BEFORE THE LEARNED SOLE ARBITRATOR

MR. AMRUT JOSHI, ADVOCATE

In the matter of Arbitration between:

Goregaon Pearl CHS Ltd. …Claimant

Versus

SSD Escatics Pvt. Ltd. …Respondent

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Goregaon Pearl CHS Ltd. …Claimant

Versus

SSD Escatics Pvt. Ltd. …Respondent

<u>Appearances:</u>

<u>For the Claimant</u>:

Mr. Mayur Khandeparkar, Mr. Tushar Gujjar, Ms. Shweta Amalsadiwalla, Mr. Deepak Singh, Advocates i/b M/s. S. L. Partners

Mrs. Maya Sejpal, Mr. Lancelot Lewis and Ms. Radhika Kamat, Members of the Claimant Society.

<u>For the Respondent</u>:

Mr. Rajiv Narula and Ms. Shwetaa H. Doshie, Advocates i/b M/s. Jhangiani Narula & Associates.

<u>FINAL AWARD DATED 24th JUNE 2023</u>

1. It is a matter of record that by an order dated 30th July 2018 passed in Arbitration Petition (L) No.665 of 2018, I have been appointed as an Arbitrator to adjudicate upon the disputes arising out of the Development Agreement dated 26th September 2007 as modified by the Consent Terms dated 16th May 2017 executed between the Claimant and the Respondent herein. The mandate of this Tribunal has been extended by the Hon'ble Bombay High Court initially by its Order dated 14th September 2020 and finally in Arbitration Petition (L) No. 12774 of 2023 by its Order dated 16th June 2023. Under the Order dated 16th June 2023, the mandate of this Tribunal has been extended by a period of 4 weeks from the said date.

2. In view of the aforesaid, the present Award is made within the mandate of this Tribunal.

3. While discussing the events of the time when the Respondent Company was a partnership firm ‘Sai Siddhi Developers’, the word ‘Respondent Developer’ shall mean to be a reference to the said partnership firm as it stood then. While discussing the events after the incorporation of the Respondent Company in January 2017, the word ‘Respondent Developer’ shall mean to be a reference to the Respondent Company as it exists at present. Further, the terms Building A and Building B shall be deemed to be a reference to Wing A and Wing B respectively of the buildings standing on the subject property and *vice versa*.

Prelude to the adjudication of the present dispute

4. This is a tragic saga of a few individuals, which, going by the recent past of the real estate industry in Mumbai, is no longer rare. One set of these citizens comprises the members of the Claimant Society who entered into a Development Agreement with the Respondent Developer with the fervent hope that their old buildings will be re-developed and they will be provided with bigger and better houses. This portion of construction is typically known as the rehab component. In return consideration, the Respondent Developer gets an opportunity to make substantial profits by selling the flats in what is typically known as the free-sale component to outsiders who purchase the same from a Developer. This is where the second set of citizens come in. These are flat purchasers who are said to have paid large sums of money to the Respondent Developer for purchasing flats in the free-sale component. As the story unfolds, it becomes clear that in the greedy pursuit of its profit motives, the Respondent Developer has severely breached its obligations under the Development Agreement resulting in the project getting completely stuck. As a result, the members of the Claimant Society

had been left to fend for themselves outside their own houses and that too without any rent for years together. On the other hand, the flat purchasers who have parted with large sums of their life-savings have been left to pursue their remedies against the Respondent Developer with no home in sight. I say with utmost restraint at my disposal, that the present case is one of the most unfortunate tragedies similar to the one that has been articulated in detail by the Hon'ble Bombay Court in ***Rajawadi Arunodaya CHSL Vs. Value Projects Pvt Ltd***[1].

5. The present arbitration has a chequered history and it would therefore be relevant to discuss the events leading up to the final adjudication of Claims in the present Arbitration. They are as under:-

a) Claimant is a Co-operative Housing Society of sixty members, who had already handed over possession of their respective flats for redevelopment under a Development Agreement executed in 2007. Under this Development Agreement, the developer was duty bound to complete the project within twenty-two months from the date of receipt of Commencement Certificate with a three months grace period. The project involved construction of two wings of a new building, Wings A and B. Both wings were to partly accommodate the members of the Claimant Society and partly third-party purchasers of the free sale component of the project.

[1] Order dated 15th March 2021 in Commercial Arbitration Petition (L) Nos. 74 and 3930 of 2020

b) In pursuance of the Development Agreement, all members of the Claimant Society vacated their respective flats by handing over possession to the Respondent Developer. Respondent Developer had executed a bank guarantee in favour of the Claimant Society in the sum of Rs. 5 crores for fulfilling his commitment under the Development Agreement.

c) On or about 17th June 2008, a Commencement Certificate for construction of the new building was issued by the Municipal Corporation of Greater Mumbai ('**MCGM**') to the Respondent Developer. Though construction was undertaken in pursuance thereof, it was nowhere near completion even as late as by August 2016, that is to say, even after passage of eight years from issuance of the Commencement Certificate.

d) In the premises, by their notice dated 16th August 2016, the Claimant Society revoked the Power of Attorney given by it to the Respondent Developer for development of the subject property. This was followed by an Arbitration Petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Act**") by the Claimant Society seeking *inter alia* appointment of a Court Receiver to take over the redevelopment project and to complete it. Various breaches on the part of Respondent Developer were alleged in the Arbitration Petition. These included non-completion of the project within the stipulated period of 25 months, change of plans without the Claimant Society's consent and unauthorized construction of two additional floors for which stop-work notice was issued by MCGM in 2011, etc.

e) In the meantime, the Bank Guarantee of Rs. 5 crores was invoked and encashed by the Claimant Society. After various interim orders passed by the Hon'ble Bombay High Court on that Arbitration Petition, finally, on or about 7 July 2017, the parties entered into Consent Terms.

f) Under these Consent Terms, the total liability of the developer was fixed at about Rs. 7.62 crores. It was agreed that Rs. 2.5 crores would be adjusted, from out of the Bank Guarantee amount of Rs. 5 crores, towards arrears of rent and balance Rs. 2.5 crores towards share of profits of the Claimant Society as per the Development Agreement. The Consent Terms provided for completion of Wing A with part OC on or before 31st December 2017 with a grace period of three months and completion of Wing B with part OC on or before 30th June 2018. The Consent Terms had a termination clause in the event of breach, if any, on the part of the Respondent Developer. Post-dated cheques were issued by Respondent Developer in pursuance of the Consent Terms.

g) During this intervening period, the Respondent Developer had apparently created third-party rights in the free sale component by entering into agreements with various third-party purchasers.

h) Respondent Developer committed breaches of the Consent Terms. Not only was construction of A and B Wings not completed within the respective stipulated periods, but even the cheques issued in pursuance of the Consent Terms were dishonoured.

i) This resulted in the Claimant Society filing a Contempt Petition against the Respondent Developer in February 2018. The Hon'ble Bombay High Court passed Order dated 6th March 2018 in that Contempt Petition recording that the Respondent Developer had undertaken to pay a sum of Rs. 5.42 crores in instalments, and a bar chart, filed with the affidavit of the Respondent Developer, was taken on record requiring completion of construction in accordance with it.

j) Since, even this Order was breached by the Respondent Developer, the Claimant Society by their notice dated 9th June 2018, terminated the Development Agreement and Power of Attorney.

k) Further to this termination, an Arbitration Petition under Section 9 of the Act was filed by the Claimant Society, seeking various injunctive reliefs against the Respondent Developer. These included a restraint on the Respondent Developer from interfering with the Claimant Society's endeavour to complete the project on its own or through an appointment of a third-party Developer and handing over possession of the project to such Developer.

l) At the hearing of this Arbitration Petition, by consent, disputes between the parties were referred to me as the Sole Arbitrator, converting the Petition under Section 9 into an Application under Section 17 of the Act.

m) By my Order dated 17th September 2018, passed under Section 17 of the Act, this Tribunal allowed the Claimant Society's Application *inter alia* permitting the Claimant Society to appoint a new Developer or contractor for completion of the project. Respondent Developer was restrained from interfering with the redevelopment process through such new Developer or contractor. Private receivers were appointed by this Tribunal to facilitate the handover of possession of the subject property with the construction put up thereon, from the Respondent Developer to the Claimant Society. This Tribunal *inter alia* noted the decision of the Claimant Society to accommodate all its members in Wing B, which was at a much more advanced stage of completion around that time. So far as Wing A was concerned, the Claimant Society was directed to ensure that no third-party rights were created in respect thereof by sale of any flat in Wing A to any new purchaser. This was evidently to protect the claim of the Respondent Developer in the event it was found at trial that Respondent Developer is entitled for the relief of Specific Performance and/or damages in lieu thereof in terms of law as it stood then.

n) This Tribunal's Order dated 17th September 2018 was carried in Appeal under Section 37 of the Act by the Respondent Developer. By an Order dated 14th December 2018 passed by the Hon'ble Bombay High Court, this Tribunal's Order was upheld and Respondent Developer's Appeal was rejected. The Hon'ble Bombay High Court expressed the view that the this Tribunal's Order was fully justified.

o) Being dissatisfied, Respondent Developer carried the matter higher in a Special Leave Petition ('**SLP**') before the Hon'ble Supreme Court of India. By its Order dated 21st January 2019, the Hon'ble Supreme Court of India rejected the SLP filed by the Respondent Developer.

p) At that stage, considering the fact that some of the flat purchasers claiming under the Respondent Developer had also challenged this Tribunal's Order under Section 17 of the Act, by a separate order dated 21st January 2019, the Hon'ble Supreme Court of India, whilst rejecting the SLP of these flat purchasers *inter alia* observed that though it found no ground to interfere as the SLP of the Respondent Developer against the very same Order had been dismissed, the third-party purchasers were given liberty to approach this Tribunal and seek appropriate remedies, if so advised.

q) The flat purchasers thereafter approached this Tribunal by an application seeking modification of the Order dated 17th September 2018. This Tribunal, after hearing the parties at length, by an Order dated 27th February 2019, rejected the application made by these flat purchasers. This Tribunal also *inter alia* directed the Respondent Developer to circulate the Order dated 27th February 2019 to all the third-party flat purchasers with whom flat purchase agreements or other contracts were entered into by the Respondent Developer for the obvious reason that all these flat purchasers were similarly situated in facts and law qua the Claimant Society.

r) In or around March 2019, one of the flat purchasers filed her own Suit for specific performance of her agreement for sale with the Respondent Developer (agreement dated 8th June 2015) before the City Civil Court at Dindoshi. On her ad-interim application in a Notice of Motion [‘**Flat purchaser’s motion’**], the City Civil Court at Dindoshi passed a temporary injunction, restraining the Claimant Society herein from alienating or creating third party interest in the flat allotted to her by the Respondent Developer in B Wing of the new building.

s) Being aggrieved, the Claimant Society moved the Hon’ble Bombay High Court by filing Appeal from Order (St) No. 22143 of 2019. In its Order dated 14th October 2019, the Hon’ble Bombay High Court noted that the resistance of Respondent Developer as well as third-party purchasers claiming flats in the free sale component of the redevelopment project, to completion of balance construction by the Claimant Society in accordance with the order of this Tribunal, has been repelled right upto the Hon’ble Supreme Court of India.

t) The Hon’ble Bombay High Court also observed that the entire scheme put in place by this Tribunal’s Order dated 17th September 2018, which has stood the scrutiny of courts right upto the Hon’ble Supreme Court of India, is that all members of the Claimant Society shall be rehoused in Wing B, leaving the remaining flats in Wing B to be sold so as to raise the requisite finance for completing the balance construction of Wing B, leaving entire Wing A, which is designed to comprise

of 21 floors housing about 70 flats, untouched as and by way of protection of the interests of the Respondent Developer and third party purchasers claiming under him in the event the Respondent Developer were to succeed in the present Arbitration.

u) The Hon'ble Bombay High Court also observed that if this scheme has been sustained by all courts including the Hon'ble Supreme Court of India, there was no reason why it should then be disturbed at the behest of a third-party purchaser, whose arguments anyway have already been considered by the Hon'ble Supreme Court, though not at her instance, but at the instance of other purchasers similarly placed as her.

v) The Hon'ble Bombay High Court therefore, by its Order dated 14th October 2019, allowed the Appeal filed by the Claimant Society and quashed and set aside the Order passed by the City Civil Court at Dindoshi. The Hon'ble Bombay High Court also expressed a *prima-facie* opinion that the Claimant Society cannot be said to be a promoter even as per the new regime under RERA.

w) The Order dated 14th October 2019 was challenged before the Hon'ble Supreme Court of India through a Special Leave Petition which was ultimately dismissed as withdrawn on 20th January 2020.

x) Subsequently, the Flat purchaser's motion was finally decided by the City Civil Court at Dindoshi by its Order dated 1st

February 2020. The same was rejected. While rejecting the same, the City Civil Court at Dindoshi was *inter alia* pleased to observe that Claimant Society cannot be said to be a "promoter", that there is no privity of contract between the Claimant Society and the flat purchasers, specific performance cannot be granted to the Flat purchasers against the Claimant Society and that the remedy of the Flat purchasers is to file proceedings for recovery of money against the Respondent Developer. However, at paragraph 33 of the said Order, the City Civil Court at Dindoshi went on to observe as under:-

> *"33. ………Therefore the scheme which is formulated by the learned Sole Arbitrator* ***he will decide as to what is to be done about the rights of the flat purchasers****. Moreover in the last para of his interim order he has categorical stated that building 'A' wing is kept reserved for defendant no.1 and the plaintiff and other purchasers. Therefore they need not have to apprehend about loosing their rights.* ***The learned Sole Arbitrator while deciding final arbitration proceeding will certainly take into consideration the rights of the plaintiff and other flat purchasers and decide the same****."*

y) The aforesaid observation made by the City Civil Court at Dindoshi will be referred to and discussed herein at the appropriate stage. Further, it is required to be noted that by an email dated 19th April 2023 one Adv. Anil D'Souza (Email address:- anil@adventadvocates.in Mobile No[2].:- 9930062000) sent me a copy of a common Order dated 11th March 2022 passed by Chairperson of Real Estate

[2] As mentioned in his email dated 19th April 2023

Regulatory Authority, Mumbai, Shri Ajoy Mehta in a batch of Complaints filed by several persons claiming to be Flat purchasers in the concerned Project Registration Nos. P51800006158 and P51800004301. Apart from making certain observations in the said Order dated 11th March 2022, the Ld. Chairperson has dismissed certain Complaints as being non-maintainable, disposed of some Complaints as being non-maintainable as on that particular date of the Order and some Complaints have been disposed of with the liberty to re-approach RERA, if necessary, once this Tribunal finally disposes of the present Arbitration. The Ld. Chairperson has also gone on to hold that it will be the responsibility of the Claimant Society herein to ensure that the rights of the concerned Complaints who were granted liberty to re-approach RERA, are protected as and when steps are taken to complete the said Projects P51800006158 and P51800004301.

z) The Claimant Society and the Respondent Developer after completing their pleadings in the present arbitration, proceeded to go to trial before me in the present arbitration and led evidence through their respective witnesses. Extensive compilations of documents have been filed before me and the parties have argued their respective cases.

aa) The Claimant Society essentially seeks a confirmation of this Tribunal's interim Order. The Claimant Society *inter alia* seeks a declaration that the termination is valid and binding on the Respondent Developer and also seeks damages upto the date of termination.

bb) The Respondent Developer on the other hand, seeks a declaration that the termination is invalid and not binding on the Respondent Developer and also seeks specific performance of the Development Agreement and the Consent Terms. In the alternative, Respondent Developer seeks restitution, compensation and damages in lieu of specific performance.

cc) This is how the battle lines are drawn.

RIVAL CASES OF THE PARTIES

Case of the Claimant Society

6. Briefly stated the case of the Claimant is as under:

(a) The Claimant Society which presently comprises of 60 members, was in ownership and in possession of 3 buildings viz., B-3, B-4 and B-5 constructed on the land bearing Survey No.7 and CTS No.27 (pt.) of Village Goregaon at Siddharth Nagar, Goregaon (West), Mumbai - 400104 [**'subject property'**] by virtue of a registered Sale Deed executed in its favour by the Maharashtra Housing and Area Development Authority [**'MHADA'**]. The aforesaid 3 buildings consisted of 60 flats in aggregate.

(b) At a Special General Body meeting held on 18th June 2006, the Respondent Developer was appointed for the purpose of carrying out demolition of the buildings and reconstruct new buildings in lieu thereof. Pursuant to this decision, a Development Agreement dated 26th September 2007 ["**Development Agreement**"] was executed between the Claimant and the Respondent alongwith a Power of Attorney of the same date in favour of the Respondent.

(c) The members of the Claimant Society vacated their flats in the year 2007 itself. A Commencement Certificate was procured on 17th June 2008.

(d) The Respondent Developer, having started the construction in the year 2008, began to commit several defaults in meeting

the timeline for construction as well as in the payment of compensatory rents in lieu of temporary alternate accommodation.

(e) It is the Claimant's case that under the Development Agreement, the construction was to be completed within 25 months of the date of the Commencement Certificate ("CC"). In other words, the Respondent ought to have completed the construction on or before September 2010, which is 25 months after CC date of 17th June 2008. The Respondent therefore became liable to pay a default penalty of Rs.1 lakh per month from September 2010.

(f) The entire redevelopment was based on utilization of 2.4 FSI and it was agreed that Two Buildings 'A' & 'B' of 16 floors each with 4 flats per floor were to be constructed. At this juncture, the project was considered to be COMPOSITE since more than 50% of the total FSI was being consumed for constructing the rehab flats. The 60 members of the Claimant Society were to be rehabilitated equally in both the buildings starting from the first habitable floor. Therefore, the MCGM would have granted simultaneous CC for both the buildings to ensure that the original members would get their respective flats at the earliest.

(g) All flats were required to have a carpet area of 860 sq. ft. excluding dry balconies and niches. The Respondent not only breached this requirement but also altered the plans submitted before the Municipal Corporation of Greater Mumbai [**'MCGM'**] without prior permission of the Claimant Society. The Respondent also constructed one of the

buildings with additional floors without the permission of the Claimant Society. The Respondent also commenced construction and constructed certain floors without the requisite Commencement Certificate in so far as Building 'B' is concerned and for that reason a stop work notice was issued by the MCGM on 4th August 2011.

(h) In the year 2012, MCGM amended the Development Control Rules and introduced the concept of 35% Fungible FSI which was free for rehab flats and chargeable with premium for saleable flats. Therefore, 272 sq.ft. free fungible FSI was sanctioned for the members of the Claimant Society. In the same year, MHADA introduced the concept of pro-rata FSI of 3.5 for all societies in Siddharth Nagar, Goregaon West.

(i) The Respondent Developer took advantage of this introduction and applied for free fungible FSI of 1517.04 sq.mtrs for use in the rehab flats meant for the members of the Claimant Society. Despite the fact that this fungible FSI cannot be used in the construction of saleable flats and can only be used in rehab flats, the Respondent Developer did not provide for the rehab flats to be admeasuring 860 + 272 = 1132 sq.ft.

(j) In March 2012, having regard to the introduction of pro-rata FSI of 3.5 by MHADA, in anticipation of a largesse, the Respondent also submitted an application for concessions based on which the project was converted from COMPOSITE to NON-COMPOSITE. This meant that less than 50% of the development potential was being used for rehab component. Conversion to NON-COMPOSITE meant that the Respondent

Developer could allot flats to the members of the Claimant Society as per his choice. This was never informed to the Claimant Society.

(k) The Respondent submitted revised plans dated 14th June 2012 wherein all 60 rehab flats were shown allotted from 4th to 19th Floor of a single building, i.e. Building 'B'. This was contrary to the Development Agreement which contemplated proportionate allotment of members of the Claimant Society in both the buildings.

(l) As a result of the unauthorised conversion the area of the flats of Building A was shown as 80.54 square meters and flats of Building B were shown as 93.48 square meters despite the fact that the Development Agreement required the size of all flats to be the same.

(m) The Respondent Developer made an application before MHADA pursuant to which the MHADA sanctioned an FSI of 2.5 for the redevelopment. The Claimant Society was promised that the Supplementary Agreement would be executed for sharing the profits arising out of this additional FSI. The Respondent has however failed to execute the said Supplementary Agreement thereby depriving the Claimant Society.

(n) Upon perusal of the plan dated 14th June 2012 and the revised plans submitted on 21st November 2013, the Claimant Society learnt that the Respondent Developer has shown an allotment of 60 flats to the members of the Claimant Society from the 4th to 19th floors in Building 'B' alone. Despite this position, the Respondent has sold 42 out of the 70 available

flats in Building 'B' to free sale purchasers thereby leaving only 28 flats for allotment to the original members of the Claimant Society.

(o) The flats to rehabilitate the remaining 32 members of the Claimant Society were not yet constructed. As regards Building 'A', the Respondent only had a Commencement Certificate upto 7th floor level + LMR and OHT for height upto 22.55 mtrs., as per approved amended plans dated 21st November 2013. The Respondent Developer however forged the said CC to read as if the same is extended upto 14th floor level + LMR and OHT for height upto 48.05 mtrs., as per the approved amended plans dated 21st November 2013. On the basis of this forged CC, the Respondent has sold flats atleast upto the 21st floor in the Building 'A'. The remaining 32 members of the Claimant Society were therefore left in the lurch.

(p) On an RTI Application, the Claimant Society also found that the Respondent had submitted a forged and fabricated undated letter to the CEO, MHADA on behalf of the Claimant Society to grant FSI for the said property.

(q) The Respondent also defaulted in paying the monthly compensatory rent with applicable escalation of 10% to the members of the Claimant Society from December 2014. The Claimant Society filed proceedings before the National Consumer Disputes Redressal Forum.

(r) Given several lapses on the part of the Respondent especially with regard to the completion of development within the stipulated time and with regard to the timely

payment of the monthly rent, the Petitioner Society decided to encash the bank guarantee of Rs.5 crores by writing a letter dated 26th August 2015 to the Union Bank of India for that purpose.

(s) The Respondent filed a Suit being Suit (L) No.921 of 2015 before the Hon'ble Bombay High Court which refused to grant any interim reliefs to the Respondent. The Bank Guarantee was encashed by the Claimant Society in September 2015 subsequent to which the aforesaid suit is withdrawn by the Respondent.

(t) Subsequently, the Claimant Society learnt that the Respondent is misusing the Power of Attorney dated 26th September 2007 by attempting to procure an FSI of 3.5 to the exclusion of the members of the Claimant Society. The Claimant Society therefore revoked the said Power of Attorney by letter dated 16th August 2017 and the same was informed to MHADA. Subsequently, the Claimant Society filed a Petition under Section 9 of the Act being Arbitration Petition No.160 of 2017 in the Hon'ble Bombay High Court. By an order dated 27th October 2016, the Hon'ble Bombay High Court granted ad-interim reliefs directing the Respondent to make certain disclosure which included making a disclosure on the Applications made and the sanctions / approvals procured in respect of the subject redevelopment as well as the details of the flats sold to the third parties.

(u) During the pendency of the aforesaid Petition, Consent Terms dated 16th May 2017 were executed between the parties and the same were taken on record of the Hon'ble Bombay High

court as recorded in the order dated 7th July 2017. Several obligations were undertaken by the Respondent under the Consent Terms qua the rental payments as well as construction timelines. The flats meant for the members of the Claimant Society were yet again divided between the two Buildings.

(v) The Respondent has stated to have even breached the Consent Terms dated 16th May 2017. Several meetings were thereafter held between the Claimant Society and the Respondent during which time the Respondent misled the members of the Claimant Society with a view to wriggle out of its obligations. The post-dated cheques that were given to the Claimant Society in furtherance of the Consent Terms dated 16th May 2017, aggregating to a sum of Rs.5,32,20,000/- were returned dishonoured. The Claimant Society took recourse to sending a statutory notice dated 4th December 2017 under Section 138 of the Negotiable Instruments Act, 1881, which was met with responses by the Respondent stating that Respondent is in the process of procuring financial assistance, which shall be available only after 31st December 2017. The Respondent Developer is also stated to have assured the members of the Claimant Society that the amounts shall be transferred by RTGS and that the dues of the Claimant Society would be cleared.

(w) Apart from several other breaches of the Consent Terms, the Respondent has also breached the deadlines of 31st December 2017 and 30th June 2018 for completing construction of Buildings ‘B’ and ‘A’ respectively. The Respondent also created third party rights in respect of the

flats in the said building without being entitled to do so under the said Consent Terms.

(x) Despite the fact that 32 members of the Claimant Society were to be handed over flats in Building ‘A’ and 28 members in Building ‘B’, the Respondent had only completed around 10% and 80% of the construction work in those Buildings respectively. In order to complete the work of Building ‘A’, the Respondent is required to purchase pro-rata FSI from MHADA, which costs about Rs.11 to 12 Crores. Unless and until such FSI is procured, the 32 members of the Claimant Society would be left in the lurch.

(y) Be that as it may, a without prejudice meeting was held on 22nd January 2018 between the parties wherein the Respondent is stated to have made several assurances about the payments that were due and payable under the Consent Terms. The Respondent stated that the same will be cleared on or before 30th January 2018. This assurance was not honoured. A letter dated 3rd February 2018 was addressed stating that the Respondent is ready and willing to complete the construction of the buildings and for that purpose, an extension of 3 months in respect of each building was sought. Even this letter is stated to have been breached.

(z) As on 20th January 2018, an aggregate amount of Rs.5,61,20,000/- remained outstanding from the Respondent Developer. The Claimant Society filed a Contempt Petition being Contempt Petition (L) No.24 of 2018, which was listed for hearing on 6th March 2018 before the Hon’ble Bombay High Court. At the said hearing, Mr. Tanna, one of the

Directors of Respondent agreed and undertook to pay a sum of Rs.5,42,16,436/- inclusive of 15% interest in the manner that is more particularly set out in the said order dated 6th March 2018. The Respondent also agreed and undertook to pay current and future rents / compensation and penalty to the members of the Claimant Society in the manner that is more particularly set out in the said order dated 6th March 2018. A bar chart was undertaken to be submitted on or before 13th March 2018.

(aa) Subsequently, vide order dated 5th April 2018, the Executive Engineer of MHADA was directed to inform the Hon'ble Court, the quantum of premium that would be required to be paid by the Respondent for the pro-rata FSI of 1820 sq. mtrs. in relation to Building 'A'.

(bb) Given that the Respondent breached even the undertakings recorded in the order dated 6th March 2018, the Hon'ble Court by its order dated 2nd May 2018 directed the Respondent and its directors to disclose theirs and their family's assets.

(cc) The Claimant Society resolved to terminate the Development Agreement read with the Power of Attorney dated 26th September 2006 by passing a Resolution in the Special General Body Meeting held on 3rd June 2018. Accordingly, a termination notice dated 9th June 2018 was addressed to the Respondent.

(dd) The Claimant had therefore filed the Section 9 Petition which was then converted into a Section 17 Application to be heard before this Tribunal. The Arbitration proceedings before this Tribunal began thereafter. Further events are a matter of

record of this Tribunal and the same are narrated herein above in detail in the ***Prelude***.

(ee) As regards the Counter Claim filed by the Respondent Developer, the same is an afterthought. In any event, Respondent Developer has admittedly committed several breaches of its obligations under the Development Agreement and the Consent Terms. The Respondent Developer has never been ready and willing to abide by the terms of the Development Agreement and the Consent Terms.

(ff) The claim for specific performance as made by the Respondent Developer is merely an eyewash to retain the project so as to save itself from refunding the amounts taken by the Respondent Developer from the 3rd party flat purchasers. There is no privity of contract between the 3rd party flat purchasers and the Claimant Society and that the Claimant Society cannot be held to be bound and liable 2 the 3rd party flat purchases.

(gg) In view of the termination of the Development Agreement and the Consent Terms on account of breaches committed by the Respondent Developer, the Respondent cannot claim any damages from the Claimant Society. The Respondent Developer is also not entitled to restitution or restoration of the amounts received by the members of the claiming society during the subsistence of the Development Agreement since the said amounts cannot be termed as a benefit received by the members of the Claimant Society.

(hh) The Respondent Developer has not only cheated the members of the claiming society but has also cheated and

defrauded several 3rd party flat purchasers who have invested huge sums of money with the Respondent Developer. On account of the default committed by the Respondent Developer the members of the Claimant Society had been out of their homes for more than a decade and had been shelling out the monthly displacement rent from their own pockets. Several original members of the claiming society have expired whilst waiting for their dream homes to be constructed.

(ii) The Claimant Society has extended complete cooperation in obtaining approvals and sanctions. Despite this position, the Respondent Developer has failed to show any progress in the development. The Respondent Developer has suppressed the fact that MHADA had first issued an offer letter dated 14th March 2014 for pro-rata FSI. The Respondent Developer however was not in a position to raise finance for the payment of the premium and therefore allowed the said offer to lapse. MHADA thereafter issued several revised offers for pro-rata FSI which again lapsed since the Respondent Developer never paid the premium. The Claimant Society has always given their NOC to the Respondent Developer and MHADA at the relevant time.

(jj) With regard to the Respondent Developer's contention that it could not raise finance on the ground of delay in issuance of NOC, the same is merely an excuse since the Respondent Developer did not have the capacity to raise finances. Moreover, in several of its affidavits filed before the honourable Bombay High Court, the Respondent Developer has stated that it has sold flats to third-party purchases and

has received substantial amounts from them. The Respondent therefore should have had sufficient funds at its disposal to complete the project.

(kk) The Respondent Developer has miserably failed to carry out construction as envisaged under the Development Agreement and has in fact gone beyond what was supposed to be carried out in terms of the Development Agreement. The termination effected by the Claimant Society against the Respondent Developer is after giving the requisite notice as envisaged under the Consent Terms.

(ll) As per the specific terms of the Development Agreement, the Respondent Developer cannot seek any compensation or damages from the Claimant Society. In view of the termination affected by the Claimant Society, there cannot be any charge on the subject property.

(mm) The prayers in the Statement of Claim are therefore required to be granted and the Counter Claim of the Respondent Developer is liable to be rejected.

<u>Case of the Respondent Developer</u>

7. Briefly stated the case of the Respondent is as under:

(a) The Claimant Society has not validly terminated the Development Agreement dated 26th September 2007 along with Power of Attorney dated 26th September 2007. It is therefore stated that the same is bad in law and not binding on the Respondent Developer.

(b) The Claimant Society has breached the Consent Terms dated 16th May 2017 and as such it is not entitled to any relief in the present arbitration.

(c) In view of the demolition of the original building and construction of two Buildings A and B as on date, the circumstances have changed substantially and the parties cannot be restored to the position in which they stood when the contract was made. The Claimant Society is not entitled to rescind the contract at this stage having regard to Section 27(2) of the Specific Relief Act, 1963 especially when third-party rights have been created during the subsistence of the contract.

(d) To the contrary, the Respondent Developer is entitled for specific performance of the Development Agreement and the Consent Terms and in the alternative, for restoration of monetary benefits received by the Claimant Society and damages and compensation in lieu of specific performance.

(e) Under the Development Agreement the Respondent was to develop the subject property in accordance with the DCR rules by consuming 6880 square feet per floor. It was further agreed between the parties that the initial FSI to be exploited on the subject property was 2.4 and that the Respondent would be allowed to load further TDR on the subject property over and above the permitted FSI, provided the benefits accruing from the additional construction is shared in equal ratio between the Claimant Society and the Respondent Developer. The subject property forms part of a MHADA

layout and the redevelopment was to happen by way of a self-financing scheme.

(f) The Respondent Developer was to construct 60 flats for the members of the Claimant Society half of whom would be accommodated in each building A and building B. Subsequent to the execution of the Development Agreement, individual agreements with the members of the Claimant Society have also been executed where the members have accepted allotment partly in Building A and partly in Building B. After excluding these 60 flats meant for the members of the Claimant Society, the Respondent was entitled to sell flats in both the buildings.

(g) As per the Development Agreement the Respondent was to to cease to have any right in the said project only after all the additional flats are developed and constructed and sold by the Respondent Developer. At this juncture, the Respondent Developer has not completed the sale of all the additional flats. Many of the flats coming to the share of the Respondent Developer are still to be constructed. The Respondent Developer therefore still has rights in the project.

(h) Under clause 10.22 of the Development Agreement the Claimant Society's right to terminate the Development Agreement is triggered only if the Respondent Developer is unable to complete the reconstruction work within a period of 25 months from the date of receipt of Commencement Certificate. The construction work means the RCC work and the external and internal plastering work. Only in such an event, does the Claimant Society get the liberty to terminate

the Development Agreement. Even otherwise, apart from the fact that the said clause is void and not binding upon the Respondent Developer, the same now stands overridden by virtue of the Consent Terms dated 16th May 2017.

(i) The Respondent Developer has obtained lease and conveyance from MHADA in favour of the Claimant Society as per the understanding between the parties prior to the execution of the Development Agreement. The Respondent Developer has invested approximately Rs. 115,45,10,114 and constructed 2 buildings, building A and building B on the subject property.

(j) Respondent Developer completed construction of 7 floors of building A and 21 floors of building B and utilised 2.5 FSI[3] on the original plot area of 2543.49 square meters. With the utilisation of this FSI on the original plot area, only 32 members of the claim society could be given accommodation[4].

(k) To accommodate the balance members and to make the project viable, the Respondent Developer also acquired tit-bit area to the extent of 1204.32 square meters increasing the original plot area to 3747.81 square meters as per the approved plan dated 21st November 2013. Respondent Developer has therefore merely consumed FSI to the extent of 2.04 only[5]. With the consent of the Claimant Society, the Respondent Developer also purchased additional FSI for a

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[3] Paragraph 9 of the Statement of Defence
[4] Paragraph 3(xviii) of the Counter Claim
[5] Paragraph 9 of the Statement of Defence

sum of Rs. 8,21,03,435 without which the Respondent could not construct more than 7 floors in both the wings on the subject property. Respondent Developer had also made an application to MHADA for additional pro-rata FSI to be sanctioned in 2013 but it was informed that MHADA had stopped sanctioning additional pro-rata FSI due to revisions in policies.

(l) Vide a Circular dated 27th April 2016, MHADA admitted that various redevelopment projects including that of the Claimant Society were stalled for 7 or 8 years due to the process of approving the layout plans being lengthy and time consuming. In view of the approval process of the layout plans taking considerable time modern developer had suggested the amalgamation of the Claimant Societies with the adjoining property namely that of Kapil Vastu Co-operative Housing Society Limited to salvage the situation and in order to resume construction without any further delay. The Respondent had paid a premium of Rs 4,72,42,966 for obtaining the offer letter dated 27th December 2013 in respect of the amalgamation of the said property of Kapil Vastu Co-operative Housing Society Limited with the subject property and an NOC dated 6th December 2014 was granted by MHADA for the same. The consent of Kapil Vastu Co-operative Housing Society Ltd. was already obtained. However, the Claimant Society did not agree for the same and the construction of building a on the subject property could not be completed for want of additional FSI. The Respondent is therefore not responsible for stoppage of construction.

(m) For these reasons which were beyond the control of the Respondent Developer, the Respondent Developer addressed the letter dated 31st March 2015 to the Claimant Society and expressed its helplessness in completing the pending work until the MHADA authorities sanction the additional FSI. The Respondent Developer once again the requested the Claimant Society to grant its consent for amalgamation.

(n) Despite this position, the Claimant Society failed to grant consent to amalgamation with Kapil Vastu CHSL on one hand and on the other hand proceeded to wrongfully invoke the bank guarantee, thereby encashing a sum of Rs. 5,00,00,000 between the period of June to September 2015.

(o) The Claimant Society had also filed a frivolous consumer complaint in the National Consumer Dispute Redressal Commission *inter alia* raising false allegations against the Respondent Developer with respect to the delay in completion of the project by the Respondent when the same was on account of *force majeure* conditions.

(p) Out of these Rs. 5,00,00,000 the Claimant Society has already apportioned sum of Rs. 2.5 crores which is its share of benefits that was to be obtained from the procurement of the additional FSI when such additional FSI could not even be obtained for want of NOC from the Claimant Society.

(q) The Claimant Society filed an Arbitration Petition under section 9 of the Act in or around October 2016 *inter alia* raising false allegations of wilful delay in completion of the project. This ultimately led to the filing of the Consent Terms

related 16th May 2017. Under these Consent Terms, the members of the Claimant Society agreed to accept certain monetary benefits on account of the unintentional delay on the part of the Respondent Developer to complete the project. At this point MHADA had indicated to the Respondent that it would sanction the additional FSI on the subject property by about July 2017. The Consent Terms required the Claimant Society to grant its NOC for obtaining finance as also an NOC for obtaining the sanction of the additional FSI by MHADA. Under the Consent Terms the members of the Claimant Society were to be accommodated in building B by March 2018 and in building A by June 2018.

(r) In July 2017, the MHADA authorities started sanctioning additional FSI which was kept on hold by them for the past several years. Between May 2017 to November 2017 several oral requests were made to the Claimant Society by the Respondent Developer requesting them to comply with their obligations of issuing NOC for sanction of the additional FSI as agreed under clauses 39 and 40 of the Consent Terms as also for issuance of NOC for raising finance as agreed under clause 41 of the Consent Terms. The Claimant Society never issued the NOC for obtaining the additional FSI. In so far as the NOC for raising finance is concerned the Claimant Society issued the NOC in October 2017 but backdated the same to July 2017. There was a delay in granting NOC for raising finance because of which Respondent Developer could not raise finance.

(s) For want of NOC for obtaining the additional FSI, the Respondent Developer was unable to proceed with the

balance work and this in turn resulted in the unintentional failure of the Respondent to adhere to the timelines recorded in the Consent Terms as regards handing over possession of the flats to the Claimant Society.

(t) Despite this position, the Claimant Society filed a frivolous Contempt Petition against the Respondent Developer raising allegations of non-payment of rent and delay in construction. The Claimant Society suppressed the material fact that it was guilty of not issuing the requisite NOC for obtaining the additional FSI.

(u) To avoid any further dispute, the Respondent agreed to pay the arrears of Rs. 5,42,16,436 which were due up till 6th March 2018 (and which also included 15% interest and brokerage), arrears of rent up to February 2018 and penalty for the month of January and February 2018. The Respondent Developer also further agreed to pay the current and the future rents, compensation and penalty to the members of the Claimant Society as are payable at the relevant time under the Consent Terms. Post the undertakings given by the Respondent to the Hon'ble Bombay High Court, the first installment of Rs. 1,72,72,145/- has been paid by the Respondent to the Claimant Society. As regards the next installment of Rs. 1,72,72,145/- is concerned, the same was payable on or before 15th May 2018, but the same could not be paid on account of default on the part of the Claimant Society in issuing NOC for raising finance.

(v) In the meantime, MHADA issued a revised offer letter dated 16th April 2018 sanctioning the additional FSI for the subject property.

(w) The Claimant Society by its letter dated 9th June 2018, wrongfully and high-handedly terminated the Development Agreement and the Consent Terms by raising false and frivolous allegations of wilful default on part of the Respondent Developer in adhering to the timelines agreed in the Consent Terms. The Respondent addressed a reply dated 20th June 2018 to the said termination notice.

(x) The said termination was issued even before October 2018 being the date on which the Respondent Developer was required to handover possession of flats in building A to the members of the Claimant Society. The termination is therefore premature. The termination is also issued after the MHADA issued the revised offer letter dated 16th April 2018 sanctioning the additional FSI. The Respondent Developer had requested the Claimant Society to grant its NOC in compliance with clause 39 and clause 40 of the Consent Terms by its letter dated 31st May 2018. The Claimant Society however failed to respond to the said request on account of which the Respondent Developer was unable to complete the balance construction.

(y) As on date the Respondent Developer has invested crores of rupees in the development of the subject property by constructing 2 Wings/Buildings. It has constructed 18 floors plus 3 podium floors in building B and 4 floors plus 3 podium floors in building A and is still to complete the construction of

the balance 16 floors in building A and is ready and willing to complete the same upon issuance of NOC by the Claimant Society for additional FSI as agreed under the Consent Terms.

(z) The Respondent Developer has also created various 3rd party rights and sold flats to various purchasers out of the sale component coming to the share of the Respondent. The Claimant Society has also received substantial monetary and other benefits from the Respondent and being aware of the heavy investments made by the Respondent Developer in the construction carried out by the Respondent till date, the termination issued by the Claimant Society is illegal.

(aa) The Claimant Society has not followed the prescribed procedure set out under clause 48 of the Consent Terms before issuing the termination notice dated 9th June 2018. Moreover, having regard to the fact that the members of the Claimant Society have taken benefits under the Development Agreement and having regard to the fact that on account of changes in circumstances, Consent Terms have been executed between the parties, as per Section 27 of the Specific Relief Act, 1963 it is not open to the Claimant Society to terminate the contract.

(bb) The termination of the Development Agreement and the Power of Attorney both dated 26th September 2007 are premature in view of clause 48 of the Consent Terms dated 16th May 2017. By virtue of clause 48 of the said Consent Terms, the Claimant Society is bound to issue a written notice of 60 days *inter alia*, calling upon the Respondent Developer

to comply with the terms contained in the said Consent Terms and also to provide the Respondent Developer an opportunity to rectify the breach within 60 days as per the said clause 48 of the Consent Terms.

(cc) The Respondent Developer is therefore entitled to a declaration that the termination issued by the Claimant Society is illegal null, void and not binding on the Respondent Developer. Without prejudice and in the alternative, in the event this Tribunal were to conclude that the termination effected by the Claimant Society is legal valid and binding upon the Respondent, then the Respondent is entitled to seek restoration of the benefits and a refund of all the amounts received by the members of the Claimant Society under the Development Agreement and the Consent Terms. These monetary benefits are in the tune of Rs. 30,68,54,552/- In addition to this, the Respondent Developer has suffered various losses and damages on account of the purported termination of the Development Agreement and the Consent Terms and on account of the expenses incurred for the development of the subject property till date, loss of profits and loss of reputation. The Claimant Society is therefore liable to pay to the Respondent a sum of Rs. 118,13,97,856/- as damages in lieu of specific performance in the event this Tribunal upholds the termination of the Development Agreement and the Consent Terms.

(dd) The Claimant Society is also liable to pay a sum of Rs. 29,09,70,826/- to the Respondent Developer on account of compensation for loss of profit being the profit which the Respondent would have earned on sale of 75 flats in the

subject project. The Respondent Developer is also entitled to interest at 12 % p.a. from 1st November 2018 till payment and/or realisation of the monetary amounts.

(ee) The Respondent has already completed substantial amount of work of construction. The development of Building ‘B’ was on the verge of completion and the development of Building ‘A’ was also in the process of being completed subject to the Claimant Society issuing its No Objection Certificate (NOC) to MHADA with respect to transfer of unutilized FSI in the name of the Claimant Society to enable the Respondent to proceed with the construction of Building ‘A’. The Claimant Society, however, defaulted in that obligation.

(ff) The delay in development is occasioned on account of delay / non-release of finance from various investors of the Respondent. One of the reasons for the same is the publishing of newspaper articles and various videos by the Claimant Society showing the Respondent in poor light. The delay is also attributable to the past conduct of the Claimant.

(gg) The Respondent is always and still ready and willing to comply with all obligations as recorded in the Consent Terms dated 16th May 2017 read with the Development Agreement dated 26th September 2007 and that grave prejudice would be caused to the Respondent if the claim for specific performance is not granted.

(hh) The Claimant Society has received several benefits under the Development Agreement dated 26th September 2007 and while retaining those benefits, it is unlawful, unfair and unreasonable on the part of the Claimant Society to terminate

the said Development Agreement dated 26th September 2007. The Respondent Developer has spent more than 100 crores for developing the Claimant Society's property and has acted upon the powers granted by the Claimant Society under the Power of Attorney dated 26th September 2007.

(ii) As per the offer letter dated 16th April 2018 the MHADA have agreed to offer additional FSI of 1820.18 sq. mtrs. built up area out of the total additional FSI of 3454.18 sq. mtrs. of built up area on the subject property upon payment of premium in four installments.

Points for Determination

On the basis of the pleadings of the parties, the following points are framed for determination.

a. Whether the Claimant proves that the Termination Notice dated 9th June 2018 terminating the Development Agreement dated 26th September 2007 read with Power of Attorney dated 26th September 2007 read with the Consent Terms dated 16th May 2017, is legal, valid and binding upon the Respondent Company and its Directors and/or any persons claiming through them?

b. Whether the Claimant proves that it is entitled for vacant and peaceful possession of the property viz. land bearing part of Survey No. 7 CTS No. 7 (part) situated, lying and being at Village Goregaon (West), Mumbai 400104 alongwith building standing thereon to the Claimant Society?

c. Whether the Claimant proves that stamp duty and other charges in respect of the Lease and Conveyance Deed was paid by the Claimant which was executed by MHADA?

d. Whether the Claimant proves that the Respondent had amended the status of the project from composite to non-composite in the MCGM without the sanction of the general body of the Claimant Society?

e. Whether the Claimant proves that the Development Agreement dated 26th September 2007 contemplated utilisation of 2.4 FSI only?

f. Whether the Claimant proves that the Respondent without the knowledge and approval of the Claimant, submitted an Application to MCGM for a concession on 26th March 2011 and applied for revised plan using 3.39 FSI?

g. Whether the Claimant proves that the Respondent has committed breaches of their obligations under Development Agreement read with Power of Attorney dated 26th September 2007 as modified by the Consent Terms dated 16th May 2017?

h. Whether the Claimant proves that they had performed their part of obligations Development Agreement dated 26th September 2007 read with Power of Attorney dated 26th September 2007 as modified by the Consent Terms dated 16th May 2017 until termination?

i. Whether the third party rights, encumbrances, flat allotments, Agreements for Sale and other documents creating third party rights executed by the Respondent in pursuance of the Development Agreement 26th September 2007 read with Power of Attorney dated 26th September 2007 as modified by the Consent Terms dated 16th May 2017 are binding on the Claimant?

j. Whether the Claimant proves that it is entitled for the monetary reliefs claimed at prayer clause 'i' of its Statement of Claim?

k. Whether the Respondent proves that the termination notice dated 9th June 2018 terminating the Development Agreement read with Power of Attorney dated 26th September 2007 read

with the Consent Terms dated 16th May 2017, is illegal, invalid and not binding upon the Respondent Company and its Directors and/or any persons claiming through them?

l. Whether the Respondent proves that they have always been ready and willing to perform their part of obligations Development Agreement dated 26th September 2007 read with Power of Attorney dated 26th September 2007 as modified by the Consent Terms dated 16th May 2017?

m. Whether the Respondent proves that there have been no breaches on its part in performing Development Agreement 26th September 2007 read with Power of Attorney dated 26th September 2007 as modified by the Consent Terms dated 16th May 2017 and that the Claimant has breached the terms thereof?

n. Whether the Respondent proves that the Development Agreement 26th September 2007 read with Power of Attorney dated 26th September 2007 as modified by the Consent Terms dated 16th May 2017 are valid, subsisting and binding upon the parties and that the Respondent is entitled for an award of specific performance thereof?

o. Whether the Respondent proves that in view of demolition of Original Building and construction of two Buildings “A” and “B” Wings and creation of third party rights in respect of the subject property, the parties cannot be substantially restored to the original position, which they stood in when the contract was made, therefore, the Claimant is not entitled to terminate the Development Agreement 26th September 2007?

p. Whether the Respondent proves that the delay in performance of the Development Agreement dated 26th September 2007 was for reasons beyond the control of the Respondent?

q. In the alternative to point 'n' above whether the Respondent is entitled for the monetary relief as prayed for at prayer clause 'd' of its Counter Claim?

r. In the event the answer to point 'j' above is in the affirmative, whether the Respondent proves that it is entitled for a set off of the sums mentioned in prayer clause 'g' of its Counter Claim?

s. What costs and payable by which party?

t. What Award?

Oral Arguments advanced on behalf of the parties:

8. Mr. Mayur Khandeparkar, the Learned Counsel, made submissions on behalf of the Claimant Society. He began his arguments by setting out the broad events that have transpired in the dispute between the parties since the signing of the Development Agreement dated 26th September 2007 till the present stage of the arbitration. He has tendered a detailed List of Dates and Events *inter alia* setting out how the matter has progressed thus far.

9. After referring to the issues framed by this Tribunal as recorded in the minutes of the hearing held on 8th March 2019, Mr. Khandeparkar submitted that broadly this Tribunal will be concerned

with rendering findings on whether or not the termination effected by the Claimant Society is valid and whether or not the Respondent Developer is entitled to restitution of what remains in the hands of the Claimant Society subsequent to the termination.

10. Mr. Khandeparkar has taken me through the prayers made in the Statement of Claim and the Counter Claim. He has also invited my attention to the particulars of claim made by both the parties.

11. At the outset, Mr. Khandeparkar submitted that insofar as prayer clause (d) is concerned, the same is already granted by this Tribunal by its Order dated 17th September 2018 on Claimant's application under Section 17 of the Act. Insofar as prayer clause (e) is concerned, he submitted that a temporary relief in that regard is already in force by this Tribunal's Order dated 17th September 2018 which will be needed to be confirmed in the Final Award if the Claimant Society succeeds. Further, in fairness he also submitted that the reliefs prayed for in prayer clause (g) of the Statement of Claim cannot be granted except to the extent they relate to the parties to the present arbitration and will be guided by what this Tribunal orders in terms of prayer clause (f). As regards prayer clause (h) is concerned, the same has already been granted. He lastly pointed out that in view of this Tribunal's Order dated 17th September 2018, the reliefs prayed for at prayer clauses (j) and (k) do not survive for consideration since the possession of the subject property has already been handed over to the Claimant.

12. Mr. Khandeparkar thereafter took me through the clauses of the Development Agreement. He submits that as per Clause 2 of the Development Agreement, it was the specific agreement between the parties that the total FSI to be exploited on the subject plot would be

2.4 alone. He submitted that as per the said clause if any benefits arise on account of surplus construction that may become possible due to any further potential that may become available, would be shared equally between the parties. Further, referring to clause 3 of the Development Agreement, it was pointed out that only after 60 flats are provided to the members of the Claimant Society, the Respondent Developer could have sold flats from the free sale component. It was submitted that the Respondent Developer has breached this understanding by not only going beyond the permissible FSI of 2.4 but also by selling flats from the free sale component without first providing the 60 flats to the members of the Claimant Society.

13. It was submitted that the Respondent Developer had also not complied with the requirement to buy insurance in the name of the Claimant Society as provided in clause 9(c) of the Development Agreement. The Respondent Developer had also not complied with Clause 9(f) which required it to not commit any illegal act or violate any rule laid down under law in as much as there indeed was a stop work received in respect of the construction on the subject property.

14. Mr. Khandeparkar then invited my attention to the clauses of the Development Agreement which stipulated that the construction of the Development work shall be completed by the Respondent Developer within 25 months from the date of Commencement Certificate and till such time as the members of the Claimant Society shall be paid the stipulated sums in lieu of temporary alternate accommodation. Further, relying upon clause 22 of the Development Agreement, Mr. Khandeparkar pointed out that the said clause specifically stipulates that if the Respondent Developer does not complete the project after 3 months extension, then the Claimant

Society will be at liberty to terminate the Development Agreement and take over all the rights of the project and appoint a new developer of its choice to complete the reconstruction. It was also pointed out that the said clause further stipulates that the Respondent Developer shall have no right to claim any damages or compensation from the Claimant Society and that the Respondent Developer shall also forgo its right to sell the commercial premises, which are part of the saleable portion of the flats. It was submitted that a party in breach cannot claim damages and restitution. Mr. Khandeparkar submitted that at no point in time has the Respondent Developer challenged Clause 22 of the Development Agreement on the ground of it being unconscionable, null or void.

15. My attention was then invited to Clauses 42, 43 and 47 of the Development Agreement before adverting to Clause 37 of the same. It was submitted by Mr. Khandeparkar that all the costs associated with the redevelopment viz., construction costs, costs and premiums for obtaining approvals, additional development potential, various clearances etc. was to be borne by the Respondent Developer and that under no circumstances can the Respondent Developer ask for any amount or contribution from the Claimant Society towards these obligations. Similarly, duty has been cast upon the Claimant Society to co-operate with the Respondent Developer by *inter alia* providing the original title documents/deeds and/or other information and papers required for submission to various development authorities including the MCGM.

16. Mr. Khandeparkar submitted that the Respondent has consistently breached material terms of the Development Agreement dated 26th September 2007. He submits that Respondent Developer has also breached the Consent Terms dated 16th May 2017 which were

entered into pursuant to the previous proceedings filed by the Claimant Society in the Hon'ble Bombay High Court. The members of the Claimant Society have been out of their houses since the year 2007. The members of the Claimant Society having completely lost all faith and confidence in the abilities of the Respondent Developer therefore had no other option but to terminate the Agreement with the Respondent. Mr. Khandeparkar submitted that the Respondent has not been ready and willing to honour his part of the bargain under the Development Agreement dated 26th September 2007 read alongwith the Consent Terms dated 16th May 2017 since the very beginning.

17. As regards the several breaches committed on the part of the Developer, Mr. Khandeparkar submits that under the original Development Agreement dated 26th September 2007, the Respondent was duty bound to complete the project within 22 months from the receipt of the Commencement Certificate with a 3 months' grace period. He submitted that it is an admitted position today i.e. 2018, that the buildings are not complete. He invited my attention to several letters[6] addressed by the Claimant Society to the Respondent in the period from 2010 to 2015 wherein, the Claimant Society has inter alia, called upon the Respondent to complete the construction, make payments towards monthly compensation and other issues in relation to the construction. He submitted that the Respondent had even carried out unauthorized construction behind the back of the Claimant Society, which led to the issuance of stop work notice dated 4th August 2011[7] from the Municipal Corporation for Greater Mumbai under Section 354A under MMC Act.

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[6] Pages 143 onwards in Claimant's COD Vol-I.
[7] Pages 104 and 105 of Claimant's COD Vol-I.

18. It was submitted that the Claimant Society had time and again called upon the Developer to clear the outstanding rents failing which remedial actions under the Development Agreement will be taken. Despite receiving repeated assurances from the Respondent about payment of rents and completion of development, the Respondent is stated to have persistently defaulted. My attention was invited to a legal notice dated 19th March 2015[8] addressed on behalf of the Claimant Society wherein several breaches qua the Development Agreement have been set out. These breaches are consumption of additional FSI and changes in layout plan without consent of the Claimant Society, non-payment of rent / brokerage / corpus, unwanted insistence of amalgamating with another Society and the delay in completion of the development. It was submitted by Mr. Khandeparkar that the Respondent Developer addressed a letter dated 31st March 2015[9] wherein the Respondent Developer not only sought to renegotiate the terms of the contract between the parties but also sought further time to grant possession of the flats. He submits that this was starkly contrary to Clause 22 of the Development Agreement.

19. It is submitted that due to persistent non-payment of rent / brokerage / corpus, the Claimant Society was constrained to invoke the Bank Guarantee of Rs. 5,00,00,000/- by addressing a letter dated 26th August 2015[10] to Union Bank of India. My attention is invited to the fact that such invocation of Bank Guarantee was challenged by the Respondents by filing a Suit in the Hon'ble Bombay High Court. My attention was also invited to the Order dated 22nd September 2015[11]

[8] Page 229 of Claimant's COD Vol-I
[9] Page 244 of Claimant's COD Vol-I
[10] Page 111 of Claimant's COD Vol-I
[11] Page 117 of Claimant's COD Vol-I

passed by the Hon'ble Bombay High Court wherein, the Hon'ble Bombay High Court has expressed a *prima facie* opinion that the Respondent is in breach of its contractual obligations qua the Development Agreement dated 26th September 2007. The Hon'ble Bombay High Court also found that there was no case made out by the Respondent to grant an injunction on invocation of the Bank Guarantee. The injunction was therefore refused.

20. Mr. Khandeparkar submitted that upon invocation of the Bank Guarantee, the Claimant Society received Rs. 5,00,00,000/- out of which Rs. 2.5 crores were appropriated towards the pending arrears of rent while the balance Rs. 2.5 crores were appropriated towards the society's share of profits that will arise out of utilization of additional FSI.

21. Having lost faith and confidence in the Respondent, Mr. Khandeparkar submitted that the Claimant Society revoked the Power of Attorney by its notice dated 16th August 2016[12]. He submitted that vide the said notice, the Claimant Society has *inter alia* categorically put it on record that the Claimant Society had only granted consent for usage of 2.4 FSI and not any other. He also invited my attention to a letter dated 18th August 2016[13] addressed by the Claimant Society to MHADA placing on record the several illegalities committed by the Respondent Developer and its architect and calling upon the MHADA to withdraw the Offer Letter dated 14th March 2014.

22. It is submitted that thereafter the Claimant Society filed an Arbitration Petition (L) No. 1196 of 2016 (subsequently registered as

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[12] Page 131 of Claimant's COD Vol-I
[13] Page 137 of Claimant's COD Vol-I

Arbitration Petition No. 160 of 2017). My attention was invited to an Order dated 7th December 2016[14] passed in the said Arbitration Petition wherein, the Hon'ble Bombay High Court directed the Executive Engineer, Building & Proposal (WS) of MCGM to appear before the Hon'ble Court and submit the original records pertaining to the project undertaken by the Respondent. It was submitted that this direction was given as the Claimant Society has alleged that forged and fabricated Commencement Certificate has been used by the Respondent. Ultimately, after certain orders were passed in the said Arbitration Petition, the parties entered into Consent Terms dated 16th May 2017[15] which were taken on record by the Hon'ble Bombay High Court by its order dated 7th July 2017[16].

23. Mr. Khandeparkar then took me through several clauses of the Consent Terms, more particularly clauses, 8, 9, 24(a), 36 to 43 and 48. On the requirement of NOC to be given by the Claimant Society to the Respondent Developer, Mr. Khandeparkar submitted that the Claimant Society indeed had issued the requisite NOC that was required by the Respondent Developer, which it wrongly claims was never given to it. My attention was invited to letter dated 28th September 2017[17] wherein the Respondent Developer had requested the Claimant Society to provide the NOC for raising finance and the letter dated 31st October 2017[18] sent by the Respondent Developer to the Claimant Society which records at paragraph 3 thereof that the Claimant Society has indeed issued the NOC on 10th October 2017. Mr. Khandeparkar submitted that this

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[14] Page 325 of Claimant's COD Vol-II.
[15] Pages 326 to 354 of of Claimant's COD Vol-II
[16] Pages 355-356 of Claimant's COD Vol-II.
[17] Page 385 of the Respondent's COD Vol-II
[18] Page 388 of the Respondent's COD Vol-II

NOC for raising finance was given by the Claimant Society despite the fact that no allotment letters were issued by the Respondent Developer in respect of two flats as was required under Clause 37 of the Consent Terms.

24. As regards the NOC for the usage of pro-rata FSI is concerned, Mr. Khandeparkar invited my attention to Clause 37[19] of the Consent Terms dated 16th May 2017 as also the Order dated 5th April 2018[20] passed by the Hon'ble Bombay High Court and letters dated 10th and 11th April 2018[21] issued by the Claimant Society to the Executive Engineer (MHADA) whereby the Claimant Society has given its NOC for release of pro-rata FSI to the extent of 1820 sq.mtrs out of the 3454.18 sq.mtrs in respect to the redevelopment of the subject property. He therefore submits that it cannot lie in the mouth of the Respondent Developer to now contend that the Claimant Society did not grant the requisite NOC thereby causing a hindrance in the competition of the project.

25. He has also tendered a chart setting out the breaches committed by the Respondent Developer in respect of the Consent Terms.

26. He further submitted that under the Consent Terms more particularly clause 8 thereof, the Respondent Developer has given 7 post-dated cheques out of which 5 were dishonoured. He submits that this dishonor on the part of the Respondent, especially after having agreed to abide by the Consent Terms dated 16th May 2017, was really the tipping point as far as the Claimant Society is concerned. The Claimant Society was constrained to issue a legal notice dated

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[19] Page 363 of the Respondent's COD Vol-II
[20] Page 399 of the Respondent's COD Vol-II
[21] Page 400 and 401 of the Respondent's COD Vol-II

4th December 2017[22] under Section 138 of the Negotiable Instruments Act.

27. My attention was also invited to the reply dated 13th December 2017[23] given by the Respondent to the Claimant's legal notice dated 4th December 2017. It was urged that the Respondent has itself admitted in the said letter that it has shortage of funds and that it is in the process of obtaining the same from financial institutions. Mr. Khandeparkar submitted that Respondent Developer's financial state as borne out from the said letter is contrary to what is recorded at clause 36 of the Consent Terms where the Respondent Developer has confirmed to having the necessary financial capacity to complete the project.

28. It is also pointed out that the Respondent has admitted its liability towards the Claimant Society in the said reply dated 13th December 2017 as also in a subsequent letter dated 3rd February 2018[24]. Further, it was pointed out by Mr. Khandeparkar that in the said letter dated 3rd February 2018, the Respondent Developer sought further time to complete the construction by seeking an extension beyond the deadlines mentioned in the Consent Terms for Building A and Building B. It was pointed out that the Respondent Developer had also sought for a further extension to clear the arrears of rent. It was thus argued that even at that stage the Respondent Developer was not ready and willing to abide by its obligations under the Consent Terms.

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[22] Page 360 to 362 of Claimant's COD Vol-II
[23] Pages 363 and 364 of Claimant's COD Vol-II
[24] Pages 382 to 384 of Claimant's COD Vol-II

29. Mr. Khandeparkar submitted that the Claimant Society was therefore constrained to file a Contempt Petition being Contempt Petition (L) No.24 of 2018 for breach of the Consent Terms dated 16th May 2017 as recorded in the order dated 7th July 2017 passed by the Hon'ble Bombay High Court. He invited my attention to an order dated 6th March 2018[25] wherein it is categorically recorded that the director of Respondent Developer herein agreed and undertook to pay a sum of **Rs.5,42,16,436/-** inclusive of 15% interest, brokerage, arrears of rent upto February 2018, penalty for January 2018 and February 2018 as per the Consent Terms dated 16th May 2017 in the following manner and on the due dates mentioned below:-

Particulars	**Amount in installments (Rs.)**	**Due date**
1st installment	1,72,72,145.00	15th April 2018
2nd installment	1,72,72,145.00	15th May 2018
3rd installment	1,72,72,145.00	15th June 2018
Brokerage	24,00,000.00	15th June 2018
Total:	**5,42,16,436.00**	

The Respondent Developer also filed a bar chart *inter alia* showing that it will obtain a part Occupation Certificate in respect of Building B by July 2018. In the said order dated 6th March 2018, the Respondent Developer had also agreed and undertaken to pay current and future rents / compensation and penalty to the members

[25] Pages 424 and 425 of Claimant's COD Vol-II

of the Claimant Society as per the Consent Terms dated 16th May 2017 in the following manner:

Date	Amount (Rs.)	Penalty (Rs.)	Total Amount (Rs.)
15th March 2018	26,80,000.00	2,50,000.00	29,30,000.00
10th April 2018	26,80,000.00	2,50,000.00	29,30,000.00
10th May 2018	26,80,000.00	2,50,000.00	29,30,000.00
10th June 2018	26,80,000.00		26,80,000.00

Mr. Khandeparkar submitted that it is an admitted position that out of the payments referred to in the aforesaid two tables, the two installments of Rs.1,72,72,145/- each payable by 15th May 2018 and 15th June 2018 respectively, and the rent / compensation / penalty referred to in the second table in so far as they relate to the payment which was due on 10th June 2018, were all breached / defaulted.

30. Mr. Khandeparkar submitted that Respondent Developer failed to achieve all the milestones set out in the bar chart submitted in the Hon'ble Court in respect of both the Buildings. It was pointed out by Mr. Khandeparkar that MHADA had also issued a revised offer letter dated 16th April 2018 for the payment of premium amount in four installments for the allotment of additional BUA of 1820 sq.mtrs out of 3454.18 sq.mtrs as per MHADA's policy. The total premium payable was Rs. 7,52,93,898/- which, Mr. Khandeparkar submits, was never paid by the Respondent Developer. Further, Mr. Khandeparkar also invited my attention to a letter dated 31st May 2018[26] whereby the Respondent yet again called upon the Claimant Society to grant its consent to load the MHADA FSI of adjacent plot

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[26] Page 443 of Respondent's COD Vol-II

contrary. He submits that this was contrary to Clause 13 of the Consent Terms.

31. Ultimately, in Mr. Khandeparkar's submission, the Claimant Society was left with no option but to terminate the Development Agreement and Power of Attorney by its legal notice dated 9th June 2018[27]. He submits that, broadly, the Respondent was in breach of clauses 2, 3, 9, 10, 12 and 22 of the Development Agreement and clauses 2, 4, 5, 8, 15, 17, 23, 24, 33 and 42 of the Consent Terms. Not only that, Mr. Khandeparkar submits, the Respondent was also in breach of its solemn undertaking given before the Hon'ble Bombay High Court as recorded in the order dated 6th March 2018.

32. Mr. Khandeparkar invited my attention to the contents of the termination notice dated 9th June 2018 and submitted that it is apparent that the Respondent Developer had severely breached its obligations under the Development Agreement and the Consent Terms. He submitted that there is ample correspondence on record to suggest that the Respondent Developer has constantly attempted to renegotiate the terms contained in the Development Agreement as well as the Consent Terms. According to him this is a clear refusal to perform one's obligations within the meaning of Section 39 of the Indian Contract Act, 1872 thereby giving the Claimant Society the right to terminate the contract with the Respondent Developer.

33. Mr. Khandeparkar submits that Clause 48 of the Consent Terms requires written notice of 60 days to be given to the Respondent Developer to rectify the breaches, which in the present case was given on a number of occasions by the Claimant Society. He

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[27] Page 434 of Claimant's COD Vol-II

submits that the notice under section 138 of the Negotiable Instruments Act, the filing of the Contempt Petition, the undertaking given by the Respondent Developer to the Hon'ble Court and his own letter dated 3rd February 2018 were sufficient notices to the Respondent Developer to cure its breaches. Apart from this, Mr. Khandeparkar argued that a party can terminate an agreement even if it does not expressly contain a clause enabling a party to terminate an agreement. He has relied upon the decision of the Division Bench of the Hon'ble Bombay High Court in the case of ***Srushti Raj Enterprise (India) ltd. Vs. Tilak Safalya Co-operative Housing Societies Ltd.*** reported in ***2018 SCC Online BOM 1954*** and in particular paragraph 12 thereof.

34. Mr. Khandeparkar has also relied upon the decision of the Hon'ble Delhi High Court in the case of ***Air India Ltd. Vs. Gati Ltd.*** reported in ***2015 SCC Online DEL 10220*** in support of his submission that the Respondent Developer has committed repudiatory breaches of the contract between the parties and there has been no waiver or acquiescence of such breaches by the Claimant Society.

35. On the point of material breaches of a contract by the Respondent Developer, Mr. Khandeparkar submitted that apart from several breaches committed by the Respondent Developer, the most material breach is the failure in paying amounts of transit rent to the members of the Claimant Society for all these years. In support of this submission he has placed reliance on a decision dated 15th December 2020 rendered by the Hon'ble Bombay High Court in ***Borivali Anamika Niwas CHSL Vs. Aditya Developers & Ors.*** (Commercial Arbitration Petition (L) No. 5738 of 2020).

36. Mr. Khandeparkar also submitted that merely because the Respondent Developer had some rights under the Development Agreement read with the Consent Terms, to sell units in the Free sale component, that by itself will not create any rights in him qua the subject property since the same depended on fulfilment of several contractual obligations. He submitted that since the Respondent Developer failed in fulfilling these obligations, there is simply no vested interest created in his favour. In support of this submission, he has relied upon the decision of the Hon'ble Bombay High Court in the case of ***HDIL Vs. MIAL & Ors.*** reported in ***2013 SCC Online Bom 1513.***

37. Moving further, lest it be argued that termination of the Respondent Developer was effected on grounds which were not taken up during the contemporaneous correspondence, Mr. Khandeparkar submitted that by virtue of the law laid down in ***MSEDCL Vs. Datar Switchgear Ltd.*** reported in ***(2018) 3 SCC 133,*** the same is permissible so long as those grounds existed in fact.

38. On the Respondent Developer's contention that there were frequent policy changes at MHADA's end which were beyond the control of the Respondent Developer, Mr. Khandeparkar pointed out that the Development Agreement was entered into in 2007 and the Commencement Certificate was obtained in June 2008. He also pointed out that having regard to Clause 22 of the Development Agreement, the project was to be completed within 25 months of the Commencement Certificate, i.e. on or before September 2010. The revised offer letter of MHADA, dated 25th August 2011[28] came after the time to complete the development had expired. Further, Mr.

[28] Page 153 of Claimant's COD Vol-I

Khandeparkar also submitted that after Consent Terms were entered into between the parties, there is no question of contending policy paralysis. He submitted that the Consent Terms were also breached by the Respondent Developer as set out in the chart submitted earlier. On the point that there is no question of the performance of the Respondent Developer becoming impossible due to policy changes, he has relied upon the decision of the Hon'ble Supreme Court of India in the case of ***Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath*** reported in ***AIR 1968 SC 522.***

39. Further, in support of his argument that having regard to Clauses 22 and 27 of the Development Agreement, the Respondent cannot be awarded any damages, compensation or restitution, Mr. Khandeparkar submitted that an arbitral Tribunal cannot ignore the terms of the contract and especially so when a particular clause in the contract has not even been challenged by any party on the ground of it being void or otherwise illegal. He relied upon the following decisions in this regard:

    a) ***Visakha Petroleum Products Pvt Ltd. Vs. B. L. Bansal and Ors*** (decision dated 4th March 2015 in Arbitration Petition No. 653 of 2011)

    b) ***SAIL Vs. J. C. Budharaja, Govt. and Mining Contractor*** reported in ***(1999) 8 SCC 122***

    c) ***Delhi Development Authority Vs. R. S. Sharma*** reported in ***(2008) 13 SCC 80.***

40. According to Mr. Khandeparkar Clause 22 of the Development Agreement stipulating that the Respondent Developer shall not make any claim for compensation or damages in the event of

termination is actually a part of the bargain struck between the parties. He submits that although couched in the negative form, the same is still a "consideration" for the Claimant Society under the contract. In support of this submission, he has relied upon the decision of the Hon'ble Supreme Court of India in the case of ***Chidambara Iyer and Ors. Vs. P. S. Renga Iyer & Ors.*** reported in ***(1966) 1 SCR 168.***

41. Coming to the Counter Claim made by the Respondent Developer, Mr. Khandeparkar submitted that the same has been made primarily in respect of two heads, viz., i) expenditure and ii) damages. Insofar as the expenditures are concerned, Mr. Khandeparkar submitted that the Respondent Developer has failed miserably in proving the same in accordance with the settled three-step method of proving expenditure viz., proving that work has been done, invoices have been received and payments against such invoices have been made by bringing on record the bank statements.

42. My attention was invited to the affidavit of evidence of Mr. Jayesh Tanna (RW-1), where he has deposed about the Claimant Society and its members having received various monetary benefits which are enumerated in the Counter Claim filed by the Respondent Developer. Mr. Khandeparker also invited my attention to this statement of monetary benefits which is brought on record by the Respondent Developer at Item No. 58 in the compilation of documents. Mr. Khandeparkar pointed out that Respondent Developer has set out in the said statement certain monetary payments without having made them in the first place. He submitted that payments under Clause 8B, 8C, 8D, 8F and 44A and C were never made by the Respondent Developer and were yet counted in the said statement. He also invited my attention to RW-1's answer to

Q.No. 31 in cross examination where RW-1 has admitted to this position.

43. Turning to the claim made by the Respondent Developer for loss of profits, Mr. Khandeparkar invited my attention to the particulars of claim at Item No. 60 at Page 493 of Respondent's Compilation of Documents Vol-II. He submitted that the Respondent Developer is making a claim for a sum of Rs. 29,09,70,826/- supposedly on account of loss of profits which it would have earned on sale of 75 flats in the subject property. He submitted that the Respondent Developer has brought absolutely no evidence on record to substantiate this claim. According to him, the evidence brought on record is not only vague but is also devoid of particulars and sans corroborative proof.

44. Insofar as the evidence led by the Respondent Developer through RW-2 and RW-3 who are stated to be the contractors engaged by the Respondent Developer is concerned, Mr. Khandeparkar submitted that the same is not worthy of being accepted in view of the depositions made in cross examination. Similarly, in respect of the evidence of Respondent Developer led through RW-3, Mr. Khandeparkar invited my attention to his affidavit of evidence and the notes of evidence in cross examination and submitted that the same is also completely vague and inconclusive. He submitted that the Respondent has made out absolutely no case for an award of damages. Finally, he submitted that in any event on account of the severe breaches committed by the Respondent Developer, it is not entitled to make any claim for damages having regard to Clause 22 of the Development Agreement.

45. Mr. Khandeparkar therefore prayed that the reliefs as prayed for by the Claimant Society be granted and the Counter Claim made by the Respondent Developer be dismissed.

<u>Oral arguments on behalf of the Respondent Developer</u>

46. On the other hand, Mr. Rajiv Narula, Learned Counsel made submissions on behalf of the Respondent.

47. Mr. Narula commenced his submissions by addressing me on Points (d), (e) and (f) framed by me as recorded in the Minutes of the hearing held on 8th March 2019. He began by inviting my attention to the averments made by the Claimant Society at paragraph 7(v) of the Statement of Claim and submitted that it is totally incorrect to say that the concept of pro-rata FSI was introduced in 2012 only. Mr. Narula particularly invited my attention to the pleaded case of the Claimant Society as set out in paragraphs 7(h), (l), (s), (t), (v), (w), (x), (y), (z), (aa) and (bb) read with the depositions contained in the Affidavit of Evidence of CW-1 and in particular paragraphs 15, 16 and 17 thereof. Mr. Narula submitted that having regard to the deposition contained at paragraph 16 of the Affidavit of Evidence of CW-1 it is clear that the Claimant Society was aware of the Concessions Report and the concessions applied for by the Respondent Developer since 2012. He also pointed out that CW-1 has deposed at paragraph 17 of her affidavit of evidence that copy of the amended IOD with revised plans were received by the Claimant Society under a cover of a letter dated 26th June 2012 and it was learnt by the Claimant Society that the status of the project was changed from Composite to Non-Composite. Mr. Narula submitted that there was no objection whatsoever to this communication at all.

48. My attention was then invited to the concessions report[29] and some of the answers given by CW-1 Mrs. Maya Sejpal in her cross examination by Mr. Narula to submit that the Claimant Society was always aware of the amendments in plans and were infact acting in furtherance thereof. He submitted that it is dishonest on the part of the Claimant Society to suggest that the amendments in plans took place without their consent.

49. Moving further, Mr. Narula invited my attention to the pleaded case of the Claimant Society at paragraph 7(l) of the Statement of Claim to point out that it was even the Claimant Society's understanding that the total number of flats to be constructed in the project would be 128 in number. He further submitted that per flat was to admeasure 860 sq.ft. and therefore the total square footage of 128 flats would be 1,10,080 sq.ft. which, Mr. Narula submits is consistent with Clause 2 of the Development Agreement which stipulates that the proposed Building will have 16 floors with each floor admeasuring 6880 sq.ft. On this basis, Mr. Narula would submit that the total constructed portion 10226.77 sq.mtrs (110080 sq.ft converted into sq.mtrs) divided by the plot area of 2543.49 sq.mtrs would roughly be 4, which is greater than 2.4. Mr. Narula therefore submits that even the Development Agreement contemplates that the development potential to be exploited would be greater than 2.4 FSI since it would have been impossible to contemplate the construction of 128 flats within 2.4 FSI at the time of the Development Agreement.

50. Mr. Narula also invited my attention to the evidence of CW-1 in cross-examination and in particular her answers to Q.116 and

[29] Page 549 in the Claimant's Additional COD

Q.117. He submits that in view of these answers, it was even the Claimant Society's understanding that utilization of FSI higher than 2.4 was always envisaged.

51. My attention was then invited to a letter dated 31st May 2008[30] to submit that the copies of the approved plan along with the IOD were provided to the Claimant Society at the relevant time. Further, Mr. Narula reiterated that under the cover of letter dated 26th June 2012, the Amended IOD along with the revised plan was also sent to the Claimant Society. He also submitted that time and again the Respondent Developer requested the Claimant Society to amalgamate with the neighbouring society so as to smoothen the process of further construction. He also invited my attention to the correspondence whereby the Respondent Developer has kept the Claimant Society informed about the changes in policies of MHADA and Government causing a delay in the completion of the project. He pointed out that by letter dated 14th February 2015[31] the Respondent Developer had clearly informed the Claimant Society that MHADA had kept the pro-rata FSI on hold and it was uncertain as to when it will be permitted.

52. Further, as regards the Respondent Developer wanting to construct 21 floors (18 floors + 3 podium floors), Mr. Narula submitted that the Claimant Society was always aware of the same as is borne out from the letter dated 25th January 2013[32] wherein the Claimant Society itself is asking the Respondent Developer to provide copies of necessary approvals for the said construction so as to take clearance from the General body of its members.

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[30] Page 101 of Respondent's COD Vol-I
[31] Page 222 of Claimant's COD Vol-I
[32] Page 179 of Claimant's COD Vol-I

53. Additionally, Mr. Narula has also invited my attention to several paragraphs of the Affidavit of Evidence of RW-1 Mr. Jayesh Tanna as also his evidence in cross examination to buttress the submission that the Respondent Developer was entitled to use all FSI beyond 2.4, subject to sharing the benefits with the Claimant Society, as stipulated in the Development Agreement and not that the usage of FSI was restricted to 2.4 as contended by the Claimant Society. He pointed out that not a single question is asked by the Counsel for the Claimant Society on RW-1's testimony contained in paragraphs 5, 10, 12, 13, 14, 15, 19 and 21 of his Affidavit of Evidence. Reliance is placed on the decision in the case of ***Harish Loyalka and Anr. Vs. Dileep Nevatia and Ors.*** reported in ***(2015) 1 Bom CR 361*** to contend that testimony which is not controverted is deemed to be accepted.

54. Mr. Narula further submitted that the Development Agreement does not impose any obligation upon the Respondent Developer to seek permission, consent of the Claimant Society for seeking sanction of additional FSI or for revising the plans or for submitting concession applications. A meaningful reading of the Power of Attorney executed by the Claimant Society in favour of Respondent Developer, in Mr. Narula's submission, would also make the position clear that Respondent Developer was entitled to use all permissible Development potential and the same was not restricted to 2.4 FSI.

55. He therefore submits that the nature and purpose of the contract is an important guide in ascertaining the intention of the parties. Mr. Narula argued that if parties to a contract, by their course of dealing, put a particular interpretation on the terms of the contract, in faith of which each of them acts and conducts their affairs to the knowledge of the other, then they are bound by that interpretation just as much

as if they had written it down as being a variation of the contract. According to Mr. Narula, harmonious construction must be adopted for giving business efficacy to the contract in question. He has relied upon the decision of the Hon'ble Supreme Court of India in ***Transmission Corporation of Andhra Pradesh Ltd and Ors. Vs. GMR Vemagiri Power Generation Ltd. and Ors.*** reported in ***(2018) 3 SCC 716.***

56. Even otherwise, Mr. Narula submits that these issues are irrelevant to adjudicate the present dispute in as much as the Development Agreement which was executed in 2007 has been partly altered and modified by the Consent Terms dated 16th May 2017. The above issues, Mr. Narula submits, pertain to the grievances raised by the Claimant Society during the period prior to the Consent Terms. He submits that the Consent Terms dated 16th May 2017 supersede and modify the terms of the Development Agreement. In fact the provisions of the Consent Terms grant benefit of the additional FSI proposed to be utilised by the Respondent Developer, Mr. Narula further points out. He therefore submits[33] that the conduct of the Respondent Developer only post the execution of the Consent Terms is required to be seen to adjudicate the issues and claims made by both the parties.

57. Mr. Narula then began his submissions on Points (h), (g), (m), (k), (a) and (b) as framed by this Tribunal.

58. Mr. Narula submitted that the Consent Terms supersede and modify the Development Agreement. More particularly, according to him Clause 22 of the Development Agreement is superseded by Clause

[33] This submission is also specifically taken in the Written submissions at para (nn) at Pg 19.

48 of the Consent Terms. He placed reliance on the decision of the Hon'ble Bombay High Court in the case of ***Daulatbanoo Sadruddin Nanavati Vs. Tazaldin Sadruddin Nanavati and Ors.*** reported in ***2019 (5) Bom CR 145*** in support of the contention that once Consent Terms have been entered into between the parties, the original agreement is superseded.

59. He further invited my attention to several causes of the Consent Terms and in particular clause 12 and clause 39 thereof. He submits that as per 12 of the Consent Terms, the entire project is to be completed and the same has to be read with clause 39 which contemplates issuance of NOC by the Claimant Society. Mr. Narula submitted that it is the specific case of the Respondent Developer that the NOC was never granted by the Claimant Society as required under the Consent Terms which was to be granted on the date of the Consent Terms. Non-issuance of NOC has two consequences, viz., the Respondent Developer cannot raise finance and secondly, the Respondent Developer cannot sell flats coming to its share.

60. Mr. Narula argued that the Claimant Society has raised several contentions on the breaches allegedly committed by the Respondent Developer anterior to the execution of the Consent Terms. He submitted that the project was held up for a period of over 7 years for want of finalisation of the layout. He further submitted that by virtue of the Consent Terms being entered into, the reciprocal promises contained therein substantially modified the Development Agreement. He specifically relied upon Clauses 9 and 10 of the Consent Terms. According to Mr. Narula, the core question that is required to be decided by this Tribunal is whether the termination effected by the Claimant Society would stand the test of the provisions contained in the Consent Terms.

61. Mr. Narula submits that on account of the parties entering into the Consent Terms dated 16th May 2017, the Claimant Society cannot be permitted to show the Respondent's conduct prior to the said Consent Terms. Mr. Narula therefore submits that the contents of the Termination notice dated 9th June 2018 insofar as they relate to the alleged breaches committed by the Respondent Developer prior to the execution of the Consent Terms cannot be taken into consideration. He submits that only the contents of the Termination Notice from paragraph 5 onwards can be looked at by this Tribunal and that too has to be examined with regard to the reciprocal obligations contained in the Consent Terms.

62. Mr. Narula was at pains to submit that the Claimant Society has not fulfilled its reciprocal obligations of granting an NOC as contemplated under various Clauses of the Consent Terms and particularly Clauses 39, 40 and 43. According to Mr. Narula, the Consent Terms contemplated a grant of NOC for utilization of Full FSI, which was never given by the Claimant Society. Obtainment of this FSI was important to complete the construction of Building 'A' even as per the understanding of the Claimant Society and to this effect Mr. Narula invited my attention to paragraph 42(d) of the Statement of Claim of the Claimant Society.

63. Mr. Narula submitted that the Consent Terms contemplated completion of the full project and not just the rehab component meant for the members of the Claimant Society and that the Claimant Society was to give its NOC for utilization of the full FSI. My attention was invited to a letter dated 10th April 2018[34] addressed by the Claimant Society to MHADA wherein NOC is given for the

[34] Page 400 of the Respondent's COD Vol-II

release of pro-rata FSI to the extent of 1820 sq.mtrs. out of the 3454.18 sq.mtrs. Mr. Narula further pointed out that the said letter itself records that the said FSI is required to complete the rehabilitation of the original members of the Claimant Society. He therefore submits that it is an admitted position that the NOC given by the Claimant Society was not for the utilization of the full FSI as was contemplated by the Consent Terms. Further, he submitted that he learnt of this letter only at the time of the hearing of the application under Section 17 of the Act when the Claimant Society produced a copy before this Tribunal at the time of arguments in support of its contention that it has complied with Clause 40 of the Consent Terms. The letter was never served upon the Respondent Developer at the relevant time and this stand has been specifically stated at paragraph 54 of the Affidavit of Evidence of RW-1, which has not been controverted at all. In any event, Mr. Narula submits, this was never the NOC for utilization of the full FSI on the subject property.

64. Moreover, Mr. Narula also invited my attention to the clarificatory letter dated 11th April 2018 addressed by the Claimant Society to MHADA and pointed out with considerable vehemence that the Claimant Society retracted the line contained in its letter dated 10th April 2018 which spoke of payment of premiums in installments. He submitted that the Claimant Society ought to have provided a reasonable facility to the Respondent Developer at the time of granting the NOC and ought to have allowed the Respondent Developer to pay the premium in installments as they said premium amount is a substantial amount. Mr. Narula argued that the Respondent Developer is excused by such refusal by virtue of section 67 of the Indian Contract Act, 1872 and on this ground the

Respondent Developer is required to be excused for the non-performance as the said non-performance is caused due to the refusal of the Claimant Society to afford to the Respondent the reasonable facility of paying premiums in installments as per MHADA's policy.

65. As regards the NOC for raising further finances, Mr. Narula submitted that the Respondent Developer had written several letters to the Claimant Society. He invited my attention to a letter dated 28th September 2017[35] wherein such a request was made. It was pointed out by Mr. Narula that the said NOC was issued by the Claimant Society belatedly only in October 2017.

66. He pressed into service the provisions of the Indian Contract Act, 1872 and in particular Section 51, 52, 54, 55 and 67.

67. Mr. Narula then pressed into service the provisions of Section 27 of the Specific Relief Act, 1963 to argue that at this stage of the contract, this Tribunal must refuse to rescind it at the behest of the Claimant Society. He repeated that not only has the Claimant Society been responsible for the change in circumstances by not granting the NOC as required, but there are also third parties in form of flat purchasers who have acquired rights for value, during the subsistence of the contract. He therefore submits that this Tribunal ought to refuse to rescind the contract at the behest of the Claimant Society. In the alternative, Mr. Narula submits that if this Tribunal were to allow rescission of the contract between the parties, then the Claimant Society must be made to pay for every brick that is constructed at the subject property.

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[35] Page 385 of Respondent's COD Vol-II

68. My attention was invited to the pleaded case of the parties in this regard. Referring to paragraphs 3 (xxxiv), (xxxv), (xxxvi), (xxxvii) of the Counter Claim, Mr. Narula submitted that several oral requests were made to the Claimant Society after the execution of the Consent Terms requesting them to comply with their obligations of issuing NOC for sanction of additional FSI as agreed under clause 39 and 40 of the Consent Terms an issue NOC for finance as agreed under clause 41 of the Consent Terms he submitted that a prompt issuance of NOC for finance was a prerequisite to enable the Respondent Developer to comply with their payment obligations as recorded under the subject Consent Terms within the timelines mentioned therein. The NOC for sanction of additional FSI was also important prerequisite to enable the Respondent Developer to comply with the deadline of handing over possession to the members of the claiming society in building A and building b in accordance with the time schedule. To this pleaded case of the Respondent Developer, Mr. Narula invited my attention to paragraph 13(r) and paragraph 13(ff) of the Statement of Defence filled by the Claimant Society to the Respondents counterclaim. He pointed out that the Claimant Society has denied that the grant of NOC was a prerequisite to enable the Respondent to complete the project within the timelines. He also pointed out that the Claimant Society has also attempted to resile from its obligation of issuing NOC for the additional FSI required to complete the construction.

69. Mr. Narula also pointed out that the Claimant Society has taken contrary stands if one sees the pleading at paragraph 12 of the Statement of Defence to the Counter Claim and compare it with what is stated at paragraph 26(d) of the Statement of Claim.

70. On the other hand, Mr. Narula submits, the Respondent has fulfilled all the preconditions entitling it to receive the NOC from the Claimant Society under the Consent Terms. He pointed out that as per clauses 9, 10 and 37 of the Consent Terms, the Respondent Developer was to handover allotment letters with respect to the specific flats mentioned in the said clauses as a precondition for granting NOC by the Claimant Society. He submitted that the said allotment letters were granted on the same day of the Consent Terms dated 16th May 2017 and hence there is no question of any delay on the part of the Respondent Developer in fulfilling its obligations under the Consent Terms entitling it to receive the NOC from the Claimant Society. He submitted that the fact that these allotment letters have been provided to the Claimant Society is recorded in the letter dated 31st October 2017[36]. Mr. Narula submitted that the Respondent Developer has not brought these allotment letters on the record for a simple reason that there is no pleading on the part of the Claimant Society that these allotment letters were never issued by the Respondent Developer. He pointed out that the Claimant Society raised the argument that no allotment letters were issued, for the first time during the final hearing of the present arbitration and the same therefore cannot be considered by this Tribunal since it is beyond pleadings.

71. In a nutshell, Mr. Narula submitted that insofar as the NOC for raising finance is concerned the Claimant Society granted it belatedly in October 2017 under backdated letter and as regards the NOC for availing the pro-rata FSI from MHADA, the same firstly came with a fetter that the payments of premiums cannot be made in installments and secondly the same was not an NOC for utilization

[36] Page 388 of Respondent's COD Vol-II

of full FSI. Mr. Narula submitted that the entire project is a self-financing scheme and that the Consent Terms were executed at a stage where the Respondent Developer had invested substantial sums of money. Considering the business realities, according to Mr. Narula, funds would be required to offer the sale component or the receivables against the same to get finance and thereafter use the moneys in order to comply with each of the obligations under the Consent Terms. He submitted that on account of the non-issuance of NOC by the Claimant Society for the additional FSI the finance and money that could be raised by the Respondent Developer were completely blocked. He submitted that this was the primary reason on account of which the Respondent Developer could not proceed further and comply with its monetary obligations and construction obligations.

72. To conclude his submissions on this point Mr. Narula submitted that the Respondent Developer has always been ready to perform his obligations as modified under the Consent Terms. He submitted that the Claimant Society in fact did not perform its obligations of issuing the NOC under clauses 39 and 40 of the Consent Terms. The Respondent Developer has not committed any breaches of the Consent Terms but has complied with all its obligations thereunder according to Mr. Narula. The only reason why the monetary obligations as well as the construction obligations could not be complied with is because the Claimant Society did not grant its NOC which was a pre-requisite for the Respondent Developer to obtain full FSI, raise finance, put up construction and comply with all its obligations. In other words, Mr. Narula submitted that it was the Claimant Society which prevented the Respondent Developer from complying with its obligations under the Consent Terms and for this

reason the termination issued by the Claimant Society is not only premature but the same is also wrongful and invalid.

73. In this regard, Mr. Narula relied upon the following authorities.

a) ***Daulatbanoo Sadruddin Nanavati Vs. Tazaldin Sadruddin Nanavati and Ors.*** reported in ***2019 (5) Bom CR 145***

b) ***Shanti Builders Vs. CIBA Industrial Workers' Co-op Housing Society Ltd. and Ors.*** reported in ***2012 (4) MhLj 614***

c) ***Ramchandra Nayak Vs. Karnataka Neeravari Nigam Ltd.*** reported in ***(2013) 15 SCC 140.***

d) ***Maharashtra State Electricity Distribution Vs. DSL Enterprises Pvt Ltd.*** reported in ***2009 (4) Bom CR 843.***

74. On readiness and willingness, Mr. Narula submitted that the Respondent Developer was always ready and willing to complete its obligations under the Consent Terms which had substantially modified the terms of the Development Agreement. He submitted that on account of the conduct of the Claimant Society in not issuing the required NOC, the Respondent Developer was prevented by the Claimant Society from performing its obligations under the Consent Terms. Moreover, the Claimant Society unilaterally terminated the agreement between the parties in teeth of clause 48 of the Consent Terms requiring a return notice of 60 days to be given to the Respondent Developer. As on the date of the termination, Mr. Narula submitted that the only breach that the Respondent Developer could be said to have committed was that a sum of Rs. 1,72,72,145/- was due and payable on 15th May 2018 which was not

paid. The subsequent installments which were due on the Consent Terms were to be paid on or before 10th June 2018 and 15th June 2018. Thus, on 9th June 2018, considering the non-compliance of the Respondent Developer with respect to the payment of the second installment which was due on 15th May 2018, the period of 60 days counted from 15th May 2018 to have been given to the Respondent Developer ends in July 2018. Similarly the other payments which were due and payable on 10th June 2018 also could not be a reason to terminate until 60 days expired from the date of 10th June 2018 and 15 June 2018 respectively Mr. Narula continued to submit that going by clause 48 of the Consent Terms it is only after a lapse of 60 days of the failure on the part of the Respondent Developer that the Claimant Society could terminate the Development Agreement and the Consent Terms. He therefore submitted that the termination which happened on 9th June 2018 is illegal, invalid and not binding on the Respondent Developer.

75. As regards the non-compliance of the timeline with respect to the completion of Building B to accommodate the members of the claiming society is concerned, Mr. Narula submitted that the same was nearing completion as stated by the Respondent Developer in its reply to the termination notice and even as per the admissions of the Claimant Society made in its pleadings. Mr. Narula submitted that the readiness and willingness of the Respondent is clearly borne out from the fact that despite non-compliance on the part of Society in issuing the NOC for additional FSI thereby blocking the finances of the Respondent Developer the Respondent Developer continued to proceed with the construction of Building B. He pointed out that the Respondent Developer was also ready with pay order to be given to the members of the Claimant Society when they filed a

Contempt Petition, which is admitted by the members of the Claimant Society in their reply to the Counter Claim.

76. As regards the Claimant Society's contention that filing of the Contempt Petition can be considered as a sufficient notice under clause 48 of the Consent Terms, Mr. Narula submitted that the same is totally incorrect. He submitted that the 60 days as counted from the filing of the Contempt Petition would expire on 10th May 2018, whereas the termination is apparently effected in view of the non-payment of the second installment onwards which fell due on 15th May 2018. He therefore argued that 60-day period ought to have been counted from 15th May 2018 as required to be given to the Respondent Developer. He pointed out that no notice has been given to the Respondent Developer on or after 15th May 2018 or alternatively, neither 60-day period was allowed to have been lapsed from either of 15th May 2018, 10th June 2018 or 15th June 2018 so as to entitle the Claimant Society to terminate the Development Agreement read with the Consent Terms. He pointed out that the Claimant Society straightaway issued a termination notice on 9th June 2018.

77. Mr. Narula also took me through the response dated 20th June 2018[37] and submitted that there is no denial of the contents of the said letter.

78. Mr. Narula then moved further and addressed this Tribunal on the point of monetary claims made by the parties against each other. Mr. Narula submitted that this Tribunal ought to direct restoration of all the benefits and advantages received by the Claimant Society under

[37] Pages 453 to 473 of Respondent's COD Vol-II

the Development Agreement and the Consent Terms from the Respondent Developer on account of its failure to grant the requisite NOC thereby resulting in the project getting stalled. He submitted that it is the Claimant Society that has caused breaches of the Consent Terms on account of which the entire project has been put in jeopardy. For these reasons when the Claimant Society has unlawfully terminated the Respondent Developer Mr. Narula submits that it should be made to return all the moneys and the benefits that it has received thus far. Further, he also submitted that the Claimant Society has not been able to prove its claims.

79. My attention was invited to the provisions of section 64 and 65 of the Indian Contract Act to argue that the Claimant Society is duty bound and statutorily liable to restore to the Respondent Developer all the benefits and advantages received by it under the Development Agreement. He submitted that the amounts which are mentioned in Exhibits 3 and 4 of the Counter Claim filed by the Respondent Developer are undisputedly benefits and advantages received by the Claimant Society. He further submitted that the amounts mentioned in the Exhibit 5 although are captioned under the head of loss of profits, in any event, is the value of the sale component flats in Building B which has already been constructed by the Respondent Developer which is also a benefit under the Development Agreement received by the Claimant Society. He submitted that in the event the Claimant Society does not honour the 3rd party sales created by the Respondent Developer during the subsistence of the Development Agreement, then the Claimant Society is liable to pay the monetary value of the entire constructed portion of all the 75 flats which include both, the rehab component as well as the sale component.

80. Mr. Narula submitted that Exhibit 3 of the Counter Claim is also dealing with various payments made to MHADA and the rent and corpus received by the Claimant Society members and the expenses incurred for construction and on-site expenses. He submitted that it is only due to these payments that the Claimant Society has been able to get the benefit and advantage of a flat in a newly constructed building with additional area. These are also the benefits received by the Claimant Society, according to Mr. Narula. He pointed out that the Claimant Society was not able to bear the demolition and redevelopment expenses on its own and for this reason the Respondent Developer was engaged to redevelop the property and to give larger flats to the members of the Claimant Society. Mr. Narula submitted that the expression “benefit” is defined under the Black’s Law dictionary and the same is not limited to pecuniary gains or to any particular kind of advantage. It refers to whatever is advantageous or what enhances the value of the property. He has tendered the extract of the definition from the Black's law dictionary.

81. Mr. Narula therefore submitted that each of the amounts mentioned in Exhibits 2, 3 and 4 of the Counter Claim are benefits and privileges which the Claimant Society would not have received from the Respondent Developer if the Development Agreement had not been executed. He submitted that it is due to the expenses incurred by the Respondent Developer that the members of the Claimant Society have received the above mentioned benefits, profits privileges, advantages and rights during the subsistence of the agreement. It is due to the Development Agreement that the members of the society have received the benefit of rent, corpus and additional area of flats. It is on account of MHADA and the BMC

payments made by the Respondent Developer, the purchase of the tit-bit area by the Respondent Developer, the payments made towards premiums for fungible FSI and the expenses incurred by the Respondent Developer on demolition and reconstruction of the subject property, that the new buildings have come into existence due to which the Claimant Society has received newly constructed houses with an additional area much more than the original area of their old flats. If this was not done, Mr. Narula submitted that the members of the Claimant Society could never get a flat with extra area and neither would the sale component flats come into existence. For all these reasons, Mr. Narula submitted that the members of the Claimant Society are statutorily liable under section 64 and 65 of the Contract Act to restore and return each of these amounts received by them under the Development Agreement in the event the contract is held to be terminated.

82. He also submitted that this Tribunal's observation in the Order dated 17th September 2018 as also the observations of the Hon'ble Bombay High Court affirming this view in its Order dated 14th December 2018 about rental payments not being a benefit, the same were both made at interim stages and were only *prima facie* observations. He submitted that a decision is a judicial precedent containing a principle which forms an authoritative element termed as *ratio decidendi* and an interim order containing *prima facie* findings are only tentative.

83. Coming to the argument made by the Claimant Society in respect of clause 22 of the Development Agreement under which the Respondent Developer has purportedly agreed not to claim damages or compensation in the event of termination, Mr. Narula submitted that firstly, the termination is invalid and secondly even

assuming that the termination is lawful, the Respondent Developer has nowhere agreed not to claim restitution or restoration of the benefit received by the Claimant Society under the Development Agreement.

84. He submitted that the right to seek restitution under section 64 and 65 of the Contract Act cannot be disallowed by the Tribunal in any circumstances. Even otherwise, Mr. Narula submits that the way in which clause 22 has been worded, it is clear that the same has not been triggered at all. He submitted that this was to be invoked after a lapse of 3 months post the completion of the originally assigned 22 months to complete the project. It was only if the Claimant Society invoked this clause at the relevant time and terminated the Development Agreement, was the Respondent Developer to lose its right to claim damages and compensation. Even then, Mr. Narula submitted that nothing would have prevented the Respondent Developer from claiming restitution if circumstances would have warranted. However, Mr. Narula pointed out that the Claimant Society did not terminate the agreement at the relevant stage but continued to negotiate with the Respondent Developer which ultimately culminated into Consent Terms, several years down the line. With the execution of the Consent Terms, Mr. Narula submitted that the conditions that were mandated for the effectuation of the exclusion clause, did not exist. The Consent Terms modified the Development Agreement to the extent mentioned in the Consent Terms. Mr. Narula submitted that Clause 22 of the Development Agreement relating to termination have been superseded by clauses 44, 46 and 48 to 51 of the Consent Terms. He pointed out that the Consent Terms contain exhaustive provisions on termination in Clauses 48 to 51. He submitted that these clauses do not make any

reference to clause 28 of the Development Agreement to extrapolate the applicability of the exclusion clause.

85. Further, Mr. Narula also submitted that Claimant Society's reliance on Clause 23 of the Development Agreement in denying the Respondent Developer's right to seek restitution is also thoroughly misplaced. He submits that there is no occasion for the society to refer to Clause 23 since the Claimant Society has failed to show that any claim, loss, costs and charges are made against the Claimant Society on account of the Developers carrying out the redevelopment on the said property, by any person by the reason of search redevelopment. It is not even the case of the Claimant Society in the Statement of Claim according to Mr. Narula. Similarly, he submits that the reliance of the Claimant Society on clause 47 of the Development Agreement is also misplaced since the said clause can only apply if the Respondent Developer was asking for expenses for putting up the construction during the subsistence of the Development Agreement. Mr. Narula pointed out that presently the Respondent Developer is only asking for the restoration of the benefit granted by it, and that too only because the Claimant Society has chosen to terminate the contract.

86. For the proposition of law that restitution or restoration of benefit stands on a different footing then damages claimed by a party, having regard to section 64 and 65 of the contract act, Mr. Narula relied upon the decision in the case of ***Murlidhar Chatterji Vs. International Film Company Ltd.*** reported in ***1944 (46) Bom LR 178.*** He further submitted that a party in breach of a contract also has a right to claim restoration and in the event the said party claiming restoration is held to have breached the contract the other party is always free to claim damages provided they are proved to

have been sustained in accordance with law from such party claiming restoration. In that event, Mr. Narula submits that the damages proved to be sustained can always be set off against the party claiming restoration. He invited my attention to the illustrations mentioned under section 65 and section 75 of the Indian Contract act. Reliance has also been placed on a decision of the honourable Madras High Court in the case of ***G. Gopala Chettiar Vs. N. Giriappa Gowder*** reported in ***AIR 1972 Mad 36.***

87. Coming to the monetary claims made by the Claimant Society, Mr. Narula pointed out that there is absolutely no evidence record to substantiate a claim in the sum of Rs. 60,00,00,000 made by the Claimant Society on the ground of alleged mental harassment and loss caused due to delay in completion of the project. Without prejudice to the submission, Mr. Narula also submitted that the law of contract does not allow the claim of damages for mental agony. He relied upon the decision of the Hon'ble Supreme Court of India in the case of ***Ghaziabad Development Authority Vs. Union of India*** reported in ***AIR 2000 SC 2003***.

88. In so far as the claim made on the basis of bank vouchers, bank slips, vouchers, payment receipts issued by advocates architects, consultants and audit reports of the auditor, Mr. Narula submitted that the signature of the respective parties on each of the above documents are not identified or proved by the Claimant Society's witness in evidence. He also submitted that the said statements or slips are also not supported with the requisite certificate under section 65B of the Evidence Act. In any event, Mr. Narula would submit, the Claimant Society has accepted performance even after the execution of the Consent Terms and in view thereof the Claimant Society cannot make any claim for the period prior to the execution

of the Consent Terms. He relied upon the provisions of section 55 of the Indian contract act which provides that no compensation can be claimed in the event performance is accepted after the agreed time unless at the time of accepting performance notice is given to the promiser by the promise of his intention to do so. He submitted that no notice is given by the Claimant Society to the Respondent Developer that it would claim compensation for the delay caused by the Respondent Developer up till the date of the Consent Terms, significantly when the Claimant Society has accepted performance post the original timelines having expired under the Development Agreement and further timelines have been agreed under the Consent Terms. He also submitted that in any event the Claimant Society has failed to prove that these claims are sustained by them by reason of the breach of the contract on the part of the Respondent Developer post the execution of the Consent Terms or that any injury was sustained by the Claimant Society.

89. As regards the damages for the delay post the execution of Consent Terms, Mr. Narula was at pains to repeat his submission that the Respondent Developer is not responsible for the same because it was the Claimant Society who failed in issuing the requisite NOC. He submitted that the Claimant Society cannot seek performance until the required NOC for additional FSI is issued by them.

90. Turning to the monetary claims made by the Respondent Developer, Mr. Narula submitted that the Respondent Developer has clearly led evidence as regards the amounts spent by them for the development of the subject property. He submitted that RW-1 has lead evidence to prove the benefits received by the Claimant Society under the Development Agreement and his testimony is not controverted by the Claimant Society in cross examination. My

attention was invited to the deposition contained in paragraphs 9 to 15 of the additional affidavit of evidence of RW-1. Mr. Narula pointed out that not a single question is asked by the Claimant's Counsel disputing or challenging the testimony of RW-1 on benefits received by the Claimant Society and on damages. He also submitted that the Respondent Developer has brought on record the income tax returns with acknowledgements showing the moneys received by the Claimant Society and spent in the redevelopment. Various bank statements and vouchers are also produced. He submitted that even these are not disputed or challenged in cross examination by the Claimant's Counsel and hence the same are deemed to be admitted. He has relied upon the decisions of the Hon'ble Bombay High Court in the cases of ***Harish Loyalka and Anr. Vs. Dilip Nevatia and Ors.*** reported in ***(2015) 1 Bom CR 361*** and ***United India Insurance Company Ltd. Vs. Manjari Dilip Chunekar*** reported in ***(2016) 1 Bom CR 209.***

91. Mr. Narula therefore submitted that the Claimant Society's contention that the expenses are not proved cannot therefore be sustained and is required to be rejected. He further pointed out that a chart was produced by the Respondent Developer correlating the expenses with the concerned supporting document, for convenience of this Tribunal and that obviates the Claimant Society's contention that the bills and the bank statements have not been correlated in the affidavit of evidence. He submitted that RW-1 has made sufficient deposition in his affidavit of evidence which has remained uncontroverted in cross examination. In any event, Mr. Narula would submit, if this Tribunal harbours any doubt with respect to the said expenses or the benefits or advantages received by the Claimant Society, it would be the duty of this Tribunal to quantify the same

when parties seek restoration. He submitted that this Tribunal can appoint an independent valuer to quantify the same before passing the award and accordingly order restoration as prayed for. He has placed reliance on the decision of the Hon'ble Supreme Court of India in the case of ***Allahabad Bank Vs. Bengal Paper Mills Co. Ltd.*** reported in ***(2004) 8 SCC 236***.

92. As regards the claim for loss of profits to the tune of Rs. 118, 39, 97, 856/- is concerned, Mr. Narula submitted that RW-1 has specifically deposed about the same in paragraph 67 of his affidavit of evidence, which remains totally uncontroverted in cross examination. He has also relied upon the Ready Reckoner for quantifying the same. He has also argued that the testimony of RW-1 at paragraph 14 in Additional Affidavit of Evidence has not been shattered in cross examination.

93. Moving to the last point of whether or not the third-party rights, encumbrances, flat allotments and agreements for sale created by the Respondent Developer in pursuance of the Development Agreement and the Consent Terms are binding on the Claimant Society, Mr. Narula submitted that they indeed are binding on the Claimant Society. He submitted that the third-party sales are executed by the Respondent Developer during the subsistence of the Development Agreement and by virtue of the power of attorney given by the Claimant Society to the Respondent Developer. He pointed out that under the Power of Attorney, the Claimant Society has agreed to ratify all the acts of the Respondent Developer. According to Mr. Narula, the Claimant Society has also agreed and confirmed that the acts of the Respondent Developer under the power of attorney shall be done as a representative of the Claimant Society. My attention was invited to the concerned clauses of the

Development Agreement as also the power of attorney in this regard. Mr. Narula therefore submitted that the Claimant Society cannot dishonour the third-party rights which have been created by the Respondent Developer during the subsistence of the Development Agreement.

94. Insofar as the law laid down in the decision of the Hon'ble Bombay High Court in the case of ***Vaidehi Akash Housing Pvt. Ltd Vs. New D.N. Nagar Co-op. Housing Society Union Ltd & Ors.***[38] is concerned, Mr. Narula submitted that the said decision was rendered at a time when the Real Estate Regulation Act had not come into force. Upon the RERA act coming into force on 1st May 2016, the law laid down in the case of ***Vaidehi Akash*** *(supra)* will no longer be a good law so as to insulate the Claimant Society from the third-party purchasers. He argued that this decision ceases to be binding if a statute or a statutory rule inconsistent with it, has been subsequently enacted.

95. Mr. Narula submitted that the Act was specifically enacted to protect the interests of the homebuyers. In this regard, he placed reliance on the decision of the Hon'ble Supreme Court of India in the case of ***Bikram Chatterji & Ors. Vs. Union of India*** reported in ***(2019) 19 SCC 161.***

96. To conclude, Mr. Narula submitted that the Respondent Developer has always been ready and willing to perform his obligations. He also submitted that the readiness and willingness on part of the Respondent Developer who is seeking specific performance of a contract would also depend upon the question as to whether or not

[38] Judgment dated 1st December 2014 in Notice of Motion No.961 of 2013 in Suit No.262 of 2012

the Claimant Society has complied with everything that was required of it to be done in terms of the contract. He relies upon the decision in the cases of ***P. D'Souza Vs. Shondrilo Naidu*** reported in ***(2004) 6 SCC 649*** and ***Nathulal Vs. Phoolchand*** reported in ***(1969) 3 SCC 120***. On loss of business opportunity and loss of profits, Mr. Narula submitted that if loss of business is essentially loss of profit then, as held by the Hon'ble Supreme Court in various judgments including ***A.T. Brij Paul Singh & Ors. Vs. State of Gujarat*** reported in ***AIR 1984 SC 1703*** the same is to be computed as a percentage of the value of the balance work which the Respondent Developer could not do because of the contract having been wrongly terminated thereby leading to loss of anticipated profit on the value of the work which was left undone. He has also relied upon ***Dwarka Das Vs. State of Madhya Pradesh*** reported in (***1999) 3 SCC 500***

Arguments in Rejoinder

97. In Rejoinder, after inviting my attention to the relevant documents on record, Mr. Khandeparkar made pointed submissions as under:

a) The Claimant Society has granted all the NOCs as required under the Consent Terms.

b) Even otherwise, the Respondent Developer cannot argue breach of reciprocal obligations if he himself was in fundamental breach of the material terms of the contract, viz., payment of rent to the members of the Claimant Society.

c) Even though one may argue that the Consent Terms would tend to condone the defaults committed by the Respondent Developer, the obligations under the Development Agreement are not wished away but are only re-aligned.

d) The Respondent Developer failed to pay premium as per the MHADA Offer letter dated 16th April 2018.

e) The terms of the Development Agreement regarding non-claiming of compensation and damages has not been altered by the Consent Terms.

f) Respondent Developer has failed to prove its damages. Even as per the chart co-relating the invoices with the bank statements as tendered by Mr. Narula, the Respondent Developer has only been able to show expenditure of around 8.25 crores as against the claim of Rs. 18 odd crores made towards the construction cost. These Rs. 8.25 crores of construction cost brought on record by the Respondent Developer is in respect of the entire Building B which consists of 70 flats admeasuring around 70, 420 sq.ft. Out of this 70,420 sq.ft., an area of 42,900 sq.ft has to be discounted since the members of the Claimant Society initially had their flats admeasuring 715 sq.ft. Therefore, the Respondent Developer can only claim for the remaining 27,520 sq.ft which would come to around Rs. 3.20 crores. This sum of Rs. 3.20 Crores is much lesser than the Claimant Society's claim for rent upto the date of termination which is Rs. 3.72 odd Crores.

g) In the event this Tribunal were to conclude that some monetary compensation is liable to be given to the Respondent Developer, then the same ought to be directed to be paid into the RERA Account for the benefit of the flat purchasers.

ANALYSIS AND FINDINGS ON THE POINTS FOR DETERMINATION

98. I have given my anxious consideration to the rival submissions made by the Advocates for both the parties and with their assistance, I have gone through the pleadings as well as the documentary and oral evidence available on record.

99. Since the facts having bearing on Points (a), (d), (e), (f), (g), (h), (k), (l), (m), (n) and (p) are all more particularly interlinked together, these points will be discussed together and I have rendered my findings thereon accordingly herein below.

The Contract between the parties under the Development Agreement

100. It would first be prudent to note the exact transaction that was envisaged between the parties since that will throw light on many of the aforesaid points. The relevant clauses of the Development Agreement dated 26th September 2007 executed between the Claimant and the Respondent are reproduced as under:

> "2. *The said Society hereby appoints the Developers and the Developers herein agrees to accept the said appointment to **carry out the redevelopment work of the said Original building constructed on the said land, described in the "Schedule-1" hereunder**, by demolishing the said Building and reconstructing the Building/s as more specifically detailed and shown in "**Annexure-E-1**". The said Building/s which is proposed to be 16 stories (including service floors) shall be constructed strictly in accordance to Development Control Rules and other laws, rules that are in force at the time of construction thereof by consuming 6880 FSI per floor as more specifically detailed and shown in "Annexure "E-2". **The parties hereto hereby understand and agree that the total F.S.I. to be exploited out of the said plot is 1:2.4 (i.e. 2.4***

F.S.I.) *therefore in any event,* ***if the Developers are allowed to load*** *any further T.D.R. on the said plot over and above the said permitted F.S.I.,* ***because of any new schemes and/or Act or modifications thereof then upon such event, the benefits accruing from the additional / surplus construction so carried out because of such new schemes and/or Act or modifications, shall be divided by and between the Developers and the said Society in equal ratio****.*

3. ***The said Society has hereby permitted the Developers to sell out of its share of flats / area so arrived at, after first providing 60 flats to the existing members of the said Society absolutely free of cost, in lieu of their existing flats, and after settlement of any benefits accruing from the clause 2 mentioned hereinabove****. Each of the said flat excluding dry balconies, hitches, etc., admeasure 860 Sq. ft. carpet area and should contained 3 bedrooms (2 of such bedrooms with attached bathrooms), living room, kitchen being the same size of the existing premises (i.e. 8x13 ft.) and a guest bathroom as particularly detailed in Annexure "E-3". It has been specifically agreed by the parties hereto that the allotment of flats to existing members shall be in the manner that it should start from Bldg. No.3 Ground Floor (Flat Nos.41 to 44), Bldg. No.4 Ground Floor (Flat Nos.61 to 64) and Bldg. No.5 Ground Floor. (Flat Nos.81 to 4), then Bldg. No.3, First Floor (Flat Nos.45 to 48), Bldg. No.4 First Floor (Flat Nos.65 to 68) & …. And to on in a similar fashion flats will be allotted in new two buildings proportionately as per their existing floors. However, anyone desirous to have internal exchange of their flats, shall have the liberty to do the same before signing individual agreement with the Developer.*

9(e) *The Developers hereby* ***irrevocably and unconditionally undertake to consult the Said Society in all respect*** *with regard to the construction work so carried by the Developers herein by virtue of these presents.* ***The Developers further irrevocably and unconditionally agree to provide copies of all letters and/or correspondence and/or plans / approvals and or modifications thereof pertaining to the Redevelopment work, to the Society without any specific request / demand made by the Society in that respect. The Developers shall also immediately provide all originals for verification purpose if the same are ever required by the said Society****.*

9(f) *The Developers hereby expressly agree and **<u>unconditionally undertake not to commit any illegal act or violate any rule laid down under Mumbai Municipal Corporation Act, 1888</u>** or Development Control Regulations for Greater Bombay, 1991 or the Maharashtra Housing and Area Development Act, 1976 or any other act and/or any subsequent modification thereof that may govern the use of F.S.I/T.D.R. or the redevelopment work so undertaken herein by the Developers. The Developers hereby indemnifies and keeps indemnified the said Society and its members against any such violation, act or omission committed by them during the subsistence of this agreement, which may resultantly prejudice the rights, and interest of the said society and its members.*

9(g) *In the event, **<u>if any modifications/changes are required in the Annexure attached hereto because of any changes in plan</u>** or otherwise, then the same **<u>shall be mutually discussed and agreed upon</u>** during the meeting of the managing committee or in the special general body meeting between parties hereto in writing. Such changes so made in the new Annexure shall replace the redundant Annexure without modifying the other clauses of this agreement.*

9(h) *The Developers shall execute the entire redevelopment project as contemplated here in solely in the name of the society including and not limited to **<u>obtaining permissions for purchasing T.D.R. and/or tit-bit land, payment of premiums etc</u>**., or any other right **<u>to give full effect to this agreement</u>**. The **<u>society shall have the right to exploit these rights and liberties arbitrarily in case of default on the part of the developer</u>**.*

9(k) *The Developers hereby also confirm that the said **<u>Society and its members shall not be liable to any of the purchasers of the saleable premises of the new building or any third party for any act of commissions and/or omissions on the part of the Developers</u>** or any contractors/ sub-contractors appointed by the Developers.*

10. ***Compensation for Alternate Accommodation and other benefits to be given to the members of the said Society:***

1. *The Developers undertakes to bear and pay to all 60 members of the said society whilst signing the*

Members Agreement, the following compensation towards temporary alternate accommodation.

a) Rs.20,000/- (Rupees Twenty Thousand only) per month for 25 months (22 months + 3 months grace period) from the date of surrendering vacant possession of the premises, out of which an amount of Rs.2,20,000/- (Rupees Two Lac Twenty Thousand only) being an amount payable for 11 months shall be paid in advance by one single cheque. For balance amounts the Developers shall issue 14 post-dated cheques (balance 11 months + 3 months grace period) amounting to Rs.20,000/- (Rupees Twenty Thousand only) each.

b) It is hereby irrevocably and unconditionally agreed by the Developers that in case the Developers fail to complete the development work within the stipulated period of 25 months, upon such event i.e. after expiry of 25 months the Developers shall be liable to pay to all members an additional rent of 10% over and above the agreed monthly rent of Rs.20,000/- (Rupees Twenty Thousand only) until such time the members are put in possession new flats.

c) The Developers shall also pay to each of the Members by way of Corpus Fund, a sum of Rs.2,00,000/- (Rupees Two Lacs only) to ease the burden of the Members towards increase in the taxes and maintenance charges of the said New Building.

d) Together with the amounts mentioned above the Developers shall additionally pay Rs.20,000/- (Rupees Twenty Thousand only) towards brokerage for each flat.

2. *It is hereby irrevocably and unconditionally agreed that in case of any cheque being dishonoured, the Developers shall be liable to pay double the amount of such dishonoured cheque.* ***However in any event if the same cheque is returned on more than two occasions then upon such circumstances the Developers shall be under an obligation to pay a penal charge of Rs.50,000/- (Rupees Fifty Thousand only) on every such second act of***

default. *In any event, if the Society receives more than 6 such complaints from its aggrieved members then upon such circumstances the Society shall have full arbitrary rights and decisive powers to pass any judgment against the Developers. Any such judgment passed shall be final and binding on the Developers and the Developers shall not challenge the same. However,* ***in case of dishonor of cheques, suitable action u/s.138 shall also be taken against the Developers and the legal expenses for that shall be borne the society, which shall be reimbursed by the Developers***.

3. *The Developers shall be liable to bear and pay the compensation and/or licencee and/or rent towards the alternate accommodation for all 60 members, until such time the members are not put in possession of new flats. It is hereby agreed and understood by the Developers that the members shall only be put in possession of new flats after full occupation certificate is obtained for the said New Building by the Developers.*

8. *Notwithstanding anything contained herein if, within three months of handing over vacant possession by the Members of the flats in the Original Building to the Developers, the Commencement Certificate is not received by the Developers, then this agreement for re-development shall stand terminated and whatever amounts spent by the Developers towards obtaining F.S.I., T.D.R. and advance payments towards Corpus Fund will be forfeited by the Said Society. The Society will then be at liberty to enter into agreement for re-development with any other Developer of its choice.*

12. *The Developers hereby undertake to provide a Bank Guarantee of any Nationalised Bank for Rs.5,00,00,000/- (Rupees Five Crores Only) to the society on receipt of I.O.D. and before signing this Agreement. This Bank Guarantee shall be revised and the amounts thereof shall be substantially reduced after considering the progress of the work as undertaken by the Developers. This Bank Guarantee can only be invoked in case this agreement is*

terminated because of any act of default on the part of the Developers.

22. ***The Developers agree to complete the total re-construction work within a period of 22 months from the date of Commencement Certificate. In the event of the Developers failing to complete the re-construction work within the stipulated period of 22 months, then the Developers will have to pay a penalty of Rs.1,00,000/- per month of delay to the Society. In addition to this the Developer shall pay to each of the Members / allottees Rs.22,000/- (Rupees Twenty Two Thousand Only) per month as compensation towards temporary and alternate accommodation, until the Member is put in possession of the Permanent Alternate Accommodation in the said New Building. However, if the Developers extended period permitted with penalty after the stipulated 22 months for completion of the construction work will be only for 3 months.*** *After expiry of these 3 months, if the Developer has yet failed to complete the entire building R.C.C. work and the external and internal plastering work of the* Building/s (*that is completed with entire brick work*) ***then upon such event, the said Society shall be at liberty to terminate this agreement and take over all rights in the said project and appoint a new Developer of its choice to complete the reconstruction work. In such a case, the Developers will have no right to claim any damages / compensation from the Said Society. The Developers shall also forego its right to sell the flats / commercial premises, which are part of the saleable portion of the flats after proving the existing Members 60 flats in the new building***.

23. ***The Developers shall keep the Said Society indemnified against any claim, loss, costs, charges, etc. that may be made by any person against the Said Society on account of the Developers carrying out the Re-development on the Said property***.

27. ***The Developers shall from time to time and at all times indemnify and keep indemnified, save, defend the Society from and against all losses, damages, litigations, claims, demands and costs that may be made and/or raised by any one and incurred by the Society as a result of any act or omission on the part of the Developers, sub-contractors and employees of the Developers and/or for the breach of any rules, regulations, bye-laws and/or statute governing the development of the said property***.

29. *The society shall at the request and costs of the Developers, sign and execute all applications, plans, letters, declarations, writings etc. for the purpose of obtaining permissions of the concerned authorities including the Municipal Corporation of Greater Mumbai, M.H.A.D.A., the competent authority under the ULCR Act, for the purposes mentioned in these presents and/or as may be necessary and essential for the Developers for implementing the project as envisaged under this agreement.*

42. ***The Developers shall bear and pay all costs of construction including*** *costs, charges and expenses of obtaining all permissions, approvals, sanctions, or otherwise, N.A. orders, I.O.D. and Commencement Certificate and also payments to the M.C.G.M. by way of deposits, security deposits, scrutiny fees, development charges, debris deposit, or any other charges, payments, remuneration to architects, engineers, contractors, labour contractors, suppliers of building materials, workmen, employees, security staff,* ***and cost of acquiring additional T.D.R. and other expenses relating to the development of the said plot of land***.

47. *Under no circumstances, the developers shall ask for any amount or contribution from the Society or any of its members towards expenses for putting up such construction.*

53. *As an essential part of this agreement it has been agreed, declared and confirmed between the parties hereto as follows:-*

i. That by this agreement no possession is transferred or intended to be transferred in favour of the developers within the meaning of the Bombay Stamp Act, in force or any other law or legislation. However, this development agreement shall be duly stamped and registered at the cost of the Developers within 30 days of the date of execution of this agreement.

ii. ***That the possession of the said land is and shall always remain with the Society****.*

iii. ***This agreement shall not be construed as a partnership or joint venture or agreement of partnership and the same shall be on principal-to-principal basis****.*

iv. This Agreement is strictly personal and the ***Developers in no manner shall be entitled to assign its benefits to any third party or make changes in its constitution by including or removing partners****.*

….

SCHEDULE – (I) OF THE SAID PROPERTY REFERRED TO ABOVE

All that piece or parcel of land situated and lying underneath and appurtenant to Building Nos. B-3, B-4, and B-5 *bearing Survey No. 7 and City Survey No. 27 at village Goregaon, Siddharth Nagar, Goregaon (W) in Mumbai – 400 104 in the Registration Sub District of Bandra Bombay Suburban District* ***admeasuring 2543.49 square meters together with open space 1124.00 Sq. mtrs and 80.32 Sq. mtrs Tit-bit area, aggregating to 3747.81 sq.mtrs*** *& or thereabout and bounded as follows:*

On on towards the West by: 6.00 mts Widr Road

On or towards the South by: Patra Chawl (672 T/s)

On or towards the North by: 18.30 Mtr. Wide Road

On or towards the East by: Kapilavastu Housing Society"

[**Emphasis supplied**]

101. Bare perusal of the aforesaid clauses of the Development Agreement dated 26th September 2007, would show that the Respondent had specific obligations in the redevelopment process qua the Claimant Society, the relevant ones for the purpose of determining the Points under consideration, are:

(a) **Restricting the use of FSI to 2.4**:- Having regard to Clause 2 of the Development Agreement, the Respondent Developer was to carry out the redevelopment work of the construction pertaining to land described in **Schedule-1** thereof. Now, Schedule-1 describes the land by its Survey numbers admeasuring 2543.49 square meters **together with** open space 1124.00 Sq. mtrs and 80.32 Sq. mtrs Tit-bit area, **aggregating to 3747.81 sq.mtrs.** Clause 2 further envisages that the total FSI to be exploited out of the said plot is 2.4 FSI.

(b) The Respondent Developer was to foot all the expenditure in the process of redevelopment. [Clauses 42 and 47 in particular]

(c) The Respondent Developer was to construct in consonance with the applicable laws. [Clause 9(f)].

(d) Any revisions in plans could only be made with prior consultation with the Claimant Society. [Clauses 9(e) and 9(g) in particular]

(e) The Development Agreement between the parties was on a principal-to-principal basis and that none of the parties was

an agent of the other. [Clauses 9(k) and 10(53)(iii) in particular]

(f) The Respondent was to complete the construction of the new buildings within 25 months (22 months + 3 months grace period) from the date of the Commencement Certificate. [Conjoint reading of clause 10(1)(b) read with clause 10(22)].

(g) The Respondent Developer was to pay Rs.20,000/- per month for the first 25 months to each Member of the Claimant Society. [Clause 10(1)(a)].

(h) Beyond the period of 25 months, if the construction is yet incomplete, the Respondent Developer was to pay an increase of 10% rent over and above the agreed monthly rent of Rs.20,000/- until such time the members of the Claimant Society are put in possession of the new flats. [Conjoint reading of clause 10(1)(b) and clause 10(22)].

(i) In case of default on the part of the Respondent in respect of point (f) above, the Respondent is liable to pay a penalty of Rs.1,00,000/- per month to the Claimant Society. [Clause 22]

(j) The Respondent can sell its share of free sale component/ area after first providing 60 flats to the existing members of the said Society. Two buildings will be constructed, viz., Building A and Building B and the flats will be allotted to the members of the Claimant Society proportionately in these buildings as per their existing floors. [Clause 3]

2.4 FSI

102. Conjoint reading of Clauses 2 and 3 of the Development Agreement make it amply clear that the construction to be put up on the subject property was supposed to be building/s of 16 storeys with 6880 sq.ft. per floor totaling to 110080 sq.ft. (or 10226.77 sq.mtrs). Further, it is Clause 3 that envisages the construction of 2 such buildings, viz., Building A and Building B. After providing 60 flats admeasuring 860 sq.ft each to the members of the Claimant Society (totalling **51,600 sq.ft**), the Respondent Developer could sell the balance portion, i.e. 58,480 sq.ft.) as free sale component.

103. Reading Clause 2 with the Schedule-I and Clause 9(h) of the Development Agreement, it becomes clear to me that the parties had definitely agreed to restrict the exploitation of FSI to 2.4 of the subject plot. Now, this plot area to be developed is clearly specified in Schedule-I, that is to say, land admeasuring 2543.49 square meters **together with** open space 1124.00 Sq. mtrs and 80.32 Sq. mtrs Tit-bit area, **aggregating to 3747.81 sq.mtrs.** This FSI of 2.4 was thus pegged to the aggregate plot of 3747.81 sq.mtrs and not 2543.49 sq.mtrs as Mr. Narula has attempted to argue. This is also clear from a reading of Clause 9(h) of the Development Agreement which lays down that it was incumbent upon the Respondent Developer to execute the entire redevelopment project as contemplated in the Development Agreement *inter alia* by obtaining permissions for purchasing TDR and/or tit-bit land, payment of premiums, etc. or any other right to give full effect to this agreement, meaning to give full effect to the agreement to exploit not more than 2.4 FSI on land aggregating to 3747.81 sq.mtrs. Under Clause 9(h), the Respondent Developer is obligated to purchase the TDR and/or tit-bit land by paying requisite premiums so as to give full effect to

the agreement which stipulates that 2.4 FSI should be utilized having regard to the plot area of 3747.81 sq.mtrs.

104. In the aforesaid backdrop, it is rather surprising to see Respondent Developer's pleadings at paragraphs 3(xvii) to 3(xx) of the Counter Claim. In complete disregard to the understanding clearly struck under the Development Agreement, the Respondent Developer has blatantly proceeded on the basis that the developable area was 2543.49 sq.mtrs and 2.4 FSI was correlated with this area. Respondent Developer goes on to state that between June 2008 and June 2013, it completed the construction of 7 floors of Building A and 18 floors of Building B and by virtue of such construction the 2.4 FSI on the original plot area of 2543.49 sq.mtrs. stood completely utilized. On one hand, apart from being a misleading statement on what the 2.4 FSI was exactly related to, on the other hand, this pleading is also an admission that the Respondent Developer breached the limit of 16 floors that was mentioned in Clause 2 of the Development Agreement. Further, the pleading at paragraph 3(xviii) is completely contrary to the Development Agreement in as much as it goes on to state that with the consumption of 2.4 FSI, only 32 out of 60 members of the Claimant Society could be accommodated. There is absolutely no explanation in the pleadings as to why the Development Agreement at clause 2 lays down what it does, if 2.4 FSI was not going to be enough to accommodate all 60 members of the Claimant Society. The question that begs to be answered is, "Why then would the parties agree to restrict utilization of FSI to 2.4 if the same was not going to be enough to accommodate the 60 members of the Claimant Society?".

105. The stand taken by the Respondent Developer in the aforesaid paragraph of the Counter Claim, is therefore, completely contrary to

the Development Agreement which is infact meant to accommodate all 60 members' flats as also free sale component, both within 2.4 FSI, precisely because the 2.4 FSI is agreed[39] to be marked to the plot area being 3747.81 sq.mtrs and not 2543.49 sq.mtrs as the Respondent Developer would now contend, evidently to cover up and justify its breaches.

106. Moving further, the Respondent Developer makes yet another misleading statement in its Counter Claim at paragraph 3 (xx) that it purchased the tit-bit area and open land from MHADA totaling 1204.32 sq.mtrs and paid a premium in the sum of Rs. 8,18,03,435/- "*in order to make the project viable and accommodate the remaining 32 members of the Claimant Society..*". I find that the Respondent Developer has attempted to portray that it has bestowed an extra-contractual favour on the Claimant Society, whereas the correct position is that the Respondent Developer was indeed contractually obligated under clause 9(h) to obtain such permissions and purchase such TDR and/or tit-bit land, etc. to give full effect to exploiting 2.4 FSI calculated on 3747.81 sq.mtrs. I am of the clear opinion that the Respondent Developer has attempted to obfuscate the issues and paint a misleading picture by proceeding on the basis that FSI of 2.4 was to be calculated on 2543.49 sq.mtrs. That is plainly contrary to clauses 2 and 3 of the Development Agreement read with Schedule-I thereof.

107. Mr. Narula's contention as recorded herein above, where he multiplies 6880 sq.ft. per floor by 16 floors to arrive at 10226.77 sq.mtrs, which is more than 4 times 2543.49 sq.mtrs so as to argue that the Development Agreement always contemplated utilization of

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[39] On a conjoint reading of Clauses 2, 9(h) and Schedule-I of the Development Agreement.

FSI beyond 2.4 is therefore without any substance. It is accordingly rejected. It is rejected because this argument stems from a pleading made in the Counter Claim that either misreads or ignores the contractual provisions. This constructable portion of 10226.77 sq.mtrs. has to be pegged to land admeasuring 3747.81 sq.mtrs. That is how the project was perceived as viable in the first place, having regard to clauses 2 and 3 of the Development Agreement read with Schedule-I thereof. As per clause 3 of the Development Agreement, as noted by me herein above, the Respondent Developer was getting a sizeable portion in the free sale component.

108. As regards the evidence of RW-1 Mr. Jayesh Tanna given in cross examination, he has admitted in his answer to Q. 23 that Clause 2 of the Development Agreement was not complied with by the Respondent Developer. In his answer to Q. 19, RW-1 has stated that one of the reasons why the Respondent Developer could not complete the project within 22 months of the Commencement Certificate is that the area of the plot had to be corrected. I must note that this statement in cross examination as regards “area correction”, etc. is not founded in pleadings at all. Area correction has a definite connotation when it comes to an immovable property, depending on the facts of each case, for instance when the area mentioned in the revenue records is inconsistent with the factual position for whatever reason. Further, when RW-1 was asked in Q. 48 to explain his answer, he has given an answer which is inconsistent with the pleaded case of the Respondent Developer. He has stated to the effect that FSI could be sanctioned only on the original plot area of 2543.49 sq.mtrs initially and that a policy change took place only in or around 2015 which permitted the Respondent Developer to obtain FSI on the open area of land admeasuring

around 1124 sq.mtrs and tit-bit area of 80.32 sq.mtrs. He further states that this “correction” had to be done so that full development potential could be utilized. **Firstly**, this is contrary to the bare understanding between the parties as set out in Clauses 2, 3, 9(h) read with Schedule-I of the Development Agreement and **Secondly**, his assertion that this policy opened up only after 2015 is even contrary to MHADA’s offer letter of 2011 (Exhibits R-9 and R-10). The MHADA offer letter of 2011 (Exhibit R-9) also specifies the premium of Rs. 8,21,03,435/-, which the Respondent Developer claims to have paid at the relevant time, as it was obligated to pay having regard to Clause 9(h) of the Development Agreement. In my view, the Respondent Developer has, by way of an after-thought, taken a stand that its act of paying the said premium was “*to make the project viable*”.

109. Mr. Narula has attempted to argue that CW-1 has admitted in cross examination that the Development Agreement could never have contemplated utilization of only 2.4 FSI and that it was always understood that further FSI would be exploited. In particular he had invited my attention to CW-1’s answers to Q.116 and Q.117. However, on a perusal of these answers in the background of the entire controversy, I am unable to accept Mr. Narula’s contentions. A suggestion was put to the witness whether she agrees that for housing members of the Claimant Society in Building A, additional FSI would be needed. This suggestion was accepted by the witness. Merely on this count, it cannot be concluded that the parties had always agreed that FSI higher than 2.4 could be utilized. CW-1’s answer is to be understood in the context of the matter. As is noted hereinafter, it is an admitted position that originally under the Development Agreement, the members of the Claimant Society

were to be housed proportionately[40] in both the Buildings. However, subsequently, the Respondent Developer amended the plans and as per such amendment, all the 60 members of the Claimant Society were shown to be housed in Building B alone and despite this position, the Respondent Developer went ahead and sold as many as 42 flats in the said B-Wing to the outsiders. Respondent Developer's stand, as is discussed hereinafter, was that this was a mistake on the part of his architect. Be that as it may, it is also a matter of record that ultimately the parties entered into Consent Terms which again envisaged housing the members of the Claimant Society in two Buildings proportionately. It was at that particular stage of the redevelopment, on account of circumstances created by the Respondent Developer himself, that additional FSI was then required. Even then, this so called 'additional FSI' as the Respondent Developer calls it, was part of the development potential that the Respondent Developer was always contractually obligated to obtain in the first place having regard to Clauses 2, 3, 9(h) read with Schedule-I of the Development Agreement. It was in that context that CW-1's answer is required to be understood when she answered Q.116 and 117. Apart from that, the Claimant Society in its pleadings as also CW-1 in her evidence, has taken a consistent stand that the total FSI that could be exploited would be 2.4. I also find from the correspondence exchanged at the relevant time, the Respondent Developer has not taken the stand now taken before me at this stage in respect of this point.

110. To conclude the discussion on this point, I find that the Development Agreement at Clauses 2, 3, 9(h) read with Schedule-I clearly envisage that the utilization of FSI has to be restricted to 2.4.

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[40] Clause 3 of the Development Agreement

However, the same has to be understood to mean on plot area being 3747.81 sq.mtrs and not 2543.49 sq.mtrs as is sought to be suggested by the Respondent Developer. **I therefore answer Point (e) in the affirmative.**

111. Even otherwise, assuming that the answer to this Point (e) was in the negative and that the Development Agreement was construed to permit the Respondent Developer to go beyond the 2.4 FSI if the same was calculated on the basis of the plot area of 2543.49 sq.mtrs, then the same cannot be of any assistance to the Respondent Developer for at least **three reasons**. First reason being that even independent of this, the Respondent Developer has committed severe breaches of its obligations not only in terms of paying rents in lieu of transit accommodation to the members of the Claimant Society, but also in respect of constructing the project as per the timelines envisaged under the Development Agreement. As will be discussed herein after, I find that the Respondent Developer has cited the reasons of policy paralysis and supposed circumstances beyond its control merely as an excuse to hide that it was not at all ready or willing to abide by the terms of the Development Agreement. In his answer to Q.59, RW-1 has *inter alia* admitted that no challenge/representation was made by the Respondent Developer in respect of the alleged policy paralysis. Coming to the second reason, not only has the Respondent Developer amended the plans from time to time, and in my finding, without consent or consultation with the Claimant Society as required under Clauses 9(e) and 9(g) of the Development Agreement, but when MHADA issued an offer letter dated 14th

March 2014[41] on Respondent Developer's application, the Respondent Developer admittedly[42] failed to pay the premium mentioned therein. At this juncture, it is important to note two more aspects. This offer letter dated 14th March 2014 (Exhibit R-23) was initially not pleaded by the Respondent Developer in its pleadings. The Claimant Society therefore raised the contention that Respondent Developer was guilty of suppression. In the affidavit in lieu of examination in chief therefore, RW-1 specifically writes[43] "*I say that in response to the application of the Respondent,* ***MHADA issued an Offer letter*** *dated 14th March 2014, sanctioning 3.5 FSI on the original area of 3065.31 sq.mtrs* ***upon payment of Rs. 10,54,17,300/- by the Respondent Developer****."*. He then goes on to say that MHADA did not respond on account of their internal policy issues and failures, for which absolutely no iota of evidence is brought on record. He further says in his evidence in chief that this compelled the Respondent Developer to request the Claimant Society to amalgamate its redevelopment with Kapil Vastu CHSL Ltd. However, when RW-1 was confronted in cross examination whether or not the aforesaid amount of Rs. 10,54,17,300/- was indeed paid to MHADA, he answered in the negative. I therefore find that Respondent Developer did not pay the requisite premium at that time. Respondent Developer has also failed in paying the requisite premium subsequently when MHADA issued a revised Offer letter dated 16th April 2018, which has been discussed subsequently hereinafter. I therefore have no hesitation in holding that RW-1 has made statements in his Affidavit of evidence which are false to his knowledge. In my opinion, this is one of the many negative points

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[41] Pages 167 to 173 of Respondent's COD Vol-I
[42] RW-1's answer to Q.60 in cross examination.
[43] At paragraph 24 of RW-1's Affidavit of evidence

which does a complete disservice to Respondent Developer's endeavour in showing an unblemished conduct in the pursuit of its prayer for specific performance of the contract. Moreover, failure in paying premiums on multiple occasions, displays a total lack of readiness on the part of the Respondent Developer. The third reason, is that irrespective and independent of how one may interpret the understanding struck in the Development Agreement as regards the FSI potential, even the understanding crystallized in the Consent Terms subsequently, was breached by the Respondent Developer.

Events during the subsistence of the Development Agreement

112. Moving further on other Points, I find it to be an admitted position that the members of the Claimant Society vacated their flats in or around October / November 2007. The Respondent has not made any serious grievance or dispute about this particular factual position. From the correspondence available on record, it appears that the Respondent has not contended anywhere that there was any delay committed by the members of the Claimant Society in handing over the possession of the old building to the Respondent for commencement of the redevelopment process. There is also no grievance on the part of the Respondent Developer that the project was delayed on account of delays occasioned by the inter-se disputes amongst the Society members, as is the usual grievance in a case of redevelopment of this type. In any event, the Commencement Certificate in respect of the subject property was obtained as far back as 17th June 2008. This is also an admitted position.

113. As per clauses of the Development Agreement dated 26th September 2007, the Respondent was obligated to complete the redevelopment within 25 months of the date of Commencement Certificate i.e. 25 months from 17th June 2008. Accordingly, the said date by which the Respondent Developer ought to have completed the redevelopment envisaged under the Development Agreement dated 26th September 2007 would be on or around July / August 2010. It is an admitted position that the Respondent Developer never completed the project until the termination notice dated 9th June 2018 and thereafter as this litigation has progressed, there remained no question of it.

114. From the material available on record, it can be seen that the Claimant Society had initiated correspondence with the Respondent Developer since as early as 2010. The Claimant Society had, in the said voluminous correspondence raised several grievances about the shortcomings on the part of the Respondent Developer not only in so far as the deadline for the project completion but also in so far as the payment obligations under the Development Agreement are concerned. By a letter dated 13th May 2010[44], the Claimant Society pointed out that there was hardly any work going on at the site despite the Respondent's repeated promises. The Claimant Society has also pointed out that the Respondent Developer had not furnished the approved plan of Building 'A' as well as Building 'B' as well as the Shopping Centre. The Claimant Society has also pointed out that the Respondent Developer has failed in providing timely cheques for brokerage, transportation, shifting, etc.

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[44] Page 143 of Claimant's COD Vol-I

115. By a further letter dated 21st June 2011[45], the Claimant Society largely reiterated its grievance in respect of the slow pace at which the construction activity was taking place at the site. The Claimant Society had also put on record its disappointment with the excuses given by the Respondent Developer about non-availability of labour and rise in construction material prices. The Claimant Society also requested a copy of the detailed plan submitted by the Respondent Developer to the Municipal Corporation at the time of obtaining the IOD/CC. It was categorically put on record by the Claimant Society that it has not received a detailed plan submitted by the Respondent Developer at the time of obtaining the IOD/CC. At this juncture, I find that there is absolutely nothing brought on record by the Respondent Developer to controvert this assertion of the Claimant Society that the detailed plan was never submitted to the Claimant Society earlier. During the course of cross examination of CW-1, Mr. Narula had confronted the witness with a letter dated 25th November 2011 (Exhibit R-1C). As per that letter, the copies of the BMC approved plans appear to have been sent in November 2011. It is also further clear from the said letter that there was an amendment in the IOD.

116. Coming back to the letter dated 21st June 2011, the Claimant Society also requested the Respondent Developer to inform about the FSI granted by the authorities and the TDR purchased and loaded by the Respondent Developer. The Claimant Society also pointed out that since the Respondent had not completed the redevelopment on or before July/August 2010, it was liable to pay a penalty of Rs.1,00,000/- per month to the Claimant Society which the Respondent had failed to do as required under the Development Agreement. A specific grievance was also made that the

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[45] Page 147 of the Claimant's COD Vol-I

Respondent had extended construction meant for the neighbouring Society on the subject plot of the Claimant Society.

117. Subsequently, as the record points out, a stop work notice dated 4th August 2011[46] was issued by the MCGM which was received by the Claimant Society on 7th August 2011. From a perusal of the said Stop work notice, it is clear that the said notice was issued in respect of unauthorized work carried out by the Respondent Developer beyond the CC and the approval in respect of Building 'A'. It also appears that in the Building 'B', the Respondent Developer had carried out certain works, which were not as per the approved plan. In the pleadings of the Respondent as well as during the course of arguments, nothing has been brought on record by the Respondent to show that the said stop work notice was illegal or that it was challenged by the Respondent Developer. It is therefore amply clear to me that this was one of the first instances of the Respondent Developer breaching a provision of law which it had undertaken not to breach, having regard to Clause 9(f) of the Development Agreement. In my opinion, this is also a blemish on the conduct of the Respondent Developer in the pursuit of its prayer for specific performance.

118. By letter dated 14th November 2011[47], the Claimant Society yet again wrote to the Respondent Developer raising a grievance about the non-completion of the redevelopment despite the fact that about 4 ½ years had elapsed (at the relevant time) since execution of the Development Agreement. The Claimant Society also called upon the Respondent Developer *inter alia*, to provide several documents like

[46] Page 104 of the Claimant's COD Vol-I
[47] Page 157 of the Claimant's COD Vol-I

the NOCs from statutory authorities, copies of the Plans, copies of the IOD, copies of the CC for Building 'A', Building 'B' and the Shopping Complex, receipts of the payments made by the Respondent to statutory authorities and copies of the correspondence exchanged with the statutory authorities on behalf of the Claimant Society. The Claimant Society also called upon the Respondent to inform the tentative date by when the said project will be completed. The Claimant Society also called upon the Respondent to pay the arrears of the penalty as stipulated under the Development Agreement, which as on the date of the said letter, according to the Claimant Society was around Rs.25,00,000/-. The Claimant Society also called upon the Respondent Developer to increase the rent in lieu of temporary alternate accommodation in view of the gross delay. The Claimant Society has also insisted on execution of a Supplementary Agreement on account of changes in circumstances due to inordinate delay. The Claimant Society lastly raised a grievance about the substandard work carried out in the Building 'B' at the relevant time and the unauthorized wall that was built between the subject plot and the neighbouring plot in such a way that the same encroached upon the subject plot.

119. From the material brought on record by the Respondent Developer, the first time a draft of the Supplementary Agreement appears to have been shared with the Claimant Society was post November 2012[48], i.e. a year later. Admittedly, the Supplementary Agreement was ultimately never executed.

120. Atleast from the aforesaid correspondence noted above, it becomes clear to me that the Respondent Developer had not satisfactorily

[48] Letters at Exhibits R-16, R-17 and R-18

dealt with the queries raised by the Claimant Society in respect of the plans and sanctions obtained by the Respondent from the statutory authorities and the correspondence exchanged between them. From a holistic reading of the evidence on record, I find that the Respondent had committed a clear breach of the understanding contained at clauses 9(e) and 9(g) of the Development Agreement dated 26th September 2007. The Claimant Society had been making a request to the Respondent Developer since May 2010 till November 2011, having regard to the contents of the letters noted aforesaid. The least a responsible Developer would have done is to ensure a semblance of transparency between itself and the Claimant Society which has entrusted the job of redevelopment to it.

121. I also find that the Respondent Developer has amended plans from time to time unabashedly without prior intimation to the Claimant Society and without consulting the Claimant Society. Respondent Developer has not brought a single documentary evidence on record of this Tribunal to show that it submitted draft plans to the Claimant Society for its approval and requested for a discussion as contemplated under Clauses 9(e) and 9(g) of the Development Agreement. The extensive documentary evidence on record demonstrates that the Respondent Developer has shown disregard to the terms of the contract and has acted as per its own sweet will with impunity.

122. Similar position appears from the letters dated 12th March 2012[49] (Exhibit C-17F) and 9th June 2012[50] (Exhibit C-17G) addressed by the Claimant Society to the Respondent. A categorical grievance

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[49] Page 167 of the Claimant's COD Vol-I
[50] Page 171 of the Claimant's COD Vol-I.

has been made therein that inspite of several written and telephonic reminders, the Claimant Society was not getting any proper response from the Respondent Developer. The Respondent Developer has not brought any evidence on record to show that it had satisfactorily answered and attended to these grievances raised by the Claimant Society.

123. The Respondent Developer replied to the letter dated 9th June 2012 by its letter dated 26th June 2012[51], the contents of which read as under:

> "*Respected Sir,*
>
> *We are in receipt of your above dated letter we are in reply thereto we would like to state that* ***we had hardly worked for obtaining Amended Plans and Commencement Certificate*** *for further construction of your Society / Building known as 'Pearl CHS. Ltd' of which we have already received the Amended Plan dated 14/06/2012* ***of which copy is enclosed / submitted herewith this letter and the C.C. is in process which would be obtained at the earliest****.*
>
> ***We may also enclose the Barchart according to the new further construction for Wing A & B separately and also ensure you to complete the construction of your building / society as early as possible and may comply all statutory / legal formalities to give you peaceful possession****.*
>
> *We request you to take note of the above points and the queries related to the construction work and any other queries will be discussed in our joint meeting with our Architect, Contractor and your Committee Members to give you the best results of discussion within one month from today as per the convenience of all the parties.*

[51] Page 172 of the Claimant's COD Vol-I

***We also undertake to clear all the defects if any at the earliest, we expect the same co-operation from you to complete the project as early as possible**."*

[**Emphasis Supplied**]

From this particular reply, the Respondent had assured the Claimant Society that the redevelopment will be completed "*as early as possible*" as per the Bar chart that was enclosed with the said letter. This letter is from 2012. Even in 2018 when the termination notice dated 9th June 2018 was issued by the Claimant Society, the redevelopment was nowhere near completion. In my opinion, the Respondent Developer has taken the Claimant Society for granted and abused its dominant position by not honouring the promises made to the Claimant Society. Moreover, the last line of the said letter, which talks about clearing the defects "*if any*" is as vague as possible. This letter also indicates that the Respondent Developer yet again amended the IOD. While the Respondent has stated in the said letter that it expects cooperation from the Claimant Society, the said letter or any other letter addressed by the Respondent as will be discussed hereinafter, hardly sets out how the Claimant Society was in any way non-cooperative. It is not even the Respondent Developer's case that the members of the Claimant Society were in any way non-co-operative during the period between the execution of the Development Agreement and its termination on 9th June 2018, much less any evidence which would point towards the same. However, having observed this, I must also mention that much grievance has been raised by the Respondent subsequently in time, post-execution of the Consent Terms, in respect of non-grant of NOC to MHADA by the Claimant Society. That grievance however, as discussed hereinafter is totally without any substance.

<u>Amendment in the status of Project from composite to non-composite and amendment in plans</u>

124. This brings me to consider the case put up by the Respondent Developer that the fact that the project has been changed from COMPOSITE to NON-COMPOSITE and the fact of amendment in plans from time to time took place with the knowledge and approval of the Claimant Society. Mr. Narula's laborious submissions have been noted in detail herein above. In short, it was Mr. Narula's submission that the Claimant Society was always aware of the amendments in plans and were infact acting in furtherance thereof. He has submitted that it is dishonest on the part of the Claimant Society to suggest that the amendments in plans took place without their consent. These submissions now fall for consideration.

125. The Respondent Developer has pressed into service the letters dated 31st May 2008, 25th November 2011, 26th June 2012, 23rd July 2013 and 6th October 2014 to contend that plans were all along shared with the Claimant Society. Bare perusal of the letter dated 31st May 2008[52] makes it clear that the Respondent Developer is said to have shared copies of the plans <u>after</u> the IOD had been obtained on the same. IOD was obtained on 16th August 2007[53] (Exhibit C-40) whereas as per Respondent Developer's own showing the plans on the basis of which the IOD was obtained, were given to the Claimant Society under the letter dated 31st May 2008. Similar to what I have observed earlier while discussing the letter dated 25th November 2011 (Exhibit R-1C), there is absolutely no evidence brought on record by the Respondent Developer to show

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[52] Page 101 of Respondent's COD Vol-I
[53] Page 540 of Claimant's Additional COD

that these plans were shown to the Claimant Society prior to their submission to the authorities and they were deliberated upon after consulting with the Claimant Society.

126. Coming to the letter dated 26th June 2012[54] (Exhibit R-15) the contents of which are extracted herein above, I find that even in this instance the Respondent Developer on its own showing, is sending the amended plans to the Claimant Society after they have been put up for approval before the authorities and after the IOD has been obtained on the same. This brings me to the letter dated 23rd July 2013[55]. Consistent with its non-transparent conduct, even this letter makes it evident that the Respondent Developer got the MHADA layout sanctioned without prior consultation and approval with the Claimant Society. This letter explicitly states that Respondent Developer "*…will provide you copy of the same & we expect commencement certificate of the building by end of the August 2013.".* Moving forward, the letter dated 6th October 2014[56] is even more interesting. The Respondent Developer, although sends the amended plan dated 21st November 2013, it is silent about the MHADA offer letter dated 14th March 2014[57] which had come by then. The said offer letter was also given on the basis of the proposal dated 14th June 2013.

127. In this regard, I am of the considered opinion that Respondent Developer has clearly misused the Power of Attorney granted to it by the Claimant Society by repeatedly amending the plans without prior consultation and/or approval of the Claimant Society.

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[54] Page 145 of the Respondent's COD Vol-I
[55] Page 155 of Respondent's COD Vol-I
[56] Page 176 of Respondent's COD Vol-I
[57] Page 167 of the Respondent's COD Vol-I

128. Now, this brings me to the testimony of CW-1 Mrs. Maya Sejpal in her evidence in chief as well as cross examination which is sought to be profited from, by Mr. Narula. Paragraphs 15 to 18 of her Affidavit of Evidence were particularly pressed into service by Mr. Narula to argue that the Claimant Society was always aware of the concessions applied for by the architect of Respondent Developer. Even though Mr. Narula has painstakingly attempted to extract a contradiction from the witness, that too on a point which is completely insignificant in the larger scheme of things, I find that the witness has successfully withstood his cross examination. Mr. Narula's submissions seek to profit from the fact that in certain paragraphs of her evidence in chief, the witness' deposition can be interpreted[58] to mean that the Claimant Society was aware of the Concessions Report since 2012 whereas at some other paragraph it is mentioned by the Claimant Society that it obtained the same under RTI in 2014. The witness has properly clarified this position in her answers to Q.55 to 63. The witness has clearly stated that the Concessions report of 2012 were obtained under RTI in 2014 and that when the letter dated 26th June 2012 was served on the Claimant Society, it only came annexed with only one floor plan. This assertion was not tested further by Mr. Narula by putting a further question demanding more substantiation of the same. In any event, to my mind, whether the Claimant Society learnt of the concessions being applied for in 2012 or 2014 the same is immaterial in view of the fact that I find nothing on record which shows that the Respondent Developer disclosed/shared/provided the same for consultation with the Claimant Society prior to applying for the same. Moreover, in my opinion some of the questions put to

[58] On a verbal jugglery

the witness may have misled the witness in view of the fact that the legal suggestions contained therein are not strictly in consonance with law. For instance, at Q.24 a suggestion has been put to CW-1 that in view of the concept of fungible FSI being introduced, the sanctioned plans were required to be modified. This question pre-supposes the position that on the introduction of the fungible FSI regime, all plans in force had to compulsorily undergo modification. In my opinion, it would be incorrect to contend so in view of the last proviso and the first explanatory note below Regulation 35(4) that was introduced in January 2014. The concerned proviso and the explanatory note read as under:

> *"…..*
>
> *Provided, that this regulation shall be applicable in respect of the buildings to be constructed or reconstructed only.*
>
> *Explanatory Note:- i)Where IOD/IOA has been granted but building is not completed, this regulation shall apply only at the option of owner /developer,"*

129. It clearly stipulates that the fungible FSI regime was to apply only in respect of buildings **to be constructed or reconstructed only.** In cases where IOD had been granted, but the building was not completed, like in the present case, this regulation was to apply only at the option of the owner/developer. In my opinion, it is therefore clear that merely because Fungible FSI regime is introduced, all the ongoing constructions do not have to be modified. At least, the Respondent has brought no material on record to suggest that the competent authorities adopted a contrary policy which compelled the Respondent Developer to compulsorily modify the plans.

130. The upshot of the aforesaid analysis is that at the most Mr. Narula may have been able to show that at some point in time upon

Respondent's sharing, the Claimant Society became aware of the amendments in plans, applications for concessions and so on. However, what was required under the Development Agreement having regard to Clauses 9(e) and 9(g) was that the Claimant Society ought to have been consulted and its approval ought to have been taken in terms of the said clauses beforehand. That vital requirement is missing in the Respondent's conduct. Even RW-1 in his cross examination has ultimately been unable to answer the question whether or not the Respondent can show that it ever 'consulted' the Claimant Society prior to submission of plans and amendments thereof. It is one thing to say that the Claimant Society became aware and gained knowledge of a particular state of things and quite another thing to say that the said state of things are put in place with its consent and after due consultation. Both are not the same.

131. As regards Mr. Narula's argument that upon learning of the amendments in plans, the Claimant Society still acted in furtherance thereof and for this reason it estopped from raising any objections is concerned, I am unable to persuade myself to accept the same. This argument is devoid of merits and in any event is not of much assistance to the Respondent Developer. The correspondence on record would reveal that the Claimant Society had time and again raised objections. For instance, by a letter dated 16th August 2016[59] the Claimant Society revoked the Power of Attorney granted to the Respondent Developer. By a further letter dated 18th August 2016[60] (Exhibit C-16), the Claimant Society has made a detailed representation before MHADA requesting MHADA to cancel and

[59] Pages 131 to 136 of the Claimant's COD Vol-I
[60] Page 137 of the Claimant's COD Vol-I

withdraw the Offer letter dated 14th March 2014. The Claimant Society has recorded in the said letter that as per Clause 9 of the Offer letter dated 14th March 2014, no resolution of the General Body of the Claimant Society has been obtained. The Claimant Society has also recorded further breaches committed by the Respondent Developer *inter alia* in terms of allotment of flats to the members of the Claimant Society in one Building as against proportionately in two Buildings, unilateral change of status from composite to non-composite and forgery of a Commencement Certificate to show that CC has been obtained upto 14th Floor whereas in reality the same was only until the 7th Floor. On a reading of such correspondence, I am not inclined to accept Mr. Narula's argument that no objections were raised.

132. Furthermore, given the precarious position that the members of the Claimant Society were put in by the Respondent Developer, I cannot find fault with them if after learning about the various amendments in the plans, they still condoned the same and acted in furtherance thereof. On an assessment of the evidence, I have no hesitation in holding that these hapless members of the Claimant Society were caught between the devil and the deep blue sea. The members of the Claimant Society, most of whom are senior citizens, were desperately waiting for roofs over their heads. Cross examination of CW-1 and reading of the Q/As 75 to 77 thereof would suggest that Mr. Narula has sought to rely upon the letter dated 20th May 2013[61] wherein the Claimant Society has requested the Respondent Developer to not construct beyond podium + 18 floors despite the fact that the Development Agreement envisaged only 16 floors. A contention appears to have been raised on the basis of these

[61] Page 185 of the Claimant's COD Vol-I

particular answers that the Claimant Society acted in furtherance of the modification and accepted construction beyond 16 floors. Given however, the dominant position that the Respondent enjoyed in the transaction, I do not see this as a material circumstance at all. A party cannot be faulted for showing hope and giving chances to the other party in a transaction of this nature, so as to somehow salvage the situation. One has to be mindful of the fact that these members were out of their houses on one hand and not being paid the transit rent regularly before it was completely stopped later. Such was the position. In any event, assuming that this circumstance enures to the benefit of the Respondent Developer's case, even then the Respondent Developer has breached the Contract ultimately despite having his way all throughout. The Respondent Developer has failed the Claimant Society at every stage and for this reason the arguments put up on behalf of the Respondent Developer are thoroughly misconceived.

133. Further correspondence between the parties has also been discussed in detail herein below where the Claimant Society has repeatedly asserted that their prior approval or consent was never taken by the Respondent Developer in this regard. I also note from the correspondence exchanged at the relevant time, that the Respondent Developer has never specifically refuted the position that prior approval or consent of the Claimant Society was not taken by it. In view of the aforesaid analysis, **I answer Point (d) in the affirmative**. Insofar as Point (f) is concerned, I hereby record a finding that the Respondent submitted an application for concession and applied for revised plan using 3.39 FSI <u>without prior knowledge or approval of the Claimant Society</u>. Post-facto knowledge of the Claimant Society is immaterial in the absence of prior approval. It is

still a breach of the terms of the Development Agreement. **Point (f) is answered accordingly**.

<u>Other breaches on the part of the Respondent Developer</u>

134. Apart from the correspondence addressed by the Claimant Society from time to time insofar as the rental payments are concerned, there is other correspondence which also indicates that the Respondent Developer failed in honouring even the simplest of commitments. For instance, by a letter dated 22nd November 2012[62], the Respondent Developer *inter alia* assured that a sample flat would be ready in due course. This assurance was not honoured which compelled the Claimant Society to address a letter dated 21st October 2013[63], almost a year later, enquiring about the same.

135. Letters dated 25th January 2013[64], 15th February 2013[65] and 12th March 2013[66] also indicate that the Claimant Society was repeatedly following up with the Respondent Developer on all the pending obligations. Keeping in mind the terms of the Development Agreement, in its letter dated 25th January 2013 the Claimant Society has asked the Respondent to share copies of the approvals issued by the authorities for construction upto 21 floors in Building B so that the same can be approved by the General Body. The Claimant Society has also pointed out that in Building B, the floors upwards of 9th Floors have flats with extensions thereby violating the basic term of the Development Agreement that all the flats shall be of same size. The Claimant Society is also requesting the

[62] Page 146 of Respondent's COD Vol-I
[63] Page 187 of the Claimant's COD Vol-I
[64] Page 179 of Claimant's COD Vol-I
[65] Page 181 of Claimant's COD Vol-I
[66] Page 167 of Claimant's COD Vol-I

Respondent Developer to work out the benefits that need to be shared with the Claimant Society. Similar request has been repeated by the Claimant Society in its letter dated 15th February 2013. In the said letter, the Claimant Society has also called upon the Respondent Developer to pay the penalty amounts which were payable under the Development Agreement and for revalidation of the Bank Guarantee. Further, suffice it to say from the contents and the tenor of the said letter that I find the Respondent Developer to be totally opaque about its activities and intentions regarding the subject project. Similar is the case with the letter dated 12th March 2013.

136. Further, there is a letter dated 20th May 2013[67] addressed by the Claimant Society wherein yet another grievance is made that the Respondent Developer is not responding to various queries raised by the Claimant Society from time to time. As observed by me herein above, the members of the Claimant Society were driven and compelled to toe the line with the Respondent Developer given the dominant position he enjoyed in the contract at the relevant time. Such queries are in respect of the Supplementary Agreement which was in contemplation at the relevant time, the abnormalities / defects / faults in Building 'B', requests in respect of furnishing approval letters / sanction letters issued by statutory authorities for constructing 21 floors in Building 'B', etc. Under the said letter dated 20th May 2013, the Claimant Society has also made it clear to the Respondent that there shall be no amalgamation / merger of the property of the Claimant Society with the neighbouring Society. A reminder letter appears to have been sent on 21st October 2013[68]

[67] Page 185 of the Claimant's COD Vol-I
[68] Page 187 of Claimant's COD Vol-I

followed by letter dated 4th November 2013[69]. In the said letter dated 4th November 2013, the Claimant Society yet again pointed out that the certified copies of the approved plan in respect of Building 'B' and NOC from MHADA and MCGM for construction of Building 'A' and Shopping Complex had not been provided to the Society till that date.

137. From the record, there appears to be a letter dated 12th September 2014[70] addressed by the Respondent wherein the Respondent has stated that an FSI upto 2.5 has been completely utilized in the present structure standing on the subject property. This structure is Ground + 21 floors of Building 'B' and Ground + 7 floors of Building 'A'. The Respondent also insists vide this letter that there is a need to amalgamate with the neighbouring property and load the FSI arising from that property on the subject property. Three options have been given by the Respondent Developer to the Claimant Society with regard to the amalgamation with the neighbouring property. It is therefore clear beyond any doubt to me that the after having committed several breaches of the Development Agreement, the Respondent was giving options to the Claimant Society thereby attempting to force the Claimant Society to choose any of them, all of which require amalgamation with the neighbouring plot. From the record, it is evident that the Respondent Developer's intention all along was to amalgamate with the neighbouring plot, presumably for its self-serving interests.

138. In respect of the usage of 2.5 FSI on the subject property, the Claimant Society has clarified its stand atleast as earliest as on 28th

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[69] Page 188 of Claimant's COD Vol-I
[70] Page 204 of Claimant's COD Vol-I

January 2015[71] (Exhibit C-17BB) wherein the Claimant Society has reiterated that as per the Development Agreement, the Respondent is obligated to complete the project within 2.4 FSI (and not 2.5 FSI) to put all the original 60 members in their respective new flats. It is also recorded therein that the Respondent continues to avert the queries raised by the Claimant Society from time to time. The Claimant Society has also put it on record that the Respondent Developer has obtained no permission from the Claimant Society in so far as usage of 3.5 FSI is concerned. This letter is responded to by the Respondent by its letter dated 5th February 2015[72] (Exhibit C-17CC). The Respondent reiterates therein that 2.5 FSI has already been consumed on the subject property and that further development will require permission for the usage of 3.5 FSI. The Respondent has sought to shift the blame of its delay on changes in the policies by MHADA and that the Claimant Society must now accommodate the Respondent by exploring various options. I find that this is akin to putting someone under a disadvantageous position in the first place and then offering rescue options which are further likely to jeopardize that person while presumably furthering one's own self-interests. In my opinion, this is not only a breach of the Development Agreement but also an attempt to make gains at the cost of the members of the Claimant Society. There has been no cross examination of CW-1 on behalf of the Respondent Developer on any of this correspondence. Respondent Developer has also not brought any evidence on record to show this correspondence does not accurately portray the state of affairs as it stood at the relevant time.

[71] Page 213 of the Claimant's COD Vol-I
[72] Page 215 of the Claimant's COD Vol-I

139. Be that as it may, I find from the documentary evidence available on record that the Claimant Society continued to engage with the Respondent Developer, presumably with the fervent hope that the Respondent will come around and the members of the Claimant Society would finally have a permanent roof over their heads.

140. The Claimant Society has addressed a letter dated 9th February 2015[73] in response to the Respondent's letter dated 5th February 2015. The Claimant Society has taken a categorical stand at paragraphs 2, 3 and 4 of the said letter, which are reproduced under for the sake of brevity:

> *"2. You say (as per today's scenario FSI upto 2.5 has been consumed whereas as Per Development Agreement you were to complete two buildings of 16 floors (16 + 16) inclusive of 60 flats within the FSI of 2.4. Hence immediately allot these 60 flats to the Members. Now you, yourself saying you have consumed 2.5 FSI which is 0.1 FSI higher then what is mutually agreed.*
>
> *3. All options and offers presented by you at our special general body meeting in September 2014 has been rejected in front of you by members **because you did not present to members any deadline for possession of their flats**.*
>
> *4. You have mentioned that due to MHADA policy you have faced hardships in Completing the project, **please explain whether MHADA asked you to increase number of floors from 16th 18th floors**. Change the size of flats measurements, designs etc etc. **Also please let us know when did we give permission to you do the same**."*

[Emphasis supplied]

From the aforesaid paragraphs which have not been met with any effective traverse in the contemporaneous correspondence or in the subsequent evidence, I find that the Claimant Society was not

[73] Page 217 of the Claimant's COD Vol-I

presented with any concrete deadline for the possession of their flats when the Respondent had offered several of its 'options' or 'proposals' to supposedly rescue the Claimant Society from a position which was created by the Respondent itself as will be noted hereinafter. The Claimant Society has also categorically taken a stand that the Respondent unilaterally increased the number of floors of the Buildings from what was envisaged under the Development Agreement dated 26th September 2007. Vide the said letter, the Claimant Society has also categorically informed the Respondent that if reply is not received from the Respondent, the Claimant Society will invoke the remedies available to it under the Development Agreement. The Claimant Society has also pointed out that the arrears of rent and brokerage had not been cleared by the Respondent Developer.

141. From the perusal of the aforesaid letter, it also appears that the Claimant Society had even attempted to accommodate the Respondent by suggesting that all members of the Claimant Society be put in possession in Building 'B' by completing the same. This would have obviated the requirement of paying rents by the Respondent. It also appears to have been suggested by the Claimant Society that after completion of Building 'A', some members can also shift to Building 'A' without any hassle. This was presumably suggested by the Claimant Society on account of the fact that the Respondent would have created third party rights in respect of Building 'B'. A prudent developer, especially the one who finds himself in a self-created difficult situation, would have normally accepted this facility/workable solution[74] as was offered by the

[74] Para 5(d) of letter dated 9th February 2015 at page 219 of Claimant's COD Vol-I

Claimant Society. It is, however, undisputed that this suggestion was not taken forward by the Respondent Developer.

142. Going further into the documentary evidence, I find that since no meaningful response was received from the Respondent, the Claimant Society was therefore constrained to address a letter dated 14th February 2015[75] calling upon the Respondent to clear the rents and respond to various queries raised by the Claimant Society, failing which remedial action as per clause 22 of the Development Agreement will be taken. Not satisfied with the response of the Respondent vide letter dated 18th February 2015[76], the Claimant Society again addressed a letter dated 22nd February 2015[77]. Vide the said letter dated 22nd February 2015, the Claimant Society yet again reiterated that the permissible FSI utilization as envisaged under the Development Agreement was only 2.4 and not 2.5. It was further pointed out that the Respondent was to complete 16 + 16 floors in Building 'A' and Building 'B' (with four flats on each floor) within the permissible 2.4 FSI. A grievance has also been made as to why 120 flats could not be completed by utilizing 2.4 FSI. It was also *inter alia*, pointed out that the Respondent has gone ahead and increased the number of floors in Building 'B' without the prior permission of the Claimant Society.

143. The Claimant Society has also addressed a legal notice dated 19th March 2015[78] inter alia, raising grievance about consumption of additional FSI without prior informed consent, changes in layout plan without consent, insistence on amalgamation with another Society,

[75] Page 222 of the Claimant's COD Vol-I
[76] Page 225 of the Claimant's COD Vol-I
[77] Page 226 of the Claimant's COD Vol-I.
[78] Page 229 of the Claimant's COD Vol-I

non-payment of rent / brokerage / corpus and the penalty which the Respondent has failed to pay as per clause 22 of the Development Agreement. The Respondent replied to the said legal notice by its letter dated 31st March 2015[79], raising therein several contentions. On a careful scrutiny of the contents of the said letter, I find that the Respondent had been very vague. The Respondent had not at all effectively traversed or dealt with what is stated in the legal notice dated 19th March 2015. The Respondent had also not effectively dealt with why the project, which was to be completed within 25 months from the date of receipt of the first Commencement Certificate, had not been completed by then. The Respondent had also not effectively dealt with the Claimant Society's contention that under the Development Agreement, the Respondent was only required to construct 16 floors per building. At paragraph 4 of the said letter[80], the Respondent has sought to justify changing the layout to include additional floors in view of the introduction of the fungible FSI regime in 2012. Pertinently, there is an admission in the said paragraph that the said additional floors were decided to be constructed by the Respondent without the express consent of the Claimant Society. For the sake of brevity, paragraph 4 is reproduced as under:

"4. *In respect of clause No.4 under reply we say that original our client had allotted to make two buildings of 16 storey with four flats per floor i.e. total of 128 flats, but as you are aware that policies have changed since our Development Agreement was executed and as on date we are making two towers of 21 storeys (3 podium plus 18 residential floor) with four flats on each floor i.e. total of 144 flats – 8 flats for refuge area i.e. 136 flats. We say that in 2007 there was minimum parking requirement and fungible F.S.I. rule which was not followed*

[79] Page 244 of the Claimant's COD Vol-I.
[80] Page 245 of the Claimant's COD Vol-I

> *by M.C.G.M. Now since 2012, fungible rule is followed and staircase area, lobby area, passage area, flower bed and dry balance are counted in F.S.I. and we have to pay premium to M.C.G.M. on current ready reckoner rate.* ***<u>So there are hardly any changes to the original terms agreed.</u>*** *The society can check the amount we have spend on premiums, construction cost, rents etc. and till now the project is in a loss."*

[**<u>Emphasis Supplied</u>**]

From the aforesaid, it is clear that the Respondent itself admits that there was no express consent from the Claimant Society but there are "*hardly any changes*" to the original terms agreed.

Further, the contents of paragraph 10 of the said letter does not inspire confidence in as much as on one hand, the Respondent Developer had kept on insisting amalgamation with the neighbouring plot while at paragraph 10, the Respondent feigns that it is not forcing the Claimant Society for amalgamation but the same is the need of the hour as it is beneficial for the progress of the redevelopment work. Further at clause (g) of paragraph 10[81], the Respondent states that it will "*try to give possession*" to the Claimant Society "*as early as possible*" after fulfillment of all requirements by the Claimant Society as demanded by the Respondent. In my opinion, the conduct of the Respondent has not been satisfactory and unblemished at all. I find that the Respondent Developer was always lacking in both, readiness as well as willingness to perform as per the originally agreed terms.

144. From the documentary evidence, it also appears that the Claimant Society was further constrained to encash the bank guarantee which was given by the Respondent in a sum of Rs.5 crores. This was

[81] Page 248 of the Claimant's COD Vol-I

presumably done as the Respondent had not cleared the arrears of the payment obligations under the Development Agreement. This invocation was under a letter dated 26th August 2015[82]. The Respondent has thereafter filed a suit being Suit (L) No.921 of 2015 along with a Notice of Motion (L) No.2457 of 2015 seeking injunction on the invocation of bank guarantee. By an order dated 22nd September 2015[83], the Hon'ble Bombay High Court, on well settled principles governing injunctions in respect of invocation of Bank guarantees, refused to grant such injunction. Although the said order dated 22nd September 2015 was primarily in respect of refusal of ad-interim injunction against invocation of bank guarantee, the Hon'ble Bombay High Court has also expressed *prima-facie* opinion that the Respondent was in clear breach of its contractual obligations and has consumed additional FSI and constructed floors beyond permissions without the consent of the Claimant Society. The Hon'ble Bombay High Court has expressed this prima facie opinion[84] after referring to extensive correspondence which was brought to its notice. This *prima facie* opinion was expressed by the Hon'ble Bombay High Court on the attendant circumstances as they existed at the relevant time. In my Order dated 17th September 2018 I have specifically referred to this and have opined therein that I had absolutely no reason to take any other view than what is expressed by the Hon'ble Bombay High Court, especially in view of what was observed by me at that stage of the arbitration. Since then, a lot has happened in the present arbitration; most important of all, the parties went to trial and led evidence. <u>The documentary as well as oral evidence now available on record compels me to take the same</u>

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[82] Page 111 of the Claimant's COD Vol-I
[83] Page 117 of the Claimant's COD Vol-I
[84] Paragraphs 6, 12, 13, 14 and 15 of the Order dated 22nd September 2015 passed in Notice of Motion (L) No.2457 of 2015

view again. In other words, there is no sufficient ground to dislodge the opinion expressed earlier.

145. Coming back to the Bank Guarantee, ultimately the same was permitted to be invoked by the Claimant Society, who appropriated a sum of Rs.2.50 crores towards the pending arrears of rent and Rs.2.50 crores towards the share of profits that were to arise from the utilization of additional FSI.

146. Claimant Society also received a letter dated 16th June 2016[85] (Exhibit C-17MM) from MHADA informing that one Mr. Jayant Sengupta has filed a complaint in respect of the project. The said complaint and its annexures are on record. It has not been argued before me that this particular complaint is false. Proceeding on this basis, it appears from the said complaint that the Complainant who was 82 years old at the said time had already parted with above 60% of the sale consideration towards a flat on the 9th Floor in Building A which was to be delivered to him in December 2015. He has made a grievance about the project being stalled and there being no construction beyond 7th floor. From the annexures of the said Complaint, it appears that there is a Commencement Certificate which shows that permission has been obtained for building upto 14th floor. As is clear by now, that the said CC was forged and that it was only granted until 7th Floor. This paints a very poor picture about the conduct of the Respondent Developer. It is evident that Respondent Developer has induced innocent senior citizens to part with large sums of money on the basis of a forged document. In these set of circumstances and on the basis of such cumulative evidence on record, I cannot hold that the Respondent Developer's

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[85] Page 263 of the Claimant's COD Vol-II

conduct is unblemished even if I were to give the widest latitude and the widest benefit of doubt to it on the basis of preponderance of probabilities.

147. It is pertinent to note that until this point in time, the Claimant Society had not terminated the Development Agreement. In the meantime, however, the Claimant Society by its letter dated 16th August 2016[86] revoked the Power of Attorney dated 26th September 2007 due to the consistent breaches by the Respondent Developer, more particularly those set out at paragraph 6[87] and its sub-paragraphs of the said letter. At paragraph 6(c) of the said letter, the Claimant Society has stated that the Respondent deliberately suppressed the Commencement Certificate for construction upto the 14th floor in Building 'A' and that the Respondent has constructed only 3 podiums + 4 floors. It is also stated therein that if the Respondent has constructed 3 podiums + 11 floors as per the CC, then 43 flats would have been available out of which 32 could have been allotted to the members of the Claimant Society in Building 'A'. At this point in time, especially from the averment made in the aforesaid paragraph, it appears that the Claimant Society was under the impression that Commencement Certificate has been obtained upto 14th floor in Building 'A', which has been merely suppressed by the Respondent. However, as noted hereinabove while recording the case set out in the pleadings, the Claimant Society ultimately learnt that the said CC itself was forged and therefore non-existent in respect of the 14th floor in Building A.

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[86] Page 131 of Claimant's COD Vol-I
[87] Page 135 of the Claimant's COD Vol-I

148. The Claimant Society also addressed a letter dated 18th August 2016[88] (Exhibit C-16) to MHADA placing on record its grievance about the various illegalities supposedly committed by the Respondent Developer. A request was also made to MHADA to cancel the Offer letter dated 14th March 2014.

149. The Respondent addressed a legal notice dated 2nd September 2016[89] in response to the revocation of the Power of Attorney by the Claimant Society. From the perusal of contents of the said legal notice, it appears that the Respondent has not given a satisfactory explanation about the Claimant Society's contention about the breaches on the part of the Respondent. The Respondent however, has blamed the changes in MHADA policy and its supposed internal irregularities for the delay in completion of the project. The Respondent also attempts to persuade the Claimant Society for amalgamation with the neighbouring property. The Respondent has also alleged that the Claimant Society is not co-operating in so far as the amalgamation is concerned. It is further averred that additional FSI of 3.5 is required to complete the construction of the remaining floors beyond 7 floors of Building 'A' and that the additional FSI of 3.5 can only be obtained if MHADA lifts the suspension on its policies or if the Claimant Society agrees to amalgamate the subject property with the adjoining plot and load the FSI available on that plot to the subject property. What is pertinent to note here is that at paragraph 10[90] of the said notice, it is clearly admitted by the Respondent Developer that the CC in respect of Building 'A' for construction beyond 7 floors is still awaited. The allegation of the

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[88] Page 137 of the Claimant's COD Vol-I
[89] Page 295 of the Claimant's COD Vol-II
[90] Page 300 of the Claimant's COD Vol-II

Claimant Society that the Respondent has suppressed the CC issued for construction upto 14 floors in Building 'A', is specifically denied[91].

150. The contents of this particular legal notice and the stand taken therein are required to be viewed seriously. In so far as the issue of CC in respect of Building 'A' being forged to reflect that the permission has been granted for construction upto 14 floors, Respondent Developer's stand at the interim stages of the present arbitral proceedings was that the same was on account of a clerical error committed by the clerical staff of the Respondent as is discussed hereinafter. The same does not appeal to me for reasons given herein after.

Claimant Society approached the Hon'ble Bombay High Court

151. Be that as it may, the Claimant Society filed an Arbitration Petition under Section 9 of the Act being Arbitration Petition No.160 of 2017 (erstwhile Arbitration Petition (L) No.1196 of 2016) for various reliefs, as more particularly contained therein. A consent ad-interim order dated 27th October 2016[92] was passed in the said Arbitration Petition wherein the Hon'ble Bombay High Court directed the Respondent to make certain disclosures and file an Affidavit in reply. An Affidavit in reply dated 22nd November 2016 was filed by the Respondent in the said Arbitration Petition. I am referring to the said Affidavit in Reply dated 22nd November 2016 since it forms part of the pleadings pertaining to the interim stages of the arbitral proceedings and the same are on record. It would also be relevant to mention here that at paragraph 6 of the Counter Claim, the Respondent Developer has

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[91] Paragraph 12(n) at Page 308 of the Claimant's COD Vol-II.
[92] Page 323 of the Claimant's COD Vol-II

itself made the contents of the said pleadings a part and parcel of its case in the Counter Claim.

152. Coming to the Affidavit in Reply dated 22nd November 2016 filed by the Respondent Developer to the Arbitration Petition No.160 of 2017 (erstwhile Arbitration Petition (L) No.1196 of 2016), I find that apart from taking the same vague and evasive stands as taken in its earlier correspondence in respect of policy changes by MHADA which allegedly delayed the project, non-cooperation by the Claimant Society for amalgamation with neighbouring plot which is supposedly the best solution, etc. a very interesting averment is made at paragraph 28 of the said Affidavit in reply filed by the Respondent. The said averment reads that although the Claimant Society has annexed a copy of the CC showing that Building 'A' on subject property has received sanctioned for 14 floors, it is factually incorrect and that the said incorrect CC is annexed to one of the flat purchase agreements executed by the Respondent with a third party by one of the employees of the Respondent (Subhash Mhatre) in order to get the same registered. The said employee is stated to have done the same "*at the relevant time*" without discussing the same with the Respondent and had changed the endorsement on the CC from 7 floors to read 14 floors. It is also further averred that there are various other agreements in respect of flats proposed to be sold even beyond 14 floors of Building 'A' and in the said Agreements, the CC sanctioning construction of only upto 7 floors is annexed. It is on this ground that it is pleaded by the Respondent that there is only an error and no forgery. As noted hereinabove, this is totally unbelievable for more than one reason. ***Firstly***, this clarification did not form part of the legal notice dated 2nd September 2016. ***Secondly***, it has been brought on record only when an order

of disclosure has been passed by the Hon'ble Bombay High Court. ***Thirdly***, the allegation/averment that an error is committed by one Mr. Subhash Mhatre is set out in an Affidavit sworn by one Mr. Deep Tanna and not by Mr. Mhatre himself. ***Fourthly***, at the stage of trial, some explanation, justification or clarification ought to have been brought before me by leading evidence of the appropriate person. That has also not been done. This only leads me to draw an inference that this has happened at the behest of and with the knowledge/active involvement of the Respondent Developer. Again, this reflects very poorly on the conduct of the Respondent in its pursuit of the prayer for specific performance. In totality of these circumstances, especially in view of the categorical admission by the Respondent that it has sold flats beyond 14 floors despite the fact that the CC is only granted upto 7 floors in Building 'A', the conduct of the Respondent is far from being unblemished. It is full of blemishes. At least until this time i.e. November 2016, the Claimant Society cannot at all be faulted with for having no confidence or faith in the Respondent Developer.

153. The Hon'ble Bombay High Court thereafter passed an Order dated 7th December 2016[93] calling upon the Executive Engineer, Building and Proposal (WS), P Ward of MCGM to produce original records pertaining to the project undertaken by the Respondent to redevelop the subject property.

154. In view of the above analysis and discussion, I hereby record my finding that the Respondent Developer has indeed committed severe breaches of its obligations till the stage when Consent Terms had not been entered into. Resultantly, **I hold that the Respondent**

[93] Page 325 of Claimant's COD Vol-II.

<u>Developer has breached the terms of the Development Agreement</u>.

<u>Consent Terms, the events subsequent to their execution, the Contempt Petition and the question of grant of NOC by the Claimant Society.</u>

155. Further documentary evidence and chronology indicates that the parties arrived at an amicable settlement and executed Consent Terms dated 16th May 2017[94]. The same were taken on record by an Order dated 7th July 2017 passed by the Hon'ble Bombay High Court in Arbitration Petition No. 160 of 2017. Paragraph 1 of the said Order records that the Respondent shed its status as a partnership firm and got itself incorporated as a private limited company pursuant to a Certificate of Incorporation dated 25th January 2017 issued by the Registrar of Companies. In other words, the partners of the partnership firm that the Respondent earlier was, cloaked themselves with a corporate veil. However, it is to be noted that this circumstance has taken place at a point in time after the aforesaid Orders have been passed by the Hon'ble Bombay High Court. I find that this is again a breach of a specific clause of the Development Agreement, namely clause 10(53)(iv)[95].

156. Be that as it may, coming back to the Consent Terms dated 16th May 2017 executed between the parties, some of the relevant clauses thereof are as under:

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[94] Page 326 of Claimant's COD Vol-II
[95] Page 22 of the Respondent's COD Vol-I

“1. Without prejudice to the rights and contentions of both the parties, it is agreed that, the Respondents shall pay to each Member of the Petitioner and such each member shall accept the arrears of rent @ Rs.40,000/- (Rupees Forty Thousand only) per month for the Period from 1st December 2014 to 31st May 2017. It is hereby agreed that, thereafter from 01st June, 2017, each member shall accept further monthly compensatory rent at the same rate of Rs.40,000/- (Rupees Forty thousand only) per month per member from the date hereof until the members are put in possession of their respective flats in the proposed two buildings pursuant to receipt of occupation certificate by the stipulated dates more particularly described hereinafter.

2. It is agreed that, at the time of filing these presents in Court, the Respondent shall hand over to the Petitioner 7 Post Dated Cheques of Rs.24,00,000/- each towards the compensatory rent for 7 months for the period of 1st June 2017 to 31st December, 2017 payable to the 60 members of the Petitioner.

3. It is agreed that, the following arrears of rent is due and payable to the Petitioner’s members:

A.	*2 months rent for October & November 2014 of member Mr. A. Jha*	*Rs. 80,000.00*
B.	*1 month rent for November 2014 due to member Mr. L. Lewis*	*Rs. 40,000.00*
C.	*26 months rent from 1st December 2014 to 31st May 2017 X 60 members*	*Rs. 7,20,000.00*
	Total Rent Due	*Rs. 7,21,20,000.00*

4. It is also agreed that the Respondents shall pay the Petitioner’s members, arrears of brokerage equivalent to one Brokerage @ Rs.40,000/- per brokerage per per member. It is further agreed that, the Respondents shall continue to pay further, a maximum brokerage @ Rs.40,000/- per eleven month period thereafter from 01-2-2017 on actual basis till the members are put in possession of their respective flats in the proposed two buildings, only after receipt of occupation certificate or part occupation certificate as the case may be.

5. *It is further agreed that, the Respondents were liable to pay a penalty of Rupees One Lakh per month from September, 2010 being the deadline for handing over possession of the flats, to January 2017 to the Petitioner which amounted to rs.77 lakhs. Out of this penalty, the Respondents shall adjust Rs.60/- lakhs payable by 60 members against the parking cost (i.e. Rupees one lakh per member) and pay the balance Rs.17/- lakhs to the Petitioner as per the payment schedule appearing hereinafter:*

   Balance Penalty payable …. Rs.17,00,000.00

6. *Therefore the total amount payable to the Petitioner is as follows:*

a)	*Towards outstanding rent upto May 2017*	*= Rs.7,21,20,000.00*
b)	*Towards penalty after adjusting wth parking.*	*= Rs.17,00,000.00*
c)	*Towards outstanding brokerage upto January 2017*	*= Rs.24,00,000.00*
	Total:	*= Rs.7,62,20,000.00*

7. *It is further agreed and recorded that, the Petitioner has already encashed Bank Guarantee bearing No.316201GL0000108 and received a sum of Rs.5 crores from Union Bank of India, Byculla Branch. Out of the said sum of Rs.5 crores received from Union Bank of India, a sum of Rs.2.5 crores shall be adjusted against Rs.7,62,20,000/- (Rupees Seven crores sixty two lakhs twenty thousand only) being the total payable arrears of rent, brokerage and penalty as per clause 1, 2 and 3 hereinabove and the balance arrears amounting to Rs.5,12,21,000/- shall be paid to the Petitioner in the following manner in 4 installments.*

8. *<u>SCHEDULE OF PENALTY OF RS. 5,12,20,000/-.</u>*

   A. *Rs.1,00,00,000.00 (Rupees one crore) on the day of signing Consent Terms by 'Pay Order' in the name of "Goregaon Pearl Co-Operative Housing Society Limited in*

the name of Goregaon Pearl Co-Operative Housing Society Limited for the amounts stated hereinafter, along with 7 postdated cheques of Rs.24,00,000/- towards the compensatory rent for 7 months.

B. Rs.1,12,20,000.00 (Rupees one crore twelve lakhs twenty thousand only) on or before 30th August 2017.

C. Rs.1,00,00,000.00 (Rupees one crore) on or before 30th September 2017.

D. Rs.1,00,00,000.00 (Rupees one crore) on or before 30th October 2017.

E. Balance of Rs.1,00,00,000.00 (Rupees one crore) within 120 days from the date on 30th November 2017.

*F. **Any default in the aforesaid payments will be considered as an "Event of Default" and will attract simple interest @ 15 percent per annum** calculated on a per day basis till the date of payment which shall be without prejudice to the rights of the members to resort to legal remedies against such default. Respondents shall be liable for Default action which is more particularly defined hereinafter.*

*9. It is further agreed that the balance sum of Rs.2,50,00,000/- out of Rs.5,00,00,000/- (Rupees Five Crores only) received from Union Bank of India on encashment of bank guarantee, shall be adjusted against Petitioner's part share of profit receivable from the accrued benefits receivable by the Respondents from the additional FSI under any nomenclature made available in the said project. Hence, it is agreed by both parties that, immediately on filing these Consent Terms in the Hon'ble High Court **as a precondition to granting their NOC for applying to MHADA/MCGM for further FSI**, the Respondents shall hand over to the Petitioner an unconditional allotment letter to the Petitioner for unencumbered Flat No.1802 admeasuring minimum 863 sq. ft. minimum 1006/1010 sq. ft. carpet area which is intended to be increased to 1006 sq. ft. (carpet area) in building 'A' which shall not be a part of refuge area, along with one parking, towards agreed balance share of profit to the Society in respect of additional FSI made available by MHADA/ MCGM under any nomenclature in respect of the subject property mentioned in the title of these presents. The Petitioner shall*

be at liberty to sell this allotted flat at any time thereafter and appropriate the consideration thereof. The Petitioner shall not require any No Objection from the Respondents for sale of this flat.

12. *It is declared and confirmed that the Respondents shall be entitled to re-develop the subject property by constructing two Buildings 'A' and 'B'. Building 'A' consisting of ground plus 3 podium floors and 20 upper floors and Building 'B' consisting of Ground plus 3 podium floor and 18 upper Floors within the specified sanctioned FSI and additional FSI from MHADA / MCGM under any nomenclature. However, the area of the 28 flats in building 'B' reserved for the members of the Petitioner shall be a minimum 1006 sq. ft. carpet area as per the approved plan dated 21-11-2013 and 32 flats in building 'A' reserved for the members of the Petitioner, shall be a minimum of 1006/1010 sq. ft. carpet area.* ***The Respondents agree that, they shall complete the project within the additional FSI from MHADA / MCGM under any nomenclature which is adequate to complete the project and not stop work on the grounds of insufficient FSI.*** *Under no circumstances shall the Respondents construct beyond ground plus 3 podium floors and 20 upper floors in building 'A' and ground plus 3 podium floors and 18 floors in Building 'B' irrespective of availability of balance FSI.* ***Annexure "B"*** *is the list of original members of the Petitioner and the list of allotment of flats.*

13. *The Respondents further declare and confirm that they shall not amalgamate the subject property with the adjoining property of Kapilavastu CHSL or any other property and the re-development will be completed without amalgamation and restricted to construction of two buildings viz. buildings 'A' and 'B', Building 'A' consisting of ground plus 3 podium floors and maximum 20 upper floors plus 18 upper floors within the additional FSI from MHADA / MCGM under any nomenclature. The Respondents shall not at any time hereafter broach the topic of amalgamation NOR ask the Petitioner for permission to amalgamate with any other property.*

17. *The Respondents shall provide flats to the 32 members in 'A' Building having a carpet area of minimum 1006/1010 sq. ft., which shall be equivalent to the area of flats provided to the members in Building 'B' of 1006 sq. ft. carpet area as per last*

approved plans dated 21-11-2013. The Respondents however agree that, although they have constructed the 16 flats in building 'A' having a carpet area of 866 sq. ft. they have obtained a report from a structural engineer specifying the mode of extending the presently constructed 16 flats from 866 sq. ft. carpet area to 1010 sq. ft. carpet area. A copy of this structural report is annexed at ***Annexure "C"*** *to these presents.*

19. The Respondents agree that the flats provided to the 32 members of the Petitioner in Building "A" shall be allotted from the 4th floor, being the first habitable floor. The fourth floor shall be considered and numbered 01st Floor. Consequently, the 32 members shall be accommodated upto PART 9th FLOOR.

21. The Respondents further agree that, they shall complete the construction of the building "A" and building "B" in the subject property to the extent of the floors adequate to accommodate all the flats to be allotted to the members of the Society, i.e. 60 flats, as mentioned in the foregoing clauses and shall hand over the possession of the Flats therein to all the 60 members of the Society in full habitable condition i.e. with Occupation Certificate and with municipal water supply, electricity connection, 2 working lifts, car parking spaces, etc. in building "B" and with

24. The Respondent, subject to force majeure, agrees to complete the redevelopment of the Subject Property as the per the schedule appearing hereunder;

a) ***The Respondent shall complete the construction of Building 'B' in all respects and shall hand over possession of the Flats therein to all the members of the Society in full habitable condition i.e. with municipal water supply, electricity connection, 2 working lifts, car parking spaces, etc. including obtaining part O.C. from MCGM on or before 31st December 2017. The Respondents are granted a 03 months grace period with a proviso that they shall pay such members to be allotted in building "B" compensatory rent of Rs.50,000/- per month from 01st January 2018 in addition to the penalty more particularly described at para 44(a) herein below.***

b) The Respondents shall, complete the construction of building "A" with brick work and external plaster of the structure. During the same period the Respondent shall also simultaneously complete the internal work of the 32 flats reserved for allotment to the members of the Petitioner in building "A". the Respondent shall hand over possession of the flats to the 32 members of the Petitioner by 30th June, 2018. The Respondents are granted a 04 months grace period with a proviso that they shall pay such members to be allotted in building "A" compensatory rent of Rs.50,000/- per month from 01st July 2018 in addition to the penalty more particularly described at para 44(b) herein below.

c) The Respondents shall be liable to pay the compensatory rents to the members until expiry of 30 days after issuance of "NOTICE FOR POSSESSION" by the Respondents to the Petitioner to take possession of the flats pursuant to receipt of O.C.

29. The Petitioner shall not be liable to the flat purchasers for completion of the flats sold to them by the Respondents as the Petitioner is not a promoter under MOFA viz a viz the flat purchaser.

***36.** The Respondents hereby confirm and **represent that they have the financial capability to construct and complete the said project and handover possession of flats to 60 members of the Petitioner**. Further, in the case of no sale of flats, non receipt of money from the sale of flats or non receipt of money receivables, or any other situation, it shall fund the Escrow account and continue the work and **shall not stop the work on account of lack of funds and handover the flats to the members of the Petitioner on the scheduled dates. Any default in this will be considered as an Event of Default**.*

37.** The Respondents have agreed to give the society to unencumbered flat Nos. 1003 & 1604 admeasuring 865 sq.ft. which is intended to be increased to 1006 sq.ft (carpet area) which shall not be a part of refuge area, along with one parking each in Building 'A' as security in lieu of bank guarantee. **The Respondents shall also issue two

allotment letters in the name of the society specifying Flat Nos. 1003 and 1604 in building "A" as a precondition to granting their NOC for applying to MHADA for pro-rata FSI*. The said flats are presently proposed to be 865 sq.ft carpet area but intended to be converted into 1006 sq.ft. carpet area***.

39. ***On execution of these presents the Petitioner shall issue their NOC to MHADA/ MCGM for specifically granting further FSI and also withdraw the revocation of the Power of Attorney dated 26-9-2007 and duly intimate MHADA and the MCGM of the same****.*

40. *The Petitioner Society agrees and undertakes to withdraw their notice dated 16th August 2016 addressed by the Petitioner and Notice dated 10th October 2016 addressed by Advocate Mr. Himanshu Kode on their behalf and partially withdrawing the POA dated 26th September 2007. The Petitioner shall also withdraw their objections raised to the MHADA as regards the MHADA Offer letter dated 14th March 2014 and against their unconditional NOC for obtaining additional FSI from MHADA/MCGM under any nomenclature.*

46. ***It is reiterated that, the period of completion of Building "B" shall be 31-12-2017 with a three month grace period upto 31-3-2018. This grace period is permissible, subject to payment of penalty by the Respondent of Rs.2.5/- lakhs per month or part thereof of default to the Petitioner. The 32 flats in building "A" shall be handed over to the members of the Petitioner by 30-6-2018 with a three month grave period upto 30-9-2018. This grace period is permissible, subject to payment of penalty by the Respondents of Rs.2.5/- lakhs per month or part thereof of default to the petitioner****.*

48. *Without prejudice to clause 44 & 46, in the event of Respondent committing any default of the terms contained herein,* ***then the Petitioner shall be entitled to a Written Notice of 60 days calling upon the Respondent to comply with the terms and rectify the breach****, failing which the Petitioner shall be entitled to terminate these Consent Terms."*

[**Emphasis supplied**]

157. It is pertinent to note that under the said Consent Terms, more particularly at clause 9 thereof, the Claimant Society for the first time appears to have agreed that the Respondent shall apply for additional FSI under any nomenclature available and share the profits receivable from the accrued benefits receivable by the Respondent from the said additional FSI. It is also pertinent to note that this is an agreement between the parties as on 16th May 2017. Further, however, at clause 13, the parties have agreed that the Respondent will never broach the topic of amalgamation nor asked the Claimant Society for permission to amalgamate with any other property.

158. As per the clauses of the aforesaid Consent Terms, it is clear that the Respondent Developer has accepted total liability of Rs.7,62,20,000/- (Clauses 3 and 6 of the Consent Terms). As per clause 7 of the said Consent Terms, the sum of Rs.2.5 crores out of Rs.5 Crores, which was received by the Claimant Society, upon invocation of the bank guarantee was appropriated towards the aforesaid Rs.7,62,20,000/- leaving a balance arrears in the sum of Rs.5,12,20,000/-, which was to be paid in four installments in the manner as provided under clause 8 of the said Consent Terms. Clause 8A of the said Consent Terms stipulated that the Respondent shall provide 7 Post Dated cheques of Rs.24,00,000/- towards the compensatory rent for 7 months. It is an admitted position that several cheques that were given by the Respondent Developer in terms of clause 8 of the Consent Terms were returned dishonoured for insufficiency of funds. The details of the said cheques are more particularly mentioned in the legal notice dated 4th

December 2017[96], which was addressed on behalf of the Claimant Society under Section 138 of the Negotiable Instruments Act, 1881. The Respondent replied to the said legal notice vide its letter dated 13th December 2017[97]. In the said reply, it is clearly averred by the Respondent that the Respondent was in the process of raising funds from financial institutions and the funds will be available on or before 31st December 2017. There was also an assurance that upon disbursement of funds, the payments will be released at the earliest. In other words, it is a clear admission of liability on the part of the Respondent that it was liable to pay the amounts under a legal notice dated 4th December 2017. It is also important to note that in this letter the Respondent Developer has made no grievance whatsoever that on account of non-receipt or delay in granting NOC to raise funds, it could not raise finance. No dispute whatsoever has been raised in that regard by the Respondent. In view of this clear position, all the arguments made by Mr. Narula that delay in granting NOC to raise finance, which took place only in October 2017 when a backdated NOC of July was granted, etc., are wholly without any substance.

159. Perusal of the documentary evidence further indicates that by a letter dated 3rd February 2018[98] (Exhibit C-27), the Respondent Developer begins by saying *"we are endeavouring sincerely to comply…."* Insofar as its obligations under the Consent Terms are concerned. I find that an "endeavour" on the part of the Respondent Developer was not what was contemplated under the Consent Terms as also by the Orders of the Hon'ble Bombay High Court. The

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[96] Page 360 of Claimant's COD Vol-II
[97] Page 368 of Claimant's COD Vol-II
[98] Page 382 of Claimant's COD Vol-II

Respondent Developer was under a mandatory obligation to do it. An “endeavour” was not good enough. Further contents of the said letter also reveal that the Respondent Developer has admitted its breaches and shortcomings. It has sought extensions in the deadlines to construct as well as to pay. I also find that to justify its request for extensions, the Respondent Developer has audaciously written in the said letter that the Claimant Society is adequately secured with a sum of Rs. 2.5 crores as a part of the bank guarantee encashment. In my opinion, the Respondent Developer has pretended to be oblivious to the position that the pending arrears that it was liable to pay were much more than Rs. 2.5 Crores at the relevant time. One more thing that is required to be noted in the said letter is that although the Respondent Developer raises its grievance about the members of the Claimant Society making supposedly defamatory publications, there is not one whisper about grievance in respect of non-receipt of NOC or delayed receipt of NOC to raise funds. This is one of the instances which adds to the reasons for rejecting Mr. Narula’s elaborate arguments on the supposed non-grant of NOC by the Claimant Society.

160. In my considered opinion, after having entered into the Consent Terms and after having agreed to a particular schedule of payment to clear the arrears, it was incumbent upon the Respondent to honour the said obligations. This was not honoured and the same qualifies as yet another breach on part of the Respondent, only this time, this was a breach of the provisions of the Consent Terms.

161. The Respondent’s failure to honour its obligations after having them expressly accepted under the Consent Terms, in my opinion has a direct bearing on the question of readiness on the part of the Respondent Developer to comply with the Consent Terms. This is

one more instance to add in the list of instances discussed herein above which indicate that the Respondent Developer has lacked on the aspect of readiness all throughout. The record also indicates that the Respondent was not ready and willing to perform its obligations. Non-receipt of NOC is the primary excuse put forth by the Respondent Developer, which, as mentioned herein above and as will be discussed herein below, is totally bogus and illusory.

Subsequent breaches and undertakings made before the Hon'ble Bombay High Court by the Respondent Developer in Contempt Petition

162. Despite the fact that the Respondent had assured that the payments will be cleared as soon as funds are received from financial institutions on or before 31st December 2017, there was a failure on the part of the Respondent to fulfill that assurance. The Claimant Society was therefore constrained to file a Contempt Petition (L) No.24 of 2018 alleging contempt by the Respondent of its undertakings[99] given to the Hon'ble Court under Consent Terms dated 7th July 2017.

163. An order was passed in the said Contempt Petition filed by the Claimant Society on 6th March 2018[100]. The said order clearly records that the Director of the Respondent agreed and undertook to pay a sum of **Rs.5,42,16,436/-** in the manner that is more particularly set out herein above while recording Claimant's submissions. The Respondent also agreed and undertook to pay current and future rents / compensation and penalty to the members of the Claimant Society in the manner as is set out. An undertaking

[99] Para 5 of Order dated 7th July 2017
[100] Page 573 of Volume III of Section 9 Petition

was also given that a Bar Chart will be submitted by the Respondent setting out how the Respondent intends to complete the redevelopment on the subject property. It is not in dispute that the said bar chart given to the Hon'ble Court was also not completed by the Respondent. This circumstance also has a direct bearing on the aspect of "readiness" and "willingness". In my considered opinion, the Respondent was not ready or willing to abide by its obligations and undertakings given in the Consent Terms as also those given to the Hon'ble Bombay High Court.

164. The Affidavit in Reply dated 17th February 2018 filed by the Respondent Developer in the Hon'ble Bombay High Court in the Contempt Petition, exposes one more instance of the unsatisfactory conduct of the Respondent Developer. ***Firstly***, no grievance about the NOC for additional pro-rata FSI is raised in the said Affidavit. If it indeed was a real grievance, then any prudent party who is assisted by reputed law firms, would raise the same at the first instance. That has not been done. ***Secondly***, however, the Respondent Developer has raised a minor grievance about delay in the issue of NOC for raising funds as contemplated under Clause 41 of the Consent Terms. While making that averment, Respondent Developer has stated on oath that the said NOC was received in or about second week of November 2017. This averment is directly contrary to Respondent's own admission at paragraph 3[101] of the letter dated 31st October 2017 (Exhibit R-42) which specifically takes a stand that the said NOC was received on 26th October 2017. In my opinion, the Respondent Developer has been very casual about its pleadings, since this is an instance of making a false statement on oath. Moving further, the entire Affidavit in Reply dated 17th February

[101] Page 389 of Respondent's COD Vol-II

2018 makes absolutely no grievance about non-grant of NOC for pro-rata FSI.

165. At this juncture, it would also be important to note that at paragraph 13 of the said affidavit dated 17th February 2018 the Respondent Developer has spoken of a letter dated 25th May 2017 addressed by the Claimant Society withdrawing its complaints. The said letter has also been put on record as exhibit 5 of the said affidavit. Perusal of the said letter and the 3rd paragraph thereof, makes it clear to me that the Claimant Society had withdrawn its complaints made to MHADA and the MCGM.

166. Thereafter, another short Affidavit was filed by the Respondent Developer in the Contempt Petition, being Affidavit in Reply dated 15th March 2018[102] wherein, apart from submitting the bar-charts to the Hon'ble Bombay High Court showing estimated time of completion of work, the Respondent Developer has also brought on record the MHADA Offer letter dated 16th May 2017. Pertinently, even though this Offer letter has been brought on record, the Respondent Developer has made no grievance about the Claimant Society not granting the requisite NOC. All this documentary evidence compels me to hold that even though Clause 39 of the Consent Terms seems to suggest that the NOC for additional FSI was to be given on the execution of the Consent Terms, the parties themselves understood that the said stipulation is not inflexible and the NOC can be granted as and when needed. Indeed the said NOC has been granted subsequently, as will be discussed hereinafter.

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[102] Exhibit R-51 at Page 402 of the Respondent's COD Vol-II

167. Infact, in the said Affidavit dated 15th March 2018 filed by the Respondent Developer, it has undertaken to pay the amount payable for FSI for the rehab component which was estimated to be Rs. 10,02,57,048/-. The said amount is undertaken to be paid in four equal installments as per the MHADA circular no. 6749 dated 11th July 2017. There is no documentary evidence brought on record by the Respondent Developer that it took any steps to pay the premium.

168. From the record, it also appears that by an order dated 5th April 2018[103], the Hon'ble Court directed the Executive Engineer of MHADA to inform about the premium that will have to be paid by the Respondent for pro-rata FSI of 1820 sq. mtrs., for the ongoing project in relation to Building 'A' on the Claimant Society. I find that it was pursuant to this Order that the Claimant Society addressed the letter dated 10th April 2018[104] (Exhibit R-49) (as clarified by letter dated 11th April 2018), whereby the Claimant Society has already granted its NOC for release of pro-rata FSI to the extent of 1820 sq. mtrs., out of 3454.18 sq. mtrs. in respect to the redevelopment of the subject property. From the perusal of the said letter, it is clear to me that the said letter has been addressed in compliance and in furtherance of the order passed by the Hon'ble Bombay High Court. It is also clearly mentioned therein that the Claimant Society has no objection for release of pro-rata FSI to the extent mentioned therein. It is also clear that the Claimant Society had granted NOC as per clause 9 of the Consent Terms dated 16th May 2017. Clause 9 contemplates the granting of NOC by the Claimant Society for

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[103] Page 429 of Claimant's COD Vol-II
[104] Page 400 of Respondent's COD Vol-II

applying to the MHADA / MCGM for further / additional FSI under any nomenclature.

169. Admittedly, as per the offer letter dated 16th April 2018[105] (Exhibit R-52) the MHADA have agreed to offer additional FSI on 1820.18 sq. mtrs. built up area out of the total additional FSI of 3454.18 sq. mtrs. of built-up area on the subject property upon payment of premium in four installments. This particular Offer letter dated 16th April 2018 issued by MHADA is the one sanctioning the additional FSI as was contemplated under the Consent Terms. The same is also understood as such by the Respondent Developer in its pleadings. The same becomes clear on a cumulative reading of paragraphs 3(xlvii) and 3(l) of the Counter Claim. From paragraph 3(l) of the Counter Claim it can be seen that the Respondent Developer states to have informed the Claimant Society about the revised Offer letter dated 16th April 2018 and requested for its NOC in terms of Clause 39 and 40 of the Consent Terms by addressing a letter dated 31st May 2018. The same is also stated at paragraph 57 of the Affidavit in lieu of examination in chief of RW-1. Moving forward from this position, a <u>perusal of the said Offer letter dated 16th April 2018 would reveal that it specifically refers to the Claimant Society's letter dated 10th April 2018</u>. It is on that basis that the MHADA has issued this Offer letter quantifying the total premium to be payable by the Respondent Developer. It also specifically states[106] that as per Resolution No. 6749 dated 11th July 2017, payment of premium will be allowed in four installments. This documentary evidence is clearly sufficient for me to conclude that the Claimant Society has indeed granted the requisite NOC under Clause 39 of the Consent Terms

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[105] Page 434 of Respondent's COD Vol-II
[106] At first line on Page 436 of the Respondent's COD Vol-II

on the basis of which the Offer letter dated 16th April 2018 was issued in the first place.

170. The next step that was envisaged as per the Consent Terms was the payment of requisite premium to MHADA and/or MCGM. In this regard, there is no documentary evidence brought on record by the Respondent Developer to show that any amount has been paid by it by way of premium to MHADA/MCGM especially when the Claimant Society has already granted its NOC for release of additional FSI. It is not even the case of the Respondent Developer that it made this payment. I find that the Respondent Developer has simply blamed the Claimant Society, and that too wrongly and belatedly, by taking a stand that it did not grant the requisite NOC.

171. At this juncture, it would be necessary to deal with two submissions made by Mr. Narula. The first one was that the letters dated 10th April 2018 and 11th April 2018 were never received by the Respondent Developer at the relevant time but were received only at the time of hearing of the application under Section 17 of the Act before this Tribunal. The second submission, which was without prejudice to his submission that the 10th April 2018 is not a NOC in its true sense, was that the Claimant Society by its letter dated 11th April 2018 removed the option of payment of premium in installments, which put fetters in the attempts of the Respondent Developer to make the payment. As regards the first submission, the same is difficult to accept. It is not believable that Respondent Developer did not have copies of the letters dated 10th April 2018 and 11th April 2018 especially when the same were issued by the Claimant Society in pursuance of the Hon'ble Bombay High Court's Order dated 5th April 2018. The letter of 10th April 2018 is also specifically mentioned in the Offer letter dated 16th April 2018.

Further, the assertion made at paragraph 54 of the Affidavit of Evidence of RW-1 that these letters were seen by the Respondent Developer only during the hearing of the application under Section 17 of the Act before this Tribunal has absolutely no foundation in pleadings. Both the main pleadings of the Respondent Developer, viz. the Counter Claim and the Statement of Defense were filed in November 2018. The application under Section 17 of the Act was disposed of in September 2018. Nothing prevented the Respondent Developer to make a sufficient pleading to this effect in its main pleadings filed in November. Now, coming to the second submission on the letter dated 11th April 2018 withdrawing the option of paying the premiums in installment, I find that the same is irrelevant in view of the subsequent Offer letter dated 16th April 2018 which infact permitted the Respondent Developer to pay the premium in instalments.

172. In any event, once MHADA has issued the Offer Letter dated 16th April 2018, the question of NOC would no longer survive. The only next step was to pay the premium, which the Respondent Developer has failed in paying. As regards the supposed delay on the part of the Claimant Society in granting the NOC for raising finance is concerned, it was sought to be argued by Mr. Narula that it was on account of this position that the Respondent Developer could not raise finance and therefore could not complete the project. This submission is merely stated to be rejected. ***Firstly***, there is no sufficient evidence led by the Respondent Developer in support of this assertion and ***secondly***, this cannot be argued in teeth of Clause 36 of the Consent Terms.

Termination of the contract by the Claimant Society

173. In the meantime, apart from the fact that the Respondent Developer did not comply with the construction timelines as set out under Clause 24 of the Consent Terms, the Respondent Developer also committed a default of its payment undertakings as recorded under the Order dated 6th March 2018. The installments of Rs.1,72,72,145/- to be paid on or before 15th May 2018 and 16th June 2018 respectively were breached apart from other breaches in respect of rent / compensation / penalty which was due on 10th June 2018.

174. In these circumstances and in view of the overall analysis of the evidence on record, it is clear to me that the Respondent Developer has committed consistent breaches of not only the clauses of the Consent Terms, but also of its undertakings given to the Hon'ble Bombay High Court.

175. The Claimant Society thereafter passed a unanimous Resolution in its Special General Body Meeting dated 3rd June 2018[107] terminating the said Development Agreement dated 26th September 2007. In furtherance of the said unanimous Resolution, the Claimant Society has also addressed a legal notice dated 9th June 2018[108] informing the Respondent Developer of its termination.

176. The Respondent Developer replied to the termination notice by its letter dated 20th June 2018[109] (Exhibit R-56). In the said reply, the Respondent has taken various stands as noted hereinabove. The Respondent has also stated that the delays were on account of force

[107] Page 432 of the Claimant's COD Vol-II
[108] Page 434 of the Claimant's COD Vol-II
[109] Page 453 of the Respondent's COD Vol-II

majeure conditions and circumstances which were beyond its control. It is stated that such delays happened on account of policy issues of MHADA, internal irregularities of MHADA, circulars of MHADA, pendency of layout approval and suspension order, etc. In my considered opinion, these are not force majeure conditions. The Respondent cannot be permitted to blame policy issues of MHADA and changes in the development regime for the delay and breaches on its part in the development process. It also appears that the Respondent Developer has instead of sticking to what were the binding and essential terms of the bargain under the Development Agreement dated 26th September 2007, has delayed the project in anticipation of policy changes and the possibilities of obtaining higher benefits, all this without the consent of the Claimant Society, which appointed the said Respondent in the first place.

177. In my Order dated 17th September 2018 on Claimant Society's application under Section 17 of the Act, I had recorded *prima-facie* findings that the Respondent Developer has been in breach of its obligations at all stages and that the Claimant Society would be justified in terminating the Development Agreement. That was at a prima-facie stage. Those observations and findings were upheld by the Hon'ble Bombay High Court in its Order dated 14th December 2018. Respondent Developer's challenge from the said Order dated 14th December 2018 was dismissed by the Hon'ble Supreme Court. Thereafter the parties have led evidence and trial has been conducted. Now, the wealth of evidence that has emerged at trial is sufficient for me to confirm my earlier view.

178. It is now required to consider the other submissions raised on behalf of the Respondent Developer by Mr. Narula. It was submitted that once the parties have signed the Consent Terms, the Claimant

Society cannot be permitted to rely on the alleged shortcomings/breaches on the part of the Respondent Developer which took place prior to signing the said Consent Terms dated 16th May 2017. It is Mr. Narula's submission that by signing the Consent Terms, the Claimant Society is deemed to have waived its objections/grievances in respect of the past. I am not inclined to agree with Mr. Narula. The agreement recorded in the Consent Terms itself falsifies Mr. Narula's submission. The Consent Terms infact crystallize the liability of the Respondent including its penal liability as envisaged under the Development Agreement dated 26th September 2007 (clauses 1 to 8). It therefore can hardly be said that the Claimant Society had 'waived' its objections or grievances as is sought to be suggested by Mr. Narula. On the contrary, the Claimant Society appears to have given an opportunity to the Respondent to cure and regularize its breaches.

179. Moreover, even if it is assumed for a moment that Mr. Narula is correct in his submission that the Claimant Society cannot be permitted to reopen the Respondent's breaches committed prior to signing the Consent Terms, given the fact that not only has the Respondent breached those Consent Terms independently, but the Respondent has also breached its subsequent undertakings as recorded by the Hon'ble Bombay High Court in its Order dated 6th March 2018, it would still be a case where the Claimant Society is completely justified in terminating the contract with the Respondent Developer. Viewed thus, the Respondent Developer has committed a breach of both, the Development Agreement as also the Consent Terms, independently and irrespective of each other. On that count, Mr. Narula's submissions even on this aspect are without any substance.

180. In any event, non-payment of transit rent to the members of the Claimant Society for several years together is a breach of a core obligation of the Development Agreement as also the Consent Terms. Mr. Khandeparkar's reliance on ***Borivali Anamika Niwas CHSL Vs. Aditya Developers & Ors.*** (Commercial Arbitration Petition (L) No. 5738 of 2020) in this regard is correct.

Termination of the contract by the Claimant Society, whether premature and contrary to Clause 48 of the Consent Terms?

181. The discussion on whether the Claimant Society was justified in terminating the contract, would not be complete unless Mr. Narula's submissions on the termination being premature and contrary to Clause 48 of the Consent Terms, are considered. It is contended by him that by virtue of clause 48 of the Consent Terms, the Claimant Society was bound to issue a written notice of 60 days *inter alia*, calling upon the Respondent Developer to cure its breaches, which was not done. It is contended that on this ground, the termination by the Claimant Society is bad in law. In my opinion, the said submission made by Mr. Narula is devoid of merits. The Claimant Society had clearly addressed a statutory notice under Section 138 of the Negotiable Instruments Act, 1881 on 4th December 2017[110]. The said legal notice was issued on account of dishonor of the cheques given by the Respondent in furtherance of clause 8 of the Consent Terms dated 16th May 2017. A bare perusal of the said notice, at paragraph 7, clearly indicates that the Claimant Society had asked the Respondent to cure its breaches. The said legal notice was also replied to by the Respondent Developer through the letter dated 13th December 2017 whereby the Respondent assured

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[110] Page 360 of Claimant's COD Vol-II

to release the payments as noted hereinabove. There is, therefore, substantial compliance of clause 48 of the Consent Terms dated 16th May 2017. Even otherwise, the filing of the Contempt Petition by the Claimant Society can also deemed to be a written notice given by the Claimant Society as contemplated under clause 48 of the said Consent Terms dated 16th May 2017. The said Contempt Petition was filed in the month of February 2018. The Respondent gave its undertaking to make periodical payments as recorded in the order dated 6th March 2018. The very fact that certain undertakings were given to the Hon'ble Court would go to show that the Respondent had infact availed of the opportunity to cure its breaches as contemplated under Clause 48 of the Consent Terms. That opportunity was, however, squandered by the Respondent Developer. Those undertakings were breached. The Bar Chart submitted to the Hon'ble Bombay High Court was also breached. The decision to terminate the Respondent Developer was taken unanimously by the General Body of the Claimant Society on 3rd June 2018. The said decision was communicated to the Respondent Developer on 9th June 2018. Looking at this chronology, it is clear that the Claimant Society gave sufficient notices, whether constructive or express, in compliance with clause 48 of the Consent Terms dated 16th May 2017. Mr. Narula's submission that the only breach that the Respondent Developer could be said to have committed was the non-payment of Rs. 1,72,72,145/- which was due and payable on 15th May 2018 and in view thereof the termination notice dated 9th June 2018 having been issued prior to expiry of 60 days is premature, is thoroughly misconceived. Apart from several breaches discussed herein above, the Respondent Developer was also in breach of its obligation to complete the balance construction envisaged under Clause 24 of the Consent Terms. The said Clause

read with Clause 46 of the Consent Terms required the Respondent Developer to complete the construction of Building 'B' on or before 31st December 2017 with a three-month grace period upto 31st March 2018. Respondent Developer has not completed the same on or before 31st March 2018. The submission of Mr. Narula that the said termination notice was not in accordance with clause 48 of the Consent Terms is wholly devoid of merits and is therefore rejected.

182. I find that there is compliance of clause 48 of the Consent Terms before ultimately issuing the termination notice dated 9th June 2018. The Respondent Developer was given more than sufficient opportunities to cure its breaches and avert termination. The spirit behind Clause 48 of the Consent Terms is to give an opportunity to a party to cure its breaches within the stipulated period from the date of that breach.

183. I therefore hold that the Respondent Developer has committed a breach of the Consent Terms and the Claimant Society was justified in terminating the contract with the Respondent Developer. Accordingly in view of the above findings on this issue, **Point (k) is answered in the negative.** The Respondent Developer has failed in proving that the termination notice dated 9th June 2018 terminating the contract between the parties is illegal, invalid and not binding upon the Respondent Developer**.**

184. A Careful analysis of the evidence on record and in view of the my findings on the main Points as framed for determination as also the ancillary points discussed herein above, I find that the Claimant Society granted the requisite NOCs as required under the Consent Terms whereas the Respondent Developer yet again committed breaches of its obligations. Cumulative effect of the aforesaid

findings as also the answers recorded in respect of the connected Points for determination, **I answer Points (g) and (h) in the affirmative.**

185. As a natural consequence of the findings recorded by me herein above in respect of the breaches on the part of the Respondent Developer of the Development Agreement and the Consent Terms, as also the findings recorded in respect of the other connected Points, **I have no hesitation in answering Points (l) and (m) in the negative.** Respondent Developer has failed in proving its readiness and willingness to perform its contractual obligations and has also failed in showing how it abided by and completed its contractual obligations.

186. In view of my findings on the aforesaid points, I am compelled to answer Point (p) in the negative. Even otherwise, there are other reasons for answer this Point in the negative. ***Firstly***, as noted by me herein, there is absolutely no evidence brought on record by the Respondent Developer to show that there was any policy paralysis as claimed. ***Secondly***, even if it is assumed that there were some difficulties on account of non-responsiveness on the part of the competent authorities, there is no iota of evidence brought on record by the Respondent to show that it took any pro-active steps in this regard. ***Thirdly***, the Respondent Developer had admittedly not been able to pay the premium under the MHADA Offer letter dated 14th March 2014 at the relevant time. ***Fourthly***, the Hon'ble Bombay High Court in the case of ***Heritage Lifestyle and Developers Ltd Vs. Cool Breeze Co-op. Housing Society Ltd & Ors,*** reported in ***2014 (3) MhLJ 376*** has laid down in no uncertain terms that the members of a housing Society cannot be made to wait permanently for revised and favourable MHADA policies. ***Lastly***, even in the

period post the execution of the Consent Terms, MHADA had issued an offer letter dated 16th April 2018. The Respondent Developer failed to pay the premium in respect thereof. I have already found herein that the excuse of lack of NOC from the Claimant Society is not available to the Respondent Developer. **For all these reasons, Point (p) is answered in the negative**.

187. A cascading effect of the determination of all these points is that **Point (n) will also have to be answered in the negative**. I hold that the Respondent is not entitled for an award of specific performance.

Whether Consent Terms novate the Development Agreement thereby extinguishing the agreement contained in Clause 22 of the Development Agreement?

188. I am unable to accept Mr. Narula's submission that the Consent Terms supersede the original agreement contained in the Development Agreement and in particular that Clause 22 of the Development Agreement does not survive in view of Clauses 44 to 51 of the Consent Terms. In effect, Mr. Narula argues that the Development Agreement is novated by the Consent Terms. In my opinion, this is not correct. The provision of law to which the concept of novation can be traced to, is section 62 of the Indian Contract Act, 1872. The same is reproduced as under:

> ***Section 62*** *- Effect of novation, rescission, and alteration of contract*
>
> *If the* ***parties to a contract agree to substitute*** *a new contract for it, or to rescind or alter it, the original contract need not be performed.*

189. A bare perusal of the aforesaid provision reveals that for there to be a new contract in substitution or rescission or alteration of the old

contract, the parties to such an old contract must collectively agree to do so. There has to be an agreement between the parties that they intend to substitute or rescind or alter the contract existing between them. I have carefully gone through the clauses of the Consent Terms. I do not find any clause in the Consent Terms under which the parties can be said to have agreed to rescind the Development Agreement and that the Consent Terms are meant to substitute the Development Agreement. Coming to the question of the alteration of the contractual terms contained in the Development Agreement are concerned, I am inclined to accept Mr. Khandeparkar's submissions that the Consent Terms merely re-align some of the obligations set out in the Development Agreement concerning the time of completion of the Buildings, quantum of the transit rent, etc.

190. In my opinion, a mere alteration of some of the obligations contained in the Development Agreement are not sufficient to erase or novate the Development Agreement in its entirety. I do not find any provisions in the Consent Terms by virtue of which the main clauses of the Development Agreement, such as Clause 22, have been waived or struck off. They continue to bind the parties with suitable modifications as contemplated in the Consent Terms. In my opinion, Clause 22 will have to be read with the modified and re-aligned obligations set out in the Consent Terms in respect of the obligations of payment of transit rent and completion of construction of the two Buildings.

191. Parties to an agreement[111] may vary some of its terms by a subsequent agreement[112]. Mere alteration or modification of the

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[111] Like the Development Agreement in this case

terms of the contract is not enough. For an “alteration” to come within the scope of Section 62 of the Indian Contract Act, 1872, it must go to the very root of the original contract and change its character so that the modified contract must be read as doing away with the original contract. But where the modifications do not go to the very root and change its essential character and the arrangement has no independent contractual force, the original terms continue to be part of the contract and are not rescinded or superseded except in so far as they are inconsistent with the modifications. This is the precise statement of law laid down in the case of ***Chrisomar Corporation Vs. MJR Steels Private Ltd. and Ors.*** reported in ***(2018) 16 SCC 117*** whereby the Hon’ble Supreme Court of India speaking through His Lordship the Hon’ble Mr. Justice R. F. Nariman quoted with approval the law laid down by the Hon’ble Calcutta High Court in ***Juggilal Kamlapat Vs. NV International Credit-en-Handels, Rotterdam*** reported in ***AIR 1965 Cal 65***.

192. The upshot of the aforesaid discussion would compel me to hold that Clause 22 of the Development Agreement is not done away with, but the same has to be read along with the modified/altered terms contained in the Consent Terms. The Consent Terms merely re-align and alter the ingredients required to trigger the Claimant Society’s right to invoke clause 22 of the Development Agreement. The decision in the case of ***Daulatbanoo Sadruddin Nanavati (supra)*** as relied upon by Mr. Narula on the point of supersession, has been rendered in a completely different set of facts which are not even remotely comparable to the case at hand. In that case, the Hon’ble Bombay High Court categorically found that the joint properties of the parties therein had been brought in by the parties

[112] Like the Consent Terms in this case

into the joint venture projects and due to such hotchpotch of the properties, the original rights of the parties in those properties prior to the date of filing consent terms, had merged with the terms and conditions agreed upon by the parties in the said consent terms which were filed in Court. It was on this basis the Hon'ble Court took the view that in view of the Consent Terms completely altering the shares of each party in the joint properties and in view of the parties having acted upon the same, there cannot be a partition as per the original rights as they stood prior to the Consent Terms. Thus, in that case the nature and the consequence of the Consent Terms was entirely different on the original rights. The same is not the case before me. Surely, the Hon'ble Bombay High Court in ***Daulatbanoo Sadruddin Nanavati (supra)*** cannot be understood to have laid down an absolute proposition that whenever there is any modification or alteration in a contract by Consent Terms or otherwise, there is compulsory novation of the original agreement. That decision has to be understood in the peculiar facts that obtained in that case and for this reason the same is of no assistance to the Respondent Developer.

193. This brings me to the consequences of the termination of the contract by the Claimant Society and the entitlement of the parties thereafter.

<u>Termination of the Contract resulting in its rescission and the provisions of Sections 39 and 64 of the Indian Contract Act, 1872</u>

194. The English law[113] recognizes a marked distinction between rescission of the contract on one hand and its repudiation/termination on the other. Being different concepts, they result in different outcomes for the parties especially by providing different basis for the recovery of damages. In cases of contracts entered into on account of mistake, fraud or misrepresentation, they are treated in law as never having come into existence, i.e. they are treated as void-ab initio. In cases of a breach of a contract on the other hand, the contract is said to have come into existence but has been put to an end or discharged by the party suffering the breach. Such a party has the choice to affirm the contract or bring it to an end, whilst still claiming damages in addition.

195. In the context of the Indian Contract Act, 1872, the position appears to be somewhat different as will be seen from the discussion herein below.

196. Mr. Khandeparkar has argued that the **termination** of the Development Agreement by the Claimant Society falls within Section 39 of the Indian Contract Act, 1872.

197. On the other hand, Mr. Narula has strongly pressed into service the provisions of Sections 64 and 65 of the Indian Contract Act, 1872 which provide for consequences of **rescission** of a voidable contract and obligation of a person who has received advantage under void

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[113] As understood from the decisions in the cases of Paul Martin Foster Howard Jones Vs. Dennis Eaton Tates [2011] EWCA Civ 1330 following Johnson Vs. Agnew [1980] AC 367.

agreement, or contract that becomes void. At this juncture, I must note that Mr. Narula's reliance on Section 65 is thoroughly misplaced. It is nobody's case that the contract between the parties is discovered to be void or it has now become void, i.e. unenforceable at law[114].

198. In view thereof, the provisions that fall for immediate consideration are Sections 39 and 64 of the Indian Contract Act, 1872.

> ***Section 39 - Effect of refusal of party to perform promise wholly***
> *When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee* ***may put an end to the contract****, unless he has signified, by words or conduct, his acquiescence in its continuance.*
>
> ***Section 64 - Consequences of rescission of voidable contract***
>
> ***When a person at whose option a contract is voidable rescinds it****, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall,* ***if he have received any benefit*** *thereunder from another party to such contract,* ***restore such benefit, so far as may be****, to the person from whom it was received*
>
> ***(Emphasis Supplied)***

199. It is clear from the aforesaid that Section 39 does not expressly state that the contract has become "voidable" but only provides a right to a party to "put an end" to the contract. On the other hand, Section 64 speaks of rescission of a voidable contract. The questions that would definitely arise for consideration are whether the contracts which are spoken of in Section 39 can be termed to be "voidable" in

[114] Section 2(g) of the Indian Contract Act, 1872.

any manner and whether the expression “put an end” equals “rescinding”. If both these tests are satisfied then Section 64 of the Indian Contract Act, 1872 gets attracted.

200. Having regard to Section 2(i) of the Indian Contract Act, 1872, whenever one party to a contract has the option of annulling it, the contract is voidable, whether the word “voidable” has or has not been used. Seen thus, a default within the meaning of Section 39 of the Indian Contract Act, 1872 giving a right to a party to put an end to the contract (in other words, annul a contract), also renders the said contract voidable even though the word “voidable” has not been used in the provision. The first question posed above, therefore, has quite a straightforward answer.

201. Now comes the second question, i.e. whether putting an end to the contract/terminating a contract/annulling a contract amounts to its “rescission” within the meaning of Section 64 of the Indian Contract Act, 1872. This is a crucial question since if it is answered in the affirmative, then the rigours of Section 64 will come into consideration.

202. Contracts declared to be voidable by Section 2(i) of the Indian Contract Act, 1872 may be classified into two groups, viz., a) contracts voidable in their inception under sections 19 and 19A on the ground of mistake, misrepresentation, fraud or the like and contracts becoming voidable by one party exercising its right to rescind on account of subsequent default of the other party, as mentioned in Section 39, 53 and 55.[115]

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[115] Pollock & Mulla, 16th Edition, Page 761

203. In the context of Indian law, some courts had initially suggested that section 64 applied only to that class of contracts which were voidable for want of free consent; but later it has been decided by the Privy Council in the case of ***Murlidhar Chatterjee (supra)*** that section 64 applies to cases of rescission under section 39 as well, in the context of Indian Contract Act, 1872.

204. Viewed thus, Mr. Narula is correct in his submissions that if the Claimant Society claims to have terminated the contract under Section 39 of the Contract Act, then it necessarily amounts to a rescission within the meaning of Section 64 of the Contract Act. On this basis, Mr. Narula has further submitted that the Claimant Society must therefore restore the benefits received by it to the Respondent Developer.

205. But before I turn to the issue of the restoration of benefits received by the Claimant Society to the Respondent Developer and to examine the argument put forth by Mr. Narula, it is also necessary to note a few more legal positions. Although in ***Damodar Valley Corporation Vs. K. K. Kar*** reported in ***(1974) 1 SCC 141*** the Hon'ble Supreme Court of India was considering a question whether an arbitration clause in a contract would survive even after its rescission, it recognized the fundamental position that where there is a unilateral termination of the contract resulting in rescission, the future performance of the contract comes to an end, but the right to claim damages either for the previous breaches or for the breach which constituted the termination will remain alive.

206. Another important provision that requires to be considered is Section 75 of the Indian Contract Act, 1872 which reads as under:-

> ***Section 75 - Party rightfully rescinding contract entitled to compensation***
> *A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract.*

207. In ***Maharashtra State Electricity Distribution Company Ltd. Vs. Datar Switchgear Ltd.*** reported in ***2013 SCC Online Bom 1755,*** the Hon'ble Bombay High Court has held that a claim for compensation under section 75 of the Contract Act is maintainable when the right to repudiation of the contract has been exercised under sections 39, 53, 54 or 55 of the Contract Act. While holding so the Hon'ble Court followed the decision in the ***case of Mirza Javed Murtaza vs. U.P. Financial Corporation Kanpur and another*** reported in ***AIR 1983 All. 234(1)*** and in particular paragraph 13 thereof which reads as under:-

> *"13. The situations in which one of the parties to a contract, may rightfully rescind and put an end to it are dealt with u/s. 39, 53, 54, 55 and 64 of the Contract Act.* ***Section 39 states that when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance****. The rightful rescinding of a contract involving reciprocal promises has been dealt with under Section 53 of the Act which provides that when a contract contains reciprocal promises and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the other party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract. Section 54 deals with the effect of default as to the promise which should be first performed, in a contract consisting of reciprocal promises. The section provides that when a contract consists of reciprocal promises such that one of them cannot be performed, or that its performance cannot, be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim*

the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract. Section 55 deals with the effect of failure to perform at fixed time, in a contract in which time is essential. ***Section 64 concerns the consequences of rescission of voidable contracts stating that when a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received****. Thus the general conditions in which a contract can be rightfully rescinded have been first contemplated under Section 39. Sections 54 and 55 are applicable to those general conditions in the particular field of reciprocal promises. Section 55 then seeks to apply the same conditions in the field of such contracts in which time is essence of their performance. Section 64 dealt with the consequences of repudiation of a contract by such party at whose option it was repudiable. Section 75 on the other hand enables the person rightfully rescinding a contract to get compensation from the party at whose fault the repudiation had to be brought about. Section 64 in this way deals with some sort of liabilities, and does not deal with claims so directly. Since it makes a person liable, the very liability of that person may legitimately give rise to the claim of another person.* ***So, when Section 64 says that the party who lawfully rescinds a contract must, return the benefit which he has under the contract received from the party for whose conduct the contract had to be repudiated, it has the implication in it of giving birth to the claim of the other party to insist upon the repudiating party to make restoration of the benefit which he has hitherto received or enjoyed under the contract. The peculiarity about this claim is that it is not after all a claim of compensation. It is obviously that type of claim which can better be called as claim for restoration or restitution. The aim is to bring the parties to a position as if there had been no contract****. In its aim and intent, the claim for compensation is quite the reverse of a claim of restitution. A claim for compensation aims not at bringing the parties in a position as if no contract had been entered into but in a position as if the contract had been performed. The one restores the benefit, the other recoups the loss. The*

> *person who lawfully rescinds a contract is, on the one hand, under a legal liability to restore the benefit, if any received by him under the contract to the person from whom he has received it, and gives him at the same time and on the other hand, a legal right to claim compensation for the damage, if any, he has suffered through the non-fulfilment of the contract (see 'Law of Claims' by Dr. R.G. Chaturvedi, pages 454 and 455).* ***The kind of refusal contemplated in Section 39 of the Contract Act is one which affects the vital part of the contract and prevents the promisee from getting in substance what he bargained for****. The claim for compensation under Section 75 is maintainable when the right of repudiation of the contract has been exercised under either of the Sections 39, 53, 54 or 55 of the Contract Act."*
>
> (**Emphasis Supplied**)

208. The interplay between Sections 39, 64 and 75 of the Indian Contract Act, 1872 was thus lucidly explained by the Hon'ble Allahabad High Court which was followed by the Hon'ble Bombay High Court in ***Datar Switchgear Ltd. (supra),*** which decision has been ultimately affirmed by the Hon'ble Supreme Court of India in ***MSEDCL Vs. Datar Switchgear Ltd*** reported in ***(2018) 3 SCC 133.***

209. The upshot of the aforesaid discussion is that a contract can be validly and rightfully rescinded[116] under Section 39 of the Indian Contract Act. A party rightfully rescinding the contract under Section 39 is definitely entitled to compensation for any damage which it has sustained through the non-fulfillment of the contract. Such a right is found in Section 75 of the Indian Contract Act, 1872. However, coupled with this right, there is also a liability on such a party to return or restore the 'benefit', so far as may be, to the party from which it was received. This liability of one party gives a birth to a right in the other party to seek restoration.

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[116] Or "terminated" or "put to an end" in the Indian context.

210. Applying this law to the facts at hand, it is the Claimant Society that has terminated/rescinded/put an end to the contract between the parties. In these circumstances, even though it is entitled to claim for damages under Section 75 from the Respondent Developer in accordance with the stipulations of the contract, it may still have to return or restore any "benefit" that it may have received from the Respondent Developer.

211. This brings me to consider whether or not it can be said that any "benefit" has been conferred upon the Claimant Society by the Respondent Developer during the subsistence of the Contract.

Whether there is any "benefit" received by the Claimant Society which it is liable to restore to the Respondent Developer?

212. At Exhibit 2[117] of its Counter Claim and set-off, the Respondent Developer has quantified a sum of Rs. 30,68,54,552/- towards the monetary benefits that the Claimant Society is supposed to have received according to the Respondent Developer. In cross examination it has come on record by way of RW-1's admission to Q.31 that the Respondent Developer breached the conditions of Clauses 8B, 8C, 8D and 8E of the Consent Terms. It was not disputed by the Respondent Developer that it has not paid the amounts mentioned under the said clauses. If that be so, it is totally wrong on the part of the Respondent Developer to still include amounts under some of these clauses in its particulars of claim. Even otherwise, I find that the Respondent Developer is not entitled to a restoration of the amounts paid to the Claimant Society towards rents in lieu of temporary alternate accommodation for a simple

[117] As also at Item No. 58 of the Respondent's COD Vol-II

reason that the same cannot be said to be a “benefit” at all. In my Order dated 17th September 2018 passed under Section 17 of the Act I had taken the view that such amounts are not a “benefit” at all. This Order was challenged by the Respondent Developer before the Hon’ble Bombay High Court and the Appeal was dismissed by the Hon’ble Bombay High Court by its Order dated 14th December 2018. The Hon’ble Bombay High Court’s observations at paragraph 27 of the said decision is reproduced as under:

> *“27. In my view, this submission of Mr. Narula overlooks the fact that the respondent members had agreed to redevelopment in the hope of better prospects and payment was made only in inducement for the members of the society who agreed to redevelop and vacating their homes rather than continue in the premises during repairs that would have to be undertaken.* ***Payment of rent cannot be in any manner considered to be a “benefit”.*** *It only facilitated the members to be housed in different premises. There is substantial collateral hardship that is associated shifting from one own home to rented premises and during the period that is to be taken for the new and permanent home to be constructed.* ***The respondents are out of their homes for about 11 years. When they vacated their premises they were expecting to be back in their new homes within a reasonable period of time. Although shifting to rented premises may appear to be a formality to facilitate redevelopment, in fact it is a commitment made in anticipation of performance of the petitioners promises to rehouse them in permanent accommodation.*** *While resolving to enter into such agreement, the members of the society , for that matter no home owner, would expect or tolerate delay of this nature.”*
>
> *(**Emphasis Supplied**)*

213. The Hon’ble Bombay High Court’s view that payment of transit rent cannot be construed to be a “benefit” has binding force. The Hon’ble Supreme Court of India has not interfered with the Order dated 14th December 2018. Mr. Narula had attempted to argue that the view

expressed by the Hon'ble Bombay High Court in this regard was a view that was made at an interim stage and therefore has to be understood as a prima-facie observation. I am unable to persuade myself to accept this submission. The view expressed by the Hon'ble Bombay High Court is a view on the legal position. The stage at which it is made is immaterial in my opinion. I am fully supported by what is held at paragraph 32 by the Hon'ble Bombay High Court in ***IREP Credit Capital Pvt. Ltd. v. Tapaswi Mercantile Pvt. Ltd.***, reported ***2019 SCC OnLine Bom 5719***. The same is reproduced below.

> ***"32.*** *I will pre-empt another line of attack that I see hovering on the horizon, though in fairness Mr. Kamat does not take it explicitly today. There is no use and will be no use saying that Kulkarni J's view in Saifee Developers was "only at the ad interim stage". That means nothing, or next to nothing. It muddles two different facets : a pronouncement on law, and the stage at which this is done.* ***It is entirely possible, and indeed often happens (and, given the way we handle our interim applications, increasingly happens) that a question of law is fully decided at an interim or even ad interim stage. The fact that it is at an ad interim stage makes it no less binding. One must look at what was decided, and how.*** *If the pronouncement on law is said to be a prima facie view, then a different view at a later stage may be possible. But if the finding on law is determinative, in the sense there is nothing further to be discussed or decided at any later stage, and no different result is possible no matter what facts are later on record, then that finding must be taken as concluded, conclusive, binding and not merely a prima facie view.* ***There may be a final decision on the law applied to a prima facie finding on facts; the two are not inconsistent, and nothing is shown to me to suggest that a finding on law at an ad interim or interim stage is never binding or need not be followed. Were it so, it would never be necessary to fully consider the law at any interim (let alone ad interim) stage. It would only ever be necessary to return a broad-brush finding of what the position in law might likely be****. Indeed, I believe this to be a wholly incorrect approach. The only judicious approach is to*

apply the correct law to a prima facie view of the facts. On a fuller examination of the facts, the legal position remaining unchanged, there may well be a different outcome. But I do not see how a fuller examination of facts can alter the position in law. The dichotomy that Kulkarni J noted and resolved has nothing at all to do with the facts of any given case. It was simply a matter of considering a set of precedents and examining their impact on the statute. That appears to me to be a sufficiently final pronouncement on law, subject only to a contrary view at an appellate stage, and it cannot be brushed aside by a later bench of coordinate strength only because of the stage at which it came to be pronounced or decided.

(Emphasis Supplied)

214. An Arbitral Tribunal is certainly bound by law laid down by the Hon'ble High Court even though the same may have been rendered at an interim stage. I am therefore bound by the observation of the Hon'ble Bombay High Court made in its Order dated 14th December 2018.

Whether the Respondent Developer is entitled for any monetary reliefs?

215. Insofar as the restoration of the construction costs incurred by the Respondent Developer in putting up the building are concerned, the same also cannot be said to be a "benefit". I find Mr. Khandeparkar to be justified in his reliance on ***Borivali Anamika Niwas CHSL (supra)***, paragraph 19 whereof reads as under:-

"19. The mere fact that the developer has put money into the project cannot and does not create equity in and of itself. After all, the objective of the developer is not to do this for a charitable purpose. It is to make large financial gains. ***The expenditure on the project is not, therefore, a handout to the society members****. It is very much in the nature of an investment. But that investment is clearly coupled with a contractual obligation that the developer is bound to discharge. Without discharging this obligation, it can claim no rights in equity or in law."*

216. In view of the aforesaid, all the contentions of the Respondent Developer insofar as the restoration of its expenses are concerned, are wholly without any substance. In any event, at Exhibit 3 of the Counter Claim, the Respondent Developer has double counted the sum of Rs. 30,68,54,552/- despite the same having been prayed for in Exhibit 2. Insofar as the other expenses mentioned in Exhibit 3 are concerned, in view of the legal position discussed above, the same cannot be granted.

217. At this juncture, it would be necessary to deal with Mr. Narula's submissions that the evidence in chief of RW-1 insofar the expenses incurred by it, has largely gone uncontroverted. He had relied upon the decision in the case of ***Harish Loyalka (supra)*** to contend that in view of the evidence having gone unchallenged, this Tribunal should accept the same. I am afraid I am unable to accept this submission. There can be no quarrel about the law laid down by the Hon'ble Bombay High Court in ***Harish Loyalka (supra),*** however, the same cannot come to the rescue of the Respondent Developer in the present case especially when its evidence has failed to stand on its own legs in the first place. ***Secondly***, I find much substance in Mr. Khandeparkar's rejoinder submissions as recorded in paragraph 97(f) herein above. The amount of expenses supposedly incurred by the Respondent Developer on the project as co-relatable to the bank entries, is lesser than the claim made by the Claimant Society. In any event, having regard to Clause 22 of the Development Agreement, which survives with suitable modifications as observed by me herein above, would bar a claim from the Respondent Developer.

218. Insofar as the claim for loss of profits in the sum of Rs. 29,09,70,826/-, I accept Mr. Khandeparkar's submissions that there

is an absolute insufficiency of evidence on the part of the Respondent Developer to prove this claim.

219. In any event, the Respondent Developer cannot seek any damages from the Claimant Society for two primary reasons, viz., Respondent Developer is itself a party in breach where the Claimant Society is not responsible in any manner; and the terms of the contract between the parties operate as a complete bar in as much as under Clause 22 of the Development Agreement, the Respondent Developer has agreed not to claim any damages or compensation from the Claimant Society in the event it breaches the specified obligations under the contract.

220. It would also be necessary to note here that once the Respondent Developer is found to be disentitled to an award of specific performance, there is, in any event no question of awarding any damages or compensation. This position has been clarified by the Hon'ble Bombay High Court in the case of ***Board of Control for Cricket in India Vs. Deccan Chronicle Holdings Ltd.*** reported in ***2021 SCC Online Bom 834*** at paragraph 249 of the said report which reads as under:

> *"249. It seems to me self-evident that damages 'in lieu' of specific performance could only have been granted if the claim for specific performance was pressed; a specific finding was returned that DCHL was entitled to specific performance; then, that specific performance was rendered impossible in light of certain factors; and resultantly damages 'in lieu of' — that is to say, instead of — specific performance were granted. In this chain, one that seems to me to immutably correct, if the first step itself failed — whatever the reason — the rest simply could not follow.* ***If specific performance was rejected or not pressed, there could be no question of awarding damages instead of it. Similarly, damages in addition to specific performance could be granted only if specific performance was found to be a relief capable of***

> ***being granted;*** *and that required the relief to be pressed. The learned Sole Arbitrator impermissibly read DCHL's prayer — seeking damages if the relief for specific performance was rejected — as being equivalent to a prayer for damages in lieu of specific performance."*

221. The same decision would also be an authority for the proposition that once a definite bargain is struck between the parties, like the provisions of Clause 22 of the Development Agreement, then an arbitral tribunal cannot go beyond the same. I am bound to implement the contractual clauses and cannot go contrary to them. The relevant paragraphs that support this legal position are as under:

> *"232. Mr. Mehta points out that the terms ex aequo et bono and amiable compositeur have a specific legal connotation. The first means 'according to what is equitable (or just) and good'. A decision-maker (especially in international law) who is authorized to decide ex aequo et bono is not bound by legal rules and may instead follow equitable principles. An amiable compositeur in arbitration law is an arbitrator empowered by consensus of parties to settle a dispute on the basis of what is 'equitable and good'.*
>
> *233. Given the wording of the Arbitration Act, a longer examination of the antecedents of these concepts is unnecessary. The statute itself is clear and unambiguous; and in Associate Builders, the Supreme Court in paragraph 42.3 extracted Section 28 and said that a contravention of it is a sub-head of patent illegality. Ssangyong Engineering does not change this position. Given this now settled position in law, it is unnecessary to examine the additional authorities on which Mr. Mehta relies, all to the same effect.* ***They also say this : commercial arbitrators are not entitled to settle a dispute by applying what they conceive is 'fair and reasonable,' absent specific authorization in an arbitration agreement****. Section 28(3) also mandates the arbitral tribunal to take into account the terms of the contract while making and deciding the award. Section 28 is applicable to all stages of proceedings before the arbitral tribunal and not merely to the making of the award.* ***Under Section 28(2), the Arbitral Tribunal is required to decide***

> ***ex aequo et bono or as amiable compositeur only if the parties expressly authorize it to do so. The Arbitrator is bound to implement the contractual clauses and cannot go contrary to them. He cannot decide based on his notions of equity and fairness, unless the contract permits it****."***
>
> *(**Emphasis Supplied**)*

222. The aforesaid decision was recently followed by the Hon'ble Bombay High Court in the case of ***John Peter Fernandes Vs. Saraswati Ramchandra Ghanate*** reported in **(2023) 3 AIR Bom R 320.** In this case, the Hon'ble Bombay High Court held that a party who was not found entitled to specific performance could not be awarded the monetary relief in teeth of specific contractual clauses barring the same. The Hon'ble Court also noticed a ruling of the Division Bench of the Hon'ble Bombay High Court in the case of ***Vilayati Ram Mittal Pvt. Ltd.*** **v.** ***Reserve Bank of India*** reported in ***2017 SCC OnLine Bom 8479*** wherein it is held that if a clause of an agreement mandates a specific consequence and if the arbitrator issues a direction in the teeth of the same, he travels beyond his jurisdiction, for the reason that the learned arbitrator is a creature of the contract between the parties and he cannot ignore specific terms contained therein.

223. On account of the foregoing discussion, I am unable to grant any monetary reliefs to the Respondent Developer. In view of the finding recorded in Point (n) and in view of the aforesaid analysis, **I answer Point (q) in the negative**. **I hold that the Respondent Developer is not entitled to monetary relief as prayed at prayer clause 'd' of its Counter Claim**. In view of this position, the authorities relied upon by Mr. Narula in respect of assessment of damages are of no assistance to the Respondent Developer.

224. On the basis of the overall assessment of evidence and the findings recorded on all connected Points, and in particular Point (k), I am of the clear opinion that the Claimant Society was perfectly justified in terminating the contract with the Respondent Developer. I accordingly hold that the Termination Notice dated 9th June 2018 terminating the Development Agreement dated 26th September 2007 read with Power of Attorney dated 26th September 2007 read with the Consent Terms dated 16th May 2017, is legal, valid and binding upon the Respondent Company and its Directors and/or any persons claiming through them. **Point (a) is answered in the affirmative**. Resultantly, **Point (b) is also answered in the affirmative** and this Tribunal hereby holds that the Claimant Society is entitled for vacant and peaceful possession of the property viz. land bearing part of Survey No. 7 CTS No. 7 (part) situated, lying and being at Village Goregaon (West), Mumbai 400104 alongwith building standing thereon to the Claimant Society.

225. It would now be necessary to discuss Point (o) as framed herein for determination. The said Point has been framed at the behest of the Respondent. The said Point has to be answered in the negative in my opinion. I have recorded a categorical finding that the Respondent Developer has committed severe breaches of the contract between the parties at all stages, i.e. of the Development Agreement as well as of the Consent Terms. In these circumstances, the fact that the old buildings of the Claimant Society have been demolished and some new construction has been put up in its place cannot be a circumstance that can impede the termination of the contract by the Claimant Society. I have recorded a categorical finding that the termination of the contract is perfectly justified. As regards the impossibility of restoring the parties to the

original position which stood when the Development Agreement was executed, the same cannot be said to be a circumstance disentitling the Claimant from exercising its contractual right to put an end to the contract and leave the parties to raise their respective claims in law. As per ***Damodar Valley Corporation (supra),*** in case of a unilateral termination of the contract resulting in rescission, the future performance of the contract comes to an end, but the right to claim damages either for the previous breaches or for the breach which constituted the termination will remain alive. Accordingly, the parties have raised their respective claims before me and on an overall assessment I have found that the Respondent Developer is not entitled to its claims whereas the Claimant Society is entitled to the extent mentioned herein. The parties are to be left to their position as it stands today pursuant to a broken contract and there is no question of restoration. Mr. Narula's arguments on this Point seem to arise from Section 27(2)(b) of the Specific Relief Act, 1963. However, in my opinion, Mr. Narula overlooks the fact that if there are changes in circumstances which have made it difficult for the parties to be restored to the original position, the same have been on account of the severe breaches of the Respondent Developer. The said clause of sub-section 2 of Section 27 of the Specific Relief Act, 1963 may not be attracted. Insofar as third party rights being created, I must note that the flat purchasers had notice of the contract between the Claimant Society and the Respondent Developer. In my opinion, parties are required to be left at their positions after their respective claims for damages have been assessed and there is no question of their restoration to the original position as it stood when the contract was made. **Point (o) is therefore answered accordingly**.

Stamp duty on lease deed and conveyance deed

226. Since this Tribunal had framed a Point to determine whether the Claimant Society proves that stamp duty and other charges in respect of the Lease and Conveyance Deed was paid by the Claimant which was executed by MHADA, I consider it as my duty to record my find in respect of the same. I must note here that none of the parties have argued this point seriously. I am therefore left to decide this point on the basis of the available material on record, which I believe to be sufficient enough to render a definite finding. When Mr. Narula posed a specific question to CW-1 Mrs. Maya Sejpal that on what basis it is contended that the stamp duty was paid by the Claimant Society, she stated that the receipts of payment of stamp duty are in the name of the Claimant Society. Sure enough, Exhibits C-37 and C-38 substantiate this position. There was no further challenge to this on behalf of the Respondent Developer and I therefore find this material sufficient to answer **Point (c) in the affirmative.**

Question of Third party flat purchasers

227. This brings me to one of the most contested questions between the parties. The core question that is required to be decided is whether the third party rights, encumbrances, flat allotments, Agreements for Sale and other documents creating third party rights executed by the Respondent in pursuance of the Development Agreement 26th September 2007 read with Power of Attorney dated 26th September 2007 as modified by the Consent Terms dated 16th May 2017 are binding on the Claimant Society.

228. Effectively, Mr. Narula's submission is that the Claimant Society cannot unilaterally terminate the Development Agreement since the

Respondent has created third party rights by selling the free sale component to new flat purchasers. As regards the termination, I have already recorded my findings herein above.

229. As regards the the creation of third party rights by the Respondent Developer, it was Mr. Narula's submission that the Respondent has done so as an agent of the Claimant Society. He had relied upon the clauses of the Power of Attorney, especially the last clause, to canvass his submission that the Claimant Society is deemed to have ratified and confirmed all acts, deeds and things done by the Developer. He also strenuously relied upon clause (h) of the Power of Attorney dated 26th September 2007 which reads as under:

> *"h) To sign agreements of sale, Loan Agreement to Finance the project and finance with prospective purchasers of flats in the said building to be developed by the Developers, get the agreements registered and executed before the sub-registrar, notary, obtain payments and sale consideration and appropriate sale proceeds in the name of the Developers."*

230. Bare perusal of the aforesaid clause does indicate that the Claimant Society has granted the power to the Respondent Developer to sign agreements of sale, Loan Agreement to Finance the project and finance with prospective purchasers of flats in the said building to be developed by the Developers and to get them registered in the sub-registrar's office. If this clause is viewed in isolation, Mr. Narula's argument appears very attractive at the first blush. But on a closer scrutiny, the same is devoid of merits. Firstly, the Power of Attorney gives the power by the Claimant Society *"To do all things on behalf of our society in the office of MHADA (Maharashtra Housing Area Development Authority), Mumbai Mahanagar Palika (Municipal Corporation of Greater Mumbai), hereinafter referred to as MCGM, and all other governmental authorities, including the following:".*

Clause (h) therefore has to be read in this context. Moreover, clause (h) is merely an enabling provision to give effect to clause 3 of the Development Agreement dated 26th September 2007 which is the principal contract between the parties.

231. The power of attorney has to be read harmoniously with the clauses of the Development Agreement. Clauses 9(k), 10(22) and 10(23) make it clear that the contract between the parties is on a principal to principal basis. Moreover, clause 29 of the Consent Terms dated 16th May 2017 further bolsters this principal to principal relationship. Clause 29, which is already reproduced herein, reads as under:

> *"29. **The Petitioner shall not be liable to the flat purchasers** for completion of the flats sold to them by the Respondents **as the Petitioner is not a promoter under MOFA viz a viz the flat purchaser.**"*
>
> [**Emphasis supplied]**

232. No doubt the Respondent has been conferred with the authority to deal with the free sale component of the project by the Claimant Society under the Development Agreement, but the question is whether such authority was to be exercised by the Respondent for its own sake or on its own account as an independent contractor or as an agent of the Claimant Society. Even if it is assumed for a moment that the clauses of the Development Agreement are not clear enough to answer this question, the purport and the express provisions of clause 29 of the Consent Terms however leave no scope for any doubt. The clauses 9(k), 10(22) and 10(23) of the Development Agreement, the relevant clauses of the Power of Attorney and finally clause 29 of the Consent Terms read together in their proper perspective clearly envisage the development and sale of the free sale component of the project by the Respondent on its

own account and as an independent contracting party and not as an agent of the Claimant Society. I am fortified in this view by the judgment of the Hon'ble Bombay High Court in the case of ***Vaidehi Akash Housing Pvt Ltd.*** (supra). For this reason, I am unable to accept Mr. Narula's submission that the Respondent has acted as an agent by selling flats to new flat purchasers and that the Claimant Society therefore cannot unilaterally terminate the Development Agreement.

233. Moreover, the law laid down in ***HDIL Vs. MIAL*** reported in ***2013 SCC Online Bom 1513,*** would support the proposition that the Respondent Developer would get rights in his free sale component only after completion of the obligations under the contract in the first place. These obligations, as I have found herein, have been severely breached by the Respondent Developer.

234. Be that as it may, since the City Civil Court at Dindoshi as well as the Real Estate Regulatory Authority, in their respective Orders have expressed a hope that this Tribunal will consider the rights of the flat purchasers in the present Award, I deem it necessary to discussion this position.

235. On the question of whether or not the Claimant Society can be made liable to the third party flat purchasers is concerned, the clauses of the Development Agreement as also the Consent Terms as discussed above are sufficient to hold that since the contract between the Claimant Society and the Respondent Developer was on a principal to principal basis, the Claimant Society is not liable to the third party flat purchasers claiming under the Respondent Developer. The third party flat purchasers whose contracts were contingent upon the successful performance by the Respondent

Developer of the contract between the Claimant and the Respondent, have now become void in my opinion, in view of the fact that the contract between the Claimant Society and the Respondent Developer has been found to be rightfully terminated. Nothing precludes the third party flat purchasers from agitate their rights against the Respondent Developer and making an appropriate claim for damages against the Respondent Developer before the appropriate forum. The third party flat purchasers have no privity of contract with the Claimant Society so as to make the Claimant Society liable to them.

236. On this issue, I have rendered my findings in the Order dated 27th February 2019 on the applications made by certain third party flat purchasers before. I deem it expedient to extract certain portions of the said Order, for I see no reason to deviate from the legal view that I have taken in the said Order.

> *"46. Coming to the case of the Applicants, they are purchasers of flats in the free sale component that the Respondent Developer was permitted to exploit under the Development Agreement dated 26th September 2007. It is not in dispute that the individual flat purchase agreements do not contain an arbitration clause. Mr. Thakkar's argument is that since the Development Agreement dated 26th September 2007 between the Claimant Society and the Respondent Developer is the principal contract that gives the Respondent Developer the power and authority to enter into further agreements to sell the free sale component, the arbitration clause contained in the Development Agreement dated 26th September 2007 is wide enough to cover the present disputes being raised by the Applicants. Mr. Thakkar also argued that there is another similarity between the circumstances of the present case and those that obtained before the Hon'ble Supreme Court in Ameet Lalchand Shah's case is that in the present case the flat purchase agreements and the Development Agreement dated 26th September 2007 read with the Consent Terms dated 16th May 2017 are interlinked and interconnected. The purchasers of the free*

sale components are to become the members of the Claimant Society upon completion of the redevelopment project as per the provisions of the Development Agreement and the Consent Terms. This, according to Mr. Thakkar, makes the flat purchase agreements interconnected and interlinked with the Development Agreement dated 26th September 2007 and the Consent Terms dated 16th May 2017.

47. On its surface, Mr. Thakkar's argument appears very attractive. However, on a deeper scrutiny of the same, I am unable to persuade myself to accept it. This is for more than one reason.

48. Firstly, in Ameet Lalchand Shah's case, there was a very close connection between the parties as noted by the Hon'ble Supreme Court at paragraphs 14 and 25 of the said judgment. It found that they were virtually the same. Secondly, the Hon'ble Supreme Court specifically found that performance of the mother/principal agreement was not feasible without aid, execution and performance of the other three agreements being the supplementary/ancillary agreements, whereas in the present case such is not the situation. Performance of the mother/principal contract, i.e. the Development Agreement dated 26th September 2007 or of the understanding/bargain struck in the Consent Terms dated 16th May 2017, is certainly not dependent upon the performance of the individual flat purchase agreements between the Respondent Developer and the flat purchasers. In other words, whether the Respondent Developer enters into flat purchase agreements with third parties or not, has absolutely no effect on its performance of the Development Agreement dated 26th September 2007 or the Consent Terms dated 16th May 2017. Respondent Developer had to independently perform its obligations under the Development Agreement dated 26th September 2007 and the Consent Terms dated 16th May 2017. The Respondent Developer merely had the right to dispose of the free sale component in terms of the Development Agreement dated 26th September 2007 and the Consent Terms dated 16th May 2017. Availing this right is not to be understood as a pre-condition to perform the said Development Agreement.

49. Thirdly, the clauses of the Development Agreement dated 26th September 2007 and the Consent Terms dated 16th May 2017 leave no manner of doubt that the same are executed

between the Claimant Society and the Respondent Developer on a principal to principal basis. I have already recorded my prima facie finding that the Respondent Developer cannot be called as the agent of the Claimant Society. This prima-facie finding has not been disturbed either by the Hon'ble Bombay High Court or by the Hon'ble Supreme Court. It is also clear from sub-clause (iii) of Clause 53 of the Development Agreement dated 26th September 2007 wherein the Claimant Society and the Respondent Developer have specifically agreed that the Development Agreement shall not be construed as a partnership or joint venture or agreement of partnership and the same shall be on principal-to-principal basis.

50. The rights of the Applicants under the flat purchase agreements are subject to "terms, conditions and provision contained in hereinbefore recited Agreements[118]" where the expression 'Agreements' includes this Development Agreement dated 26th September 2007.

51. The Claimant Society is therefore not 'connected' or 'related' in any way to the individual flat purchasers who have independently contracted with the Respondent Developer alone. The 'connection' or 'relation' between the Claimant Society and the flat purchasers was contemplated to be established only after successful performance of the Development Agreement dated 26th September 2007 and/or the Consent Terms dated 16th May 2017 upon which the flat purchasers were to be inducted as members of the Claimant Society. However, that in itself is not sufficient to establish the required interlink or the interconnection. Mere reference in a Development Agreement to the future event that the Developer will exercise his right by entering into flat purchase agreements with third parties, does not make the Development Agreement 'interconnected' or 'interlinked' with the flat purchase agreement unless provided so specifically. In the present case, it prima-facie appears that the Claimant Society had no control over the Respondent Developer in so far as entering into flat purchase agreements with third parties is concerned.

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[118] Clause 1 of the Flat Purchase Agreement at Page 123 of the Application

52. For all these reasons, the judgment of the Hon'ble Supreme Court in Ameet Lalchand Shah's case is of no assistance to the Applicants. The same is clearly distinguishable on facts.

53. Now it is important to consider Mr. Thakkar's submissions about the Claimant Society being a "promoter". As noted herein above, Mr. Thakkar fairly submitted that he cannot impugn this Tribunal's prima-facie finding that the Claimant Society is not a promoter since the said finding is affirmed by the Hon'ble Bombay High Court. Mr. Thakkar however submits that even if the Claimant Society may not be a "promoter" for the purposes of the obligations under MOFA, the Claimant Society is still a promoter under the RERA. Mr. Thakkar bases this submission primarily on three points, viz., i) the Claimant Society would fall within the term "promoter" as defined under RERA Act and that the law laid down in Vaidehi Akash has undergone a change after the introduction of RERA Act; ii) the website of MahaRERA shows the name of the Claimant Society as "promoter" in respect of the project on the subject plot; and iii) the Order dated 26th November 2018 passed by the MahaRERA on the complaints filed by some of the flat purchasers records that the said flat purchasers continue to remain "allottees" in the said project.

54. To appreciate Mr. Thakkar's submission that the position in law under MOFA as explained in the judgment of the Hon'ble Bombay High Court in the Vaidehi Akash's case, has changed considerably after the introduction of RERA, it is important to note the definitions of the term "promoter" found in both these legislations.

55. The MOFA defines the term "promoter" at Section 2(c) which is as under:

"(c) "Promoter" means a person and includes a partnership firm or a body or association of persons, whether registered or not ***who constructs or causes to be constructed a block or building of flats or apartments for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both****;"*

(Emphasis supplied)

56. The RERA defines the term "promoter" at Section 2(zk) which is as under:
(zk) "promoter" means,--
(i) ***a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees****; or*

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) any development authority or any other public body in respect of allottees of--

(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) plots owned by such authority or body or placed at their disposal by the Government,

for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public.

*Explanation.-- For the purposes of this clause, where the **person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder**;*

(Emphasis supplied)

*57. When Mr. Thakkar contends that the Claimant Society is a "promoter" under RERA, it is understood that he contends that the Claimant Society falls under sub-clause (i) read with the explanation to clause (zk) of Section 2 of the RERA since other clauses seem unlikely to bring the Claimant Society within their sweep given the facts and circumstances of the present case. Once that is established, it would be relevant to compare the definition of the term "promoter" found in MOFA with that of the said term as defined by Section 2(zk)(i) read with the Explanation. Both seem largely identical to me. Both cover a person "**who constructs or causes to be constructed"** a structure such as a block or building of flats or apartments or an independent building or a building of apartments for the purpose of selling some or all of them. What is perhaps the difference between the two definitions is that the definition under RERA also covers a person "**who converts"** an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons. Even with the inclusion of this additional expression in the definition of "promoter", covering therein a person "who converts" an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons, it is difficult to see how it will include the present Claimant Society. In my humble opinion, the Hon'ble Bombay High Court in the Vaidehi Akash's case has also effectively dealt with this eventuality at paragraphs 16.7, 16.8 and 16.9 of its judgment which are reproduced hereunder:*

*"….It is submitted that the **Society can at any rate be said to have caused the building of flats to be constructed for the purpose of selling the same, and as a person, who causes such building to be built, is as much a promoter as a person who sells premises in such building**.*

16.8 The Society is the owner of the property and has entered into an agreement with the developers, i.e. Vaidehi, for redevelopment of its property. The redevelopment envisages construction of the Society's building to accommodate its members and also construction of building/s of flats/premises to be sold to outsiders. The agreement authorizes or entitles the developers to construct such building/s and sell flats/premises therein to outsiders. Such authority or entitlement is to the developers' account and in their own right, and as an independent contractor. ***If in exercise of such authority or entitlement, a building is constructed by the developers, it cannot be said that such building is caused to be constructed by the Society within the meaning of Section 2(c) of MOFA****.*

16.9 ***Any other interpretation would lead to anomalous consequences, which could never have been contemplated by MOFA. The owners of lands entering into agreements for sale or development agreements with promoters/developers would be held as being subject to all liabilities of a promoter, such as liability of disclosure of plans and specifications, outgoings etc. under Section 3 of MOFA, entering into agreements in accordance with Section 4, giving possession of flats and suffering the consequences of Section 8, forming co-operative societies of flat purchasers under Section 10, and so on. This would be plainly inconceivable****.*

(Emphasis supplied)

58. In my humble opinion, the aforesaid exposition of law laid down in Vaidehi Akash's case which was considering the provisions of MOFA, can also be extended to the provisions of RERA. Otherwise, if Mr. Thakkar's argument is to be upheld the owners of lands entering into agreements for sale or development agreements with promoters/developers would be held as being subject to all liabilities, responsibilities and functions to be carried out under RERA, its rules and regulations framed thereunder. A Society will then be visited with consequences for breaches by the Developer of its obligations under Sections 11 to 19. For instance, if a Developer breaches its obligations qua a flat purchaser with whom the Society has no privity of contract, like in the present case, the Society will still have to face the rigours of Sections

18 and 19 and return any amount paid by such a flat purchaser to the Developer and further compensate such flat purchaser. To borrow the words used by the Hon'ble Bombay High Court in Vaidehi Akash's case, this would be "plainly inconceivable".

59. This brings me to the other points contended by Mr. Thakkar in support of his submission that the Claimant Society is a "promoter" since the MahaRERA website shows it as such and the Order dated 26th November 2018 passed by the MahaRERA holds that the flat purchasers are still "allottees". As regards the website of MahaRERA, the task of putting information on the portal, updating the same or modifying the same from time to time, would ordinarily lie within the domain of a developer. And even if it is assumed that during the subsistence of the development agreement, Claimant Society may have itself uploaded information on the website, the mere fact that the website still shows the Claimant Society as a "promoter" does not take the Applicants' case anywhere. It may merely be an irregularity that can be cured. Since the project in the name of the Respondent Developer may not survive anymore presently given that there is no stay on the termination effected by the Claimant Society, it is difficult to accept that the Claimant Society is a "promoter" in respect of the project on the subject property.

60. As regards, the MahaRERA's Order dated 26th November 2018 terming the flat purchasers as "allottees", it appears that none of the parties before MahaRERA informed it of this Tribunal's Order dated 17th September 2018 which is passed under Section 17 of the Act. As per the position in law as it stands today, an order passed by an Arbitral Tribunal under Section 17 of the Act is deemed to be an order passed by the 'Court'. In these circumstances, MahaRERA ought to have been informed of the order affecting the substantive rights of the parties. The Applicants have averred at paragraph 4.11 of its application that "..neither the Claimant nor the Respondent informed the Applicants or even the MahaRERA about the said arbitration proceedings and the orders passed therein." One wonders why some of the Applicants who were the complainants before MahaRERA themselves did not inform it of the arbitration proceedings and the Order dated 17th September 2018 passed by this Tribunal especially when a categorical averment is made at paragraph 3 of the present

Application that the Applicants learnt about the arbitral proceedings 'in or around October 2018'. From the perusal of the order dated 26th November 2018 atleast it appears that the Claimant Society was not a party to the complaints when that Order is passed. At the hearing, Mr. Thakkar tendered an application for speaking to the minutes of the said Order filed to record the correct appearances and to include the appearance on behalf of the Claimant Society. Mr. Thakkar however also fairly informed that no orders have been passed on the said application yet.

61. As far as MahaRERA's Order dated 26th November 2018 holding that the flat purchasers are still "allottees" is concerned, I am consciously refraining myself from entering upon any discussion on the same since this Tribunal is not sitting in appeal over the same. However, it is important to mention here that MahaRERA may not have been shown this Tribunal's Order dated 17th September 2018 which was subsequently upheld by the Hon'ble Bombay High Court by its Order dated 14th December 2018. Whether MahaRERA, the limits of whose powers, functions and jurisdiction are clearly defined under RERA, can lay down a position contrary to the position laid down by an Order which is deemed to be an order of a Court, is a question that may be urged before the appropriate court in appropriate proceedings.

62. In light of the aforesaid discussion, I cannot accept that the Claimant Society is a "promoter", whether under MOFA or under RERA. Once that is established, the Applicants cannot take shelter of Section 15 of RERA. Even otherwise, it is difficult to accept that there is any 'transfer' or 'assignment' of rights as contemplated in Section 15. There has been a termination of the Development Agreement. That termination is prima-facie found to be legal and valid not only by this Tribunal but also by the Hon'ble Bombay High Court. The Hon'ble Supreme Court has not interfered with the views expressed by the Hon'ble Bombay High Court. In these circumstances, the real estate project in which the Applicants may have become "allottees", may not even survive in the first place for there to be any 'transfer' or 'assignment'."

237. I confirm my aforesaid view in this regard. The submissions made by Mr. Narula had already been made before this Tribunal when this application was considered and disposed of. I had rejected those

submissions which Mr. Narula now contended to make at the final hearing in the present arbitration.

238. I must note that similar submissions appear to have been made before the Hon'ble Bombay High Court by one of the flat purchasers in the Appeal from Order (Stamp) No. 22143 of 2019. Paragraph 8 of the said Order passed by the Hon'ble Bombay High Court reads as under:-

> *"Learned Counsel for Respondent No. 1, however, makes a few legal submissions based on the provisions of the newly enacted Real Estate (Regulation and Development) Act, 2016 ('RERA'). Relying on these provisions and in particular, the definition of "promoter" contained in Clause (zk) of Section 2 thereof, learned Counsel submits that the Appellant society is one, who has caused to be constructed a building consisting of apartments for the purpose of selling apartments to other persons and as much as Respondent No. 2 developer, it must be treated as a promoter of the project under the provisions of RERA. I am afraid, prima facie it is not possible to accept this submission. This court, in its judgment delivered in the case of Vaidehi Akash Housing Pvt. Ltd. vs. New D.N. Nagar Co-op. Housing Society Union Ltd. MANU/MH/2888/2014 : 2015 (3) ABR 270, has considered a more or less similarly worded definition of "promoter" in Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("MORA") in the context of a similar development agreement, where the landowner society had terminated the agreement on account of breaches of the developer and third party purchasers claiming under the developer had claimed that the society should be treated as a promoter and be asked to complete the project. This court held that there was no privity of contract in such a case as between the society and third party purchasers claiming through the developer. If, for any justifiable reason, the development agreement is terminated by the society and the developer is unable to obtain specific performance of the development agreement as against the society, no third party purchaser claiming under the developer can likewise seek specific performance against the society."*

239. In view of the aforesaid discussion and the legal position as explained by the Hon'ble Bombay High Court, **I answer Point (i) in the negative.** The third party rights, encumbrances, flat allotments, Agreements for Sale and other documents creating third party rights executed by the Respondent are not binding on the Claimant Society.

Claimant Society's entitlement for monetary reliefs

240. This brings me to consider whether the Claimant Society is entitled to the monetary reliefs as prayed for at prayer clause (i) of its statement of claim.

241. Prayer clause (i) of the Statement of Claim further refers to the particulars at Exhibit A of the Statement of Claim which sets out the amounts claimed by the Claimant Society. Insofar as the Legal Costs, Architect's Fees and the Miscellaneous Costs stated to be incurred by the Claimant Society, I find that this aspect of costs is sufficiently substantiated by the Claimant Society by the documents on record at Exhibits C-43 to C-58. I have therefore no hesitation in holding that the Claimant Society is entitled to recover these costs totalling **Rs. 55,58,211/-** (Rupees Fifty Five Lakhs Fifty Eight Thousand Two Hundred and Eleven Only) from the Respondent Developer.

242. Insofar as the claim for mental harassment and loss caused due to delay in completion of the project is concerned, I find absolutely no evidence being led by the Claimant Society in this regard. Even otherwise, insofar as the claim for mental harassment, I am in agreement with Mr. Narula's submissions. His reliance on the decision in the case of ***Ghaziabad Development Authority (supra)*** is well founded. This claim is therefore rejected.

243. Insofar as the claim for the amount of **Rs. 3,72,24,290/-** (Rupees Three Crores Seventy Two Lakhs Twenty Four Thousand Two Hundred and Ninety Only) is concerned, I find that the same is directly traceable to the Consent Terms. The Respondent Developer

has undertaken to pay this amount as per the Consent Terms and therefore he is liable to pay the same to the Claimant Society. At this juncture, although it has been argued that some of these payments were to be paid after 10th June 2018, the same is of no avail to the Respondent Developer since it was only an accommodation granted to it under the Order dated 6th March 2018 to pay it over a few dates. These were the liabilities in terms of arrears already incurred as stated in the Consent Terms. Insofar as interest is concerned, the parties have agreed that the rate of interest would be 15% p.a. having regard to Clause 8F of the Consent Terms. Accordingly, the Claimant Society will be entitled to interest on Rs. 3,72,24,290/- at 15% p.a. from 15th June 2018 till today, i.e. 24th June 2023 which amounts to **Rs. 85,38,321.52** (Rupees Eighty Five Lakhs Thirty Eight Thousand Three Hundred and Twenty One and Paise Fifty Two)

244. Accordingly, the Claimant Society will be entitled to a monetary award in the sum of **<u>Rs. 5,13,20,822.52</u>** (Rupees Five Crores Thirteen Lakhs Twenty Thousand Eight Hundred and Twenty Two and Paise Fifty Two)

245. In view of the aforesaid, I answer **<u>Point (j) in the affirmative</u>** and hold that the Claimant Society is entitled to paid the amounts mentioned in prayer clause (i) read with Exhibit A particulars of claim of the Statement of Claim, to the extent mentioned herein above. Finally, in view of the negative finding on Point (q), and in view of the findings recorded in respect of the other Points, **<u>I answer Point (r) in the negative.</u>**

Costs

246. That brings me to the aspect of costs. Apart from the provisions of Section 31A of the Arbitration and Conciliation Act, 1996. Insofar as the costs are concerned, guidance can be taken from the provisions of Section 31-A of the Act. Given that this Tribunal has held that the Claim made by the Claimant is well founded, the Respondent is the unsuccessful party in the present Arbitration proceedings for the purposes of Sub-Section 2 of Section 31-A of the Act. The costs in respect of the fees of the Arbitral Tribunal that are paid by the Claimant Society are **Rs. 9,65,250/-** (Rupees Nine Lakhs Sixty Five Thousand Two Hundred and Fifty Only).

247. In that view of the matter and for the reasons as discussed aforesaid, the Tribunal proceeds to pass the final Arbitral Award:-

FINAL AWARD

a) It is declared that the Termination Notice dated 9th June 2018 (Exhibit C-35) terminating the Development Agreement read with the Power of Attorney dated 26th September 2007 read with the Consent Terms dated 16th May 2017 is valid, legal and binding upon the Respondent Company.

b) It is declared that the contract between the Claimant Society and the Respondent Developer vide the Development Agreement read with the Power of Attorney dated 26th September 2007 read with the Consent Terms dated 16th May 2017 is terminated with effect from 9th June 2018.

c) The Respondent Company, its directors, servants, agents and/or persons claiming through them are hereby

permanently injuncted from interfering with the possession of the Claimant Society over the land bearing Survey No.7 and CTS No.27 (pt.) of Village Goregaon at Siddharth Nagar, Goregaon (West), Mumbai – 400104 together with the Buildings standing thereon.

d) Respondent Company is directed to handover all the original documents such as approved plans, sanctions and permissions pertaining to the redevelopment of the property on the subject property if not already handed over.

e) It is declared that the Claimant Society is entitled to a monetary award in the sum of **Rs. 5,13,20,822.52** (Rupees Five Crores Thirteen Lakhs Twenty Thousand Eight Hundred and Twenty Two and Paise Fifty Two) and the Respondent Company is ordered and directed to pay this sum of Rs. 5,13,20,822.52 to the Claimant Society.

f) It is declared that the Claimant Society is also entitled to a monetary award in the sum of **Rs. 9,65,250/-** (Rupees Nine Lakhs Sixty Five Thousand Two Hundred and Fifty Only) and the Respondent Company is ordered and directed to pay this sum of Rs. 9,65,250/- to the Claimant Society.

g) Counter Claim of the Respondent Company is rejected.

Place: Mumbai

Date: 24th June 2023

Amrut Joshi

Sole Arbitrator