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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL APPELLATE DIVISION

COMMERCIAL ARBITRATION APPEAL (LDG.) NO.194 OF 2022
IN
COMMERCIAL ARBITRATION PETITION (LDG.) NO.11890 OF 2021

Kalpataru Limited,
A Company registered under
the provisions of Companies Act,
1956 and having its Registered
Office at 91, Kalpataru Synergy,
Opp. Grand Hyatt, Santacruz (East),
Mumbai – 400 055.

...Appellant /
Original
Petitioner

....Versus....

Middle Class Friends Co-operative
Housing Society Limited,
A Co-operative Housing Society
bearing Registration No.B-470 of 1948,
having its office at N.S. Road No.10,
Plot No.3, JVPD Scheme, Andheri,
Mumbai – 400 049.

...Respondent

WITH
INTERIM APPLICATION (LDG.) NO.203 OF 2022
IN
COMMERCIAL ARBITRATION APPEAL NO.194 OF 2022

Kalpataru Limited,
A Company registered under the
provisions of Companies Act, 1956
and having its Registered Office at 91,
Kalpataru Synergy, Opp. Grand Hyatt,
Santacruz (East), Mumbai – 400 055.

...Applicant

IN THE MATTER BETWEEN :

Kalpataru Limited,

A Company registered under the provisions of Companies Act, 1956 and having its Registered Office at 91, Kalpataru Synergy, Opp. Grand Hyatt, Santacruz (East), Mumbai – 400 055.

...Appellant /
Original Petitioner

...Versus...

Middle Class Friends Co-operative Housing Society Limited,
A Co-operative Housing Society bearing Registration No.B-470 of 1948, having its office at N.S. Road No.10, Plot No.3, JVPD Scheme, Andheri, Mumbai – 400 049.

...Respondent

Mr.Navroz Seervai, Senior Counsel with Mr.Sharan Jagtiani, Senior Counsel, Ms.Gulnar Mistry, Mr.Saket Mone, Mr.Subit Chakrabarti, Mr.Shreyash Shah, Mr.Suneet Tyagi and Mr.Dinesh Parmar i/b M/s.Vidhii Partners for the Appellant.

Mr.Pravin Samdani, Senior Counsel with Dr.Birendra Saraf, Mr.Aseem Naphade, Ms.Madhu Gadodia, Mr.Deepak Deshmukh, Ms.Swati Singh, Mr.Shashank Trivedi and Mr.Shreyash i/b M/s.Naik Naik & Co. for the Respondent.

**CORAM : R.D. DHANUKA &
KAMAL KHATA, JJ.**
DATE OF RESERVE : 28TH SEPTEMBER, 2022.
DATE OF PRONOUNCEMENT: 20TH OCTOBER, 2022.

Oral Judgment (Per R.D. Dhanuka, J.) :-

1. By this appeal filed under section 37 of the Arbitration & Conciliation Act, 1996 (for short “the Arbitration Act”), the appellant (original petitioner) has impugned the judgment dated 16th December, 2021 passed by the learned Single Judge, dismissing the Commercial Arbitration Petition filed by the appellant under section 9 of the Arbitration Act. By consent of the parties, the appeal is heard

finally. Some of the relevant facts for the purpose of deciding this appeal are as under :

2. By an Indenture of Lease executed in the month of July, 1996, MHADA had granted the land admeasuring 1928.92 sq. mtrs. Bearing CTS No.195/172, situated at North-South Road No.10, Plot No.3, JVPD Scheme, Andheri, Mumbai to the respondent-society. In the month of February, 2019, the respondent society issued a public notice inviting offers for redevelopment of the building and issued the tendered documents. The appellant submitted its bid on 10th April, 2019 in response to the said public notice. On 23rd May, 2019, the appellant submitted the final revised commercial offer. It is the case of the appellant that the said final revised commercial offer was accepted by the respondent. On 23rd June, 2019, the offer made by the appellant was put to vote in a Special General Meeting by the respondent. The appellant was selected for the purpose of carrying out redevelopment of the building of the respondent-society.

3. On 11th July, 2019, the Deputy Registrar, Co-operative Societies (MHADA) granted clearance and a No Objection Certificate to permit redevelopment of the said building by the appellant. On 25th July, 2019, the respondent communicated its decision to appoint the appellant as its developer.

4. It is the case of the appellant that on 31st August, 2019, the appellant shared drafts of irrevocable consent and appointment of its Architect's letter with the respondent-society. On 7th October, 2019, the respondent appointed the appellant as the developer for redevelopment of the building of the respondent-society and forwarded the extract of Minutes dated 22nd September, 2019.

5. On 18th October, 2019, the respondent executed a Letter of Intent in favour of the appellant which sets out the principal terms of grant of rights and entitlements for a proposed redevelopment when of the plot. On 3rd December, 2019, the first draft of the development agreement along with annexures was forwarded by the appellant to the respondent-society.

6. On 16th December, 2019 and 6th January, 2020, the appellant forwarded drafts with irrevocable consents and provided the print outs to the respondent-society. During the period of January, 2020 to March, 2021, correspondence were exchanged between the parties for seeking a response on the draft development agreement in respect of the revised development agreement.

7. On 4th March, 2020, the appellant obtained a No Objection Certificate from the Airport Authority of India. On 28th August, 2020, the respondent provided the original executed copies of irrevocable consents from 18 of its members.

8. On 18th September 2020, the respondent made an application for a NOC for redevelopment of the property to the Executive Engineer, Bandra Division, MHADA intimating them about the appointment of the appellant. It is the case of the appellant that during the period between October 2020 to February 2021, the appellant shared with the respondent a full and complete set of floor plan with annexures providing for the amenities.

9. It is the case of the appellant that during the period between March and May 2021, emails were exchanged between the parties particularly regarding the parking spaces to be provided as a

part of the redevelopment process. On 15th May 2021, the appellant provided the respondent with a building proposal for submission to MHADA. According to the appellant, no response was received on the said building proposal. On 18th May 2021, the respondent issued a Termination Notice to the appellant thereby illegally terminating the LOI. On 23rd May 2021, the appellant addressed a reply to the Termination Notice. On 24th May 2021, the appellant filed a petition under Section 9 of the Arbitration Act inter alia praying for interim measures. The pleadings were completed by the parties in the said arbitration petition on or before 16th June 2021. On 16th December 2021, learned Single Judge dismissed the said interim application filed by the appellant. The appellant thus filed this appeal under Section 37 of the Arbitration Act.

10. Mr. Seervai, learned senior counsel for the appellant invited our attention to the various documents annexed to the appeal memo and also tendered a convenience compilation for the consideration of this Court. The learned senior counsel also tendered a brief written submission and the chronology of events along with a compilation of the judgments.

11. Mr. Seervai, learned senior counsel invited our attention to some of the clauses of the Tender document submitted by the appellant and the acceptance of the offer by Resolution dated 23rd June 2019 passed by the General Body of the respondent unanimously appointing the appellant as the developer for the redevelopment project. He also relied upon the LOI and various other correspondence exchanged between the parties.

12. It is submitted by the learned senior counsel that the

appellant had prayed for interim measures in the arbitration petition claiming for a specific performance of the contract allegedly agreed upon by the parties.

13. It is submitted by the learned senior counsel that all the terms and conditions agreed upon between the parties were already forming part of the Tender that was issued by the respondent-society. The appellant had issued a letter of offer to the respondent-society. He invited our attention to some of the provisions of the tender in support of his submission that every minute detail relating to the Terms and Conditions of the contract were already furnished in the Tender Document including the details of the tiles and also relating to the financial aspect agreed by and between the parties. He invited our attention to clauses in the financial bid viz. clauses 7.4, 7.22, 7.72 and 9.4 of the Tender Document and submitted that the tender document and the correspondence exchanged between the parties and the LOI were culminated into a concluded and binding contract.

14. It is submitted that the execution of agreement was not a condition precedent either in the tender or in the LOI to be executed between the parties. The said Tender Documents constituted an invitation to offer. The bid documents published by the respondent contains exhaustive details of the proposed redevelopment, including a detailed Technical and a Financial Bid. The said bid documents also contained "special conditions of contract" including exhaustive requirements of the proposed construction. The financial commercial offer also constituted an offer made by the appellant along with the commercial offers dated 10th April 2019 and 18th May 2019.

15. It is submitted that the General Body of the respondent

had already passed a resolution on 23rd June 2019 unanimously appointing the appellant as the developer for the redevelopment project. The appointment of the appellant was communicated to the appellant by the respondent by letter dated 25th July, 2019. At this stage, a concluded and binding contract came into effect. It is submitted that the respondent failed to comply with their part of the obligation only after an offer of Lotus Developers came to be received by the society on 6th May 2021 followed by a Revised offer dated 13th May 2021.

16. It is submitted by the learned senior counsel that during the period between 7th October 2019 and 31st December 2020 and thereafter till February 2021, various steps were already taken by the appellant by way of part performance of the concluded contract with the knowledge of the respondent. It is submitted that a draft development agreement was admittedly prepared and exchanged between the parties. The respondent did not execute the development agreement. It is submitted by the learned senior counsel that the learned Single Judge has not correctly considered and applied the basic fundamental of laws of specific performance.

17. The learned Single Judge at the first instance found that there was no contract at all on the ground that the development agreement was an essential requirement and was not an idle formality. The project could not proceed without it. He submitted that the learned Single Judge had proceeded to record an observation that because the appellant had expressed its willingness to proceed on the true construction of the agreement as the Court may decide, this makes clear that “the Development Agreement is no idle nice-to-have document but is of the very essence.”

18. It is submitted by the learned senior counsel that the learned Single Judge had recorded various findings which were totally contrary to the detailed conditions of the Bid Documents and erroneously held that there was no consensus ad idem which is an essential requirement of the contract: the form, nature and precise configuration of the members' component.

19. It is submitted by the learned senior counsel that the finding of the learned Single Judge that the LOI is an agreement but one that is unenforceable is erroneous. Similarly, the finding of the learned arbitrator that the arbitration agreement is an agreement within an agreement is also erroneous. It is submitted by the learned senior counsel that the learned Single Judge could not have held that though the LOI can be said to be an agreement with an arbitration clause, it would not necessarily become enforceable. This is totally erroneous. He submitted that the observations of the learned Single Judge that there exists a contract but it is enforceable only unilaterally by the respondent and not by the appellant is also totally erroneous.

20. The learned senior counsel submitted that the findings and the conclusions drawn by the learned Single Judge are completely contradictory and more particularly, the finding that an arbitration agreement can be arrived at without the existence of a contract in which it is embodied. It is submitted that though the appellant had made an averment and had shown its readiness and willingness to perform the contract, the learned Single Judge erroneously held that the suggestion (as to the true construction of the terms by the Court) is preposterous since it is not for any court or tribunal to step into the agreement making arena. The learned Single Judge failed to consider

the nature or ambit of the analysis required in a case of specific performance in a contract.

21. It is submitted by the learned senior counsel that the learned Single Judge had overlooked certain crucial elements of the dispute, including matters of equity. The learned Single Judge failed to appreciate that the parties had already taken steps towards redevelopment even prior to the execution of the LOI. This is a vital factor that points to the existence of a concluded contract and the intention of the parties to treat it as a binding contract. The appellant had also obtained a NOC from MHADA and various other permissions from various authorities for redevelopment. The learned Single Judge did not consider the argument of the appellant that the termination of the contract by the respondent was motivated by a commercial expediency.

22. It is submitted that the requirement of the members' component was not fulfilled, contrary to the record. Every provision of the draft development agreement was already incorporated in the bid documents. The learned Single Judge did not consider a comprehensive chart showing the provisions in parallel. It is submitted that the learned Single Judge did not consider the 2018 amendment to the Specific Relief Act, 1963 whereby the ambit of a Court's discretion had been significantly curtailed. The learned Single Judge ignored section 16 thereof and the fact that no case barring the grant of specific performance was made out by the respondent. It is submitted that the learned Single Judge had permitted the respondent to argue its case contrary to its pleadings. He submitted that the finding of the learned Single Judge that the respondent was always at liberty to take an alternative plea or even an inconsistent one is

contrary to the well settled law that a party cannot argue facts or mix questions of fact and law without a foundation for such arguments being laid in pleadings.

23. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in case of ***Bachhaj Nahar Vs. Nilima Mandal, (1987) 2 SCC 555*** and in case of ***Ram Swarup Gupta Vs. Bishun Narayan, (2006) 12 SCC 233***. The said judgments were not even dealt with by the learned Single Judge.

24. The learned senior counsel for the appellant tendered a compilation of 12 judgments for the consideration of this Court and referred to some of these judgments from the said compilation during the course of his arguments. The 12 judgments are as follows:-

- (a) Kollipara Sriramulu (Dead) by his LRs (in both Appeals) Vs. T. Aswatha Narayana (Dead) by his Lrs. & Ors., AIR 1968 SC 1028;***
- (b) W.J. Rossiter, George Curtis & Ors. Vs. Daniel Miller, 1124 House of Lords Vol III.***
- (c) Branca Vs. Cobarro, 854 King's Bench Division 1947;***
- (d) Arun P. Goradia Vs. Manish Jaisukhlal Shah & Ors., 2009 (1) Mh.L.J. 611,***
- (e) Shivanand Vassudev Salgaocar & Ors. Vs. Dattaraj Vassudev Salgaoncar & Ors. , 2014 SCC OnLine Bom 1250,***
- (f) Perry Vs. Suffields Limited, 2 Ch. 187,***
- (g) Jainarain Ram Lundia & Anr. Vs. Surajmull Sagarmull & Ors., 1949 F.C.R. 379,***

- (h) Rajiv Sanghvi & Ors. vs. Pradip R. Kamdar, Bombay High Court judgment dated 30th June 2022 in Interim Application No.571 of 2022 in Suit No.44 of 2021,**
- (i) Chheda Housing Development Corporation Vs. Bibijan Shaikh Farid & Ors., 2007 (3) Mh.L.J. 402,**
- (j) Mahendra J.Vora Vs. Aditya Enterprises & Ors., Bombay High Court judgment dated 7th/8th December 2006 in Notice of Motion No.1568 of 2004 in Suit No.1455 of 2004,**
- (k) Kalpataru Properties Pvt. Ltd. (formerly known as Kalpataru Construction Overseas Private Limited) Vs. Majithia Nagar Co-operative Housing Society Ltd., 2014 SCC OnLine Bom 984,**
- (l) Sushil Kumar Agarwal Vs. Meenakshi Sadhu & Ors., (2019) 2 SCC 241.**

25. It is submitted by the learned senior counsel that mere reference to a future formal contract will not prevent a binding bargain between the parties. He submits that even though there was a reference to the execution of the development agreement in the tender documents and in the LOI, that would not make the concluded contract which was already arrived at except the execution of the development agreement as not binding. He submitted that the Supreme Court in case of **Kollipara Sriramulu (Dead) by his LRs (in both Appeals) (supra)** has dealt with those aspects in great detail and has held that the mere omission to settle the mode of payment does not affect the completeness of the contract because

the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed. He submitted that all the requisite terms and conditions between the parties were already arrived at and were concluded. The learned Single Judge has erroneously distinguished the judgment of the Supreme Court in case of ***Kollipara Sriramulu (Dead) by his LRs (in both Appeals) (supra)***.

26. It is submitted by the learned senior counsel for the appellant that the learned Single Judge has formulated wrong questions for determination in the impugned order and has accordingly come to a wrong conclusion. The learned Single Judge ought to have addressed the issue whether the five documents relied upon by the appellant culminated into a binding contract. He submitted that the arbitration agreement was recorded in the tender document itself and not in the Letter of Intent (LOI).

27. Mr.Samdani, learned senior counsel for the respondent on the other hand submitted that the appeal preferred by the appellant is under section 37 of the Arbitration Act. The power of interference of this Court in this appeal filed under section 37 of the Arbitration Act is very limited. He submitted that the learned Single Judge has rightly rejected the arbitration petition filed by the appellant under section 9 for seeking interim measures after recording *prima facie* observations against the appellant on an aspect of a *prima facie* case, the balance of convenience and an irresistible injury. He submitted that all the three tests have to be satisfied for granting any interim measures under section 9 of the Arbitration Act. He submitted that this Court thus cannot interfere with the *prima facie* view taken by the learned Single Judge. The appellant has already filed a statement of claim

before the Arbitral Tribunal. In support of this submission, learned senior counsel placed reliance on the judgment of Supreme Court in case of ***Wander Ltd. and another vs. Antox India P. Ltd., 1990 (Supp) SCC 727.***

28. It is submitted by the learned senior counsel that section 9 of the Arbitration Act is akin to Order 39 Rule 1 or Order 40 Rule 1 of the Code of Civil Procedure, 1908. The principles applicable to the grant of interim relief in an application filed under Order 39 Rule 1 or Order 40 Rule 1 have to be taken into consideration by the Court while deciding an application under section 9 of the Arbitration Act.

29. It is submitted by the learned senior counsel that the building in question is 51 years old and is in a dilapidated condition. There are 32 members of the respondent-society having 32 tenements. The procedure under section 79A of the Maharashtra Co-operative Societies Act, was duly followed. Learned senior counsel invited our attention to various documents annexed to the compilation filed along with the appeal memo and a separate compilation tendered across the bar. He referred to clauses 2(a), 2(b), 16 of the Letter of Intent, clause 5.9.2, note 3, note at page 230, clause 9.4(d), clause 2 and clause 5.1.2 of the tender documents. He also relied upon clause 8.3 of the tender document which provided for issuance of power of attorney, clauses 7.24, 9.2 and 7.20 of the tender document which provided for issuance of work order.

30. It is submitted by the learned senior counsel that clauses 5.2.1, 8.4, 9.4(f), 9.13 of the tender documents and clause 9 of Letter of Intent clearly provide for the respondent-society to select all plans and amenities of the proposed building. He submitted that the parties

have neither executed any development agreement till date nor any power of attorney was executed. The respondent had also not issued any work order in favour of the appellant. The respondent-society did not admit approval of any layout plans or amenities.

31. The learned senior counsel placed reliance on section 2(h) of the Indian Contract Act, 1872 and submitted that in the present case, the tender and the Letter of Intent clearly envisage what is set out in paragraphs 1.1(a) to (d), and it cannot be said that the agreement is enforceable by law since it entails negotiations between the parties. He submitted that the appellant itself had relied upon a large number of correspondence exchanged between the parties which would clearly indicate that the terms and conditions of the contract were not finalized and had not concluded.

32. It is submitted that there were eight variations to the development agreement which were not finalized. The specification in the tender documents were required to be provided in the material which were required to be used to enable the appellant to make its offer. Pursuant to the development agreement required to be entered into, the appellant was also required to enter into an agreement with every individual flat buyer. He relied upon clause 7.22 of the tender document which provided what the contract means. He submitted that the said regularization clearly provides that the contract would include a formal agreement i.e. the development agreement.

33. The learned senior counsel placed reliance on clause 7.23 which provided for the issuance of a Letter of Intent and also invited our attention to clause 2(a) and submitted that all the terms and conditions of the contract were to be agreed upon as a condition

precedent before execution of the development agreement and ought to have formed a part of such a development agreement. It is submitted by the learned senior counsel that the mere agreement to negotiate and enter into a further agreement is not enforceable in law.

34. The learned senior counsel for the respondent invited our attention to clauses 2(a), 2(b) and 16 of the Letter of Intent and clause 5.9.2 of Note No.3, clause 9.4(d) of Note No.2 and clause 5.1.2 of the Tender in support of his submissions. He submitted that the provisions of the tender document as well as the Letter of Intent clearly provided that the Terms and Conditions mentioned in the technical and financial bid documents were only broad guidelines and the final terms and conditions shall be agreed upon before execution of the first development agreement. The bidder whose bid is accepted was required to enter into a regular contract agreement with the respondent-society containing the required Terms and Conditions including those mentioned in the entire bid document. Until a formal agreement is executed, the acceptance of the bid offer shall not be binding subject to the modifications as may be mutually agreed between the parties.

35. It is submitted by the learned senior counsel that the power of attorney was required to be executed by the society in favour of the developer for obtaining the permissions and carrying out constructions under clause 8.3 of the tender after the execution of the development agreement. It is submitted that under clause 8.4, only after signing the development agreement and the power of attorney and completing the other necessary formalities, such developer was required to arrange and to obtain the necessary approvals and sanctions to the plans from various authorities and the

commencement certificate for the lay out finally selected by the society.

36. Under clause 9 of the Letter of Intent, the amenities, fixtures and the fittings were to be finalized with the development agreement. Under clause 5.9 and clause 8.1 of the Tender, the final decision of selecting the overall layout and floor plans of the rehab building shall be at the discretion of the society in consultation with the appointed Project Management Consultant. It is submitted that under clause 8.1 of the Tender, a developer was required to construct and provide two car parkings each, free of cost as per the number of vehicles in the premises at the front / stilt of the building. The developer was required to provide adequate car parking spaces for the vehicles of visitors as per MCGM Rules and Regulations and / or as per any specifications given by the society.

37. It is submitted that since the past three years atleast, the society could not proceed with the redevelopment only because the development agreement could not be finalized due to developer making unwarranted changes to the draft agreements exchanged between the parties. These unwarranted changes were contrary to the tender documents and the Letter of Intent.

38. The learned senior counsel submitted that the last draft development agreement produced by the developer at page 534 is not the final draft and clearly required finalization between the parties for there to be a concluded contract, the draft was marked "without prejudice" and "draft for discussion". The draft had several comments at pages 547, 578 and 579 which indicate that further discussions between the parties were not only contemplated but also necessary

to finalize the agreement. No further discussion had taken place to arrive at a concluded contract.

39. The learned senior counsel for the respondent submitted that the clauses 3(a) to 3(d) of the last draft development agreement clearly showed that without the FSI details being approved, the appellant could not have commenced or carried out any construction. The details of the FSI consumption being finalized and set out in the development agreement was necessary for there to be a concluded contract. He submitted that the agreements to be approved by the General Body as per clause 18 of the redevelopment guidelines dated 4th July, 2019, issued by under section 79A of the Maharashtra Co-operative Societies Act, 1960, was not done in this case. The appellant kept on suggesting new terms as per his own whims and convenience which was contrary to the tender documents and the Letter of Intent. The contract had never culminated into a concluded contract.

40. The learned senior counsel invited our attention to paragraph 100 of the petition and submitted that it is the case of the appellant itself that there was no agreement between the parties since the developer was agreeable to the suggestions of the Court / Arbitrator on the Terms of the development agreement. Even after the exchange of last development agreement draft on 26th February, 2021, the parties had exchanged four emails dated 3rd March, 2021, 26th March, 2021, 9th April, 2021 and 13th May, 2021. These emails would indicate that issues were being discussed even three months after the exchange of the last development agreement draft.

41. The learned senior counsel for the respondent placed

reliance on the following judgments :-

(a)**Kollipara Sriramulu vs. T. Aswatha Narayana, AIR 1968 SC 1028,**

(b)**Rickmers Verwaltung vs. Indian Oil, (1999) 1 SCC 1,**

(c)**Kalpataru Properties vs. Majithia Nagar Co-operative Society, Appeal (Ldg.) No.464 of 2014,**

(d)**Amisha Buildcon vs. Jidnyasa, 2016 SCC Online Bom. 5234,**

(e)**Heritage Lifestyle vs. Cool Breeze, 2014 (3) Mh.LJ 376,**

(f)**H.S. Khan & Sons vs. Homi J. Mukadam, (1991) 2 Bom. CR 61,**

(g)**Subodh Nandy vs. Himanshu Bose, 1955 SCC Online Cal.257,**

(h)**Adhunik Steel vs. Orrisa Manganese, (2007) 7 SCC 125**

(i)**Cotton Corporation vs. United Industrial Bank, AIR 1983 SC 1272**

(j)The judgment of this Court in case of **World Crest Advisors LLP vs. Catalyst Trusteeship Ltd., 2022 SCC OnLine Bom 1409** (Paragraphs 1 to 6)

(k)The judgment of Supreme Court in case of **Dalpat Kumar and another vs. Prahlad Singh and others, (1992) 1 SCC 719** (Paragraphs 4 and 5)

(l)The judgment of Supreme Court in case of **Speech and Software Technologies (India) Private Limited vs. Neos Interactive Limited, (2009) 1 SCC 475** (paragraphs 22 and 23)

(m)The judgment of Supreme Court in case of **South Eastern Coalfields Limited and others vs. S.Kumar's Associates AKM (JV), (2021) 9 SCC 166** (Paragraphs 21 to 26)

(n)The judgment of Supreme Court in case of **Rajasthan Co-operative Dairy Federation Ltd. vs. Maha Laxmi Mingrate Marketing Service Pvt.Ltd. And others, (1996) 10 SCC 405** (paragraph 7).

42. The learned senior counsel for the respondent submitted that this Court has to consider the *prima facie* case, balance of convenience and irreparable injury. Even if a *prima facie* case is made out that by itself, it is not enough. The Court must satisfy itself that the refusal to grant an injunction will result in an irreparable injury, i.e. the party cannot be adequately compensated through damages. The Court has to consider the substantial mischief or injury likely to be caused to the parties in the case of an injunction being refused in comparison with the prejudice caused to the other side if the injunction is granted.

43. It is submitted that though in paragraph (2) of the petition filed under section 9 of the Arbitration Act, it was pleaded that the concluded contract is evinced by the Tender Documents, the acceptance of the offer, the Letter of Intent and the various correspondence exchanged contemporaneously between the parties upto May 2021. This stand has been abandoned in the Statement of Claim and the reference to the correspondence is omitted.

44. It is submitted by the learned senior counsel that the

appellant itself has pleaded in paragraph (109) of the petition filed under section 9, that the appellant is entitled to specific performance including the execution of the development agreement and has also prayed for the execution of the development agreement in the statement of claim filed before the Arbitral Tribunal. He submitted that these averments of the appellant itself would clearly indicate that the execution of the development agreement was not a mere formality but a vital condition of the bargain.

45. It is submitted by the learned senior counsel that in the arbitration petition, it was pleaded by the appellant that the appellant was willing to comply with its obligations under the agreed terms of the 'concluded contract' which had been defined in paragraph (2) of the petition. In paragraph (100) of the petition, it is averred by the appellant that the appellant had always been ready and willing to execute the formal development agreement in accordance with the true terms of the contract and was also agreeable for executing the development agreement in terms that this Hon'ble Court or the learned arbitrator may suggest so as to bring them in line with the documents comprising the concluded contract subject to the planning requirements and conditions as may be imposed by the concerned authorities.

46. It is submitted that the Court cannot create or make a contract but can only interpret a contract between the existing parties. The appellant is requesting the Court or the arbitrator to finalize the development agreement subject to various conditions. It is submitted that the Tender and the Letter of Intent are at the highest an agreement to enter into an agreement which is unenforceable in law.

47. The learned senior counsel for the respondent placed reliance on the following judgments in support of the above contentions :-

- (a) The judgment of this Court in case of ***Heritage Lifestyle and Developers Ltd. vs. Cool Breeze Co-operative Housing Society Ltd. & Ors., 2014(3) Mh.L.J. 376*** (Paragraphs 37 and 38)
- (b) The judgment of Supreme Court in case of ***Kollipara Sriramulu (Dead) by His Legal Representative vs. T.Aswatha Narayana (dead) by his legal Representatives and others, AIR 1968 SC 1028*** (Paragraphs 3 and 4)
- (c) The judgment of this Court in case of ***H.S.Khan & Sons and another vs. Homi J.Mukadam, (1991) 2 Bom.CR 61*** (Paragraphs 9 and 10)
- (d) The judgment of Calcutta High Court in case of ***Subodh Chandra Nandy & Ors. vs. Himanshu Bala Bose & Ors., 1955 SCC OnLine Cal 257*** (paragraphs 13 to 15)

48. It is submitted by the learned senior counsel that the references made to the execution of the development agreement in the Tender and the Letter of Intent leave no manner of doubt that the execution of a development agreement is not a mere formality and is a vital condition of the bargain. In support of this submission, the learned senior counsel placed reliance on the judgment of Supreme Court in case of ***South Eastern Coalfields Limited and others***

(supra) and in particular paragraphs 21 to 26 and the judgment of Supreme Court in case of **Rajasthan Co-operative Dairy Federation Ltd.** (supra) and in particular paragraph 7.

49. It is submitted by the learned senior counsel that the definition of a contract as canvassed by the appellant is artificial and at variance with the Tender and the Letter of Intent. He submitted that since there was no concluded contract that was arrived at between the parties despite one and a half year of negotiations, the respondent vide a detailed letter dated 18th May, 2021 terminated the Letter of Intent in accordance with the offer letter dated 10th April, 2019.

50. The learned senior counsel for the respondent submitted that the learned Single Judge after considering the material on record including the Tender Document and the Letter of Intent rightly came to the conclusion that the Tender Document and the Letter of Intent only represented a basic understanding and a formal agreement recording the detailed understanding was supposed to follow. The learned Single Judge *prima facie* held that there was no concluded contract and that the execution of the development agreement was not a mere formality but a term of the bargain.

51. Mr.Seervai, learned senior counsel for the appellant in his rejoinder arguments submitted that the fact that a concluded contract was arrived at, is clear from a perusal of the documents on record. The offer letters dated 10th April 2019, 18th May 2019 and 23rd May 2019 constituted the offer, which was unanimously accepted by the subsequent Resolution passed in the General Body Meeting of the

respondents that was held on 23rd June, 2019 when the appellant was appointed as the developer for the redevelopment project. The same was accordingly communicated to the appellant by the respondents on 25th July, 2019 by the respondent society in the General Body Meeting.

52. The learned senior counsel invited our attention to the clause (1) of the Letter of Intent which expressly refers to a grant of rights and entitlement. He submitted that the said clause confirmed the appointment of the appellant as the developer. The said Letter of Intent also provides for a confidentiality clause and also enjoins the respondents from negotiating or dealing with any other party for any transaction related to the proposed redevelopment.

53. It is submitted by the learned senior counsel that the proposed development agreement was only a formality and was not a condition precedent to the creation of a contract. It was not an essential term of the bargain at all. It is submitted by the learned senior counsel that in case of ***Shivanand Vassudev Salgaocar & Ors. vs. Dattaraj Vassudev Salgaoncar & Ors., 2014 SCC OnLine Bom 1250***, the learned Single Judge had himself held that every minute detail need not be found mentioned to make a contract enforceable. He submitted that even the minutest detail of the redevelopment was provided for in the Tender Document. The Tender documents included a technical bid document and a financial bid document. The technical bid contains comprehensive specifications for all technical aspects of the project.

54. It is submitted that the Tender Document constantly and

consistently refers to 'this agreement' and 'this contract' indicating that the respondent always intended for the Tender Document to operate as the repository of the agreed terms. He submitted that during the period between October 2019 and December 2020, the fact of the concluded contract is evinced by the subsequent communications between the parties and the consistent conduct of both parties. The correspondence exchanged between the parties included communications as to the execution of a formal development agreement as contemplated under the Tender Terms. The appellant has also mentioned its stand that the fact of the concluded contract being present is evinced by the subsequent communication between the parties.

55. It is submitted by Mr. Seervai that the case of the respondent on one hand that there exist no agreement for redevelopment and on the other hand is acceptance that there exist a contract to refer disputes to arbitration is contradictory. This fatal contradiction has not been properly appreciated by the learned Single Judge. The arbitration agreement is contained in the Tender Document. A valid agreement to arbitrate can result, therefore, only upon an offer being made upon the Tender and the subsequent acceptance of that offer.

56. It is submitted that the judgment cited by the respondent in case of ***Rickmers Verwaltung GMBH vs. Indian Oil Corporation Ltd., (1999) 1 SCC 1*** would assist the case of the appellant and not the respondent. In that case the Supreme Court held that there was no concluded bargain and consequently the learned Single Judge of the High Court was perfectly justified in holding that clause 53 of the Arbitration Act had no existence in the eye of the law because no

concluded and binding contract ever came into existence between the parties.

57. It is submitted by the learned senior counsel that the learned Single Judge had arrived at various contradictory observations on the issue as to whether or not there exists a concluded contract at all. It is submitted that the termination of the contract by the respondents was at the behest of the rival developer. The timing of the termination notice i.e. 18th May, 2021 coincides with the offers by a mere margin of five days received by the respondent on 6th May 2021 and 13th May 2021, made by a third party who had also made a bid in pursuance of the Tender floated by the respondents. The respondents shared the details of the appellant's commercial offer with the said third party known as Dhyam Projects Private Limited of Lotus Developers. He submitted that the learned Single Judge has erroneously perceived the dispute as one between the members of a society and a builder, instead of a dispute between two builders.

58. It is submitted that the respondent did not address some of the most crucial opening arguments made on behalf of the appellant. The argument on the conduct of parties, including the chart of permissions and clearances received, was not addressed. The argument on the fact that the Tender itself included several references to 'this agreement' and 'this contract', thereby demonstrating the intent of the respondent for its terms to be binding, was also not addressed. The mere inclusion of certain requirements such as that of a formal development agreement does not render the terms of a contract meaningless or incapable of being enforced.

59. It is finally submitted that there neither is nor can be any quarrel with the propositions enunciated as in regards with the tests for grant of interim reliefs or the ambit of interference under section 37. He submitted that the appellant has made out a *prima facie* case and has also demonstrated that there is a balance of convenience in favour of the appellant and that an irreparable injury will be caused to the appellant if the interim measures as prayed will not be granted.

REASONS AND CONCLUSIONS :-

60. The appellant who is the original petitioner has filed this petition impugning the order passed by the learned Single Judge dismissing the arbitration petition filed under section 9 of the Arbitration Act. In the impugned order passed by the learned Single Judge, the learned Single Judge has recorded various *prima facie* observations against the appellant while rejecting the petition for interim measures. The powers of the Appellate Court under section 37 of the Arbitration Act are very limited. The learned Single Judge has dealt with the arguments of both the parties at length and passed a reasoned order.

61. The Supreme Court in case of ***Wander Ltd. and another*** (supra) has held that the Appellate Court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating the grant or refusal of interlocutory injunctions. An appeal against the exercise of discretion is said to be an appeal on principle.

62. It is held that the Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the Court was reasonably possible on the material placed before it. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the Appellate Court would have taken a different view may not justify interference with the trial court's exercise of discretion.

63. The Supreme Court in case of ***Adhunik Steels Ltd.*** (supra) has held that the injunction is a form of specific relief. It is an order of a Court requiring a party either to do a specific act or acts or to refrain from doing a specific act or acts either for a limited period or without limit of time. In relation to a breach of contract, the proper remedy against a defendant who acts in breach of his obligations under a contract, is either damages or specific relief. The two principal varieties of specific relief are, decree of specific performance and the injunction.

64. It is held that it would not be correct to say that the power under section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the Courts in this connection. The principles laid down by the Supreme Court in case of ***Wander Ltd. and another*** (supra) and in case of ***Adhunik Steels Ltd.*** (supra) apply to the facts of this case.

65. In our *prima facie* view the observations made by the learned Single Judge while refusing to grant interim measures in favour of the petitioners do not suffer from any infirmity. The discretion exercised by the learned Single Judge while rejecting the petition under section 9 do not warrant any interference. The order passed by the learned Single Judge is not perverse and thus the *prima facie* view expressed by the learned Single Judge cannot be substituted by a different view by this Court. An appeal under section 37 of the Arbitration Act is not in the nature of first appeal.

66. We shall now deal with the matter on merits as to whether the order passed by the learned Single Judge refusing to grant interim measures on various grounds warrant any interference or not. The question that fell for consideration of the learned Single Judge was whether the concluded contract was arrived at between the petitioner and the respondent by offer letters, copy of the resolution passed by the respondent society, Tender Documents, Letter of Intent dated 18th August, 2019 and the correspondence or the contract would be considered as concluded only upon execution of the development agreement between the petitioner and the respondent.

67. It is not in dispute that the respondent had invited bids from the developer for carrying out redevelopment of the respondent's building on 6th February, 2019. In response to the said advertisement, the petitioner had submitted its offer on 10th April 2019, 18th April 2019 and 18th May 2019. The respondent had issued Letter of Intent on 18th October, 2019. It is not in dispute that e-mails dated 3rd December 2019, 5th February 2020, 24th February 2020, 3rd

April 2020, 14th July 2020, 5th October 2020, 5th December 2020 and 26th February 2021 were exchanged between the parties exchanging the draft development agreement.

68. It is not in dispute that the draft development agreement exchanged were marked 'without prejudice' and 'draft for discussion'. The draft development agreement exchanged between the parties had several comments for consideration of each other for further discussion between the parties before finalization of the development agreement. The parties were discussing the terms as regards the bank guarantee reduction from time to time, were discussing time frame regarding settling disputes or removing encumbrances so as to not affect the redevelopment, regarding society reimbursing the developer for any statutory violations.

69. The respondent was to confirm the milestones for which they wanted inspection by the architect. Clause (18) of the Redevelopment Guidelines dated 4th July, 2019 issued under section 79A of the Maharashtra Co-operative Societies Act, 1960 provided that the agreement has to be approved by the managing committee of the society. It is the case of the respondent society that the agreement was to be approved by the general body which has admittedly not happened in this case.

70. Clause 2(a) of the Letter of Intent contemplates execution of the development agreement. In clause (16) of the Letter of Intent issued on 18th October, 2019, it was provided that the Letter of Intent records the basic understanding between the parties in respect of the redevelopment and the detailed understanding on basis thereof would

form part of the final development agreement. Clause 5.9.2 of the Tender Document provided that the society, after acceptance of the bid, and after scrutiny of necessary formalities mentioned in the said document, shall enter into a development agreement with the selected bidder and shall enter into further agreement after the said bidder had completed all the formalities and Terms and Conditions for entering into a further agreement for carrying out construction work for the said project.

71. Note 3 at page 319 of the Tender Document provided that the terms and conditions mentioned in the said technical and financial bid documents are only broad guidelines which can be amended by the society and final Terms and Conditions will be agreed upon by all the concerned parties before execution of development agreement. Similar note is also provided at internal page 88 of the Tender Document.

72. Clause 9.4 of the tender document provided for sequence of events. Clause (d) provided for execution of the development agreement with the society. It further provided that the bidder whose bid is accepted, shall enter into a regular contract agreement with the society containing the required Terms and Conditions including those/ mentioned in all the bid documents. The bidder, his legal representative, executors, administrators etc. shall be bound for full and complete execution of the contract. The bidder whose bid is accepted shall be required to present himself in person at the office of society after the issuance of the Letter of Intent to execute an agreement in the proper form. It was further provided that failure to furnish the deposit or to execute the agreement within the time

specified, shall constitute a breach of agreement attached by the acceptance of the bid, in which case, the earnest money accompanying the bid shall be forfeited by the society as liquidated damages.

73. The said clause further provided that the contract agreement shall consist of various documents including original bid document, the contract and referred to in acceptance letter, tripartite agreement between society, developer and Project Management Consultant. All proposed plans with sections and elevations, any other documents as may be desired to protect the interest of the society and its members and individual agreement with all the members.

74. Clause (2) of the submission of offer provided that until a formal agreement is executed, acceptance of the said bid offer shall be binding on the bidder subject to modifications as may be mutually agreed between the parties and indicated in the letter of acceptance. Clause 8.3 provided for obligation on the part of the society to issue a power of attorney in favour of the developer for the specific purpose and period to enable the latter to approach the authorities concerned to obtain sanctions and approvals and to carry out construction and do various follow ups.

75. Clause 7.22 of the tender document provided that the contract shall mean the registered agreement papers, details of the company/firm, all the proformas, bid document list of amenities and facilities together with the letter of intent and any other documents specifically indicated herein and the formal agreement executed between the developer and society. All these documents taken

together shall be termed as contract.

76. Clause 7.23 provided that written intention given to bidder that the bid has been accepted in accordance with the terms, conditions and provisions shall be mentioned in the letter. Under clause 5.2.1 of the Tender Document, the respondent was to select the overall layout plan and amenities of the proposed building. Clause 8.4 of the tender document provided for obligation on the part of the bidders to furnish to the society, an earnest money in the form of demand draft/pay order of a nationalized bank or private banks in the name of the society for Rs.7,50,000/- along with their bid proposal.

77. After signing of development agreement and power of attorney and completing the formalities, the successful developer shall arrange to obtain necessary approvals and sanctions to the plans from various authorities and commencement certificate for the layout finally selected by the society. The developer is required to pay the corpus fund in the form of a demand draft/pay order of a nationalized bank/private banks to the society members or as directed by it. Under clause 9.13, the plans were required to be submitted to the Municipal Corporation or other authorities for the reconstruction/redevelopment in respect of the areas to be provided to the existing members shall be approved by the society. Any amendments/additions/alterations to the said plans as per the requirement of the development control regulations or any other statutory body shall also be approved by the society.

78. Clause 9 of the Letter of Intent provided for the amenities

and other materials for the project to be of the quality and brand as mutually approved by the society and the petitioner and has to be recorded in the proposed agreement. It is not in dispute that in this case, neither any development agreement was executed nor the power of attorney was issued by the respondent in favour of the petitioner under the work order. The respondent society has not approved any alleged due plan and amenities.

79. The parties were to carry out detailed negotiations and discussions before finalization of the contents of the development agreement. Admittedly during the period between December 2019 and February 2021, a period of 15 months, the parties had exchanged 8 e-mails on the subject matter of the development agreement on various issues which were not forming part of the Tender Document. There was no agreement on all the contents of the development agreement including the building plan or parking etc.

80. In the arbitration petition filed by the appellant, it was the case of the appellant that they are entitled to an order of specific performance which includes execution of the formal development agreement. In paragraph (100) at page 124 of the petition, the petitioner had asserted that it was agreeable to execute the development agreement in terms that this Court or the learned arbitrator may suggest.

81. At page 149 of the tender document, it was clearly provided that the Letter of Intent means an initial official communication of the society to the builder/developer accepting the bid/offer to undertake/carry out the redevelopment work for the said

project subject to fulfilling various conditions laid down in the tender documents with special conditions incorporated in offer letter. The parties were required to enter into a development agreement within 180 days which was contained in full terms and conditions.

82. A perusal of the averments made in the petition indicates that it was the case of the petitioner that the petitioner has a concluded contract with the respondent for redevelopment of the respondent society, as is evinced by the tender documents and the acceptance of the petitioner's offer, Letter of Intent dated 18th October, 2019 and entered into between the parties and various correspondence exchanged contemporaneously between the parties upto May 2021. Learned senior counsel for the petitioner could not point out that the expression 'various correspondence' was defined or explained to identify which are the precise letters which form part of the contract.

83. In paragraph (8) of the rejoinder filed by the petitioner, it is the case of the petitioner that the petitioner is and has always been ready and willing to effectuate the contract in consonance with the true and correct terms agreed between the parties. A perusal of the record further indicates that even after the exchange of the last draft development agreement on 26th February, 2021, the parties have exchanged certain emails on the subject of parking. The members of the respondent were not willing bear the annual maintenance of Rs. 8 to 10 lacs which the petitioner was asking the society towards the mechanized car parking.

84. For about three years from the date of acceptance of the

petitioner, the respondent society could not proceed with the redevelopment only because the development agreement could not be finalized because of various changes repeatedly suggested by the petitioner by exchanging number of drafts of the development agreement. A perusal of the aforesaid clause *prima facie* indicates that the tender bid or the correspondence exchanged between the parties or the Letter of Intent individually or collectively would not be a concluded contract. Several important terms and conditions were not agreed upon by and between the parties in last three years and resultantly the development agreement could not be entered into. A perusal of various provisions referred to aforesaid clearly indicates that the execution of the development agreement was not a empty formality but was a condition precedent for a concluded contract.

85. The case of the petitioner is that the petitioner is ready and willing to execute the contract on such terms and conditions as this Court or the arbitrator may deem fit. The terms and conditions of the contract were not agreed by and between the parties, cannot be drafted by this Court or the arbitrator for incorporating those terms in the development agreement. The Court cannot re-write a contract or to suggest any conditions of contract to be incorporated by passing an order against both parties.

86. The Supreme Court in case of ***Kollipara Sriramulu (Dead) by His Legal Representative*** (supra) has held that it is well-established that a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent

the existence of a binding contract. There are however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. The Supreme Court held that there may be a case where the signing of a further formal agreement is made a condition or term of the bargain. If the formal agreement is not approved and signed there is no concluded contract.

87. In the facts of this case, various crucial and material terms of the contract were not finalized and were being discussed upon by exchange of 8 e-mails. Various draft agreements were exchanged between the parties. If according to the petitioner, the bid document or the Letter of Intent itself had concluded the contract, exchange of draft development agreement for various suggestions or modifications or various crucial terms required to be incorporated would not have been exchanged between the parties. These conditions were required to be discussed, agreed and to be entered into in the development agreement which were admittedly not finalized. In our view, the execution of the development agreement has been contemplated under various provisions of the Tender Document and Letter of Intent. In our view, such execution of the development agreement was not an empty formality but was a condition precedent for arriving at concluded contract.

88. In our view, the agreement to enter into an agreement in future cannot be specifically performed. The prayers of the petitioner in the statement of claim filed before the learned arbitrator and

produced by the parties for perusal of this Court *prima facie* indicate that the petitioner seeks a mandatory order against the respondent to execute the development agreement in favour of the petitioner. The principles laid down by the Supreme Court in case of ***Kollipara Sriramulu (Dead) by His Legal Representative*** (supra) apply to the facts of this case. We are respectfully bound by the said principles.

89. Insofar as the judgment in case of ***W.J.Rossiter, George Curtis and others vs. Daniel Miller, 1124 House of Lords Vol. III*** delivered by House of Lords is concerned, the clauses under consideration of House of Lords were totally different. The facts before the House of Lords were also different. It was observed that every term made clear, by reference to an elaborate scheme of conditions under which the sales were to be made. The said judgment would not assist the case of the appellant.

90. Insofar as judgment of this Court delivered by the learned Single Judge in case of ***Shivanand Vassudev Salgaocar*** (supra) relied upon by the learned senior counsel for the appellant is concerned, this Court adverted to the judgment of this Court in case of ***Bharat Sanchar Nigam Ltd v BPL Mobile Cellular Ltd & Ors., (2008) 13 SCC 597*** holding that once a contract is arrived at, it binds the parties. Any subsequent modification or alteration would have to be by express agreement or by necessary implication. This would not assist the case of the appellant. In this case, the concluded contract is not arrived at between the parties and thus not binding on the parties.

91. It is not the case of the appellant that all the Terms and

Conditions for carrying out the work of redevelopment were already agreed upon between the parties and were remained to be incorporated in the development agreement. Reliance placed by the appellant on those 8 e-mails after submission of the bid by the appellant clearly indicate that the negotiations on various crucial issues of the contract was still going on and never concluded. The appellant itself has relied upon those e-mails and the draft development agreement exchanged between the parties before the learned Single Judge.

92. The judgment of ***Chancery Division in case of Perry vs. Suffields Limited, 2 Ch. 187*** has held that the letters of offer and acceptance contain all the terms agreed on between the parties at the date of the acceptance. The complete contract then arrived at cannot be affected by subsequent negotiation. It is held that subsequent negotiations, first commenced on new points after a complete contract in itself has been signed, cannot be regarded as constituting part of the negotiations going on at the time when it was signed. However in the facts of this case, all the terms and conditions were not finalized for arriving at a concluded contract between the parties to be incorporated in the development agreement.

93. It is not the case of the appellant that the terms which were being discussed and were communicated with each other by those 8 e-mails were for the additional scope of work to be awarded to the appellant in addition to the contract already awarded by execution of the Letter of Intent in furtherance of the tender document followed by correspondence.

94. It is not the case of the appellant that there were two sets of contracts i.e. one having been already concluded before sending draft development agreement to the respondent for consideration and approval and the other agreement was contemplated which was the subject matter of the correspondence exchanged between the parties. The judgment of **Chancery Division** in case of **Perry vs. Suffields Limited** (supra) would not assist the case of the appellant.

95. Insofar as the judgment of the Federal Court in case of **Jainarain Ram Lundia and another vs. Surajmull Sagarmull & Others, 1949 F.C.R. 379** relied upon by Mr.Seervai, learned senior counsel for the appellant is concerned, it is held that if, after a contract is concluded and its terms settled, further negotiations are started with regard to new matters, that would not prevent full effect being given to the contract already existing, unless it is established as a fact that the contract was rescinded or varied with the consent of both the parties or that both parties-treated it as incomplete and inconclusive.

96. In our view, this judgment would not assist the case of the appellant for the reason that it is not the case of the appellant that after contract was concluded between the parties fresh negotiations were started with regard to the new matters and thus the appellants were entitled to seek specific performance of the terms already concluded prior to the date of exchange of correspondence. On the contrary the record *prima facie* indicate that both the parties had treated the negotiations as incomplete and inconclusive.

97. Insofar as the judgment delivered by the learned Single

Judge of this Court in **Interim Application No. 571 of 2022 in Suit No. 44 of 2021** in case of **Rajiv Sanghvi & Ors. vs. Pradip R.Kamdar & Ors.** is concerned, the facts as well as the clauses of the agreement before this Court in the said judgment were different. The other judgments relied upon by Mr.Seervai, learned senior counsel for the appellant deals with the issues whether specific performance can be granted in respect of the development agreement or not. In our *prima facie* view, since the appellant could not establish that there was any concluded contract between the parties, those judgments relied upon by Mr.Seervai, learned senior counsel for the appellant would not assist the case of the appellant.

98. Insofar as judgment of this Court in case of **Kalpataru Properties Pvt. Ltd.** (supra) relied upon by the learned senior counsel for the appellant is concerned, the said judgment would assist the case of the respondent society and not the appellant. It is held by the Division Bench of this Court that the appellant had accepted that as per the terms of the tender, there would be no concluded contract between the parties till the “execution of the Development Agreement and related development documents”. This Court accordingly held that though there were negotiations, exchange of drafts and correspondence all stopped short of a concluded contract. The contract would come into existence only on execution of an agreement. Therefore, between the parties there was only an agreement to enter into an agreement which is not enforceable in law.

99. The Supreme Court in case of **Rickmers Verwaltung GMBH** (supra) relied upon by Mr.Samdani, learned senior counsel for the respondent has held that the Court is not empowered to create a

contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence.

100. The Supreme Court accordingly held that no concluded bargain had been reached between the parties as the terms of the standby letter of credit and performance guarantee were not accepted by the respective parties. The principles laid down by the Supreme Court in case of ***Rickmers Verwaltung GMBH*** (supra) apply to the facts of this case. In the facts of this case also, even if correspondence exchanged between the parties are taken into consideration for the purpose of considering interim measures, we are of the *prima facie* view that no concluded contract has been entered into between the parties.

101. One of us R.D.Dhanuka, J. in case of ***Amisha Buildcon Pvt. Ltd.*** (supra) has held that since the said MOU contemplates execution of various further agreements which were to be executed after negotiations and settlement of various terms, the said MOU is an agreement to enter into various agreements and thus cannot be specifically performed. We are in the agreement in the views expressed by the learned Single Judge of this Court in case of ***Amisha Buildcon Pvt. Ltd.*** (supra).

102. Similar view is taken by the learned Single Judge of this Court (One of us R.D.Dhanuka, J.) in case of ***Heritage Lifestyle and Developers Ltd.*** (supra), judgment of Division Bench of this Court in case of ***H.S.Khan & Sons and Another*** (supra) after adverting to the judgment of this Court in case of ***Kollipara Sriramulu (Dead) by His Legal Representative*** (supra) and held that there was no concluded contract between the parties and thus no relief can be granted to the petitioner.

103. The Calcutta High Court in case of ***Subodh Chandra Nandy & Ors.*** (supra) has held that whether or not there was a concluded contract depends upon the true construction of what the parties said or did or wrote at the time when the contract is said to have been concluded. If it appears that all the material terms were agreed to at the time or were capable of being ascertained without further agreement between the parties, a concluded contract must be held to have resulted. But if it appears that only some of the terms were agreed to while other material terms remained still to be negotiated, no completed contract can be found.

104. The Calcutta High Court held that although terms and conditions relating to all material matters were broadly referred to by the parties, the exact form of all or some of them had still to be negotiated and agreed to, it is not possible to find any precise contractual intention and it must be held that the contract had not been concluded. The principles laid down by the Calcutta High Court in case of ***Subodh Chandra Nandy & Ors.*** (supra) apply to the facts of this case. In this case also the Terms and Conditions were not

agreed upon between the parties were to be finalized and were not concluded till Letter of Intent was terminated by the respondent. We are in respectful agreement in the views expressed by the Calcutta High Court in case of **Subodh Chandra Nandy & Ors.** (supra).

105. The Supreme Court in case of **Cotton Corporation of India Limited** (supra) has held that power to grant temporary injunction was conferred in aid of or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly be even granted. The principles laid down by Supreme Court in case of **Cotton Corporation of India Limited** (supra) apply to the facts of this case.

106. In the arbitration petition filed by the appellant, the appellant had prayed for an injunction against the respondent not to take any coercive steps in furtherance of the termination letter dated 18th May, 2021 or from settling proceedings or dealing with or entering into agreement for sale in respect of the property in question. In our view, the learned Single Judge has rightly rejected the prayers for interim measures by recording detailed reasons having found no *prima facie* case made out by the appellant. Learned Single Judge has also come to the conclusion that the balance of convenience was not in favour of the appellant at all and greater prejudice would be caused to the respondent society if relief is granted to the appellant under section 9 of the Arbitration Act.

107. In our view, Mr.Samdani, learned senior counsel for the respondent is right in his submission that all three ingredients such as

prima facie case, the balance of convenience and irreparable injury has to be made out by the appellant while seeking any interim measure under section 9 of the Arbitration Act. In our *prima facie* view, none of these ingredients have been satisfied by the appellant in this writ petition filed under section 9 of the Arbitration Act.

108. The appellant has also filed statement of claim before the Arbitral Tribunal inter alia praying for the damages in alternate to the prayer for specific performance. In our *prima facie* view, since the appellant has not made out a case for grant of any specific performance in view of there being no concluded contract, interim measure which is in aid of final relief was rightly rejected by the learned Single Judge. If the appellant succeeds, the appellant may be awarded claim for compensation or damages. Mr.Seervai, learned senior counsel for the appellant could not distinguish any of the judgments cited by Mr.Samdani, learned senior counsel for the respondent.

109. Insofar as the *prima facie* observations made by the learned Single Judge in the impugned order are concerned, Mr.Seervai, learned senior counsel for the appellant made an attempt to attack the order on the ground that the learned Single Judge has asked wrong question to himself and has accordingly answered the question wrongly or that the learned Single Judge has overlooked certain crucial element of the dispute. It is also vehemently urged by Mr.Seervai, learned senior counsel for the appellant that on one hand the learned Single Judge has held that there was no concluded contract and on the other hand has held that the arbitration agreement still exist. In our view there is no substance in the

submission of the learned senior counsel for the appellant that the learned Single Judge has overlooked any crucial element of the dispute. We do not find any inconsistency in any of the observations made by the learned Single Judge.

110. Be that as it may, the Court has to consider the entire judgment to ascertain the correctness of the views taken by the learned Single Judge and not any stray observation. Even if any stray observation is inconsistent with the ultimate conclusion in the order passed by the learned Single Judge, the conclusion cannot be set aside on such ground.

111. We have perused the averments made by the appellant in paragraph (100) of the commercial arbitration petition stating that the terms reflected in the draft formal development agreement and which are now said to be unacceptable to the respondent were in fact a result of ongoing discussions held between the parties as mentioned in the petition. The appellant was always ready and willing to execute the formal development agreement in accordance with the true terms of the contract and is also agreeable to executing the development agreement in terms that this Court or the learned arbitrator may suggest so as to bring them in line with the documents comprising the concluded contract, subject to planning requirements and conditions that may be imposed by the concerned authorities.

112. This case of the appellant itself is sufficient to come to a *prima facie* conclusion that no specific performance of the alleged contract can be awarded in favour of the appellant. This Court or the learned arbitrator cannot suggest any terms to be incorporated in the

contract subject to planning requirements and conditions that may be imposed by the concerned authorities or otherwise. The parties are not even *ad idem* about the planning requirements and conditions that may be imposed by the concerned authorities.

113. Insofar as the existence of the arbitration clause is concerned, it is not in dispute that the petitioner itself had invoked clause 9.2(8) of the tender document contemplating the resolution disputes through arbitration and had invoked the said arbitration clause. The respondent did not dispute the existence of the arbitration clause prescribed in the tender document. The respondent has not disputed that the tender document was issued by the respondent. The petitioner has submitted its bid in response to the tender document. The dispute between the parties arises out of the tender document.

114. Be that as it may, under section 16(a) of the Arbitration and Conciliation Act, 1996, it is clearly provided that the arbitration clause forms part of a contract shall be treated as an agreement independent of the other terms of the contract. Section 16(b) provides that a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

115. In our view, the arbitration agreement is an independent agreement of the other terms of the contract. The appellant has pleaded the existence of the arbitration agreement in the arbitration petition as well as in the statement of claim which is not denied by the respondent. In our view, the arbitration agreement thus exists in these circumstances. The learned Single Judge has rightly not

dismissed the arbitration petition filed under section 9 of the Arbitration Act on the ground that there did not exist any arbitration agreement having found no substance in the submission of the learned senior counsel for the appellant.

116. In our view, the appeal is devoid of merit. We accordingly pass the following order :-

(a) Commercial Appeal (L) No. 194 of 2022 is dismissed.

(b) Interim Application (L) No. 203 of 2022 accordingly does not survive and is dismissed. There shall be no order as to costs.

(KAMAL KHATA, J.)

(R.D. DHANUKA, J.)

117. At this stage, learned counsel for the petitioner seeks continuation of the *ad-interim* relief granted by this Court. Application for continuation of the *ad-interim* relief is vehemently opposed by Mr.Samdani, learned senior counsel for the respondent. Since the building is more than 50 years old, we do not propose to continue the *ad-interim* relief granted by this Court. Application for continuation of the *ad-interim* relief is accordingly rejected.

(KAMAL KHATA, J.)

(R.D. DHANUKA, J.)