

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

ARBITRATION PETITION NO. 982 OF 2011

Mumbai Metropolitan Region Development
Authority & Anr.

...Petitioners

vs.

Shri Rajnikant L. Dharia & Anr.

...Respondents

Mr.Prasad Dhakephalkar, Senior Advocate with Mr.Ashish Kamat, Ms.Simantini Mohite, Mr.Nivit Srivastava and Ms.Sneha Patil, i/b. Mr.Nivit Srivastava, for the Petitioners.

Mr.Pradeep Sancheti, Senior Advocate with Mr.Chetan Kapadia, i/b. Mr.Suryakant Jadhav, for the Respondents.

CORAM : S.C. GUPTE, J.

DATE : 15 MAY 2020

JUDGMENT :

This arbitration petition, filed under Section 34 of the Arbitration and Conciliation Act, 1996 (“Act”), challenges an award passed by a sole arbitrator in an arbitration reference between the parties. The reference arose out of a tripartite agreement between the Petitioner herein-Mumbai Metropolitan Region Development Authority (who was the first claimant before the arbitrator and who is referred to hereinafter as ‘MMRDA’) and the State of Maharashtra (the second claimant, who is hereinafter referred to as “State”) on the one hand and six landholders (“landholders”) whose lands were covered by what is known as Powai Area Development Scheme (“PADS”) on the other.

2 Facts of the case may be briefly noted as follows :

2.1 Sometime on or about 24 January 1977, MMRDA passed a resolution to acquire and develop lands at Powai under the Urban Land (Ceiling & Regulation) Act, 1976 (“ULC Act”) or under Bombay Metropolitan Region Development Authority Act, 1974 (“BMRDA Act”). PADS was framed sometime thereabout as a scheme for such development. On or about 29 June 1977, the State issued a notice under Section 32(1) of BMRDA Act calling upon owners and others to show cause why lands should not be so acquired. On or about 12 May 1983, the State issued the final acquisition notification. On or about 21 August 1984, the State issued a circular authorizing the Commissioner of MMRDA to decide the question of exemption under Section 20 of the ULC Act for lands vested in and disposed of by MMRDA.

2.2 On or about 19 November 1986, a tripartite agreement was executed between MMRDA, the State and the landholders *inter alia* (i) requiring the landholders to surrender or deliver without demur possession of their respective lands described in a schedule under it to the State Government or its nominee, (ii) enabling making available of the lands to MMRDA for development at a nominal consideration of Re.1/- per hectare to be paid by MMRDA, and (iii) agreeing for grant of the lands on lease at a premium of a nominal sum of Re.1/- per hectare to the landholders for a term of 80 years computed from 19 November 1986. Under this agreement, MMRDA also agreed to grant exemption for the lands agreed to be demised unto the landholders from the provisions of Chapter III of the ULC Act *inter alia* for enabling them to hold land in excess of ceiling limit and to develop the same on the terms and conditions contained in the tripartite agreement. The terms and conditions *inter alia* required the landholders (clause 7 of the agreement) to construct flats, apartments or units 50 per cent of which

would not exceed 40 sq.mtrs., in terms of FSI, with remaining 50 per cent being within 80 sq.mtrs.

2.3 On or about 19 November 1986, MMRDA executed an agreement for lease in favour of the landholders in pursuance of the aforesaid tripartite agreement. The agreement for lease *inter alia* granted licence to the landholders to enter upon the lands and develop the same, making it clear that no legal interest was thereby created in favour of the landholders.

2.4 On or about 26 December 1986, in pursuance of the documents referred to above, possession of lands was handed over to the landholders, after the latter had made it over to the State.

2.5 On or about 12 February 1987, the Commissioner of MMRDA exempted the lands from the provisions of Chapter III of the ULC Act subject to conditions mentioned in the tripartite agreement and agreement for lease referred to above.

2.6 The landholders then proceeded to develop the lands through their developer and power to attorney holder Respondent No.2 ("Hiranandani").

2.7 On or about 29 January 2007, one Sushil Shivdasani made a complaint against Hiranandani to MMRDA alleging violations of the agreements referred to above as well as provisions of law whilst developing the lands.

2.8 Pursuant thereto, and after issuing a show cause notice and considering the reply of Hiranandani, on or about 14 February 2008,

MMRDA made a report to the State pointing out various violations committed by Hiranandani and seeking instructions of the State for taking action in that regard.

2.9 Further correspondence and orders of the State followed in the matter, which gave rise to various disputes between MMRDA and the State on the one hand and the landholders represented by Hiranandani on the other.

2.10 In the meantime, Public Interest Litigations were filed by various parties concerning the violations of the agreements by Hiranandani and seeking appropriate directions to the State in the matter. By its order dated 4 December 2008 passed in the PILs, this court issued interim orders in the matter, after making important observations regarding the alleged violations.

2.11 By his communication dated 5 December 2009, Hiranandani invoked the arbitration agreement contained in clause 13 of the tripartite agreement.

2.12 After some communications between the parties, the State appointed the present sole arbitrator to adjudicate the disputes and differences between the parties.

2.13 The statement of claim filed by MMRDA before the learned arbitrator prayed *inter alia* for -

- (a) declaration regarding breaches committed by the landholders

and their constituted attorney (Hiranandani) of (i) the tripartite agreement, (ii) the agreement to lease, and (iii) exemption orders dated 12 February 1987 and various other provisions of law; and

(b) money decree for a sum of about Rs. 86.75 crores together with interest.

2.14 The statement of claim filed by the State also prayed for similar directions and payment of money against the landholders and particularly, their constituted attorney.

2.15 The landholders and their constituted attorney (Hiranandani) filed their replies as well as counter-claims.

2.16 After framing issues and considering oral and documentary evidence and hearing submissions of Counsel, the learned arbitrator, by his impugned award dated 16 August 2011, rejected the claims of MMRDA and the State as well as the counter-claim of the Respondents.

3 The award has been challenged by MMRDA and the state on various grounds. The challenge pertains to (i) the issue of limitation decided by the sole arbitrator against the claimants (Issue Nos.1 and 1-A and 1-B) and (ii) the issue of breaches on the part of the Respondents and entitlement of the claimants to damages (Issue Nos.2 to 5).

4 On limitation, it is submitted, firstly, that the learned arbitrator committed a patent illegality and error of jurisdiction in holding that the claim was barred by the law of limitation. It is submitted, in particular, that

the tripartite agreement as well as the agreement to lease were not merely in the realm of private contract between the parties, but their salient conditions were incorporated in a statutory exemption order passed in public interest and accordingly, Article 55 of the schedule to the Limitation Act, 1963 did not apply to the facts of the case. In the alternative, it is submitted that there were successive and continuing breaches on the part of the Respondents and accordingly, even if Article 55 were held to be applicable, its latter part would have brought the claim within time. Further alternatively, it is submitted that since the Respondents' acts involved active concealment of facts and could be termed as fraudulent, limitation would commence when the claimants discovered the fraud or found the concealed facts.

5 On merits of the breaches made by the Respondents, and in particular the purported breach in respect of the areas of constructed flats as part of the development, such areas aggregating to 35,900.52 sq.mtrs, and damages payable as a result, the award of the sole arbitrator proceeds on the footing that there was no upper limit in respect of the total area of merged/amalgamated flats in proportion to the overall development under the tripartite agreement read with the correspondence between the parties. The learned arbitrator mainly relied on the permission granted for construction on 18 August 1989 for arriving at this conclusion. It is submitted by the Petitioners that this conclusion is opposed to the record and in the face of an express agreement and a restriction under the NOC issued to the Respondents under the ULC Act. The Petitioners submit that the conclusion is an impossible one and cannot stand the scrutiny under Section 34 of the Act.

6 Article 55 of the schedule to the Limitation Act provides for three years' limitation period for claiming compensation for breach of any contract, express or implied, not specially provided for elsewhere in the schedule. Based on this Article, the learned arbitrator held that having regard to Section 21 read with Section 43 of the Act (the date of request for reference, i.e. 11 August 2008, being the *terminus a quo*), the alleged breaches, having occurred more than 3 years before this date, were barred by limitation under the Article. The case of MMRDA and the State was that the Respondents' acts involved an active concealment of documents and facts and the reference was based on the Respondents' fraud and hence, the period of limitation would not begin to run until the claimants discovered the fraud or concealed documents or facts, having regard to the provisions of Section 17 of the Limitation Act. It was submitted that MMRDA discovered the breaches only after documents were made available to them by MCGM and an inquiry and investigation were conducted by the State Government into the matter and a final decision was arrived at. It was submitted that the reference was, thus, within time.

7 Section 17 of the Limitation Act, 1963 is quoted below :

“17. Effect of fraud or mistake –

(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act-

- a. the suit or application is based upon the fraud of the defendant or respondent or his agent; or
- b. the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or
- c. the suit or application is for relief from the consequences of a mistake; or

d. where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him;

the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, has discovered it, or in the case of concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against or set aside any transaction affecting, any property which-

i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

ii. in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

iii. in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court may, on the application of the judgment-creditor made after the expiry of the said period, extend the period for execution of the decree or order:

Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.”

The question before the arbitrator, having regard to the claimants’ submission under Section 17, was whether the reference was based upon the fraud of the Respondents or their agent, Hiranandani, or whether the knowledge of the right of action, so far as the claimants are concerned, was concealed by any such fraud. In a broad brush manner, the learned arbitrator held Section 17 to be inapplicable to the facts of the case by holding that the claimants’ pleadings lacked particulars of any such alleged fraud or concealment and in the absence of pleadings in support of the

allegation of fraud, concealment or criminal breach of trust, the benefit of Section 17 was not available to the claimants.

8 The arbitrator's observations, as above, about absence of pleadings of fraud and concealment, amount to a clear travesty of justice, and exhibit an impossible view of the material placed before him by the parties. The tripartite agreement contained a stipulation in the clearest of terms that the landholders could not construct 50% of units beyond 40 sq.mtrs (in terms of FSI) and balance 50% units in excess of 80 sq. mtrs (in terms of FSI). Any breach of this essential term would have invited resumption of possession by the Metropolitan Commissioner of MMRDA and also, called for compensation. Besides, 15% of total constructed area was to be made over to the State. These terms and conditions of the tripartite agreement were also expressly made part of the exemption order issued under Section 20(1) of the ULC Act to enable the landholders to retain land in excess of the ceiling limit and develop the same. Hiranandani, as the constituted attorney of the landholders, in his request for NOC for merger of two units, specifically made the following representations: (i) some prospective purchasers had requested for merger of two adjoining flats or one flat over another which entailed crossing of the aforesaid prescribed limits of 40 and 80 sq.mtrs; (ii) even after such mergers, in majority of cases the aggregate areas would not exceed 100 to 125 sq.mtrs and in extreme cases, 160 sq.mtrs by merging of two flats; (iii) such mergers of flats would not extend beyond 10% to 15% of the overall development. On these specific representations, a request was made for merger of two flats in some cases. The NOC granted by MMRDA for merger of two units was, in the premises, subject to various conditions. Such conditions *inter alia* included approval of building plans by restricting areas

of individual tenements; sale of tenements individually as separate units; merger only on specific requests by purchasers for making of alternations to enable joint usage of two tenements; and maintenance of future planning ratio of tenements and sizes strictly as per the tripartite agreement. Later on, clarifications were issued by the State permitting Hiranandani to utilize not more than 10% of the lands exempted under the ULC order under Section 20(1) for construction of non-residential buildings (i.e. for commercial user). Based on these permissions and /or clarifications, Hiranandani appears to have turned the whole scheme of affordable housing, which was the sole purpose of the tripartite agreement and exemption order under the ULC Act based thereon, on its head by constructing large flats far in excess, and in breach, of the proportions and sizes of tenements according to the tripartite agreement and ULC permission. (This subject has been discussed at greater length in the order below concerning the merits of the Petitioners' case on the Respondents' breaches and damages payable by them.) Throughout the relevant period, Hiranandani suppressed these breaches from MMRDA and the State. (In fact, there is reason to believe that there was collusion between the authorities and Hiranandani in developing the lands in the manner as above. That aspect, however, was not within the purview of the arbitrator.) All this came to light only when Shivdasani made complaints to MMRDA and the State against Hiranandani, whereafter, post issuance of a show cause notice and consideration of the cause shown by Hiranandani, a report was submitted by MMRDA to the State on 14 February 2008 seeking instructions for taking action. On 31 March 2008, the State addressed a letter to MMRDA, requiring the latter to carry out calculation of areas of tenements which were more than 40 sq.mtrs. and 80 sq.mtrs., the premium that may have to be charged for TDR use, etc. After various PILs were filed

before this court and interim orders were passed by the court thereon, the State appointed a committee of six members for conducting an inquiry into the whole development under PADS. It was during this inquiry that most of the facts, on the basis of which the statement of claim was filed by the claimants herein, were brought to light. These were indicated in the committee's report dated 16 December 2008 and included the fact that there were amalgamation (of 2 flats) in 2026 flats and (more than 2 flats) in 443 flats. By its letter dated 1 January 2009, MMRDA recommended the State to levy penalty of over Rs.1993 crores. After correspondence thereafter between the parties including Hiranandani, by its communication dated 4 December 2009, the State pointed out to MMRDA that Hiranandani had committed violation in respect of 35,900.52 sq.mtrs. and directed MMRDA to recover penalty as per the ready reckoner rate, working out various figures such as permitted areas for amalgamation (@15%), total areas of staircase to be excluded from TDR and permissible commercial area, etc. It was at this stage that Hiranandani made a request for reference to arbitration.

9 All of this makes for a compelling case of fraud and concealment of facts and documents. All of this forms part of the statement of claim as well as oral and documentary evidence led by the claimants before the arbitrator. It was impossible or impermissible, in these facts, for any fair and judiciously minded person to hold that there was no case of fraud or concealment (for the purposes of Section 17 of the Limitation Act) for want of particulars.

10 The claimants, both MMRDA and the State, were, thus, clearly within time; time would not have run against them for making of a

reference for a claim of breach of contract as well as of ULC permission on the part of the Respondents and seeking damages for such breach until the committee discovered the fraud and made a report in that behalf to the State and MMRDA.

11 Coming now to the breaches themselves and damages payable by the Respondents on account thereof, which is the subject matter of Issue Nos.2 to 5 considered by the learned arbitrator, the very first and foremost question to be considered is whether and to what extent there was restriction on the Respondents to maintain areas of the flats to be constructed within the areas stipulated under the tripartite agreement (and made part of the ULC order) in the light of the NOC granted by MMRDA to Hiranandani on 18 August 1989. It is not in dispute that the tripartite agreement contained an absolute embargo on Hiranandani on constructing 50% flats beyond 40 sq.mtrs. (in terms of FSI) and balance 50% beyond 80 sq. mtrs. (in terms of FSI). It is also not in dispute that this condition, which was an essential condition of the permissible development, was made part of the ULC permission granted under Section 20(1) of the ULC Act and was binding on Hiranandani. What the parties differ on is the extent to which this condition was altered by the NOC for merger granted to Hiranandani on 18 August 1989.

12 It is pertinent to note in this behalf that this NOC was granted by MMRDA in response to a request for merger made by Hiranandani on 8 June 1989 to the Metropolitan Commissioner. By this request, Hiranandani made the following representations. In the first place, Hiranandani stated that (i) some prospective purchasers (individuals/companies) had requested for merger of adjoining two flats or one flat above another and

that such merger meant exceeding the prescribed limit of areas (i.e. 40 sq.mtrs. and 80 sq.mtrs.); (ii) even after merging of two flats into one, in majority of cases the areas of flats would not exceed 100-125 sq.mtrs and in extreme cases, would not exceed 160 sq.mtrs.; (iii) merging of flats would not be beyond 10% to 15% of the overall development. In the premises, Hiranandani requested for no objection to allow two units to be merged.

13 In response to the aforesaid request, MMRDA granted NOC to Hiranandani permitting joint usage of two units (as per clause 7(iii) of the tripartite agreement) subject to the following conditions:

“(i) Building plans have been approved restricting area of tenements specified in exemption order dated 12 February 1987 issued by Metropolitan Commissioner;

(ii) Tenements have been sold individually as separate units;

(iii) Concerned purchasers or prospective purchasers have specifically requested to carry out necessary alternations, if any, to enable joint usage of two tenements;

(iv) Requisite alternations to be carried out should be approved by BMC under their regulations;

(v) Alterations for joint usage of two flats should be done before seeking OC permission from BMC for duly constructed buildings;

(vi) All future planning ratio of tenements and sizes are strictly maintained as per TA while seeking BMC's sanction of the plan."

14 The aforesaid two documents make it clear that :

(a) what was permitted was *joint usage of two units or flats* and not merger of multiple or more than two units/flats;

(b) tenements had to be sold individually as separate units, though what was permissible was carrying out alternations in them so as to enable such joint usage;

(c) such alternations could be carried out only where specific requests were made by the concerned purchasers or prospective purchasers;

(d) maximum possible area even in case of merger or amalgamation of two flats could not have exceeded 160 sq.mtrs. (i.e. by amalgamation of 2 flats of 80 sq.mtrs.);

(e) such merging of flats could only be upto 15% of the overall development; and

(f) in all future planning, ratio of tenements and sizes were to be strictly maintained as per the tripartite agreement.

15 The discussion of the learned arbitrator in this behalf (on Issue No.2) opens on an entirely incorrect note, and that is absolutely

unstatable. The learned arbitrator opens his statement of reasons on Issue No.2 by narrating that admittedly, there were no restrictions on amalgamating /merging tenements of 40 sq.mtrs. and 80 sq.mtrs. This observation, to say the least, is shocking to the conscience of the court. The whole scheme of PADS was premised on provision of affordable housing to citizens of Mumbai. In keeping with this premise, maximum permissible sizes of tenements were prescribed in the tripartite agreement, i.e. 50% flats of upto 40 mtrs. and balance 50% upto 80 mtrs. There was no question of amalgamating or merging of flats. If mergers or amalgamation of these flats were permitted, it would make no sense whatsoever of the very restriction. In the face of this stipulation, what one would need is an **affirmative sanction** for amalgamation or merger and not **absence of restriction** for such amalgamation or merger. And, evidently, it was in keeping with this basis that Hiranandani himself appears to have applied for a special NOC for amalgamation or merger of two flats and made a specific request to that effect. Such permission/NOC was granted by MMRDA specifically and subject to particular terms and conditions. As for the arbitrator's statement that want of such restriction in the tripartite agreement was an admitted matter, the less said the better. No fair or judiciously minded person could ever have come to such a conclusion in the face of the pleadings and evidence referred to above.

16 What starts on an impermissible note in the award is carried forward to conclude that *admittedly(?)* there were no restrictions regarding the size of the tenements in the other two documents, i.e. the agreement to lease dated 19 November 1986 and the exemption order dated 12 February 1987. For arriving at this conclusion, the learned arbitrator, in his reasoning, has come to yet another unstatable proposition

that there was no upper limit of 15% on the total area of merged tenements as a condition of the NOC of 18 August 1989. The NOC of 18 August 1989 was specifically with reference to Hiranandani's request of 8 June 1989 for merger of two flats. The request of 8 June 1989 made a specific representation that such merging of two flats would not be beyond 10% to 15% of the overall development. There is no way the response of MMRDA can be considered independently of the request and representation of Hiranandani, as suggested by learned counsel for the Respondents.

17 Coming now to the violation of the various conditions concerning sizes and mergers of flats under the tripartite agreement (and consequently under ULC permission), which was the subject matter of issue no.3 framed by the learned arbitrator, the record before the arbitrator unmistakably showed the following breaches on the part of Hiranandani:

(a) Contrary to the representation made to, and NOC for merger of flats obtained from, MMRDA, Hiranandani actually constructed flats of various sizes ranging from 160 sq.mtrs. (which was to be the maximum size of the flat in extreme cases) to as large as 457 sq.mtrs. As the report of the State appointed committee indicates (there being no contrary material in this behalf produced by Hiranandani), as many as 443 flats were involved in the merger of more than two flats extending their sizes well over 160 sq.mtrs.

(b) Merger or amalgamation of more than two flats by Hiranandani was beyond doubt a clear violation of clauses 7(iii) of the tripartite agreement read with the NOC of MMRDA (even if one

were to read the NOC independently of the request for merger in response to which the NOC was issued).

(c) The amalgamations were not made at the specific requests of the concerned purchasers or prospective purchasers; the flats of amalgamated sizes were advertised for sale in brochures and public notices by Hiranandani, which was clearly in breach of the NOC conditions.

(d) The amalgamated flats were not sold individually as separate units as required by MMRDA in its NOC of 18 August 1989.

(e) The amalgamated flats were far over 15% maximum of the overall development permissible under the NOC.

Of these breaches, the learned arbitrator appears to have applied his mind to only the last of the breaches, i.e. item no.(e) noted above. And even there the learned arbitrator has come to a wholly unreasonable or impossible finding as is presently pointed out below.

18 Assuming without admitting that there was an upper limit of 15% for amalgamation of two flats, the arbitrator has come to a conclusion that the amalgamated flats did not exceed this 15% ceiling limit. MMRDA and the State had produced a table of area statements (in para 7 of the State's statement of claim), showing violation on the part of Hiranandani (of maximum permissible area of amalgamated flats) to the extent of about 35,900 sq.mtrs. For felicity of reference, the table of areas is reproduced hereinbelow:

Sr. No.	Particulars	Area (Sq.Mtr.)
1	Total area in PADS approved by MCGM	5,74,492.44
2	Area of residential tenements	4,54,817.62
3	TDR area used by the developer in PADS	2,39,079.82
4	Area permitted to be used for common amenities like lift, staircase, lobby etc. as per D.C. Regulation 35(2)(c)	56,738.59
5	Areas violated as per the /Tripartite Agreement [item 4,54,817.62 sq.mtrs. less total of items (3) & (4)] viz. 2,95,818.41 sq.mtrs. =	1,58,999.21
6	15% permissible area for merged tenements viz., 15% of total violated area as per item (5) above (15% of 1,58,999.21 sq.mtrs.)	23,849.88
7	Total area of tenements of 40 and 80 sq.mtrs. (689 x 40 sq.mtrs. + 607 x 80 sq.mtrs.)	76,120.00
8	Area of two merged tenements of 40 sq.mtrs. each where the total area after merger does not exceed 80 sq.mtrs.	23,128.81
9	Total area violated (item 5... 1,58,999.21 sq.mtrs. less total of items 6, 7 and 8 ... 1,23,098.68)	35,900.52

The learned arbitrator did not agree with these area calculations for the reasons-

- (i) that the 15% limit for the total area of amalgamated flats was to be calculated of the total available area for development, which was 9,29,335 sq.mtrs (area available for overall development, as mentioned in the first schedule to the tripartite agreement, being 92.93 hectares), and not the total areas of development in PADS approved by MCGM, as was considered in the claimants' area calculations, which was about 5,74,492 sq.mtrs.; and

(ii) the TDR used by Hiranandani for construction within PADS, apart from the FSI of the PADS lands, i.e. the total of about 2,39,079 mtrs., as also the area of 56,738 sq.mtrs. of common amenities like lift, staircase, lobby, etc., for which Hiranandani paid premium to MCGM, could be used by Hiranandani free from any restriction.

The second reason should really be a non-starter, since this area has anyway been excluded from the area statement of the State in para 7 of its claim. So far as the first reason is concerned, the arbitrator appears to have come to a strange conclusion. The learned arbitrator has held in the award that (i) the 15% ceiling limit of area of amalgamated flats would work out to 1,39,400 sq.mtrs. (i.e. 15% of the total area of 9,29,335 sq.mtrs.); and (ii) the total area of amalgamated flats thus far constructed by Hiranandani, which was about 2,63,863 sq.mtrs., could well have come from the TDR area and FSI of common amenities aggregating to about 2,95,817 sq.mtrs. (i.e TDR of 2,39,079 and common amenities FSI of 56,738 sq.mtrs.).

19 Both of these conclusions are clearly perverse. First of all, the NOC of 18 August 1989 itself had made it clear that in all future planning, ratio of tenements and sizes were to be strictly maintained as per the tripartite agreement (even if one were to read it subject to NOC conditions) whilst seeking MCGM's sanction to the plans. It cannot be that the developer constructs all permissible amalgamated flats (based on total development potential) upfront; he was bound to maintain the ratio of tenements and sizes throughout the planning of the project. As and when development was planned and sanction was obtained from MCGM, the ratio and sizes according to the tripartite agreement were to be maintained.

The reasons for this are not far to seek. If the developer were to construct the bigger (i.e. amalgamated) flats and not go ahead with the balance development, could he then say that he was within the terms of the tripartite agreement (read with the NOC conditions) so long as the amalgamated flats were within the maximum permissible area having regard to the overall development potential of the lands. That would be preposterous. The plain meaning of the stipulation is that whatever he constructs, such construction must be in keeping with the ratio of tenements and sizes stipulated. No other conclusion is possible.

20 Giving credit for practically the whole of the area of TDR and FSI of common amenities for construction of amalgamated flats is also strange, to say the least. First of all, the areas of TDR and FSI of common amenities have not been considered by the arbitrator for working out 15% of maximum permissible area of amalgamated flats, and on top of it, he has taken the credit of these areas, i.e. areas of TDR and FSI of common amenities, for justifying the actual constructed area of amalgamated flats. This is completely arbitrary and fanciful. As the State appointed committee has observed in its report, in some cases, buildings constructed by use of TDR were separate, whilst in some other cases, buildings were sanctioned utilizing both land FSI and TDR. It would be wholly artificial, in the premises, to hold that whatever be the building, whether constructed out of land FSI and FSI for amenities or such FSI plus TDR or TDR alone, all amalgamated flats were from TDR and/or FSI for amenities and not from land FSI.

21 The absurdity of these conclusions is all the more apparent, if we have regard to the very basic premise of the whole PADS and tripartite

agreement entered into for its execution, which was to make available affordable housing to the citizens; that was the idea behind keeping sizes of flats within an affordable range, i.e. 40 to 80 sq.mtrs. That was also the basis for ULC permissions for construction of housing in lands in excess of ceiling limits. All this would stand turned on its head, if the artificial construction adopted by the learned arbitrator were allowed to prevail.

22 It is, in fact, doubtful if by means of the use of TDR or FSI of common amenities Hiranandani could at all have constructed flats within the demised lands, which were being developed under PADS, in breach of the tripartite agreement and conditions of ULC permission. TDR as well as FSI of common amenities (for which premium is paid by the developer) is, after all, being used in lands being developed under PADS and can only be described as part of permissible development potential of those lands. But, even if one were to assume that it was so permissible to develop the lands, the conclusions of the arbitrator regarding permissibility of the total area of amalgamated flats, as shown above, were clearly perverse.

23 The conclusions and findings of the learned arbitrator on the breaches of the Respondents, thus, cannot be sustained within the permissible limits of judicial scrutiny expected under Section 34 of the Act.

24 Apart from the discussion in the award referred to above, which really finds place under issue no.2 discussed in the award, there is no particular reason assigned for holding issue no.3 (i.e whether or not there was breach on Hiranandani's part), save and except to say that in view of his answer to issue no.2 being in the negative, i.e. that there was no upper limit in respect of the total area of merged/amalgamated

tenements in proportion to the overall development under the tripartite agreement, issue no.3 was answered in the negative. The conclusions of the learned arbitrator on issue no.2, as we have seen above, are unsustainable and his conclusion on issue no.3 also stands vitiated for the same reasons.

25 Issue no.4, which was on the claimants' entitlement to damages/compensation, was also answered in the negative for the same reasons as issue no.3, though there were some further reasons stated in the award for so answering it. These reasons were four-fold. Firstly, the learned arbitrator held that in none of the three documents (i.e the tripartite agreement, the agreement to lease and the ULC exemption order) was there any power to impose penalty (by charging the ready reckoner market rate for the area developed). Secondly, it was held that in the letter dated 30 October 2007 by MMRDA to MCGM, the request was only to stop building permissions and occupation certificates till the matter was resolved. Thirdly, the arbitrator observed that in the show cause notice dated 31 October 2007, Hiranandani was called upon to show case for withdrawal of ULC exemptions and cancellation of agreement to lease and initiation of legal action. Fourthly, it was observed that in the report of 14 February 2008, MMRDA had recommended to the State for cancellation of ULC exemption and agreement to lease and resumption of land; there was no whisper of any penalty; and that the action of the claimants (i.e. MMRDA and the State) in imposing penalty by charging market rate prescribed in the ready reckoner was *ultra vires* their powers under the statute or the three documents.

26 Before we deal with this part of the impugned award, it must be noted at the outset that the State's power to impose penalty for breach

of law or for regularization of some irregularity of law, is different from the State's power for recovery of damages under a contract to which it is a party. The former comes within its executive authority under the law, whilst the latter is within its contractual entitlement. The former is never amenable to the jurisdiction, power or authority of an arbitral forum, whilst the latter alone can be adjudicated by a privately chosen arbitral forum. The learned arbitrator appears to have applied his mind to issues reflecting on the powers of the State or a local body to charge premium and/or penalty. The entire discussion in this behalf in the award is wholly uncalled for and *sans* jurisdiction or authority.

27 Leaving out this discussion, what emerges is that whilst considering the compensatory aspect of damages payable by Hiranandani, the learned arbitrator appears to have confused between the two separate authorities wielded by the state or its organ, namely, MMRDA, or the two separate capacities in which it appears to have acted. In writing its letter of 30 October 2007 to MCGM, MMRDA was not acting in its capacity of a contracting party, but as an organ of the State in exercise of its executive authority. So also, in issuing the show cause notice of 31 October 2007, MMRDA was partly acting within its executive authority and partly exercising its contractual entitlement. The report of the state appointed committee to the State was an internal matter of the Government and has no implications for the rights or liabilities of Hiranandani. None of the three reasons cited by the arbitrator for holding against the legality or validity of damages claimed from Hiranandani is in order or in any way relevant. The only other reason, considered by the learned arbitrator for his conclusion, namely, want of provision of damages in the three documents referred to by him, though relevant, is not really decisive one way or the

other. It is not necessary that a contract should, in all eventualities, provide for all consequences of its breach; it may provide for some or even none; other consequences may follow as a matter of law under Section 73 of the Contract Act. Any party, who suffers from a breach of contract, is entitled, under Section 73, to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby. The arbitrator, in his jurisdiction to adjudicate the disputes between the parties herein, was entitled to adjudicate only these damages and had no authority to rule on any premium or penalty charged by the state or its instrumentality in exercise of its executive authority, as noted above.

28 To the extent the learned arbitrator has not considered the compensatory aspect mentioned above, which alone arose from the contract and was amenable to his jurisdiction, and instead applied his mind to the aspect of premium or penalty which comes within the realm of public law, the award contains an error of jurisdiction and cannot stand.

29 In the result, the impugned award deserves to be quashed and set aside.

30 The arbitration petition, accordingly, succeeds and the impugned award is set aside.

(S.C. GUPTE, J.)

Sanskriti
A.
Thakur

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Thakur
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