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

ARBITRATION PETITION NO. 690 OF 2019

Liberty Garden CHS Ltd.
A Society duly registered under the Maharashtra
Co-operative Societies Act, 1960
Through its authorized representative Mr. Prashant Shikarkhane
Having its C/o address at:
B-902, Vaastu Towers, Evershine Nagar, Malad (West),
Mumbai – 400 064. ... Petitioner

Versus

M/s. K.T. Group,
A Registered Partnership Firm of Mr. Dhairya Sheth
and Mr. Sandeep Sheth as partners having its
Registered office at Shop No. 6, Madhur,
T.P.S. Road, Babhai, Borivali (West),
Mumbai – 400 092. ... Respondent

**ALONG WITH
ARBITRATION PETITION NO. 802 OF 2019**

M/s. K.T. Group,
A Registered Partnership Firm having its office at
Shop No.6, Madhur, T.P.S. Road, Babhai,
Borivali (West), Mumbai – 400 092. ... Petitioner

Versus

Liberty Garden Co-operative Housing Society Limited,
A Society registered under the Maharashtra Co-operative
Societies Act, 1960 having office at Garden Quarters
Scheme, No.II/Plot No. 4, Mamlatdarwadi Road,
Malad (West), Mumbai – 400 064. ... Respondent

**ALONG WITH
NOTICE OF MOTION NO. 1586 OF 2019
IN
ARBITRATION PETITION NO. 802 OF 2019**

M/s. K.T. Group,
A Registered Partnership Firm having its office at
Shop No.6, Madhur, T.P.S. Road, Babhai,
Borivali (West), Mumbai – 400 092.

... Applicant

Versus

Liberty Garden Co-operative Housing Society Limited,
A Society registered under the Maharashtra Co-operative
Societies Act, 1960 having office at Garden Quarters
Scheme, No.II/Plot No. 4, Mamlatdarwadi Road,
Malad (West), Mumbai – 400 064.

... Respondent

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Ms. R.C. Nichani a/w Ms. Sunita M. Poddar, Mr. V.K. Khandare and
Ms.Geeta Bhoir, Advocates for the petitioner in ARBP/802/2019 and for the
respondent in ARBP/690/2019.

Mr. Aseem Naphade a/w Mr. Tushar Gujjar, Mr. Deepak Singh and
Mr.Darshil Shah i/by M/s. Solicis Lex, Advocates for the petitioner in
ARBP/690/2019 and for the respondent in ARBP/802/2019.

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 18th OCTOBER, 2019

PRONOUNCED ON : 7th JANUARY, 2020

JUDGMENT :

. By consent of parties both the Arbitration Petitions and the Notice of Motion were heard together and are being disposed of by a common judgment. By these two arbitration petitions, both the parties have challenged part of the Arbitral Award rendered by the learned arbitrator filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as “Arbitration Act” for short), Notice of Motion No. 1586 of 2019

is filed by the members of Liberty Garden Co-operative Housing Society Limited *inter-alia* praying for stay of the impugned award in respect of findings and directions in paragraph nos. 98, 102, 104, 108, 109, 111, 113 and 124 of the award. The applicant also seeks an order and directions against the respondent to handover possession of the property and structure standing on the suit plot to the private receiver and/or the petitioner in compliance with paragraph no. 109 of the impugned award as further amended on 11th February, 2009. M/s. K.T. Group has also challenged the order dated 14th February, 2010 passed by the learned arbitrator under Section 33 of the Arbitration Act in the Arbitration Petition in 802 of 2019. Some of the relevant facts for the purpose of deciding both these petitions and notice of motion are as under :-

2. The petitioner in Arbitration Petition No. 690 of 2019 was the claimant in the arbitral proceedings whereas the petitioner in Arbitration Petition No. 802 of 2019 was the respondent. The parties are referred in this judgment as per their original status in the arbitral proceedings. On 19th December, 2013, the claimant and the respondent entered into a registered Development Agreement and Power of Attorney in respect of the property land bearing CTS No. 764 admeasuring 795.5 sq. mts. at Scheme No. II/Plot No.4 Mamlatdar Wadi Ext. Road, Malad (West), Mumbai 400064 along with buildings standing thereon consisting of 2 wings comprising ground plus 3 upper floors for development. Respondent was required to carry out

construction under the said agreement. The power of attorney was executed by the claimant in favour of the respondent conferring with various powers in respect of the said development rights granted in favour of the respondent by the claimant.

3. In clause (i) of the said Development Agreement, it was provided that the buildings were constructed in 1968 and were in a dilapidated condition. It was further provided that the claimant did not have sufficient funds to reconstruct the building and thus had decided to develop the said property through the respondent. Under clause (p) of the said Development Agreement, the respondent was entitled to exploit maximum available Floor Space Index and Transferable Development Rights. In clause l of the said Development Agreement, it was provided that the respondent had expertise in development/redevelopment of properties and had sufficient financial means for such redevelopment. The responsibility to produce TDR was of the respondent under clause (q). It was further provided that the recitals shall form an integral part of the Development Agreement.

4. Under Clause 6 of the said Development Agreement, it was provided that 30 members of the claimant shall be entitled to permanent alternate accommodation with existing area plus 22% additional carpet area free of cost. The respondent had also agreed to pay each member Rs.2 lacs towards hardship compensation.

5. Annexure J to the said Development Agreement provided that each of the members had purchased an additional area from the respondent in the building proposed to be constructed. Under clause 11 of the said Development Agreement, the respondent agreed to pay to each of the 30 members transit rent at Rs.42 per sq. ft. carpet area for a period of 22 months, which was agreed to be paid at enhanced rate of 15% from 23rd month till completion. The respondent had also agreed to issue 11 post dated cheques towards the transit rent. It was agreed that if the cheques were dishonoured for two succeeding months, the respondent shall be liable to pay interest at 21% per annum on the dishonoured amount.

6. Under clause 13 of the said Development Agreement, it was provided that the respondent shall complete the construction and handover the possession of the 30 flats duly constructed with all fixtures and amenities to the 30 members within 22 months from the date of handing over vacant possession by the said members. There was a grace period of 6 months provided in the said Development Agreement. It was also provided that the time shall be an essence of the contract. In clause 20 of the said Development Agreement, the respondent agreed to execute with each of the 30 members, a Permanent Alternate Accommodation Agreement. In clause 21, it was provided that the respondent had made sufficient inquiries and was satisfied about the said property and the extent of construction

permissible thereon and also about the title of the claimant.

7. The respondent had agreed to obtain all the requisite permissions at his cost and expenses. The respondent also had agreed to offer a bank guarantee of Rs.1 crore in the form of fixed deposits in the name of the claimant and further agreed that the interest shall be credited to the respondent's account. Under clause 28(c) of the said Development Agreement, it was provided that the respondent shall be entitled to a 6 months extension beyond 22 months only on the ground of force majeure event as set out in the said clause. Under clause 28(d) of the said Development Agreement, it was provided that in the event, the respondent failed to complete the construction within the stipulated period and grace period for reasons attributed to the respondent, the respondent shall pay to the claimant and the members an amount of Rs.1.5 lakhs per month as damages in addition to the transit rent.

8. In clause 28(e) of the said Development Agreement, it was provided that in the event the respondent was unable to complete the construction within 22 months, an extension of six months shall automatically be granted but in the event, the construction is not completed within 34 months, then the society shall have right to terminate the Development Agreement and to appoint any other developer. Under clause 28(g) of the said Development Agreement, it was provided that the transit rent shall become payable from

the date, vacant possession was handed over by the members of the claimant society to the respondent.

9. In clause 30 of the said Development Agreement, it was held that the existing members of the claimant had shown their willingness to purchase an additional area from the respondent. The respondent had agreed to sell 1,288 sq. ft. additional area at the rate of Rs.17,900/- per sq. ft. for the first 100 sq. ft. and if it was beyond 100 sq. ft. but upto 200 sq. ft., then the rate shall be Rs.18,900/- per sq. ft. The respondent was entitled to sell and dispose of the flats in the new building except for the 30 flats earmarked for the 30 members of the claimant society.

10. In clause 34(d) of the Development Agreement, it was provided that the respondent alone shall be entitled to the profits or bear the losses arising out of the construction work. All expenses of the construction shall be borne by the respondent upto the grant of the Occupation Certificate. In clause 34(g), it was provided that the claimant had granted a licence to the respondent to enter the said property for carrying out the construction. The possession of the property always remained with the claimant. The claimant shall also be deemed to be in possession of the new building other than the flats meant to be developed and sold off by the respondent. The claimant shall also be deemed to be in possession of the 30 flats which the members are entitled to.

11. Under clause 40 of the said Development Agreement, it was provided that the claimant and its members shall not be liable and responsible to any purchaser or any third party or any contractor for any acts of commission and omission of the respondent. Under clause 45, it was provided that the Development Agreement along with the documents executed contemporaneously constitute the entire agreement between the parties. Under clause 52 of the Development Agreement, it was provided that except for a breach of the Development Agreement, the claimant shall not be entitled to terminate the Development Agreement. Clause 70 of the said Development Agreement recorded an arbitration clause.

12. During the period between 9th October, 2013 and 15th November, 2016 , there was correspondence exchanged between the parties. It was the case of the claimant that there was gross delay on the part of the respondent for obtaining various permissions. The respondent had failed to complete the construction within 22 months or within the extended period of 28 months and final period of 34 months. The respondent had also failed to pay transit rent for the entire period as provided in clause 9 of the Development Agreement. The respondent had alleged to have failed to furnish any bank guarantee as contemplated under clause 23 of the Development Agreement. On 27th September, 2016 and 10th October, 2016, the claimant and the respondent had meetings. The discussion held between the parties were

recorded in a letter addressed by the respondent to the claimant on 26th October, 2016.

13. It is the case of the claimant that the respondent agreed in the said letter to provide rent to all members for the period September 2016 to November 2016, from 1st December, 2016 till 15th December, 2016. The respondent was in process of obtaining further commencement certificate and expected to obtain the said further commencement certificate by December 2016 upto 7th slab. The respondent also agreed to procure commencement certificate upto 9th slab by end of March 2017 and to purchase and load TDR after casting of 9th slab after March 2017 and before June 2017. The respondent informed the claimant that the schedule for casting of 10th slab shall be conveyed after obtaining further commencement certificate by end of March 2017. The respondent requested the claimant to waive off the Bank Guarantee condition. It is the case of the claimant that none of those commitments made by the respondent in the said letter dated 26th October, 2016 were honoured by the respondent.

14. By letter dated 15th November, 2016, the claimant asked the respondent to update the claimant regarding the redevelopment of the society. The respondent provided bar chart showing proposed completion of construction of new building by July 2018. It is the case of the claimant that even the said bar chart was not followed by the respondent. Sometime in the

month of February 2017, the claimant filed a petition under Section 9 of the Arbitration Act in this Court against the respondent *inter-alia* praying for interim measures i.e. for payment of rent, for completion of project, etc. By an order dated 9th March, 2017, this Court directed the respondent to pay the monthly compensation and arrears to the members of the claimant till 31st May, 2017.

15. On 21st March, 2017, the respondent filed an affidavit in reply in the said arbitration petition and stated that the respondent was contemplating to complete the project by 31st December, 2018 and to handover the possession of the flats to the members of the claimant society. It is the case of the claimant that in the said affidavit in reply, the respondent admitted that the respondent had received the amount from the members of the claimant society towards additional area purchased as per the Development Agreement. It is the case of the claimant that even the said assurance made by the respondent in the said affidavit of reply to complete the construction by 31st December, 2018 was also not complied with.

16. By an order dated 2nd May, 2017 passed by this Court in the said petition filed by the claimant under Section 9 of the Arbitration Act, this Court recorded that the respondent had made payments of the rent till the month of March, 2017 and had further agreed to pay the transit rent for April and May 2017 on or before 15th May, 2017 and thereafter the respondent

was to make payment on or before 15th of every month. It was further directed in the said order that a joint account would be made operational where monthly payments would be deposited by the respondent. The matter was referred to the learned arbitrator.

17. In the order dated 25th September, 2017 passed by this Court, it was recorded that although the bank account with ICICI Bank was opened, the respondent had failed to deposit the transit rent as per the order dated 2nd May, 2017. The respondent gave an undertaking to the Court that the transit rent for the months April 2017 and October 2017 shall be deposited in the bank account on or before 31st October, 2017. The respondent also undertook that the transit rent shall be paid on or before 15th of each month. This Court accepted the undertaking referred by the respondent in the said order. On 25th September, 2017, the claimant filed a criminal complaint against the respondent in the local police station alleging fraud against the respondent with a request to take cognizance of the alleged criminal acts done by the respondent.

18. On 1st November, 2017, the learned arbitrator appointed by this Court issued various directions to both the parties to file pleadings and documents. On 14th November, 2017, the claimant filed statement of claim before the learned arbitrator *inter-alia* praying for specific performance of the Development Agreement or in the alternative for a declaration that the said

Development Agreement was terminated and the claimant was at liberty to appoint another developer. The claimant also prayed for a direction that the respondent shall pay the outstanding rent to members of the claimant due from April 2017 and to provide Bank Guarantee of Rs.1 crore and further sum of Rs.5 crores as ad-hoc security. The claimant also applied for a direction against the respondent to pay the amounts set out in various exhibits to the said statement of claim.

19. The respondent filed reply to the application filed by the claimant under Section 17 of the Arbitration Act before the learned arbitrator. On 27th November, 2017, claimant filed a Contempt Petition before this Court against the respondent for alleged breach of the undertakings rendered by the respondent. On 30th October, 2017, the respondent filed a statement of defence and counter claim before the learned arbitrator and prayed that the claimant be directed to refund the rent amount aggregating to Rs.11,07,520/- since it was alleged to have been paid before the members had vacated their premises. Further, pleadings were filed by the parties before the learned arbitrator. On 9th January, 2018, this Court passed an order directing the respondent no.1 firm, respondent nos. 2 and 3 to file their respective affidavits setting out their movable and immovable properties and also disclosures as mentioned in the said order.

20. On 12th January, 2018, the matter appeared before this court for

compliance of the undertaking given by the respondent nos.1 to 3. The respondents however sought time to comply with the said order dated 19th January,2018. On 17th January,2018, the respondent filed affidavit of disclosure in the said Contempt Petition. On 19th January,2018, the respondent gave an undertaking to pay an amount of Rs.61,00,000/- to the members of the claimant on or before 23rd January,2018. On 23rd January,2018, the respondent tendered pay orders aggregating to Rs.37,07,927/- and further undertook to pay the balance amount within one week. On 6th February,2018, the respondent gave further undertaking before this court to pay the monthly compensation in lieu of temporary alternate accommodation and gave a schedule for making such payment. On 26th March,2018, the learned arbitrator rejected the application filed by the claimant under section 17 of the Arbitration Act.

21. It is the case of the claimant that since the respondent failed to comply with the undertaking given to this court, on 3rd May,2018, this court summoned the Senior Police Inspector of the concerned Police Station to inform this court about the steps that were taken after receiving the complaint dated 25th September,2017 against the respondent. On 4th May,2018, this court recorded in the said Contempt Petition that it was a case of cheating and was a matter of criminal nature but the police had termed it as a case of civil nature and directed the police to investigate the matter and take necessary steps. On 25th May,2018, one of the partners of

the respondent no.1 Mr.Sandeep Sheth was arrested and was granted conditional bail by the learned Magistrate on the condition that he would pay Rs.25,00,000/- to the members of the claimant society. It is the case of the claimant that the respondent did not comply with the said condition imposed by the learned Magistrate.

22. On 13th June, 2018, the matter appeared before this court when this court recorded that all the cheques given by the respondent to the members of the society were dishonoured. The respondent no.1 developer had not only cheated innocent members of public but also had started perpetrating fraud on the courts by obtaining orders through misrepresentation. The Senior Police Inspector made a statement that he would be moving for cancellation of bail of the partner of the respondent no.1 before the learned Magistrate. Though this court directed the accountant of the respondent no.1 to remain present in court, the accountant of the respondent no.1 remained absent on two occasions. On 4th July, 2018, the accountant of the respondent no.1 remained present before this court and made a statement that the account only upto 31st March,2017 were available with him and that he would provide particulars of the amounts, which had been advanced by K.T.Group to its sister concerns and/or any firm/company/person in the last five years and which are not returned till date and also the particulars of the parties from whom K.T.Group had borrowed amounts in the last five years which were not paid till date.

23. On 21st July, 2018, the claimant informed about the arrears of rent not cleared by the respondent inspite of various undertaking given by the respondent before the learned arbitrator and to this court and informed that the claimant had proposed to terminate the said Development Agreement and prayed for time to file an application for amendment of the statement of claim. On 22nd July, 2018, the claimant passed a resolution terminating the Development Agreement and Power of Attorney with immediate effect on the ground that the society had lost the faith and trust in the respondent.

24. On 1st August, 2018, the claimant addressed a termination notice to the respondent pointing out various defaults and breaches committed by them and also informed about the resolution passed by the claimant terminating the Development Agreement and Power of Attorney. On 4th August, 2018, the respondent replied to the said notice dated 1st August, 2018 and opposed the termination of the Development Agreement and Power of Attorney and denied the alleged defaults on their part as alleged by the claimant in the notice of termination dated 1st August, 2018.

25. Sometime in the month of August 2018, the claimant filed an application for amendment of statement of claim to bring subsequent facts on record and prayed for a declaration that the termination of the Development Agreement and the Power of Attorney was valid and sought

permission injunction to restrain the respondent from obstructing the claim from appointing a new developer. The claimant also sought a declaration that the third party rights created by the respondent in pursuance of the Development Agreement read with Power of Attorney be declared null and void. The said application for amendment filed by the claimant came to be allowed by the learned arbitrator on 8th September, 2018.

26. It is the case of the claimant that though the learned arbitrator gave three weeks time from 8th September, 2018, to file an additional statement of defence and counter claim, the respondent did not file any such statement of defence and counter claim and once again sought time to file an additional statement of defence and counter claim to the amended statement of claim on 3rd November, 2018. On 30th October, 2018, the respondent sought adjournment before the learned arbitrator. It was made clear by the learned arbitrator that no further adjournment would be granted. The learned arbitrator recorded that the respondent had not filed its additional statement of defence and counter claim which was to be done by 9th October, 2018 and time was granted till 17th October, 2018.

27. On 23rd October, 2018 time for filing additional statement of defence and additional claim was extended till 26th October, 2018. The learned arbitrator granted further time to file additional statement of defence and counter claim till 15th November, 2018 and made it clear that no further

extension would be granted. The respondent however did not file any such additional statement of defence and counter claim though various opportunities were granted by the learned arbitrator.

28. On 27th November, 2018, the claimant's counsel commenced its arguments and completed the final arguments. On behalf of the respondent, the learned counsel commenced her arguments. On 28th November, 2018, the respondent sought time to file additional written statement dated 3rd October, 2018 to the amended statement of claim. The learned arbitrator made an observation that no additional written statement was ever filed and there was a deliberate attempt on behalf of the respondent to delay the hearing and conclusion of the matter. Learned counsel for the respondent then continued arguments. On 8th December, 2018 the respondent through their learned counsel completed her oral arguments. The claimant through their counsel completed rejoinder arguments and the matter was reserved for passing of award.

29. On 20th December, 2018, the learned arbitrator informed both the parties to consider certain judgments and authorities which the learned arbitrator came across and fixed the matter for arguments on 4th January, 2019. On 4th January, 2019, the learned arbitrator however could not proceed with the matter since the learned counsel for the respondent remained absent. The matter was thereafter adjourned to 17th January, 2019.

On 17th January,2019 all the arguments advanced by both the parties were concluded. The matter was reserved for passing of the award.

30. On 28th January,2019, the learned arbitrator made an award and granted relief in terms of prayer clauses (a-1), (b-1) and (i-1). The learned arbitrator upheld the validity of the termination of the Development Agreement and the Power of Attorney. The learned arbitrator appointed an advocate practicing in this court as a private receiver to take possession of the project from the respondent. The respondents were directed to handover vacant and peaceful possession of the land to the private receiver or duly authorized representative of the claimant and also to handover all the original and other documents that have been applied for, taken, or issued in the name of the claimant as well as all documents addressed to the claimant, including, but not restricted to, demands, applications, permissions, approvals and plans.

31. The learned arbitrator passed a permanent injunction order restraining the respondent from obstructing the process of appointment of a new developer for completion of the project. Insofar as prayer clauses (b-2) and (b-3) which would have affected the third parties are concerned, the learned arbitrator held that he had no jurisdiction to pass any such order against the third party purchasers who had no privity of contract with the claimant.

32. Insofar as prayer clause (c-1) is concerned, the learned arbitrator directed the respondent to pay a sum of Rs.57,77,058/- being the total of the outstanding transit rent due to the members of the claimant from January 2018 till July 2018. The learned arbitrator also allowed the counter claim made by the respondent to the extent of Rs.11,07,520/- and directed the claimant to give credit of the said amount from Rs.54,77,058/- awarded in favour of the claimant. The learned arbitrator also directed the respondent to pay interest at the rate of 21% per annum from two months after the due dates of transit rent till payment as per clause 11 of the Development Agreement.

33. The learned arbitrator directed the respondent to pay a sum of Rs.1,66,41,157/- which was paid by the members of the claimant to the respondent for the purchase of extra area in the proposed new building with interest thereon at the rate of 10% per annum from 1st February,2017 being the date on which the members were to receive the possession under the agreement till payment. The learned arbitrator directed that the said amount shall be made over to the claimant which will hold the money in trust for the members involved and refund the same to them within 45 days of receipt from the respondent.

34. The learned arbitrator allowed Rs.1,50,000/- per month from February 2017 till July 2018 towards penalty/damages totalling to

Rs.27,00,000/- in favour of the claimant and legal cost of Rs.5,19,500/-. The learned arbitrator rejected the claim of the claimant for Rs.10,54,000/- towards property tax, Rs.13,19,000/- towards LUC tax, Rs.50,00,000/- towards damages, Rs.50,00,000/- towards compensation for mental agony totalling to Rs.1,23,73,000/-. On 1st February,2019, the claimant made an application for speaking to the minutes of the award. On 8th February,2019, the learned arbitrator heard the said application for speaking to the minutes and reserved the order. On 9th February,2019, the private receiver appointed by the learned arbitrator proceeded to take possession of the said property which was however found locked. The wife of one of the partners of the respondent no.1 refused to handover possession of the said property to the private receiver.

35. On 11th February,2019, the learned arbitrator passed an order under section 33 of the Arbitration Act and made few corrections in the arbitral award dated 28th January,2019. On 21st February,2019, the claimant filed Arbitration Petition No.690 of 2019 impugning the part of the award dated 28th January, 2019 as further amended on 11th February,2019 and more particularly the findings and part of the award rejecting the claim of the claimant in paragraphs 98 to 102, 104, 108, 109, 111, 113 and 124. Insofar as the respondents are concerned, the respondent filed Arbitration Petition No.802 of 2019 impugning the arbitral award dated 28th January, 2019 as further amended on 11th February,2019.

36. Mr.Naphade, learned counsel for the claimant invited my attention to various paragraphs of the pleadings filed by both the parties, minutes of various meetings held by the learned arbitrator, various findings of fact rendered by the learned arbitrator and also various judgments in support of his submissions delivered by the Hon'ble Supreme Court and this court. Learned counsel also invited my attention to various orders passed by this court in Commercial Arbitration Petition No.247 of 2017 and also in Contempt Petition No.20 of 2018 rendering various findings against the respondent, the observations in respect of the conduct of the respondent in not complying with the orders passed by this court, fraud committed by the respondent and also to show that one of the partner of the respondent no.1 was arrested by police.

37. Learned counsel for the claimant submits that though the learned arbitrator granted various reliefs to the claimant, the learned arbitrator however directed the developer to hand over possession only of land on which the said structures were constructed and not the entire property. He submits that the members of the claimant society had higher rights than the individual free sale flat purchasers. Such third party flat purchasers could atmost claim refund and compensation against the developer and could not have claimed any right of any nature whatsoever on the structures constructed on the said land being admittedly belonging to the claimant

society. He submits that the learned arbitrator had though accepted that the termination of the development agreement and the power of attorney by the claimant was proper, the learned arbitrator did not grant complete relief in favour of the claimant for possession of the entire property including the structures constructed on the land. He submits that to this extent there is patent illegality in the impugned award.

38. It is submitted by the learned counsel that though various opportunities were granted to the respondent to file additional written statement and the counter claim, the respondent had not filed any such additional written statement and the counter claim and thus in absence of any prayer for recovery of possession of the structures constructed on the land belonging to the claimant, the learned arbitrator could not have refused to grant possession of the land with the structures standing thereon. Learned arbitrator thus could not have granted reliefs in respect of the structures in favour of the respondent without there being any counter claim filed by the respondent.

39. Learned Counsel for the claimant submits that the original members of the claimant had handed-over their respective flats and the building standing thereupon to the respondent for redevelopment. The flats owned by the claimant were demolished by the respondent and few structures were put up by the respondent on the said land. The learned arbitrator thus ought to

have directed the respondent to handover possession of the structures also whatever constructed to the claimant. He submits that the claimant had become owner of the land as well as the structure standing upon, once the society was formed and conveyance was granted under Maharashtra Ownership Flats Act, 1963. Learned arbitrator has totally over looked this aspect of the matter. The conveyance of the property was already granted in favour of the claimant by the erstwhile owner. The claimant had thus become owner of the land as well as the structure standing thereupon. The learned arbitrator thus could not have segregated the structure from the land and could not have directed to handover the possession only of the land and not the structure constructed thereon contrary to the provisions of Maharashtra Ownership Flats Act, 1963.

40. It is submitted by the learned counsel for the claimant that the learned arbitrator could not have allowed any part of the counter claim filed by the respondent and more particularly to the tune of Rs.11,07,520/- which amount was paid by the respondent to the members of the claimant society for the rent for two months as per the provision of Development Agreement and could not have set off the amount against the compensation permitted to be paid to the claimant in the sum of Rs.54,77,005/-. He submits that the learned arbitrator could not have rejected the claims of the claimant for the payment of property tax and Land Under Construction Tax which was never disputed by the respondent. He submits that it was the sole responsibility and

liability of the respondent to pay the property tax and the said Land Under Construction Tax under the provisions of Maharashtra Ownership Flats Act, 1963. The claim for Rs.10,54,000/- towards property tax and Rs.13,19,000/- towards Land Under Construction Tax thus ought to have been allowed by the learned arbitrator.

41. It is submitted by the learned counsel for the claimant that the learned arbitrator could not have rejected the claim for compensation in the sum of Rs.50 lakhs and towards mental agony caused to the members of the claimant. Learned counsel for the claimant placed reliance on the following judgments in support of various submission made in Arbitration Petition No. 690 of 2019 and while responding to the Arbitration Petition No. 802 of 2019 filed by the developers.

- i) Judgment of Supreme Court in case of ***Sutlej Constructions Limited v/s. Union of Territory of Chandigarh, (2018) 1 SCC 718.***
- ii) Judgment of Supreme Court in case of ***Associate Builders v/s. Delhi Development Authority, (2015) 3 SCC 49.***
- iii) Judgment of Supreme Court in case of ***Fateh Chand v/s. Balkishan Dass, (1964) 1 SCR 515.***
- iv) Judgment of Supreme Court in case of ***Radha Sundar Dutta v/s. Mohd. Jahadur Rahim & Ors., 1959 SCR 1309.***

- v) Judgment of Supreme Court in case of ***Om Prakash and Others v/s. Ram Kumar and Others, (1991) 1 SCC 441.***
- vi) Judgment of High Court of Rajasthan (Jaipur Bench) in case of ***Smt. Sushila Jain v/s. Rajasthan Financial Corporation, Jaipur, RLW 1979 Raj 208.***
- vii) Judgment of this Court in case of ***Jai Ratan Deep Co-operative Housing Society Limited v/s. Kumar Builders Mumbai Realty Private Limited, 2015 SCC OnLine Bom 5928.***
- viii) Judgment of this Court in case of ***Heritage Lifestyle and Developers Ltd. v/s. Cool Breeze Co-operative Housing Society Ltd. and Others, (2014) 3 Mh.L.J.***
- ix) Judgment of this Court in case of ***Goregaon Sukhnavas Co-operative Housing Society Limited v/s. M/s. Sukushal Builders and Developers and Ors., 2016 SCC OnLine Bom 3366.***
- x) Judgment of this Court in case of ***Chaurangi Builders and Developers Pvt. Ltd. v/s. Maharashtra Airport Development Company Ltd., 2013 SCC OnLine Bom 1530.***
- xi) Judgment of Supreme Court in case of ***His Holiness Acharya Swami Ganesh Dassji v/s. Sita Ram Thapar, (1996) 4 SCC 526.***
- xii) Judgment of Supreme Court in case of ***Cox and Kings India Limited v/s. Indian Railways Catering and Tourism Corporation Limited and Another, (2012) 7 SCC 587.***
- xiii) Judgment of this Court in case of ***Vaidehi Akash Housing Pvt.***

Ltd. v/s. New D.N. Nagar Co-op. Housing Society Union Ltd. and Ors. dated 1st December, 2014, in **Notice of Motion No. 961 of 2013 in Suit No. 262 of 2012.**

- xiv) Judgment of Supreme Court in case of **Sopanrao v/s. Syed Mehmood, (2019) 7 SCC 76.**
- xv) Judgment of Supreme Court in case of **Rajendra Tiwari v/s. Basudeo, AIR 2002 SC 136.**
- xvi) Judgment of High Court of Punjab at Delhi in case of **Shiv Dayal Kapoor v/s. Union of India, AIR 1963 P&H 538.**
- xvii) Judgment of High Court of Patna in case of **Dhani Sahu and Ors. v/s. Bishun Prasad, AIR 1942 Pat 247.**
- xviii) Judgment of High Court of Orissa in case of **Mahagobind and Ors. v/s. Brajabandhu, AIR 1986 Ori 281.**
- xix) Judgment dated 14th December, 2018 in case of **SSD Escatics v/ s. Goregaon Pearl in Commercial Arbitration Petition (L) No. 1072 of 2018.**
- xxi) Judgment dated 7th June, 2019 in case of **Solaris Developers v/s. Eversmile Co-op. Society in Arbitration Petition (L) No. 593 of 2019.**

42. Ms. R.C. Nichani, learned counsel for the respondent on the other hand responded to the submissions made by the Mr. Naphade, learned counsel for the claimant in Arbitration Petition No. 690 of 2019 and made

submission in Arbitration Petition No. 802 of 2019 before this Court. It is submitted that in the statement of claim filed by the claimant, there were three breaches alleged by the claimant against the respondent i.e. (i) the building was not completed by the respondent within the time prescribed under the Development Agreement, (ii) Transit rent was not paid to the claimant by the respondent since June 2018 and (iii) No bank guarantee was furnished by the respondent in the compliance with Clause 23 of the Development Agreement.

43. It is submitted by the learned counsel that three of the partners were arrested on the complaint filed by the claimant. The claimant had initially prayed for seeking specific performance of the Development Agreement in the statement of claim however had applied for amendment to the statement of claim and had deleted the prayer for specific performance. The respondent was required to pay various amounts to the members of the claimant towards transit rent, incurred large number of other expenses for getting various permissions from time to time and on purchase of TDR. She submits that during the pendency of the arbitral proceedings, the claimant illegally terminated the said Development Agreement.

44. It is submitted by the learned counsel that though the claimant also did not lead any oral evidence before the learned arbitrator, the learned arbitrator allowed large number of claims made by the claimant. The

resolution to terminate the Development Agreement was passed by the claimant only at the end of month of July 2018 and thereafter an application for amendment to the statement of claim was made by the claimant. She submits that the reply to the notice of termination was considered as reply to the application for amendment made by the applicant before the learned arbitrator. She submits that though the respondent had applied for an opportunity to file additional written statement to the amended statement of claim and also to file a counter claim in the matter before the learned arbitrator, no such opportunity was rendered by the learned arbitrator.

45. Learned counsel for the respondent placed reliance on various documents in support of her submission that the claimant had delayed in handing over of possession of the existing flats on the land to the respondent for demolition and for redevelopment. The claimant had refused to handover the possession of the flats and the vacant possession of the building by contending that the same would be handed over only after IOD and commencement certificate would be received by the respondent no.1. She submits that the commencement certificate was issued by the planning authority on 21st January, 2015 belatedly. During the period between 2015-2016, various meetings were held between the parties for discussing the difficulties faced by the respondent such as increment in budget due to higher levies by the corporation, cash liquidity crunch, low sales, demonetization, etc. The respondent had already created third party rights in

respect of the free sale flats and shops proposed to be constructed on the said land.

46. Learned counsel relied upon clause 55 of the Development Agreement in support of the submission that under the said clause, the claimant could not have terminated the Development Agreement on any ground. She placed reliance on clause 53 of the Development Agreement and would submit that under the said clause, variation of time period on account of delay by the members of the claimant was clearly permitted. Since, the claimant had allegedly not complied with its part of an obligation under the Development Agreement, the respondent also could not have complied with their reciprocal rights under the said Development Agreement. She submits that the respondent was entitled to extension of time on account of no availability of material, on account of any notice, order, rule, notification of the Government or any other Public Competent Authority.

47. Learned counsel relied upon clauses 28 to 31 and 49 of the power of attorney and submitted that the respondent was empowered to execute agreements with third parties under the said power of attorney and the same was irrevocable. Delay was caused due to various factors beyond the comprehensions and control of the respondent. It is submitted by the learned counsel that it was not the case of the claimant that the respondent was

unable to complete the project while terminating the Development Agreement.

48. The learned counsel for the respondent invited my attention to the order dated 11th February, 2019 passed by the learned arbitrator under Section 33 of the Arbitration Act and would submit that the said order passed by the learned arbitrator was beyond the purview of Section 33 of the Arbitration Act. Various payments were made by the respondent to the claimant from time to time under the said Development Agreement though belatedly. The respondent could not make payment to the claimant from June 2018 onwards, since several proceedings were filed by the claimant against the respondent. The respondent had completed the building work upto 4th floor and had applied for further commencement certificate to the planning authority. She submits that admittedly the claimant did not take any action against the respondent on the ground of alleged delay on the part of the respondent.

49. It is submitted by the learned counsel that though the respondent no.1 was appointed as a developer in the year 2011, the Development Agreement was signed by the claimant in favour of the respondent only on 19th December, 2013. In the year 2012, Development Control Regulations were amended, litigation between two members of the claimant was pending which was settled due to efforts taken by the respondent.

50. In so far as the submission of the learned counsel for the claimant that the respondent had not submitted the bank guarantee under the terms of the Development Agreement is concerned, it is submitted by the learned counsel that under the said Development Agreement, Rs.2 crores paid by the respondent were to be kept as security. The respondent had thus requested the claimant not to insist for furnishing separate bank guarantee. The said request of the respondent was accepted by the claimant. She relied upon clause 23 of the said Development Agreement and would submit that the respondent had issued two cheques of Rs.50 lakhs each as security, which cheques were accepted by the claimant. The claimant had thus waived their right under clause 23 of the Development Agreement.

51. It is submitted by the learned counsel under clause 11 of the Development Agreement, the respondent was liable to pay various amounts of rent to the members of the claimant, if the construction was not completed within 22 months. The respondent had paid the rent at enhanced rate as well as the brokerage to the members of the claimant. It is submitted by the learned counsel under clause 13 of the Development Agreement, the respondent was entitled to the grace period of 6 months after expiry of 22 months but not beyond the period of 34 months. The question before the learned arbitrator was about the correct commencement of the period of 28 months.

52. It is submitted that since IOD was issued on 13th August, 2014 and the tenants were vacated by the members of the claimant on 1st October, 2014 and commencement certificate was issued in the month of January 2015, the period of 24 months plus grace period would have commenced from the date when the commencement certificate was issued by the planning authority. The claimant had not made any complaint about the alleged delay on the part of the respondent at any point of time. The respondent had agreed to construct a building of ground plus 13 floors. Thirty flats were to be provided for the members of the claimant and the balance flats and shops were to be sold by the respondent. Some of the members of the claimant had agreed to purchase additional area from the respondent by executing separate agreements. The claimant had also raised false issue of stamp duty before the learned arbitrator.

53. Learned counsel for the respondent invited my attention to some of the paragraphs of the arbitral award and would submit that the learned arbitrator has awarded the refund of the amount paid by the members of the claimant for purchasing additional area though such members were not the parties to the arbitration agreement and also to the arbitral proceedings. She submits that the members of the claimant had stopped paying the respondent for the additional area which they had agreed to pay to the respondent deliberately. The learned arbitrator did not render any finding that the

respondent was not willing to complete the project. The respondent had purchased TDR, which could be however loaded only after construction of 9 storeys. She submits that though two of the partners of respondent were in police custody, respondent however continued to carry out work. She submits that due to the introduction of GST, price of the material went up, which was one of the relevant factor for the respondent not completing the entire project.

54. It is submitted by the learned counsel that the claimant had not served an amended copy of the statement of claim upon the respondent. The finding of the learned arbitrator that ample opportunities were granted to the respondent to file an additional written statement and counter claim is thus perverse. The learned arbitrator had treated the reply of the respondent to the termination notice as reply to the application for amendment of statement of claim and has erroneously held that no additional written statement or counter claim was filed by the respondent. She submits that in the facts and circumstances of this case, time was not of an essence of the contract.

55. Learned counsel for the respondent placed reliance on the letter dated 15th April, 2012 addressed by the claimant to the respondent denying the allegations made by the respondent and that there was no threat of termination given by the claimant in the said letter. There was no further letter addressed by the claimant complaining about the alleged delay on the

part of the respondent. She submits that the entire action on the part of the claimant to terminate the Development Agreement itself was totally illegal and thus ought to have been declared illegal by the learned arbitrator.

56. It is submitted by the learned counsel that notice of termination issued by the claimant was in respect of the Development Agreement and not the power of attorney. The respondent had taken steps promptly in making applications to the planning authority for seeking various permissions from time to time. The learned arbitrator has recorded a finding in favour of the respondent that the respondent had made excess payment of two months to the members of the claimant. She submits that the application for amendment was allowed only in the minutes of meeting held on 8th September, 2018. In the minutes of meeting held on 3rd October, 2018, the learned arbitrator recorded that copy of the amended statement of claim was served upon the respondent. She submits that the minutes of the meeting dated 8th February, 2019 were issued only after arbitral award was made on 28th January, 2019.

57. Learned counsel for the respondent placed reliance on clauses 25 and 52 of the Development Agreement and would submit that the claimant was not entitled to terminate the Development Agreement severally and except for the reasons of breaches of the provision of Development Agreement, if any by the respondent. She submits that since the claimant had initially filed

the claim for specific performance of the Development Agreement alleged breaches on the part of the respondent was deemed to have been waived. The claimant could not have been awarded claim for damages in view of waiver of alleged breaches against the respondent by the claimant.

58. It is submitted by the learned counsel that under clause 28 of the Development Agreement, 22 months provided for completion of construction was subject to various force majeure clause and other eventualities set out therein. She submits that in view of the force majeure situation and other eventualities beyond the control of the respondent, 22 months period prescribed for completion of construction had not been completed. The respondent had requested for extension of time on various grounds, which was not seriously disputed by the claimant. She submits that the respondent was not liable to pay any rent to the members of the claimant for the reasons attributable to the claimant. She submits that before expiry of 34 months, the claimant could not appoint a new developer. She submits that various submissions made by the respondent have not been dealt by the learned arbitrator in the impugned award.

59. It is submitted by the learned counsel that without prejudice to the rights and contentions of the respondent, even today they are ready and willing to complete the project by resuming the work, if permitted by this Court. She relied upon paragraph 18 of the written statement to the

statement of claim filed by the respondent and would submit that the respondent had shown its readiness and willingness to start the work and had infact carried out the work up to 4th floor. Learned counsel tendered copies of the photographs showing the stage of constructions of the building up to 4th storeys carried out by the respondent. She submits that in the circumstances set out aforesaid, the termination of the Development Agreement by the claimant was *ex-facie* illegal and thus ought to have been set aside by the learned arbitrator.

60. Learned counsel for the respondent relied upon clauses 28 to 30, 45,48 and 49 of the power of attorney executed by the claimant in favour of the partners of the respondent and would submit that under the said power of attorney, the respondent was granted power to enter into ownership agreement for sale in respect of various tenements constructed and agreed to be constructed by the respondent. The respondent was also allowed to appropriate the proceeds on sale of the flats constructed and which were to be constructed in the said building. She placed reliance on clause 31 of the said power of attorney and would submit that an interest in the land was sought to be created in favour of the respondent under the said clause. She relied upon clause 45 of the power of attorney in support of the submission that the respondent was entitled to engage another developer to assist the respondent to complete the work. The respondent had already spent substantial amount on carrying out construction up to 4 storeys and in

obtaining permissions from various authorities from time to time.

61. Learned counsel for the respondent placed reliance on the paragraphs 6 and 10 of the impugned award and would submit that the learned arbitrator has not rendered any findings as to whether the alleged breaches were committed by the respondent deliberately or in view of the force majeure events. She submits that even before completion of 28 months time to complete the construction of the building on the said land, the claimant had already filed its claim for specific performance. The RERA also had granted extension of time in favour of the respondent. She submits that the claimant did not terminate the power of attorney though had terminated the Development Agreement.

62. It is submitted by the learned counsel that no resolution was passed by the claimant for making individual claims of the members of the claimant in the same arbitral proceedings against the respondent and that also through the claimant. Learned counsel for the respondent placed reliance on the judgment of Andhra Pradesh High Court in case of ***Aliens Developers Private Limited v/s. M. Janardhan Reddy and Ors., 2016 (3) ARBLR 303(AP)***. Learned counsel for the respondent made an attempt to distinguish the judgments relied upon by the claimant on the ground that none of those judgments were applicable to the facts of this case and were clearly distinguishable.

63. Mr. Naphade, learned counsel for the claimant in rejoinder placed reliance on clause 52 of the Development Agreement in support of the submission that the claimant was entitled to terminate the Development Agreement in the event of respondent committing a breach of Development Agreement and would submit that since the respondent had committed several breaches of the provisions of the said Development Agreement, the claimant rightly terminated the said Development Agreement. Learned counsel specifically placed reliance on clauses 13 and 28, 9 and 23 of the Development Agreement and would submit that there were specific several breaches committed by the respondent including the breaches of those clauses of the Development Agreement. He submits that the respondent also committed breaches of the orders passed by this Court on 2nd May, 2017, 25th September, 2017, 9th January, 2018, 4th May, 2018 and 13th June, 2018.

64. In so far as the issue of force majeure raised by the respondent is concerned, it is submitted that the case pleaded by the respondent in support of the said case were totally vague and devoid of particulars. Even otherwise, those allegations would not fall under any force majeure events.

65. It is submitted by the learned counsel that admittedly the respondent obtained the IOD only on 13th August, 2014 i.e. 8 months after the execution of the Development Agreement. 1/3rd of the stipulated period was already

over before such IOD was obtained by the respondent. There was no GST or demonetization in the year 2013-2014 which reasons are cited by the respondent as events of force majeure, which are *ex-facie* false.

66. It is submitted by the learned counsel that the learned arbitrator has granted relief in respect of the structure in favour of the respondent there being no pleadings or evidence or any counter claim for such relief. That part of the claim granted by the learned arbitrator was beyond the jurisdiction of the learned arbitrator.

67. In so far as the issue as to whether the claimant could make any claim on behalf of the members of the society in the same arbitral proceedings though the members not being the parties to the arbitration agreement and also to the arbitral proceedings is concerned, learned counsel placed reliance on clause 6 of the Development Agreement and would submit that it was specifically provided in the said Development Agreement that some of the members of the claimant had purchased additional area from the respondent at the rate prescribed thereunder. The transaction of additional area purchased by some of the members of the claimant linked to the Development Agreement and the consequences flowing therefrom also ought to be adjusted. He submits that in any event, the respondent never raised any objection of jurisdiction before the learned arbitrator and thus cannot be allowed to raise this issue for the first time in the petition filed

under Section 34 of the Arbitration Act, in view of the waiver on the part of the respondent under Section 4 by not raising this issue under Section 16 of the Arbitration Act.

68. Learned counsel for the claimant once again placed reliance on the judgment of this Court in case of ***Vaidehi Akash Housing Pvt. Ltd. v/s. New D.N. Nagar Co-op. Housing Society Union Ltd. and Ors.*** (supra) and would submit that in view of clause 40 of the Development Agreement providing that the claimant and its members shall not be liable and responsible to any purchaser or any third party or any contractor for any acts of commission and omission of the developer, the learned arbitrator could grant smaller relief though larger relief was sought by the claimant by modifying such relief.

69. Learned counsel for the claimant placed reliance on the minutes of meeting dated 28th November, 2018 recorded by the learned arbitrator and would submit that the learned arbitrator had rightly forfeited the right of the respondent to file additional statement of defence and counter claim, since no such additional written statement and counter claim was filed for 3 months after seeking 4 adjournments by the respondent. In support of this submission, learned counsel also placed reliance on Section 25 of the Arbitration Act. It is submitted by the learned counsel that no grounds are made out by the respondent in the Arbitration Petition No. 802 of 2019 filed

by the respondent under Section 34 of the Arbitration Act. The finding of facts rendered by the learned arbitrator being not perverse cannot be interfered with by this Court in the Arbitration Petition.

REASONS AND CONCLUSIONS:-

70. Liberty Garden Co.-op. Hsg. Soc. Ltd., the petitioner in Arbitration Petition No.690 of 2019 was the original claimant and has impugned the part of the arbitral award thereby rejecting some of the claims made by the claimant and allowing part of the counter claim made by the respondent. The Arbitration Petition No.802 of 2019 is filed by the original respondent impugning part of the arbitral award allowing some of the claims made by the claimant. Notice of Motion No.158 of 2019 is filed by the respondent in the arbitral proceedings for various reliefs.

71. By consent of parties, I have heard the learned counsel for the claimant first. In so far as the claimant is concerned, the claimant has impugned part of the award in respect of the findings and conclusions in paragraphs 98, 102, 104, 108, 109, 111, 113 and 124 of the arbitral award. The respondent in arbitral proceedings has impugned the remaining part of the award which was granted in favour of the claimant.

72. In so far as the submission of the learned counsel for the claimant that though the learned arbitrator has directed the respondent to hand

over the land on which the structure was constructed by the respondent and not the entire property with structure standing thereon is concerned, it is not in dispute that the respondent had not claimed any relief for claiming possession of the structure constructed by the respondent on the land of the claimant. Under the Development Agreement entered into between the parties, the respondent had agreed to construct various tenaments for the members of claimant-society and also additional structures as and by way of resale components. The claimant had initially claimed specific performance of the said Development Agreement against the respondent. However, during the course of the arbitral proceedings, the claimant terminated the said Development Agreement and prayed for damages and monetary claim against the respondent.

73. The respondent had carried out part of the construction on the said land after demolishing the then existing structures thereon which were vacated by the members of the claimant-society. The respondent also alleged before the learned arbitrator that in respect of some of the tenaments constructed by the respondent on the said land, third party rights were already created by the respondent. In my view, the learned arbitrator failed to appreciate that the respondent had agreed to construct various tenaments on the said land for the members of the claimant-society and simultaneously to construct additional tenaments. The members of the claimant-society had handed over the then existing tenaments to the

respondent for the purpose of carrying out demolition of the then existing tenaments and to enable the respondent to construct a new building on the said plot and thereafter to hand over vacant possession of the tenaments to the members of the claimant-society along with additional tenaments agreed to be purchased by the members of the claimant-society.

74. In these circumstances, the learned arbitrator could not have directed the respondent only to hand over vacant possession of the land and not the structures. Under clause 34(g), the claimant was always in possession of the suit property. In my view, the learned arbitrator ought to have moulded the relief by giving direction to the respondent to hand over vacant possession not only the suit land but also the structures constructed by the respondent to the claimant and to adjust the equity between the parties.

75. Be that as it may, since this Court has no power to grant such relief which is not granted by the learned arbitrator in this petition under Section 34 of the Arbitration Act, this Court cannot direct the respondent to hand over possession of the structures constructed by the respondent on the suit property. Supreme Court in the case of ***Mcdermott International Inc. Vs. Burn Standard Co. Ltd. & Ors., (2006) 11 SCC 181*** has held that the Court cannot correct on error in the arbitral award and cannot make an award under Section 34 of the Arbitration Act. The principles of law laid

down by the Supreme Court in the said case apply to the facts of this case. I am respectfully bound by the said judgment. This part of the relief thus sought by the claimant in the arbitral petition filed by the claimant cannot be granted by this Court.

76. In so far as the submission of the learned counsel for the claimant that the learned arbitrator also could not have allowed the counter claim of the respondent and more particularly to the tune of Rs.11,07,520/- or any part thereof and to adjust the said amount against the amount held to be due and payable to the claimant is concerned, a perusal of the award indicates that the learned arbitrator has held that the said amount was paid by the respondent to the members of the claimant for the rent for two months as per the provisions of the Development Agreement entered into between the parties. In my view, the respondent was even otherwise liable to pay rent to the members of the claimant from time to time as per the provisions of the Development Agreement and thus the respondent having committed breaches of its obligations under the Development Agreement, the learned arbitrator could not have allowed the said counter claim to the extent of Rs.11,07,520/- made by the respondent or any part thereof. This part of the arbitral award, in my view, is contrary to the terms of the Development Agreement and also to the provisions of the MOFA and thus deserves to be set aside.

77. In so far as the next submission of the learned counsel for the claimant that though it was the sole responsibility and liability of the respondent to pay the property tax and “Land Under Construction Tax,” the learned arbitrator did not allow the said claim is concerned, a perusal of the Development Agreement indicates that it was an obligation on the part of the respondent to pay the property tax and “Land Under Construction Tax,” which liability was not disputed by the respondent. Learned arbitrator however, did not grant the said relief in favour of the claimant. Claim of Rs.10,54,000/- towards property tax and Rs.13,19,000/- towards “Land Under Construction Tax” thus ought to have allowed by the learned arbitrator, however, since this Court has no power to make an award and to allow the claims which are rejected by the learned arbitrator under Section 34 of the Arbitration Act, this Court cannot direct the respondent to pay the said amount to the claimant by this order by setting aside the award rejecting the claims.

78. In so far as the submission of the learned counsel for the claimant that the learned arbitrator could not have rejected the claim of compensation in the sum of Rs.50,00,000/- toward mental agony caused to the members of the claimant is concerned, in my view, there is no merit in this submission of the learned counsel. The claimant admittedly did not lead any evidence in support of the said claim before the learned arbitrator. I do not find any infirmity with that part of the arbitral award thereby

rejecting the claim of compensation and toward mental agony.

79. Learned counsel for the claimant relied upon large number of judgments referred to aforesaid in support of his various submissions. There is no dispute about the propositions of law laid down by the Supreme Court and various High Court in the said judgments. However, considering the limited controversy in this matter, I do not propose to deal with each and every judgments referred to and relied upon by the learned counsel for the claimant on the same issue except few judgments which are on the scope of Section 34 of the Arbitration Act while dealing with submissions made by the respondent in Arbitration Petition No.802 of 2019.

80. A perusal of the record indicates that the Development Agreement was terminated by the claimant during the pendency of the arbitral proceedings before the learned arbitrator mainly on the ground that the respondent had not completed the construction of the building within the time prescribed under the Development Agreement, transit rent was not paid to the claimant since June 2018 and no bank guarantee was furnished by the respondent in compliance with the Development Agreement.

81. Ms. Nichani, learned counsel for the respondent submitted before this

Court that partners of the respondent were arrested on the complaint filed by the claimant. The claimant had initially sought reliefs of specific performance before the learned arbitrator. Only during the course of the arbitral proceedings, the claimant amended the statement of claim after termination of the Development Agreement. No oral evidence was led even by the claimant. Though the learned counsel for the respondent led emphasis on the issue that there was shortage of necessary material required to be used for the construction of the building, there was introduction of GST, price of material had gone up substantially resulting in delay in completion of the entire project which factors were allegedly beyond the control of the respondent and would fall under 'force majeure events,' the respondent failed to demonstrate any such instances before the learned arbitrator.

82. The respondent had admittedly committed default in making payment of transit rent to the members of the claimant inspite of several orders passed by this Court. The respondent had also failed to furnish any bank guarantee to the claimant under Clause 23 of the Development Agreement. The respondent did not dispute before this Court that there was no GST or demonetization in the year 2013-14, when the Development Agreement was in force. The respondent had obtained IOD only on 13th August 2014 i.e. 8 months after the Development Agreement. 1/3rd of the stipulated period of completion provided under the

Development Agreement was already over before such IOD was obtained by the respondent from the Municipal Corporation.

83. In so far as the submission of the learned counsel for the respondent that the partners of the respondent were arrested by the police in view of the complaint made by the claimant and one of the partners is still in custody is concerned, this Court does not propose to make any comment on the arrest of the partners made by police. The conduct of the respondent and its partners have already been noticed by this Court in various interim orders passed by this Court from time to time. The respondent has no respect for the orders passed by this Court directing the respondent to pay transit rent to the claimant. Several cheques issued by the respondent towards payment of transit rent to the claimant pursuant to the orders passed by this Court were admittedly dishonoured on presentation by the claimant.

84. In my view, there is no substance in the submission of the learned counsel for the respondent that since there was prayer for specific performance made initially, it would indicate that all the breaches alleged to have been committed were deemed to have been waived by the claimant. In my view, merely because the claimant had initially prayed for specific performance of the Development Agreement and subsequently, had terminated the Development Agreement did not conclude the issue that

there was any waiver on the part of the claimant for the breaches committed by the respondent under the Development Agreement. The members of the claimant-society who had vacated their respective tenaments and handed over to the respondent for the purpose of carrying out redevelopment and to hand over possession of the tenaments in the new building were not expected to wait indefinitely for the respondent to comply with their part of the obligation. The claimant found that the respondent was bent upon to commit breaches of the Development Agreement and was not going to complete the construction of the building and to hand over tenaments to the members of the claimant-society after completion of the entire building and thus rightly terminated the Development Agreement.

85. Learned arbitrator was thus right in allowing the application for amendment of the statement of claim and to make additional prayers. The said order allowing the said application to amend the statement of claim was passed after hearing both the parties. Learned arbitrator has also granted liberty to the respondent to file additional written statement to the amended statement of claim. The respondent however, failed to file additional written statement or counter claim before the learned arbitrator.

86. In so far as the reliance placed on Clause 53 of the Development Agreement by the learned counsel for the respondent in support of the

submission that the stipulated period of completion of the building prescribed in the Development Agreement could be varied on account of delay from the members of the claimant and various other circumstances, in my view, reliance placed on the said clause by the learned counsel is mis-placed. The respondent having committed breaches of their part of the obligation under the said Development Agreement could not press in service the said Clause 53 of the Development Agreement. Be that as it may, no such case is made out by the respondent to press in service the said clause of the Development Agreement.

87. Learned arbitrator has rightly rendered various findings of facts on the issue of breaches on the part of the respondent in respect of their part of the obligations under the said Development Agreement. Learned arbitrator has rightly held that the respondent was not entitled to seek any extension of time on account of non-availability of material or on account of notice, order, rule and notification of the Government or of any other public authority.

88. In so far as the submission of the learned counsel for the respondent that the respondent was empowered to execute agreements with third parties under the power of attorney executed by the claimant in favour of the partners of the respondent no. 1 which power of attorney is irrevocable is concerned, since the respondent had failed to comply with their part of

the obligation to carry out construction in accordance with the provisions of the Development Agreement within the time prescribed and there being gross delay on the part of the respondent which was solely due to the reasons attributable on the part of the respondent, the claimant was not concerned with any such third party rights alleged to have been created by the respondent. Be that as it may, even under the Development Agreement entered into between the parties, the claimant was not responsible for any such third party rights alleged to have been created by the respondent in view of clause 40 of the Agreement.

89. In so far as the submission of the learned counsel for the respondent that the learned arbitrator could not have passed any order under Section 33 of the Arbitration Act or that the said order passed by the learned arbitrator on 11th February 2019 was beyond the purview of Section 33 of the Arbitration Act is concerned, learned arbitrator for the respondent could not point out as to how the said order dated 11th February 2009 passed by the learned arbitrator under Section 33 of the Arbitration Act was beyond the purview of Section 33 of the Arbitration Act or that the said order was perverse in any manner whatsoever.

90. I am not inclined to accept the submission of the learned counsel for the respondent that the respondent could not make any payment from June 2018 onwards on the ground that the claimant had filed several

proceedings against the respondent. Merely because the claimant did not take any action against the respondent immediately for committing breaches and the gross delay on the part of the respondent in completing of the entire project, it cannot be said that there was any waiver on the part of the claimant of their rights under the Development Agreement. In my view, amendment of the Development Control Regulations in the year 2012 or pendency of the litigation between the two members of the claimant-society which were subsequently settled would not exempt the respondent from carrying out its obligation under the said Development Agreement which was admittedly signed in the year 2011.

91. In so far as the submission of the learned counsel for the respondent that the respondent having already paid Rs.2 crores to the claimant which were to be kept at security and thus the respondent was not required to furnish a separate bank guarantee is concerned, in my view, this submission of the learned counsel is contrary to Clause 23 of the Development Agreement and other provisions of the Development Agreement.

92. In so far as the reliance placed on Clause 13 of the Development Agreement by the learned counsel for the respondent in support of the submission that the respondent was entitled to grace period of 6 months after expiry of 22 months is concerned, this submission of the learned

counsel is contrary to Clause 13 of the Development Agreement. The respondent has not satisfied any of the conditions set out in the Development Agreement for its alleged entitlement of grace period of 6 months. Learned arbitrator after interpreting the provisions of the Development Agreement has rightly rejected this submission of the respondent in the arbitral award. Interpretation of the agreement by the learned arbitrator being possible interpretation cannot be substituted by another possible interpretation by this Court.

93. In so far as the submission of the learned counsel for the respondent that the learned arbitrator could not have made any award for refund of the amount in the sum of Rs.1,66,41,157/- to the members of the claimant society for purchase of extra area in the proposed new building with interest @10 % p.a. or that the said relief was beyond the jurisdiction of the learned arbitrator is concerned, Clause 6 of the Development Agreement clearly provided that some of the members of the claimant had purchased additional area from the respondent at the rate prescribed thereunder. The said transaction of the additional area made by some of the members of the claimant is linked to the Development Agreement entered into between the claimant and the respondent. No such objection was raised by the respondent before the learned arbitrator by filing an application under Section 16 or in the written statement.

94. The respondent itself had raised a plea that there was delay in making payment by the members of the claimant for additional area purchased by them. In my view, there was thus waiver on the part of the respondent by not raising the said issue within the time contemplated under Section 16 of the Arbitration Act. The respondent thus cannot be allowed to raise this issue in this petition filed under Section 34 of the Arbitration Act. Be that as it may, to the knowledge of the respondent, members of the claimant-society have not filed any separate claim against the respondent for the reliefs which were already claimed in the statement of claim by the claimant.

95. In so far as the submission of the learned counsel for the respondent that the learned arbitrator did not give any opportunity to the respondent to file additional written statement to amend the statement of claim or the additional counter claim is concerned, a perusal of the record indicates that the learned arbitrator had granted three opportunities to the respondent to file additional written statement and additional counter claim. The respondent, however, did not avail of the said opportunities and did not file any additional written statement and additional counter claim. The respondent, as a matter of fact, commenced the arguments on merit of the claim after conclusion of the arguments made by the claimant's counsel. Learned arbitrator has dealt with this issue in great detail in the arbitral award. There is thus no substance in the submission of the learned counsel

for the respondent that the learned arbitrator had not given equal opportunity to both the parties.

96. In so far as the judgment of the Andhra Pradesh High Court in the case of ***Aliens Developers Private Limited v/s. M. Janardhan Reddy and Ors.*** (supra) relied upon by the learned counsel for the respondent is concerned, the said judgment is not applicable to the facts of this case even remotely and would not assist the case of the respondent. There is thus no merit in any of the grounds urged before this Court by the learned counsel for the respondent in Arbitration Petition No.802 of 2019.

97. Learned arbitrator after interpreting the terms of the Development Agreement and after considering the documents and pleadings forming part of the record before the learned arbitrator has allowed some of the claims made by the claimant. The findings of the facts rendered by the learned arbitrator being not perverse, in so far the claim in favour of the claimant having been allowed by the learned arbitrator cannot be interfered with by this Court under Section 34 of the Arbitration Act. The judgment of the Supreme Court in the case of ***Sutlej Constructions Limited v/s. Union of Territory of Chandigarh*** (supra) and in the case of ***Associate Builders v/s. Delhi Development Authority*** (supra) relied upon by the learned counsel for the claimant would apply to the facts of this case. I am respectfully bound by the principles of law laid down by the Supreme Court in those two judgments.

98. I therefore pass the following order :-

- (i) Arbitration Petition No.802 of 2019 is dismissed.
- (ii) The impugned award allowing the counter claim of Rs.11,07,520/- for refund of the alleged excess payment for initial transit rent awarded by the learned arbitrator in favour of the respondent is set aside.
- (iii) The arbitral award of the learned arbitrator rejecting the claim for payment of Rs.10,54,000/- towards property tax and Rs.13,19,000/- towards “Land Under Construction Tax” made by the claimant is set aside.
- (iv) Arbitration Petition No. 690 of 2019 is partly allowed.
- (v) There shall be no order as to costs.

(R.D. DHANUKA, J.)