Court Officer who shall depute his person to enable the Developer to remove the documents from his office, the costs of which shall be borne by the Developer.

5. Stand over to 12th November, 2018 in Chambers."

6. It is pertinent to note that the Court categorically recorded that the respondent has agreed that arrears of compensation in lieu of temporary alternate accommodation payable to the members is approximately Rs.29 Crores and that the same will be deposited with the Prothonotary and Senior Master of this Court within a period of one week from the said order. However, the said amount was not immediately deposited. The Court accordingly after hearing the parties again on 23 January 2019 passed the following order:-

> “. Heard Mr. Bane, learned counsel for the Petitioner and Mr.Carlos, learned counsel for the Respondent.
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> 2. This Court on 25.10.2018, after hearing the parties, had observed that the 448 members of the Society alongwith their family are virtually brought on the streets by the respondent developer who has not only failed to provide them the accommodation as promised, but has also not paid them the agreed compensation towards temporary alternate accommodation, which amounts were still needed by these members to finance their present stay on leave and license basis. It was also recorded that the respondent developer has cheated the 448 members of the Petitioner Society. Accordingly, the Court had passed an order appointing the Court Receiver, High Court, Bombay as receiver of the Suit Project with a direction to the Court Receiver that he shall forthwith take possession of the suit project and submit his report to this Court. The respondent developer was directed to file an Affidavit disclosing the assets of the partnership firm, the personal assets of the partner of the respondent developer as well as their immediate family members (encumbered and unencumbered), the bank accounts and the income tax returns of the partnership firm as well as the partners of the Respondent Firm of the last five years. There was a further direction the respondent developer shall not deal with the project any further including collecting any monies from any flat purchasers or taking any loans from any financial institutions on the strength of the suit project.
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> 3. Thereafter, this Court on 01.11.2018 passed an order recording the statement as made on behalf of the

respondent developer that majority of the members i.e. 350 members out of 448 members were willing to continue with the respondent developer, despite the respondent developer having not paid them their compensation towards temporary alternate accommodation since February 2017. Accordingly, this Court appointed Additional Prothonotary and Senior Master to conduct a meeting of 448 members on 11.11.2018 asking the Petitioner as to whether the members were willing to continue with the respondent developer. What is significant is that in paragraph 3 of the said order the Court recorded the statement as made on behalf of the respondent developer that the arrears of compensation in lieu of temporary alternate accommodation payable to the members is approximately Rs. 29 crores and that the respondent developer will deposit four months compensation with the Prothonotary and Senior Master of this Court within a period of one week from the date of the order.

4. Learned counsel for the Petitioner would submit that this undertaking given to the Court to deposit arrears of compensation for four months within one week from the date of order dated 01.11.2018 is not complied by the respondent developer. No Application was made to seek extension of time on behalf of the respondent developer. Learned counsel for the Petitioner submits that this would speak volumes about the intention of the respondent developer to undertake the project when the arrears of four months compensation cannot be cleared by the respondent developer.

5. Learned counsel for the respondent developer submits that his client is interested to undertake the project, however, because of the orders passed by this Court, his client was unable to undertake anything further and also could not approach financial institutions for obtaining finance for completion of the project. My attention is drawn to the affidavit-in-reply filed by the respondent developer and more particularly, in para 22 of the said affidavit, where he points out that the substantial construction has been undertaken by the respondent developer and that the respondent developer would have all inclination to complete the rehabilitation building. Para 22 of the said Affidavit reads thus:-

> *"22. I say that even as on date the Respondent continues to construct the said buildings and as on date Wing B 1 is completed upto its CC, Wing B2 is also completed upto its CC and is awaiting further CC, Wing B3 and B4 are also completed upto the CC and are awaiting further CC. Hereto annexed and marked as*

> ***Exhibit "M"*** *is the copy of the Architect Certificate showing that the buildings have been completed as per the approvals in place. I say that further CC is waited and once the same are obtained even the said portion of the rehab building would be completed without any delay. Hereto annexed and marked as* ***Exhibit "N"*** *is the copy of the photographs showing the substantial construction carried on site. I say that in fact the RCC work of B3 and B4 rehab buildings has been completed entirely and currently only internal work is in progress which will also be completed at the earliest. I therefore state that the contention of the project being not completed is totally false to the knowledge of the applicants."*

6. Having heard learned counsel for the parties, it appears to be quiet clear that the respondent developer is in contempt of the order dated 01.11.2018 passed by this Court having not deposited the compensation of four months as undertaken and directed by this Court in the said order. It is also quiet clear that there was no attempt on the part of the respondent developer to seek extension of time or there is no material to show that in fact, the respondent developer intended to comply with the said undertaking given to the Court. If this be so, learned counsel for the Petitioner would be correct in submitting that there are grave doubts as to whether the respondent developer can at all undertake further construction of the project complete the same and accommodate the members of the Society in the rehabilitation building.

7. However, considering the submissions as made by Mr. Carlos, learned counsel for the Respondent, and reserving the orders which would be required to be passed on the contempt plea against the developer as urged on behalf of the Petitioner, in the facts and circumstances of the case, I am inclined to grant a final opportunity to the respondent developer to place an Affidavit on record of this Petition to state as to in what manner and within what period the respondent developer would be in a position to undertake the further work and the completion of their rehabilitation buildings. Mr. Carlos has submitted that his client would approach Diwan Housing Finance for further financial facilities which would be necessary for completion of the rehabilitation project. The estimate of such financial requirement is not so far on record.

8. The respondent developer shall also place on record as to what further steps are required to be undertaken for completion of the rehabilitation building as

also the present finances which are available with the respondent developer apart from the borrowing which the respondent developer intends to procure.

9. Unless a complete and concrete plan of the respondent developer which would include all the above attributes is before the Court, the bonafides of the respondent developer would not be clear and cannot be accepted as suggested by Mr. Carlos.

10. Let this Affidavit to that effect be filed by the respondent developer be placed on record before the adjourned date of hearing.

11. It would also be necessary in the fact situation that the Petitioner implead Diwan Housing Finance Limited as party Respondent to this Petition so that the version of the respondent that finance would be made available by the said financial institution can also be ascertained for further orders to be passed.

12. The Petitioner shall carry out the necessary amendment to the cause title during the course of the day. Office to issue notice to the added Respondent, returnable after two weeks. Hamdast permitted.

13. It may also be observed that on the adjourned date, if the Court after hearing learned counsel for the parties and material on record is of the opinion that the Respondent would not be in a position to undertake further development, in that event, it would be imperative considering plight of the members of the Society and they are awaiting their rehabilitation in the permanent alternate accommodation which is partly constructed, the Court would consider the prayers (e) and (f) of the Petition which read thus :-

> *"(e) That pending the hearing and final disposal of the Arbitration Petition this Hon'ble Chief Justice and Hon'ble designated Judge may be pleased to direct the Respondent to handover possession of the plot of land bearing Revenue S. No. 22, 41A/1(p) & 2(p), 42A(p) & 42A/2(p), 3(p), 4(p), 9(p) & 24(p) and 47A of the village Chikanghar, Kalyan West on land measuring 12,593.13 Sq. Mtr and bearing Revenue S. No. 22, 41A/1(p) & 2(p), 42A(p) & 42A/2(p), 3(p), 4(p), 9(p) & 24(p) and 47A of the village Chikanghar, Kalyan West on land admeasuring 2557.01 Sq. Mtr. to applicant society and restrain Respondent from entering in the said plot as they are not ready and willing to perform their part of the Development Agreement.*
>
> *(f) That pending the hearing and final disposal of*

> *the Arbitration Petition this Hon'ble Chief Justice and Hon'ble designated Judge may be pleased to allow applicant society to carry out balance construction work through self Development."*

> 14. It is further clarified that it would be open to the respondent developer to deposit in this Court the amount as directed by this Court in the order dated 01.11.2018. In any case, this would be only be a mitigating factor for the Court to consider as to whether the Court shall proceed to take action against the Respondent under the Contempt of Court Act for having violated the order dated 01.11.2018 as noted above.
> 15. Reserving all the contentions of the parties, the hearing of this Petition is adjourned for a period of three weeks, as a last chance. Parties are put to notice that on the adjourned date the Court shall take up the matter and proceed to pass further appropriate orders.
> 16. Stand over to 13.02.2019.
> All concerned to act on the authenticated copy of this order."

7. At one point of time, respondent No.1 had made a statement that Diwan Housing Finance was inclined to finance the project and a workable solution can be arrived at. Accordingly, Diwan Housing Finance was impleaded as respondent No.2 to the present petition. Learned Counsel for respondent No.2-Diwan Housing Finance has filed an affidavit of Mr.Amol H. Walawalkar dated 11 March 2019 inter-alia stating that the entire loan amount of Rs.199 Crores was disbursed to the respondent No.1, and respondent No.2 would not be in a position to provide any further finance/financial facilities to the respondent No.1 to complete the project. The relevant contents in the affidavit as filed on behalf of the respondent No.2 are required to be noted which read thus:-

> "2. I state that the MHADA is the owner of the land and

also constructed the building of the Petitioner's building. The flat purchasers of the Petitioner society passed a resolution in a General Body meeting and majority members decided to redevelop the old building of the society and thereby appointed Respondent No.1 as a Builder/Developer and executed Registered Development Agreement on 30/12/2010. It is pertinent to note that, Respondent No.1 obtained a project loan from the Respondent No.2 for the construction of the redevelopment project known as “Patel Colossus” and mortgaged only free sale component/flat (portion belonging to the Developer) of the project “Patel Colossus” with Respondent No.2 by virtue of registered mortgage deed (simple mortgage) dated 24/2/2015 executed by Respondent no.1 wherein Petitioner is a confirming party. It is pertinent to note that MHADA has granted its No Objection to Mortgage the free sale component to Respondent No.2 dated 14/01/2015. It is to be noted that MHADA has not made as a party Respondent to this Petition though it is necessary party to this transaction. The present Respondent states that the Petitioner as a confirming party has executed the mortgage deed whereby the Respondent No.1 has created valid mortgage/security interest in favour of the Respondent No.2 therefore by the present affidavit, Respondent no.2 states that the interest of Respondent no.2 arising from the mortgage deed deserves to be protected. Respondent no.2 is entitled to the amounts which will be then outstanding in the loan account of the Respondent No.1 with interest, incidental cost and charges as per the terms of the deed of mortgage and other loan documents.

3. I state that almost the entire the Loan amount has been disbursed, as per the request of the borrower and the deed of mortgage, the Respondent no.2 would not be in a position to provide any further finance/ financial facilities to the Respondent no.1 for completion of the project. With reference to the additional affidavit filed by the Petitioner, I deny the contents of the said affidavit with reference to paragraphs other than 6 and 23 – which pertain to the Respondent no.2. With reference to paragraph 6, I state that the terms and conditions of the mortgage and disbursement are in line with the progress of construction and transit rent is in no manner relevant for the purpose of disbursement of the amount in favour of Respondent no.1. With reference to paragraph 23, I state that there is no violation on part of Respondent no.2 in disbursement of the amount in favour of Respondent No.1 and therefore, the Petitioner is not entitled to seek directions/reliefs against Respondent no.2 of any nature through the said affidavit.

> Moreover, the grievances raised by Petitioner against Respondent no.1 has nothing to do with the amount disbursed by Respondent no.2 in favour of Respondent no.1 – which primarily pertained to failure on part of Respondent no.1 to make payment of transit rent on a regular basis to the Petitioner. Even the ancillary reliefs sought by the Petitioner are in relation to penalty, interest and cost and for handing over of the possession to the Petitioner Society by Respondent no.1 for redevelopment purposes. I therefore state that the Petitioner cannot seek any relief against Respondent no.2 by way of the said affidavit."

8. On the above backdrop, the petition is heard today.

9. Learned Counsel for the petitioner has reiterated the submissions as recorded by this Court in the orders passed earlier and noted above and has submitted that in these circumstances, the petitioner would now pray for interim reliefs in terms of prayer clauses (e) and (f) (supra).

10. Admittedly, the land in question belongs to MHADA, who had constructed 28 buildings on the plot of land, the details of which are set out in paragraph 3 of the petition. A General Body Meeting of the petitioner was held on 11 April 2010 wherein it was resolved to construct the new buildings by demolishing the old buildings. It was resolved to appointed respondent No.1 as a developer. Accordingly, development agreements were entered into with respondent No.1. The members of the petitioner society vacated their premises in the year 2011. The respondent No.1 started the re-development work, however, the said work was abruptly stopped in January 2014. The amount of arrears of

the rent for temporary alternate accommodation was also not paid to the members of the petitioner. The members of the petitioner are accordingly brought on the streets by respondent no.1. There are also several breaches of the various assurances as given by respondent No.1 and a gross failure on the part of respondent No.1 to comply with the obligations under the development agreement.

11. Respondent No.1 has filed affidavit-in-reply of Mr.Hasmukh Patel, partner of respondent No.1, dated 1 November 2018 inter-alia admitting the obligations under the development agreement entered with the petitioner. Respondent No.1 has stated that IOD for the said project was obtained on 17 February 2011 and demolition of the said building was undertaken from March 2011 to July 2011. In paragraphs 8 and 9 the respondent No.1 has given the details of further steps as taken after obtaining IOD etc. namely respondent No.1 having applied for provisional fire NOC and storm water drainage NOC. In paragraph 10 of the affidavit-in-reply, it is stated that part C.C. was obtained for rehabilitation of Building Nos.B1, B2, B3 and B4 for stilt plus seven floors on 4 July 2011 and thereafter construction of the buildings commenced after receipt of the Commencement Certificate. The reply affidavit further states that on the date when the C.C. was granted, the FSI available was 1.2 and building No.20 and 28 forming part of the layout were non co-operative in the scheme. Thus, a separate development agreement dated

20 December 2012 was executed for building No.20 and 28 for which the petitioner had also given its consent. It is further stated by respondent No.1 that steps were taken to amalgamate the plots and construction activities had commenced, however due to change in the available FSI, the plans had to be revised in 2014. It is stated that at the relevant time (in the year 2014), inspite of the revision in plans, the construction was not stopped and the respondent No.1 continued to make the requisite payments of rent to the members of the society. Further it is stated that environmental clearance was also obtained on 12 December 2014. It is further stated that the adjoining society of high income group had also agreed to join the redevelopment project which was consented to by the petitioner. Thus, the respondent was required to apply for amendment of the sanctioned plans by an application dated 27 January 2015. It is stated that all work of construction, sanction and approvals of plans came to an abrupt halt in view of the order passed by this Court in PIL No.182 of 2009 whereby Kalyan Dombivali Municipal Corporation (for short, “KDMC”)was restrained from sanctioning building proposals. It is stated that respondent No.1 also moved a Civil Application No.76 of 2015 in PIL No.182 of 2009 on 24 April 2015 seeking permission of the Court for approval of the amended plans. It is stated that in April 2016, the order restraining the KDMC from granting approval was vacated and therefore the final revised commencement certificate came to be issued only in July 2017. It is thus the case of respondent No.1 that even when the project

was stalled due to no fault of the respondent No.1, the respondent No.1 continued to pay the rent to the members of the society which were mounting on account of the restraining order passed by this Court in PIL No.182 of 2009. In paragraph 20 of the reply affidavit, it is stated that on receipt of the approval as per the amended plan dated 29 July 2017, respondent No.1 commenced the work of completing the construction in full force. The relevant contents are required to be noted which read thus:-

> "20. I say that immediately on receipt of the approvals as per the amended plan dated 29/7/2017, this Respondent commenced the work of completing the construction in full force. However, due to severe financial difficulties, the rents could not be paid to the members. Hereto annexed and marked as Exhibit "K" is the copy of the amended commencement certificate dated 29/7/2017."

12. Thereafter it is stated that on 17 December 2016 a General Body meeting was held when all the members agreed to grant an extension of one year to the respondent No.1 in view of the difficulties being faced which were not under the control of the respondent No.1. In paragraph 22 of the said affidavit, respondent No.1 stated that even as on date the respondent continues to construct the said buildings and Wing B1 is completed upto its CC, Wing B2 is also completed upto its CC and is awaiting further CC, Wing B3 and B4 are also completed upto the CC and are awaiting further CC. It is stated that a further CC is awaited and once the same are obtained, even the said portion of the rehab building would be completed without any delay. Though the contents are vague and not

clear in paragraph 23 of the said affidavit it is stated that respondent No.1 has invested an amount of Rs.285 Crores and not gained or earned any profit from the said project. In paragraph 24 of the affidavit, it is stated that presently nearly 400 out of 448 members including most of the managing committee members are consenting to the respondent No.1 for going ahead with the said project and it is only the petitioner who does not represent the majority and is in abysmal minority is creating difficulties. It is stated that however there is no material on record except a letter which is stated to be of the former Chairman of the society who has stated that there was no consent taken prior to filing of this petition as stated in paragraph 25 of the reply affidavit. It is stated that the construction material is lying on site which was valued approximately Rs.3 Crores.

13. There is an additional affidavit of Mr.Hasmukh Patel dated 13 February 2019 as filed on behalf of respondent No.1 tendering unconditional apology for not having deposited the amount as directed by this Court as directed by the order dated 1 November 2018, whereby the cheque for an amount of Rs.2,15,04,000/- towards the four months rent for 448 tenants was sought to be deposited. There is prayer in the said affidavit that cheque be accepted in this Court as also unconditional apology be accepted. In paragraph 6 of the said affidavit it is stated that talks with Deewan Housing Finance Ltd. could not materialize due to

some issues facing the said finance company and respondent No.1 has accordingly approached another bank for finance facilities and accordingly a loan to the tune of Rs.25 Crores has been sanctioned. In paragraph 7 of the affidavit, it is stated that third party M/s.Shreyash Infrastproject Builders Pvt. Ltd. has been approached by respondent No.1 for financing the project and that the said party was willing to execute the work. Mr.Bane, learned Counsel for the petitioner, would however submit that ultimately though it is stated in paragraph 7, however the same could not be materialize in view of the weak financial position of respondent No.1. In paragraphs 10, 11, 12, and 13 there are assurances given by the respondent No.1 that the respondent No.1 would undertake the project work and complete the same. However, it is clear from what has transpired that respondent No.1 would not be in a position to undertake the work due to its financial condition.

14. It is writ large that respondent No.1 although agreed under the development agreement in question dated 30 December 2010 and the subsequent agreement as noted above to undertake and complete the project, however, it appears that respondent No.1 was either over ambitious and/or greedy and intended to deviate from the basic agreement by increasing the scope of development by adding further buildings in the redevelopment project which is clear from the facts which are on record and noted above. In fact two of such additions were made

to the principal project. Though it is stated that there was some impediment on the part of respondent No.1 to undertake the construction and it is stated that it was in view of the orders passed by this Court, it does not inspire any confidence in as much as the first development agreement was entered into by the respondent No.1 with the petitioner on 30 December 2010. Thereafter there are additional agreements which are entered into between the parties and the third parties who were sought to be added to the project.

15. It is quite clear that respondent No.1 is in serious financial difficulties and therefore, could not comply with the obligations in respect of the construction as also making payment of the compensation for providing transit/temporary alternate accommodation as provided to 448 members of the petitioner society. Now the position is crystal clear from the record that financially the project has become unviable to respondent No.1. Respondent No.2 initially financed the project to the tune of Rs.199 Crores and thereafter refused to provide any further financial facilities. The decision of respondent No.1 to enter into a development agreement and accept the project was a commercial decision and it was incumbent on respondent No.1 as per the terms of the agreement as entered with the society that in undertaking the project, a serious consequence of depriving the members of the petitioner society, of a shelter for a temporary period till the project is completed, was involved

and well to the knowledge and experience of respondent no.1. Admittedly in the present case this period has far exceeded the reasonable limits and the project is extraordinarily delayed due to the actions of respondent no.1. Thus the consequence was that there was an obligation on the part of respondent No.1 to adequately secure the interest of the members of the petitioner society by making payment of interim rent and ultimately completing the project and making available permanent alternate accommodation as agreed in the development agreement. It however clearly appears that the approach of the respondent No.1 was not in the interest of the society and its members, in as much as without having financial feasibility, respondent No.1 over-ambitiously made the members of the petitioner society agree for extended development of the additional buildings as situated on the adjoining land thereby completely changing the nature of project. The petitioner cannot be faulted for such changes on the part of respondent No.1. The petitioner society and its members were completely in the hands and mercy of respondent No.1, having vacated their pre-development premises and awaiting permanent alternate accommodation, and being in this situation appears to have agreed that the plots can be amalgamated and extended development can be replaced. The petitioner and its members cannot be faulted for such decision. It was obligatory for respondent No.1 if it intended to complete the development work, not only to comply primary obligations as specified in the development agreement, as also the entitlement of the occupants of the land who were part of the extended development.

16. However, it appears that respondent No.1 adopted an adamant approach causing serious difficulties to the members of the petitioner who were completely dependent on respondent No.1 for the interim compensation, for the temporary alternate accommodation and also eagerly awaiting completion of the project. Due to the financial incapability of respondent No.1, the present situation has arisen, which is abundantly clear from the reply affidavit and the additional affidavits placed on record on behalf of respondent No.1.

17. What is further glaring is that even the assurances which were given to the Court and as recorded in the orders noted above that the compensation for arrears of rent of 4 months to be deposited in the Court, was a false assurance in as much as, the report of the Prothonotary & Senior Master clearly shows that the cheque deposited on behalf of the respondent No.1 has been dishonoured for the reason "funds insufficient". This speaks volume about the conduct of the respondent No.1. Respondent No.1 has taken the members of the society to a ride as also given false assurances to the Court of payment of interim rent the cheque for which came to be dishonoured. If such is the conduct of respondent No.1 even before the Court then the learned Counsel for the petitioner would be correct in his contention that such person cannot be believed to

proceed to construct and complete the project, as also he has no financial ability as clear from the record. In the aforesaid situation, the Court will have no alternative but to permit the petitioner to take such appropriate steps to complete the construction. These are the prayers made in the petition. The said prayers are prayer clauses (e) and (f). Accordingly, it would be most eminent and in the interest of justice and more particularly, in view of the facts that about 448 members of the petitioner are out of their houses since 2011 and are not provided permanent alternate accommodation till date these prayers are necessarily required to be considered and granted. The balance of convenience is overwhelmingly in favour of the petitioner. If such reliefs are not granted, serious and irreparable injury would be caused to the members of petitioner for no fault of them. The basic entitlement and a right to a roof over their head which otherwise was entitled to them is being deprived merely because of the decision of redevelopment and respondent no.1 not fulfilling its obligations under the development agreement.

18. In the light of the above discussion, in my considered opinion, the process of law is required to come to the aid and rescue of the petitioner, as the petitioner is made to suffer at the hands of respondent No.1. The members of the petitioner are in a miserable condition as observed by Justice Kathawalla in the previous orders. Thus, considering the facts and circumstances of the case, the petition is required to be partly allowed. It

is allowed in terms of prayer clauses (e) and (f) which reads thus:-

> "e. That pending the hearing and final disposal of the Arbitration Petition this Hon'ble Chief Justice and Hon'ble designated Judge may be pleased to direct the Respondent to handover possession of the plot of land bearing Revenue S. No.22, 41A/1(p) & 2(p), 42A(p) & 42A/2(p), 3(p), 4(p), 9(p) & 24(p) and 47A of the village Chikanghar, Kalyan West on land admeasuring 12,593.13 Sq. Mtr and bearing Revenue S. No. 22, 41A/1(p) & 2(p), 42A(p) & 42A/2(p), 3(p), 4(p), 9(p) & 24(p) and 47A of the village Chikanghar, Kalyan West on land admeasuring 2557.01 Sq. Mtr. to applicant society and restrain Respondent from entering in the said plot as they are not ready and willing to perform their part of the Development Agreement.
> f. That pending the hearing and final disposal of the Arbitration Petition this Hon'ble Chief Justice and Hon'ble designated Judge may be pleased to allow applicant society to carry out balance construction work through self Development."

19. The Court Receiver is accordingly directed to accept any requisition for re-development which may be submitted by the petitioner which shall be on the basis of general body resolution and supported by an affidavit and thereafter shall hand over the project in question to the petitioner or their nominees for the purpose of undertaking further construction of the balance redevelopment.

20. As regards the prayer clauses (a), (b), (c) and (d) which are for recovery of amount, the petitioner shall take appropriate steps to recover the said amount and by invoking arbitration. In the meantime, till such appropriate application is filed and decided by the arbitral tribunal, respondent No.1 is injuncted from creating any third party rights in respect of any movable and immovable assets belonging to respondent no.1 and its partners, the details of which are on record at page Nos.324 and 325 of the paper book.

21. Needless to observe that this order is in no manner adjudication of any rights of respondent no.2-Deewan Housing Finance Ltd. who is not a party to the agreement as entered between the petitioner and respondent no.1.

22. The petition is disposed of in the above terms. No costs.

[G.S. KULKARNI, J.]