(2014) 01 BOM CK 0176

Bombay High Court

Case No: Arbitration Petition No. 600 of 2013

M/s. Heritage Lifestyle and Developers Ltd.		APPELLANT
	Vs	
M/s. Cool Breeze Co-Operative Housing Society Limited and Others		RESPONDENT

Date of Decision: Jan. 21, 2014

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 52 60 7 9
- Bombay Stamp Act, 1958 - Section 13(1) 33(1)
- Maharashtra Co-operative Societies Act, 1960 - Section 164
- Specific Relief Act, 1963 - Section 10 12(c) 14 16(c) 20

Citation: (2014) 2 ALLMR 522 : (2014) 2 ARBLR 160 : (2014) 2 BomCR 693 : (2014) 3 MhLj 376

Hon'ble Judges: R.D. Dhanuka, J

Bench: Single Bench

Advocate: S.U. Kamdar, assisted with Mr. Sanjay Jain, Mr. S.A. Oak, instructed by Mahesh Menon and CO, for the Appellant; Birendra B. Saraf, a/w. Mr. Ashwin Shete, Nikhil Wable, Karan Adik, Ms. Apoorva Gupta, instructed by Jayakar and Partners for Respondent No. 1, Mr. Venkatesh Dhond a/w. Mr. Murlidhar, instructed by Joy Legal for Respondent Nos. 34, for the Respondent

Final Decision: Dismissed

Judgement

R.D. Dhanuka, J.

By this Petition filed u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) the Petitioner seeks an injunction restraining the Respondent No. 1 from appointing any other builder/Developer to re-develop the property described in prayer (a) of the petition.

Some of the relevant facts for the purpose of deciding this petition are as under:

The respondent no. 1 is a Co-operative Housing Society. The Respondent Nos. 2 to 33 are members of the respondent No. 1 society. Respondent nos. 34 is impleaded as party-respondent pursuant to an order dated 9.7.2013 passed by this Court.

2. The respondent no. 1 society wanted to re-develop the property described in prayer clause (a) of the Petition. The respondent No. 1 is a lessee of the Maharashtra Housing and Area Development Board (MHADA) in respect of the said property. On 12.7.2012 the petitioner submitted a proposal to the first respondent in respect of re-development of the said property.

3. On 16.7.2012 the respondent No. 1 passed a resolution to cancel the then existing agreement between Shikara Constructions Pvt. Ltd. The respondent No. 1 resolved to appoint the Petitioner as a Developer in respect of the said property subject to 8 conditions mentioned therein and further resolved that a letter of intent be issued in favour of the petitioner.

4. On 23.7.2012 the respondent nos. 2 to 33 discussed and approved the appointment of the petitioner as a Developer of the said property by passing a resolution in the meeting held by the respondent No. 1 society. The Respondent No. 1 society conveyed the decision of the society to the Petitioner vide letter dated 21.7.2012. On 27.7.2012 the respondent nos. 1 to 33 executed a Memorandum of Understanding and confirmed the appointment of the petitioner as a Developer in respect of the said property and granted development rights in respect of the said property on terms and conditions recorded therein. The said MOU has been signed by respondent Nos. 1 to 33. The said MOU is not registered. The Petitioner paid an amount of Rs. 5,00,000/- to the first respondent under the said MOU.

5. It is the case of the petitioner that pursuant to the said MOU the petitioner vide letter dated 10.09.2012, informed the respondent No. 1 society about the steps taken by the Petitioner. The petitioner informed that the petitioner applied to MHADA for demarcation of the said property to ascertain the correct area of the said property. By the said letter the petitioner also informed that the petitioner was waiting for fresh policies of the MHADA as existing policies were not feasible for development of the said building and the new policies were likely to come in due course.

6. Vide letter dated 25.2.2013 the Petitioner informed the first respondent that the petitioner had approved the sum of Rs. 25,000/- for construction of society office in the building of the society and permitted the society to debit the amount of Rs. 25,000/- for initial corpus of Rs. 5,00,000/- paid by the petitioner to the society. By another letter dated 25.2.2013, to the society petitioner informed the society that the petitioner had applied for CTS plans, Property Card and Kami Jast Patrak (KJP) with the approved authorities and the same would be received by the petitioner tentatively in the second week of March, 2013 and the Petitioner would pay the full

price on or before 31.3.2013 subject to the society approving the plans. The petitioner informed that the petitioner has sent the tentative plan to Mr. Praful Shahane Project Management Consultant of the respondent no. 1 society on 16.2.2013 and requested to finalise the same at an early date to enable the petitioner to put up before the Municipal Corporation of Greater Mumbai for approval of their proposal. The society was further informed that it was the joint decision of the architect of the petitioner and of the society not to incorporate the name of the society and that the petitioner may not get the same benefit of layout of FSI from the MHADA. The Petitioner was assured that the same would be done at a latter stage when the petitioner would receive intimation from their architect to do so.

7. Vide letter dated 24..3.2013 in response to the letter dated 25.2.2013 of the petitioner, the society agreed to the tentative plans submitted by the petitioner to the Project Management Consultant of the society and requested the Petitioner to put up the file to the MHADA with prior consent of the society after showing the file before submitting to MHADA and requested to do the same immediately. The society also placed on record that in so far as CTS record, property card and Kami Jast Patrak are concerned, the petitioner had said that it would be received in the second week of March 2013 and requested to inform the society whether the petitioner had received the same or not and if not then to inform the status of the same.

8. Vide letter dated 13.4.2013 the petitioner informed the society that the Petitioner had made the file ready for submitting the same to MHADA along with 2.5 F.S.I. tenements plans subject to the MHADA and Municipal Corporation approval. A copy of the tentative plans were enclosed for the record of the society. The petitioner requested the society to attend the Office of the petitioner immediately with four committee members along with seals and letter heads of the society to enable the petitioner to submit to the MHADA on the letter heads of the society. The society was informed that the proposal was based on 911.62 sq. meters plot area and in future if the petitioner would get the lay out if any, petitioner would inform the society about the same. The Petitioner alleged that for the said reasons the Petitioner had to hold the procedure of incorporating the name of the society in the property card mutually decided in the joint meeting with the Architect of the Petitioner and the society on 24.1.2013.

9. It is the case of the Petitioner that by a letter dated 14.6.2013 sent by e-mail (received by the Petitioner on 17.6.2013) the respondent society proposed to terminate the MOU dated 27.7.2012 illegally.

10. By a letter dated 18.6.2013 the Petitioner through their Advocates to the Respondent No. 1 society invoked clause 25 of the MOU and appointed Mr. N.R. Jagtap Advocate as the sole Arbitrator and requested the Respondent nos. 1 to 33 to give consent to the appointment of Mr. N.R. Jagtap Advocate as the sole arbitrator.

11. Mr. Kamdar learned senior counsel and Mr. Jain learned counsel appearing for the petitioner submitted that the respondent no. 1 terminated the Development Agreement in respect of one more developer before entering into MOU with the Petitioner. My attention is invited to the various clauses of the MOU dated 27.7.2012. It is submitted that under the said MOU the Petitioner had agreed to provide 32 individual alternate permanent accommodation and to enter into individual agreements after obtaining letter/NOC from the MHADA and NOC from Municipal Corporation of Greater Mumbai along with IOD, TDR along with approved plans from the Municipal Corporation of Greater Mumbai in the name of the society within a period of one year from the date of execution of the said MOU. Under clause 5(ii) of the said MOU the petitioner agreed to provide to the members of the society 32 residential flats as permanent accommodation on ownership basis each admeasuring 500 sq ft/carpet area and additional 40 sq. ft yard behind the two toilets. The Petitioner also agreed to pay a sum of Rs. 16,500/- per month to each of the existing members as compensation as rent before the members vacating their respective tenements. It was agreed that if the Petitioner fails to complete the new building within 24 months from the date of Commencement Certificate the petitioner shall be liable to pay extra rent at the agreed rent after expiry of 24 months. Under clause 10 of the said MOU, the petitioner agreed that the petitioner shall be entitled to enter into agreements with respective purchasers of the flats and other premises in their own name. Under clause 11, it was agreed that the respondent No. 1 society will admit such purchasers as members of the society as per the list forwarded by the developer to the society after obtaining and handing over the Commencement certificate by the petitioner in respect of the intended buildings.

12. It is submitted by the learned Senior counsel that the petitioner had taken all the steps pursuant to the said MOU. The tentative plans were approved by the society only on 24.3.3013. It is submitted that under recital (x) the petitioner had agreed to provide alternate permanent accommodation agreements and agreed to execute agreement only after obtaining NOC from the Municipal Corporation of Greater Mumbai and IOD along with TDR within a period of one year from the date of execution of the said agreement. It is submitted that on the date of termination of the agreement time to comply with, the obligation of the petitioner to execute the individual permanent alternate accommodation with members of the society had not expired. It is submitted that the petitioner had already paid Rs. 5,00,000/- payable under the MOU to the society. The learned senior counsel invited my attention to the additional affidavit in reply filed by the respondent No. 1 society and in particular paras 8 and 9. The learned Senior counsel submits that it is the case of the respondent no. 1 society itself that since February 2013, talks were being held by the society for the redevelopment of the society falling under Sahakar Nagar-III. As far as back as on 7.5.2013, 8 societies had addressed a letter to the MHADA for granting them approval as per Rule 33(5) (2)(c) (2) for joint redevelopment of the

societies. It is submitted that the so called termination letter was received by the Petitioner by email on 17.6.2013 though it was dated 14.6.2013. It is submitted that the society had not even passed a resolution for termination of the MOU or to appoint any other Developer in place of the Petitioner.

13. Learned Senior counsel submits that it was predetermined by the society to terminate the MOU for frivolous reasons as is apparent from the correspondence into and the averments made in the additional Affidavit. It is submitted that the respondent no. 1 society has not taken any further steps pursuant to the so called termination of the MOU entered into with the petitioner and if the society is allowed to enter into any further agreement with the respondent No. 34 as alleged or with any other developer, the rights of the petitioner would be seriously prejudiced. The learned Senior counsel pointed out that the MOU was stamped on 14.6.2013 and was signed on 17.6.2013. The petitioner has already invoked arbitration agreement. The Arbitral Tribunal has been already constituted. The petitioner has filed a statement of claim against the Respondent Nos. 1 to 33. It is not in dispute that Respondent No. 34 is not impleaded as party-respondent to the arbitration proceedings. The learned Senior counsel thus submits that the interim measures as prayed by the petitioner shall be granted other wise the entire arbitration proceedings filed by the Petitioner would become infructuous and the compensation would not be the adequate relief.

14. Dr. Saraf learned counsel appearing on behalf of the society and respondent nos. 1 on the other hand submits that the MOU entered into between the Petitioner and Respondent Nos. 1 to 33 is in the nature of an agreement to enter into an agreement and thus no specific performance of such an agreement can be granted by any Court or by arbitrator. The learned Senior Counsel invited my attention to clause (x) of the MOU at page 50 of the petition in which it is recorded that the detailed Development agreement, Power of attorney and individual alternate Agreement would be executed by the Society only after obtaining NOC from the Municipal Corporation or from Architect. In clause 11 of the MOU it is recorded that it was necessary to enter into MOU recording the broad parameters of the said redevelopment upon execution of detailed Development agreement, Power of attorney and 32 individual alternate accommodation agreements. In clause 3 of the MOU it is recorded that the society has granted developments right subject to all necessary permissions/sanctions/NOC by the Corporation and other statutory authorities and subject to due compliance of Development Control Regulations within the time stipulated in the said MOU and subject to the condition that the Development Agreement was to be executed. Relying upon these clauses of the MOU, Dr. Saraf learned counsel for respondent Nos. 1 to 33 submitted that the said MOU cannot be construed as a concluded agreement but is only an agreement to enter into an agreement and thus no specific performance of such agreement can be granted. It is submitted that as the specific performance of such agreement cannot be granted, interim measures which is in aid of final reliefs cannot be

granted. In the alternate to the first submission made aforesaid, it is submitted that in the event this Court coming to the conclusion that any interest is created under the said MOU in favour of the petitioner by the society, and/or its members, it shall be impounded under the provisions of Maharashtra Stamp duty Act as the said agreement is not sufficiently stamped and such document would be inadmissible in evidence even at this stage in this petition filed under 9 of the Arbitration and Conciliation Act, 1996 and no reliefs can be granted based on such insufficiently stamped document.

15. Dr. Saraf learned counsel then submitted that the said MOU does not confer any right, in favour of the Petitioner. The ownership of the land would remain with the society. The Petitioner was not required to get any consideration for sale of the flats to the society and would have been compensated for the costs of construction to be incurred as against sale of some of the flats to flat purchasers who would have become members of the society.

16. It is submitted that Respondent No. 34 who is not a party to the arbitration agreement and has been rightly not impleaded as party in the claim filed before the learned arbitrator by the petitioner and thus no reliefs can be granted against respondent No. 34 in these proceedings though the respondent no. 34 had applied for its impleadment and this Court has permitted such impleadment. It is submitted that MHADA is the owner of the land. The learned counsel submits that though the Petitioner had agreed to get the name of the society entered into the property card and other title documents the petitioner did not take any steps inspite of repeated demands. The learned counsel invited my attention to letter dated 10.9.2012 from the petitioner to the society and submits that even at that stage the petitioner was waiting for the fresh policies of MHADA as according to the petitioner the existing policies of MHADA was not feasible for development of existing buildings and new policies were likely to be announced in due course. It is submitted that this letter would itself indicate that the petitioners was not ready and willing to comply with their obligations under the said MOU even if this Court comes to the conclusion the same was an agreement.

17. Dr. Saraf learned Counsel pointed out that the society vide letter dated 24.3.2013 had reminded the petitioner to take appropriate steps regarding CTS records and the petitioner had agreed to be do so in the second week of March 2013 but no steps were taken by the petitioner. The petitioner also did not inform the respondent No. 1 about the status of the CTS plan, property card/Kami Jast patrak. It is submitted that though the petitioner replied to the said letter vide letter dated 13.4.2013 the petitioner did not deal with the requisition made by the respondent no. 1 society regarding CTS plan, property card, Kami Jast Patrak (KJP). The learned counsel invited my attention to the photographs annexed to the affidavit in reply and would submit that the condition of the building are deteriorated and required re-development at the earliest. The petitioner had paid only Rs. 5,00,000/- and seeks

to block the entire property of respondent no. 1 society by filing this frivolous proceeding. It is submitted that since there was no progress done by the petitioner, respondent no. 1 was justified in terminating the MOU. Substantial members of the society passed a resolution to terminate the MOU and to enter into a development agreement with another developer. It is submitted by the learned counsel for the society that 8 societies falling under Sahakar Nagar-III CTS NO. 51 made an application to MHADA for a comprehensive integrated self re-development project of their societies. In February, 2013 M/s. Godrej Properties came into picture and 8 societies came together and unanimously resolved to present 2009 application to MHADA for joint development of all 8 societies. The respondent no. 1 society participated in the said discussions in the hope of extensive redevelopment coupled with the fact that the petitioner was taking no concrete steps to redevelop the plots.

18. On 7.5.2013 all the eight societies through the Project Management consultant addressed a letter to MHADA for granting their approval of premium policy scheme as per clause 33(5) (2) (c) (ii) for joint development of societies. MHADA by offer letter dated 21.5.2013 granted permissible FSI of 2.5 to the respondent no. 1 society. Similar offer letter has also been issued to other 7 societies. It is submitted that by virtue of the said offer letters to the 8 societies, the redevelopment work is in the process. It is submitted by the learned counsel that any injunction order is passed by this court it would affect not only the respondent no. 1 to 34 but also the rights of more than 200 members of other 7 societies also as those societies cannot go ahead with the joint redevelopment in the absence of the Respondent No. 1 society.

19. Dr. Saraf learned counsel appearing for the society placed reliance on the Judgment of this Court delivered by the Division Bench on 25.6.2013 in Appeal (L) No. 272 of 2013 in case of Lakdawalla Developers Pvt. Ltd. Vs. Badal Mittal & Ors. in support of his submissions that if the MOU is insufficiently stamped, the said issue has to be decided by the Court while hearing the application u/s 9 of the Arbitration and Conciliation Act 1996 by the learned Judge when the documents came before the court in the course of proceedings u/s 9. The Division Bench of this Court considered the provisions of section 33(1) of Bombay Stamp Act and in particular Article 5(ga) of the schedule to stamp duty payable on the agreement or the MOU where it relates to the Promoter/Developer for construction or development of sale or transfer of immovable property. This Court passed an order impounding the MOU and directed the Office to forward the said MOU to the Collector of stamps for adjudication of stamp duty and penalty. Dr. Saraf further submitted that this submission of the society is alternate submission and only in the event this court coming to the conclusion that any right is created in favour of the petitioner under the said MOU, the said MOU is required to be stamped before the same can be considered by this court. In these proceedings filed u/s 9 of the Arbitration Act. Paras 3 to 6 of the said Judgment read thus:

3. On behalf of the Respondent it has been submitted that the MOU dated 29th July, 2011 contemplates in clause 15 that parties would enter into a final agreement with respect to development and construction of the rehabilitation and free sale building for each part of each phase of the property. Hence, it has been urged by the learned counsel for the Respondents that the stamp duty would be payable only on the execution of the final agreement for each phase.

4. The agreement between the parties which is contained in the MOU dated 29th July 2011 prima facie does contemplate that the Respondents will finance the construction of and construct the rehabilitation and free sale buildings on the property in question. In consideration thereof, clause 4 stipulates that the Appellant would hand over to the Respondents a certain proportion of the constructed area of the free sale buildings. Clause 6 required the Respondents to pay sum of rs. 1.50 crores to the Appellant to enable the Appellant to finance transit accommodation for the slum dwellers which was payable every month on and from 1st April 2011 till the completion of the development of the entire property. In the event of defaults on the part of the Respondents in making the said payment the Appellant was required to repay the entire amount received and the cost of construction incurred by the Respondents on the property till the date of default. Clause I of the MOU caste specific obligations on the Respondents to construct the rehabilitation and free sale buildings work being required to be commenced after requisite permissions were received. The construction was required to be completed within 36 months after receipt of requisite permission for each building.

5. The objection in regard to the document being insufficiently stamped ought to have considered by the learned single Judge when the document came before the Court in the course of the proceedings u/s 9. A consideration of the issue could not have been deferred to the arbitration proceedings having regard to the provisions of section 13(1) of the Bombay Stamp Act, 1958. Article 5(ga) of the Schedule relates to the stamp duty payable on an agreement or MOU where it relates to giving authority of power to a promoter or a developer by whatever name called for construction on development of or sale or transfer (in any manner whatsoever) of any immovable property. Prima facie the document would require stamping and has been insufficiently stamped having regard to the provisions of Article 5(ga) of the Schedule to the Bombay Stamp Act, 1958.

6. In the circumstances, we pass the following order:

(i) The MOU dated 29th July 2011 (Exhibit D) is impounded. An authenticated copy of the MOU shall be forwarded by the Prothonotary and Senior Master to the Collector of Stamps, Mumbai Suburban District for adjudication of the stamp duty and penalty if any payable on the document under the provisions of the Bombay Stamp Act, 1958.

(ii) The Collector of Stamps, Mumbai Suburban District shall expedite the determination in terms of clause (i) above and complete the exercise within a period of four weeks of the receipt of a duly authenticated copy of this order from the Prothonotary and senior Master.

(iii) Pending further orders, the direction contained in the impugned order of the learned single Judge dated 29 April 2013 shall remain stayed.

(iv) The further hearing of the appeal shall stand over to 19th August, 2013.

20. Dr. Saraf learned Counsel placed reliance on the judgment of this Court in the case Gurudev Developers Vs. Kurla Konkan Niwas Co-op. Hsg. Society, in support of his submissions that no specific performance can be granted by this Court in respect of the Development Agreement. Reliance is placed on para 5, 6 and 7 of the said judgment. Relevant portion of the said paragraphs reads thus:

The counsel has further relied on 1982 MH. L.J. Page 484 O.N. Bhatnagar vs. Rukibai N. Bhavnani &ors. In this case the Supreme court has held on page 495 para 17 as follows:

17. In Deccan Merchants Cooperative Bank Ltd. vs. M/s. Dalichand Jugraj Jain, this court had occasion to construe the meaning of the expression touching the business of a society occurring in section 91(1) of the Act. It was observed that the answer depends on the words used in the Act and that the non obstinate clause clearly ousts the jurisdiction of civil courts if the dispute falls squarely within the ambit of section 91(1) of the Act. The court then went to enumerate five kinds of disputes mentioned in section 91(1) first disputes touching the constitution of a society secondly disputes touching election of the office bearers of a society, thirdly dispute touching the conduct of general meetings of a society, fourthly disputes touching the management of a society and fifthly dispute touching the business of a society. In the context, it was said (at p.495).

It is clear that the word "business" in this context does not mean affairs of a society because election of office bearers conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word "business " has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its byelaws

In regard to the question whether dispute touching the assets of a society would be dispute touching the business of the society, it was observed:

Ordinarily, if a society owns buildings and lets out parts of building which it does not require for its own purpose it cannot be said that letting out of those parts is a part of the business of the society. But it may be that it is the business of a society to construct and buy houses and let them out to its members. In that case letting out property may be part of its business.

In my view, the observations made in the aforesaid judgments make it clear that the suit filed by the plaintiff would not be maintainable of the ground that the requisite notice as required u/s 164 of the Maharashtra Cooperative Societies Act has not been served. Counsel has further submitted that even if the suit is said to be maintainable yet no relief can be granted to the plaintiff in the suit as the agreement dated 18th Jan 1985 is merely development agreement and the same cannot be specifically performed. Learned counsel has relied on a judgment given in Notice of motion No. 2716 of 1987 in Suit No. 2673 of 1987. A. Nihalani vs. Mr. Wilfred D''Souza and ors. In that Notice of motion this court had the occasion to consider the nature of the agreement as to whether the same was simply a development agreement or an agreement for sale. Therein the agreement contemplated a payment of Rs. 2,85,000/- to the owners i/b defendant nos. 1 and 2. It permitted the plaintiff to develop the property and construct the building in which of flats were to be sold on ownership basis as per the requirements and guidelines of the lessors of the land viz Salset Catholic Cooperative Housing society Ltd. The agreement envisages that within a period of 18 months the developer should provide to the owners and tenants a temporary alternative accommodation and that the owners should also remove the person who is occupying the garage. When disputes had arisen the agreement was cancelled and the reserved rights in favour of the plaintiff to develop the property had been withdrawn. The defendants in fact after terminating the agreement entered into another agreement with another developer for the purpose of developing the property. It was argued on behalf of the society that having regard to the provisions of section 14 of the Specific Relief Act 1963 such an agreement cannot be specifically enforced. This view was prima facie accepted. It was held:

The facts show that the plaintiff was not in a position to develop within the period contemplated under the agreement. It was not an agreement to sell. The plaintiff was to develop and sell flats may be to christians and earn his profit. Therefore, in such a case if the agreement was put an end to, at the highest the remedy of the plaintiff could be by way of damages and there is no question of specific performance of this contract.

It may be noted that the agreement therein was very similar to the agreement in the present case. Therefore, I am prima facie of the view that no suit for specific performance would lie in such circumstances.

6. Counsel for the defendant has brought to my notice another judgment of this court in which the same view has been reiterated (Given in notice of motion No. 76 of 1987 in Suit No. 3419 of 1986).Therein again a similar view has been taken and held that such a development agreement cannot be said to be an agreement to sell nor an agreement to lease. It has been held that it is simply an agreement to develop the property belonging to defendants on certain terms and conditions. Thus suit has been held that such an agreement cannot be specifically enforced.

This judgment of the learned Single Judge has been upheld in Appeal being Appeal No. 285 of 1988 decided on 7th March 1988. The Division Bench has observes as follows:

7. In essence the suit agreement is a development agreement where the aim of the professional builder/contractor (appellant) is to make a profit by completing building and selling the flats at a profit.

A breach of such an agreement can be compensated by way of damages. Merely because a temple and a guest house of devotees were also to be constructed within the plot makes no difference to the essence of the development agreement. While we applaud the pious zest of the professional builder contractor in seeking to ameliorate the spirits and material comforts of the devotees the essence of the contract still remains a building contract entered into with the aim of making profits by the expedient of constructing the building and selling the flats at a profit. We agree with the learned single Judge that damages for breach of such a contract would be the adequate remedy.

Appeal dismissed.

The Division Bench Judgment has been followed by a single Judge bench in Notice of Motion No. 763 of 1989 in Suit No. 844 of 1989 on February 8,1991. Therein also the parties were entered into an agreement which was very similar to the agreement in the present suit. The learned Judge after considering the characteristics of the agreement has held:

The plaintiffs are professional builders/contractors and their claim in entering into the suit agreement was to make profit by completing building and selling the flats therein. Breach of such an agreement can be compensated by way of damages. No interest in land has been created by the defendants in favour of the plaintiff''s under the said agreement." Argument of the counsel is that an interest in the land had been created by the defendants in favour of the plaintiffs because the defendants had under the agreement agreed to sell to the plaintiffs the entire second floor of the building to be constructed and one shop also was rejected. The learned Judge held:

I am afraid it is not possible to accept this contention. It is correct that under this clause the defendants have agreed to give and allot to the plaintiffs the premises mentioned in sub clauses (a) and (b) thereof. However, this is nothing but due to remunerating the plaintiffs for the services of construction of the building which the plaintiffs have agreed to render to the defendant sunder the said agreement.

Relying on the aforesaid Division Bench judgment the learned Judge has further held:

I am supported in my view to the effect that the suit for specific performance of development agreement is not maintainable by an unreported judgment of the

Division Bench of this court in Appeal No. 285 of 1988 in Notice of Motion no. 76 of 1987 in Suit No. 3419 of 1996 being the judgment of Lentin and Sujata Manohar. dated 7th March 1988."

7. In this view of the matter, I have no manner of doubt in holding that prima facie an agreement such as the one which is the subject matter of the present suit cannot be specifically enforced. However, counsel for the plaintiffs has brought to my notice the decision given in Notice of motion No. 2475 of 1993 in Suit No. 3872 of 1993 dated 24th October 1996. In that case there was an agreement dated 30th November 1990 wherein the defendants had agreed to assign to the plaintiffs the development rights for developing the suit property. The plaintiffs were to develop the suit property. The defendants wanted to back out of the agreement and therefore suit for specific performance was filed. A perusal of paragraph 11 of the Judgment would show that the case put forward by the defendants therein was that there was no concluded agreement as such no specific performance could be granted. In paragraph 12 of the judgment the argument of the defendant to the effect that the agreement is merely a development agreement and therefore, the same cannot be specifically performed was noticed. A perusal of paragraph 14 shows that the court came to the conclusion that there is no termination of the agreement by the defendant. In paragraph 16 it is observed that a reading of the agreement clearly shows that the first defendant has in fact assigned the development rights of the said property in favour of the plaintiff. The agreement says that the authority and the arrangement as arrived at between the plaintiff and defendant is irrevocable. It was therefore be served that the defendant therein had entered into an agreement with the plaintiff who had taken various steps in accordance with that in pursuance of the said agreement. The plaintiffs were always ready and willing to perform their part of the contract. As a consequence of this nothing was pointed out on behalf of the first defendant which would disentitle the plaintiffs from the relief on equitable consideration. Thus it was held that the plaintiff had a prima facie case. The defendant therein was held singularly responsible for not complying with this part of the contract. A perusal of the said authority however shows that none of the authorities mentioned above which had been pointed out by the learned single counsel for the defendant in this case were pointed to the learned single Judge. This court is bound by the decision given by the aforesaid Division Bench.

21. Dr. Saraf learned counsel placed reliance on the Division Bench Judgment of this Court in case of Chheda Housing Development Corporation Vs. Bibijan Shaikh Farid and Others, and in particular paras 12, 13 and 14 in support of his submissions that since no NOC is granted in favour of the Petitioner and no consideration is paid by the society to the Developer and the Developer having been allowed to sell the flats to the purchasers, such agreement cannot be specifically performed. Para 12 to 14 of the said Judgment reads thus:

12. On the other hand, on behalf of the respondents their learned counsel relied on the unreported Judgment in the case of (Asso Rihalani vs. Mr. Wilfred D'' Souza & ors) dated 18th January 1988 and the order in Notice of Motion No. 76 of 1987 in Suit No. 3419 of 1986 and the Appeal from the Appellate Bench and the judgment in the case of (Lokhandwala Estates Vs. Development company Ltd. & anr. vs. Goregaon Siddarth Nagar Sahakari Griha Nirman Sanstha Ltd. dated 27th September 1996 and the judgment in Gurudev Developers Vs. Kurla Konkan Niwas Co-op. Hsg. Society, and another judgment in The Peerless General Finance and Investment Co. Ltd. Vs. Swan Mills Limited and Others, to contend that a development agreement cannot be enforced. All these Judgments on the facts of those cases, have taken a view that a development agreement cannot be specifically enforced. Reliance is also placed in the case of (Union construction Co.(Private) Ltd. vs. Chief engineer Eastern command, Lucknow and anr.) In that case the issue was whether a building or engineering contract could be specifically performed considering section 12(c) of the Specific Relief Act. The Court held that compensation in money would be adequate remedy. What was in consideration was the explanation to section 10. The High Court was dealing with a Second Appeal and not a matter arising from an interim relief. Section 10 provides that specific performance of a contract of immovable property should normally be granted as a Rule. However, the explanation sets out that specific performance need not be granted if the contrary is proved, meaning thereby that compensation in money is adequate. In other words, in a case of transfer of immovable property, the normal rule is that if there is a breach of contract to transfer the immovable property, the normal rule is that if there is a breach of contract to transfer the immovable property that cannot be adequately relieved by compensation in money unless the contrary is proved.

13. In our opinion from a conspectus of these judgments, what is relevant would be the facts of each case and the agreement under consideration. Agreements considering what is discussed, amongst others, could be:

(a) An Agreement only entrusting construction work to a party for consideration;

(b) An Agreement for entrusting the work of development to a party with added rights to sell the constructed portion to flat purchasers, who would be forming a Co-operative Housing Society to which society, the owner of the land, is obliged to convey the constructed portion as also the land beneath construction on account of statutory requirements.

(c) A normal agreement for sale of an immovable property.

An Agreement of the first type normally is not enforceable as compensation in money is an adequate remedy. An Agreement of the third type would normally be specifically enforceable unless the contrary is proved. A mere agreement for development, which creates no interest in the land would not be specifically

enforced.

We are however dealing with a case of the second type. Courts for construing such a contract in this State will have to take into consideration, the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as the Act, 1963 apart from the Specific Relief Act. Under that Act, a local Act, there is an obligation cast on the owners of the land to convey not only the constructed portion but also his interest in the land beneath the construction. Under the Act an owner of the land who causes the construction to be put up becomes the promoter. Such construction can be put up by a developer or builder, who in turn sells the constructed portions to various persons by entering into Agreements. These provisions, in our opinion would be relevant in determining the true character of the document. Can such a contract be specifically enforced. Let us, therefore, consider some of the arguments advanced by the respondents to contend that the agreement is a development agreement. Reliance was placed by the 10th Respondent on Clause 6 of the Agreement to contend that no specific performance can be claimed and that payment of interest is sufficient remedy. In our opinion, such a contention is misplaced. The Clause, correctly construed prima facie would be a clause for liquidated damages in addition to specific performance. The other contention is that, considering the agreement was stamped and stamp duty paid as a Development Agreement and it must be so held. In our opinion, mere payment of stamp duty on an instrument will not change or alter the nature of the Agreement. The Agreement will have to be read considering its terms. Reliance is placed on the Judgment in The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another, . The ratio of that judgment is that in a case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible and that extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning and evidence of the acts done under it, is a guide to the intention of the parties, particularly, when acts are done shortly after the date of the instrument. In our opinion the learned Single Judge has construed the various terms of the agreement and the other material on record and at the prima facie stage has come to the conclusion that the Agreement can be specifically performed. An Appellate Court, more so a Court considering an interim order which involves exercise of discretion normally will not interfere with the finding of fact recorded by the trial Court and the exercise of discretion unless the finding is perverse. Nothing has been brought on record to hold that the findings are perverse. The document on the face of it, cannot be an agreement for security. It can only be construed as an Agreement to sell or a development agreement. In our opinion in this case, the finding recorded by the learned Single Judge was a finding eminently possible on the material on record. We are, therefore, clearly of the opinion that the Agreement prima facie is an agreement which can be specifically enforced and consequently the Appellants have made out a prima facie case. The

other predicates for grant of an injunction will be answered in the discussion that follows.

14. We then come to the issue of the clarification to the order issued by the learned Single Judge. The crux of the issue is, whether after having come to the conclusion that the Agreement could be specifically enforced, the learned single Judge could have in so far as FSI/TDR clarified the earlier part of the order. It is no doubt true that the clause in the Agreement provides that the Appellants will purchase from the owners the right to F.S.I. in respect of an area of 2,00,000 sq. ft. area to be used and utilised by construction of the buildings free from all encumbrances and as available on the property being part of Plot No. C-2 shown shaded in green colour on plan "B" by use of the FSI available in respect of Plot No. C-2 and potentiality of benefit of TDR by whatever name called as generated or to be generated and created by owners from and out of other portion of the entire property being subject to reservations of D.P. Road, P.G., etc., and/or to be acquired by purchase of Slum TDR, by the owners at their costs from the open market, free from all encumbrances claims and demands at or for the consideration of Rs. 500/- per sq. ft. (Built up area). From this, what emerges is firstly that the FSI available from the suit land on which the buildings are being put up can be used and balance to be supplied from the remaining property or to be supplied by purchase of Slum TDR. The expression TDR, is Transfer of Development Right. This enables the FSI to be used on any other plot of land which is generated from some other plot and can be used in terms of the D.C. Regulation in force.

22. Dr. Saraf placed reliance on the Judgment of the Supreme Court in case of Aniglase Yohannan Vs. Ramlatha and Others, and in particular paras 9 and 12 in support of his submissions that conduct of the parties seeking specific performance has to be unblemished all throughout to make him entitled to the grant of specific reliefs. It is submitted that in this connection the Petitioner had not taken any steps except payment of Rs. 5,00,000/- and thus would not be entitled to seek specific performance and thus no reliefs shall be granted by this Court in favour of the Petitioner. Paras 9 and 12 of the said Judgment reads thus:

9. The requirements to be fulfilled for bringing in compliance of the Section 16(c) of the Act have been delineated by this Court in several judgments. Before dealing with the various judgments it is necessary to set out the factual position. The agreement for sale was executed on 15.2.1978 and the period during which the sale was to be completed was indicated to be six months. Undisputedly, immediately after the expiry of the six months period lawyer''s notice was given calling upon the present appellant to execute the sale deed. It is also averred in the plaint that the plaintiff met the defendant several times and requested him to execute the sale deed. On finding inaction in his part, the suit was filed in September, 1978. This factual position has been highlighted in the plaint itself. Learned Single Judge after noticing the factual position as reflected in the averments in the plaint came to hold that the

plaint contains essential facts which lead to inference to plaintiff''s readiness and willingness. Para 3 of the plaint indicates that the plaintiff was always ready to get the sale deed prepared after paying necessary consideration. In para 4 of the plaint reference has been made to the lawyer''s notice calling upon the defendant to execute the sale deed. In the said paragraph it has also been described as to how after the lawyer''s notice was issued plaintiff met the defendant. In para 5 it is averred that defendant is bound to execute the sale deed on receiving the balance amount and the plaintiff was entitled to get the document executed by the defendant. It is also not in dispute that the balance amount of the agreed consideration was deposited in Court simultaneously to the filing of the suit. While examining the requirement of Section 16(c) this Court in Syed Dastagir v. T.R. Gopalakrishna Setty noted as follows: (SCC p. 341. para 9)

9. So the whole gamut of the issue raised is, how to construe a plea specially with reference to Section 16(c) and what are the obligations which the plaintiff has to comply with in reference to his plea and whether the plea of the plaintiff could not be construed to conform to the requirement of the aforesaid section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one''s case for a relief. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. In India most of the pleas are drafted by counsel hence the aforesaid difference of pleas which inevitably differ from one to the other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test whether he has performed his obligations, one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. The same plea may be stated by different persons through different words; then how could it be constricted to be only in any particular nomenclature or word. Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form. So to insist for a mechanical production of the exact words of a statute is to insist for the form rather than the essence. So the absence of form cannot dissolve an essence if already pleaded.

12. The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The

provision imposes a personal bar. The Court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief.

23. Dr. Saraf learned counsel placed reliance on the Judgment of the Supreme Court in the case of N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, and in particular para 5 in support of his submissions that remedy for specific performance is an equitable remedy and party who seeks specific performance has to show that he was always been ready and willing to perform his obligations all throughout. Para 5 of the said Judgment reads thus:

5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court which discretion requires to be exercised according to settled principles of law and not arbitrarily as enumerated u/s 20 of the Specific Relief Act, 1963 (for short "the Act). u/s 20, the court is not bound to grant the relief just because there was a valid agreement of sale. Section 16(c) of the Act envisage that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to prove the same he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution will date of the decree he must prove that he is ready and has always been wiling to perform his part of the contract. As stated the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract.

24. It is submitted by Dr. Saraf that on 10.6.2013 the society had passed a resolution which was attended by 30 members out of 32 members. Another meeting of the society was held on 16.6.2013 in which it was resolved to enter into development agreement with another developer. That resolution was passed by 25 members out of 32 members of the society. It is submitted that the members of the society acts and speaks through the society. The society has already pursuant to the resolution passed by the majority of members terminated the MOU and thus separate termination letter from the members was not required. The learned counsel

submitted that thus no case is made out by the petitioner for grant of any interim measures. The MOU has been terminated as far back as on 14.6.2013. The petitioner has already invoked Arbitration clause recorded in the MOU. The Arbitral tribunal is already constituted. The petitioner has already filed the statement of claim.

25. Dr. Saraf, learned counsel appearing for the respondent no. 1 submits that MHADA by its offer letter dated 21st May, 2013, MHADA considered the request of the eight societies including respondent no. 1 for allotment of balance built up area in the proposed redevelopment of eight builders under revised D.C. Regulations 33(5) on various terms and conditions. On 10th November, 2013 in the special general meeting of the 1st respondent society was held in which all the members present in the said meeting voted in favour of selecting M/s. Acme Properties Developer Pvt. Ltd. and respondent no. 1 society decided to reverify and confirm the decision taken by the society on 16th June, 2013 and passed a resolution to select a common developer to join eight societies, in presence of authorised officer of the Deputy Registrar and voted in favour of M/s. Acme Properties Developer Pvt. Ltd. as developer for redevelopment of eight participating societies.

26. On 16th December, 2013, respondent no. 1, M/s. Sahakar Nagar Happy Home Co-operative Housing Society Limited, Dolly Friends Co-operative Housing Society Limited and M/s. Acme Property Developers Pvt. Ltd. entered into a development agreement on the terms and conditions recorded therein. Copies of various resolutions and approvals granted by MHADA were annexed to the said development agreement. A copy of the said development agreement is furnished to the court for perusal and consideration by Dr. Saraf, learned counsel for respondent no. 1. Learned counsel submits that condition of the building of the 1st respondent is totally dilapidated. MHADA has not granted any approval so far in favour of the petitioner. Even in MOU entered into between the petitioner and the respondent no. 1, it was clearly stated that the building of the 1st respondent are in dilapidated condition.

27. Learned counsel placed reliance on the judgment of the Division Bench of this court reported in (2013) 1 ALR 380 in support of his submission that this is not a case in which the petitioner can get specific performance of the MOU and thus no interim measures as demanded by the petitioner can be granted. Learned counsel also placed reliance on the unreported judgment of this court delivered on 10th June, 2013 in Notice of Motion No. 1393 of 2012 in Suit No. 762 of 2012 in case of Gopi Gorwani vs. Ideal Co-operative Housing Limited and others. It is held by this court in the said judgment after considering the conduct of the plaintiff therein that the plaintiff was not ready and willing to abide by the agreement at all times. In such a scenario, the question of granting specific performance of the purported contract based on the expression of interest did not arise and therefore the question of granting any interim reliefs to the plaintiff also did not release. It is held that the society has been waiting for about four years for the redevelopment of its property.

The balance of convenience is also in favour of the society and against the developer. It is held that the work of redevelopment of the housing society is such that a society must have confidence in its developer and once members of the society have expressed loss of trust, faith and confidence in the developer on account of various deviations and violations done by the developer, which is clear from the correspondence on record, the society cannot be forced to get the redevelopment work done through the plaintiff. Paragraph (31) of the said judgment reads thus:-

31. From the aforesaid facts it is clear that the Plaintiff has repeatedly deviated from the terms of the EOI, of which the Plaintiff has sought specific performance in the present suit. The Plaintiff has alleged a further Agreement to cover up such violation, but not sought specific performance of the purported further Agreement. The conduct of the Plaintiff also shows that the Plaintiff was at all times not ready and willing to abide by the Agreement. In such a scenario, the question of granting specific performance of the purported contract based on the EOI (at Exhibit C to the Plaint), does not arise and therefore, the question of granting any interim relief to the Plaintiff also does not arise. The first Defendant has been waiting for the last about four years for redevelopment of its property. The balance of convenience is also in favour of the first Defendant and against the Plaintiff. The work of redevelopment of a Housing Society is such that a Society must have confidence in its developers. Once the members of the Society have expressed loss of trust, faith and confidence in the developer on account of various deviations and violations done by the developer, which is clear from the correspondence on record, the Society cannot be forced to get the redevelopment work done through the Plaintiff. In view thereof, the Plaintiff is not entitled to any interim relief and the Notice of Motion is disposed of as dismissed.

28. Dr. Saraf placed reliance on the unreported judgment of the Division Bench delivered on 23rd September, 2013 in Appeal (L) No. 82 of 2013 in case of Shantilal J. Shah and others vs. Jitendra Sanghavi and others. In the said judgment after considering the fact that the building was in dilapidated condition, Division Bench of this court held that it would be far fetched to presume that the parties contemplated that the owners would have no more than a right to continue in occupation despite the failure of the developer to carry on development, the owners, tenants and occupants should only wait, stand by and see the building in their occupation collapsing, as a result of the dilapidated position of the structure. Learned counsel submits that all the members of the respondent no. 1 societies belong to low income group and in view of no progress of the redevelopment of the dilapidated building, all the members of the society have been suffering for no fault of theirs.

29. Mr. Dhond, learned senior counsel appearing for the respondent no. 34 states that there is no arbitration agreement between the petitioner and respondent no.

34. Respondent no. 34 is not a party to the arbitration proceedings filed by the petitioner. Petitioner cannot seek any declaration in the arbitration proceedings against respondent no. 34 or any other reliefs of any nature whatsoever against respondent no. 34. It is submitted that the composite redevelopment agreement has been already entered into between respondent no. 34 and other seven societies and no reliefs thus can be granted of any nature which would affect not only the respondent no. 1 society but also seven other societies who have agreed to get their respective buildings redeveloped through respondent no. 34 after obtaining permission from MHADA.

30. Mr. Jain, learned counsel appearing for petitioner in rejoinder submits that respondent no. 1 society and/or respondent no. 34 have not produced any documents showing the joint development of the properties of seven societies duly approved by MHADA. The amount of Rs. 5 lacs paid by the petitioner to the 1st respondent society has not been returned. Learned counsel submits that all the terms and conditions mutually agreed by and between the petitioner and respondent no. 1 have been duly recorded in the letter of respondent no. 1 to the petitioner addressed on 21st July, 2012 and thereafter in the Memorandum of Understanding dated 27th July, 2012. Nothing is left for negotiation or agreed upon between the parties. It is submitted that MOU entered into between the parties was complete agreement. Respondent no. 1 society had granted all permission/authority to the petitioner under the said MOU. Learned counsel placed reliance on the Judgment of the Supreme Court reported in AIR 1959 SC 620 in case of Trivenibhai vs. Lilabhai and more particularly paragraphs 6, 7, 14 and 15 in support of his submission that the court has to consider the effect of the document and must enquire whether it contains unqualified and unconditional words of present demise and includes the essential terms of the agreement.

31. Mr. Jain, placed reliance on the judgment of the Supreme Court in case of Kollipara Sriramulu Vs. T. Aswathanarayana and Others, and in particular paragraph (3) thereof in support of his submission that mere reference to a future formal contract would not prevent a binding bargain between the parties. It is submitted that merely because in the MOU it is provided that further documents would be executed between the parties would not mean that the said MOU would be an agreement to be entered into an agreement. Paragraph (3) of the said judgment of the Supreme Court reads thus:-

3. We proceed to consider the next question raised in these appeals, namely whether the oral agreement was ineffective because the parties contemplated the execution of a formal document or because the mode of payment of the purchase money was not actually agreed upon. It was submitted on behalf of the appellant that there was no contract because the sale was conditional upon a regular agreement being executed and so such agreement was executed. We do not accept this argument as correct. 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. As observed by the Lord Chancellor (Lord Cranworth) in Ridgway v. Wharton the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement In Von Hatzfeldt-Wildenburg v. Alexander it was stated by Parker, J. as follows:

It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

32. In so far as issue of insufficiency of stamp duty raised by the society is concerned, learned counsel appearing for the petitioner submits that the said MOU does not give any authority which would attract payment of stamp duty under Article 5(ga). The said MOU does not grant any development rights but provides that the development agreement would be entered into in future. No rights have been created in favour of the petitioner till conditions set out in the said MOU are satisfied. Learned counsel invited my attention to prayer (e) of the statement of claims filed before the learned arbitrator. Reliance is placed on the judgment of this court in case of Balawantgir Ganpatgir Giri through his LRs. Nanibai Giri and Others Vs. Manasi Construction and Developers and Others, . Reliance is placed on paragraphs 5, 6, 11 and 12 of the said judgment in support of his submission that the said MOU would not attract payment of any stamp duty under Article 5(g) (a) of the Maharashtra Stamps Act as canvassed by the society. Learned counsel submits that what is required to be stamped is not a transaction but the instrument as defined u/s 2(e) read with section 3 of the Maharashtra Stamps Act. Only a document in writing can be stamped and not an oral agreement. In case of any ambiguity in the instrument benefit is liable to be rendered in favour of the assessee. Learned counsel submits that since execution of the MOU is not in dispute, even if such MOU is not stamped, question of tendering the arbitration agreement in evidence did not arise. It is submitted that since arbitration

agreement is asserted by the petitioner in petition and is not denied by respondent no. 1 in reply, arbitration agreement even otherwise is deemed to have existed u/s 7 of the Arbitration and Conciliation Act, 1996. A document which gives authority as prescribed under Article 5(ga) only requires to be stamped and not otherwise. The petitioner was given a right to construct a building by utilising FSI, purchase of TDR, to sale flat to outsiders, allot flats to members of respondent no. 1 and thus the petitioner was the owner of the building and would be liable to execute a deed of conveyance in favour of the society such document would fall under Article 12(b). Learned counsel submits that respondent no. 1 society has granted licence in favour of the petitioner to enter upon the land which licence cannot be revoked and is enforceable. Learned counsel submits that respondent no. 1 has neither pleaded that the petitioner was unwilling to carry out their obligation under the MOU nor have terminated the MOU on that ground. In any event, respondent no. 1 has condoned and/or waived the alleged delay on the part of the petitioner in carrying out redevelopment. Respondent no. 1 did not insist the petitioner to commence redevelopment before termination of the MOU. Though petitioner was granted one year time under the said MOU, the said MOU has been terminated even before expiry of the contractual period. Learned counsel made attempt to distinguish the judgment of the Supreme Court in case reported in N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, . Learned counsel submits that respondent no. 34 is not a bonafide purchaser and has acquired alleged rights with notice. Reliance is placed on the judgment of the Supreme Court in case of Bharat Karsondas Thakkar Vs. Kiran Construction Co. and Others, in support of his submission that the third party purchaser is not a necessary party. Learned counsel made an attempt to distinguish the judgment of this court in case of Gopi Gorwani (supra) on the ground that this court in the said matter has come to conclusion that there was no agreement.

33. Dr. Saraf, learned counsel appearing for the society vehemently urged that the submission of the petitioner on the one hand that all the rights and authorities were conferred upon the petitioner by respondent no. 1 under the said MOU and on the other hand that no rights are created under the said MOU and the development agreement was to be entered into mutually on compliance with various conditions and would not attract payment of stamp duty is self destructive and is inconsistent with each other. Learned counsel submits that under clause (3) of the said MOU, it was clearly provided that the development agreement was to be entered into in future subject to various events, no interest is created in the land in favour of the petitioner. Learned counsel distinguished the judgment relied upon by Mr. Jain in rejoinder. Learned counsel submits that there is no provision for conveying the land and the building in favour of respondent no. 1 as it always vest in the society. There was no question of granting any licence under sections 52 and 60 as urged by the petitioner. In this case, building was to be constructed for the members of the respondent no. 1 society. The entry was permitted to the petitioner only for

construction of the building. It is submitted that respondent no. 1 was demanding compliance of the obligations. The Architect of the society could not waive the conditions of the MOU on behalf of the society as alleged. In the termination notice respondent no. 1 has taken a stand in writing that the petitioner had failed to comply with their obligations and was not willing to comply with their obligations. It is submitted that the balance of convenience is in favour of the members of the society and against the petitioner.

REASONS AND CONCLUSIONS:

34. One of the issue raised by the defendant in this proceedings is whether MOU entered into between the petitioner and the respondent Nos. 1 to 33 as such is enforceable in law is prima facie concluded agreement and in respect of such writing whether petitioner can get specific performance of such document at all. In support of this submission both parties have invited my attention to various clauses of the MOU. A perusal of the MOU prima facie indicates that the MOU was entered into for recording the broad parameters of the redevelopment pending the execution and registration of the detailed development agreement, POA and 22 individual permanent alternate accommodations. Limited rights were granted in favour of the petitioner subject to various permissions, sanctions, NOCs from authorities subject to due compliance with the development regulations and subject to development agreement being executed. The petitioner had paid only a sum of Rs. 5 lacs under the said MOU to respondent No. 1 society. It is not in dispute that no further writing is executed between the petitioner and respondent Nos. 1 to 33 granting development rights in favour of the petitioner.

35. At this stage it would be appropriate to refer to one of the arguments advanced by the learned counsel appearing for the petitioner that the said MOU would not require payment of any stamp duty as the same did not grant any development rights but provided that the development agreement would be entered in future. No rights had been created in favour of the petitioner till conditions set out in the said MOU were satisfied. At the same breath the petitioner also submits that nothing is left for negotiation or to be agreed upon between the parties in future. In my view, the argument of the petitioner that all the terms and conditions are already agreed upon in the MOU and nothing further was to be agreed upon by entering into a development agreement is self destructive and is contrary to the submissions of the petitioner that under the said MOU, no development rights are created in favour of the petitioner but it provided that the development agreement would be entered into in future and no rights had been created in favour of the petitioner till conditions set out in the MOU were satisfied.

36. In my prima facie view on perusal of the provisions of the MOU and the fact that no further development agreement was entered nor was there any compliance of any conditions set out in the MOU which were not complied with according to the respondents, the said MOU at the most could be considered as an agreement to

enter into an agreement in future subject to various contingencies set out therein. In my prima facie view such MOU thus cannot be specifically enforced. In my prima facie view specific performance of an agreement to enter into an agreement cannot be granted.

37. In so far as judgment of Supreme Court in case of Kollipara Sriramulu (supra) relied upon by the petitioner is concerned, it is held that there are 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 former contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. It is one of the argument of the petitioner that such MOU did not grant any development rights but provides that the development agreement would be entered into future itself is sufficient to hold that the said MOU is at the most is an agreement to enter into an agreement and prima facie cannot be enforced. In my view the judgment of Supreme Court relied upon by the petitioner is of no assistance to the petitioner. In case of Trivenibai (supra) Supreme Court has held that the Court has to consider the effect of the document and must inquire whether it contains unqualified and unconditional words of present demise and includes the essential terms of the agreement. In my prima facie view the provisions of the MOU does not indicate that any rights are created in favour of the petitioner or that it records any essential terms of the agreement. It is not in dispute that various sanctions, NOCs required to be obtained from various authorities have not been obtained by the petitioner.

38. In the Memorandum of understanding dated 27th July, 2012, it is recorded that the existing building of the society was in a dilapidated condition and thus the society had decided to demolish the existing buildings and to redevelop the said property. As majority of the society members wanted to avail of the benefit of TDR without contribution by them as most of the members were retired persons and necessary expertise was not available for the construction of the said intended buildings. It was desired by the society that development rights would be granted by the society to a developer who will spend monies required for the purpose of construction and completion of the intended buildings. It was also recorded that a detailed development agreement, power of attorney and 32 individual permanent alternate accommodation agreements would be executed by the society only after obtaining offer letter, NOC from MHADA, NOC from Civil Aviation, IOD along with TDR loaded along with all concessions approved from the authorities in the name of the society within the period of one year from the date of execution of the said MOU and to record the broad parameters of the said redevelopment, the said MOU be entered into between the society and the developers. It is recorded that it was necessary to enter into the said MOU in respect of the redevelopment of the said property recording the broad parameters of the said redevelopment pending the execution and registration of the detailed development agreement, power of attorney and 32 individual permanent alternate accommodation agreements. It was

provided that the society granted, subject to all necessary permissions, sanctions, NOCs from authorities, and subject to due compliance with development control regulations within time prescribed under the said MOU and subject to that development agreement would be executed, development rights in respect of said property to the developers. The developer also agreed to pay Rs. 16,500/- per month as compensation towards rent to each of the members. Society agreed to make the respective purchasers of the flat as members of the society. The society permitted the developer to enter upon the said property for carrying out detailed survey and demarcation of various areas for development and for obtaining permissions and plans sanctioned along with unconditional IOD etc. Clause 24 of the said agreement recorded that the parties would be entitled to specific performance of the said MOU.

39. It is not in dispute that the parties did not enter into any development agreement or any other writing as recorded in the said MOU. The Petitioner only paid sum of Rs. 5 lacs under the said MOU to the respondent no. 1 society. By letter dated 21st July, 2012 by the society to the petitioner, it was recorded that the petitioner should update the property card by incorporating name and correct area of the society and shall obtain offer letter from MHADA, purchase FSI/TDR, obtain NOC from Civil Aviation Authority. It was also stated that the petitioner shall obtain various permissions in the name of society and for the benefit of society within one year from the date of the said letter of intent. It was recorded that after receipt of all the permissions by the petitioner in the name of society, society would execute development agreement and power of attorney on mutual terms and conditions agreed between the parties attaching all the permissions. By letter dated 12th September, 2012, the petitioner informed the society that the petitioner had applied for fresh demarcation from the land Manager from MHADA to ascertain the correct area of the plot. Petitioner was waiting for fresh policies of MHADA as existing policies of MHADA were not feasible for development of the existing building. The new policies were likely to come in the due course. It is also stated that the upgradation of the property card of the plot of the society would be done simultaneously along with MHADA offer letter.

40. By letter dated 25th February, 2013, the petitioner informed the society that the petitioner had applied for CTS plan, property card and kami-jast patrak with approved authorities and the same will be received in second week of March, 2013 and thereafter petitioner would put up the file before MHADA tentatively on or before 31st March, 2013 subject to the society approving the plans. Petitioner had sent tentative plans finalized by the architect to the project management consultant on 16th Feb. 2013 and requested the society to finalize the same at the early date. It was alleged that in a joint decision of the architect of the petitioner and the old architect of the society, it was decided not to incorporate name of the society on the property card at that stage so that the petitioner may get some benefit of lay out in respect of FSI from MHADA and the same could be done at latter stage. The petitioner assured that as and when petitioner receives any intimation from their

architect, it would be done. By letter dated 24th March, 2013 the society informed the petitioner that the society agreed to the tentative plans submitted by the petitioner to the project management consultant and requested the petitioner to put up the file to MHADA with prior consent of the society showing the file before submitting the same to MHADA immediately. The respondent society placed on record that the petitioner had stated that CTS plan, property card and kami-jast patrak would be received in the second week of March, 2013 and called upon the petitioner to inform whether petitioner had received the same or not and if not to disclose the status of the same.

41. By letter dated 13th April, 2013, the petitioner enclosed copy of the tentative plan for record of the society and requested to attend the office of the Petitioner with all committee members along with seal of the society, stamps and letterheads to enable the petitioner to draft the required application to be submitted to MHADA on the letterhead of the society. Petitioner informed that the present proposal was based on 911.62 sq. Mtrs. plot area and in future if petitioner gets the lay out benefit, petitioner would inform the society about the same and for the said reason, petitioner had to hold the procedure of incorporating the name of the society on property card as alleged to have been mutually decided in the joint meeting between the architect of the petitioner and architect of the respondent society.

42. On 14th June, 2013, the society after recording various reasons, terminated the MOU dated 27th July, 2012. The petitioner vide their advocates letter dated 18th June, 2013 nominated Mr. N.R. Jagtap advocate as sole arbitrator and requested to concur with his appointment. It is the case of the society that on 7th May, 2013, petitioner along with other several societies had addressed a letter to MHADA for granting their approval of premium policy scheme under provisions of Development Control Regulations of joint development of societies. MHADA by letter dated 21st May, 2013 granted permissible FSI of 2.5 to respondent no. 1 society and addressed similar letter to seven other societies. The respondent no. 1 and other seven societies had made an application to MHADA for comprehensive integrated self-redevelopment project of their societies. About more than 200 members of the other seven societies had also agreed for such joint redevelopment. The society has placed on record that on 16th December, 2013, respondent no. 1 and two other societies entered into development agreement with respondent no. 34 on the terms and conditions recorded therein. Various permissions and approvals granted by MHADA are annexed to the said development agreement. A copy of the said development agreement is produced on record by the society. The respondent no. 1 society and other seven societies have taken steps pursuant to the said agreement.

43. It is not in dispute and as recorded in the MOU itself that the buildings of the respondent no. 1 society were in dilapidated condition. Respondent society has also produced photographs showing the existing condition of the buildings as deteriorated. It was recorded in the MOU itself that the said buildings required

redevelopment at the earliest. A perusal of the record and correspondence indicates that petitioner did not take any concrete steps under the said MOU. Neither any permission is granted by MHADA nor any plans are sanctioned. The petitioners themselves were waiting for fresh policies of MHADA as the existing policies were not feasible according to the petitioner. The members of the society in my view can not be asked to wait permanently for revised and favourable policy by MHADA in future. In view of the dilapidated condition of the buildings, and the petitioners not having taken positive steps under the MOU entered into, in my prima facie view after decision taken by absolute majority of the members, society was justified in terminating the MOU entered into with petitioner and entering into fresh agreement with respondent no. 34.

44. It is not in dispute that the society has already terminated the MOU on 14th June 2013. Documents placed on record by the society indicates that the respondent No. 1 society alongwith other 7 societies had applied for permission from MHADA for joint development which permission is granted by MHADA. Pursuant to such permission/NOC, respondent No. 1 alongwith other societies has already entered into development agreement jointly with respondent No. 34. Resolution to terminate the MOU with the petitioner was passed by majority of members of respondent No. 1 society. Resolution is also passed by the members of respondent No. 1 to enter into development agreement with respondent No. 34. It is not in dispute that the petitioner has already filed statement of claim before the arbitral tribunal. Respondent No. 34 is not a party to arbitration proceedings. If any interim measures in the facts of this case is granted as prayed, it would affect not only the members of respondent No. 1 Society but would also affect large number of members of the other 7 societies who have agreed for joint development of their respective buildings with respondent No. 34.

45. In my prima facie view, the respondent No. 1 has rightly terminated the said MOU which is subject matter of arbitration proceedings filed by the petitioner. No stay of such termination can be ordered by this Court. In the event the petitioner succeeds in arbitration proceedings, petitioner would be compensated in terms of money.

46. A perusal of the correspondence annexed to the petition and affidavits prima facie indicates that the petitioner was not ready and willing to comply with the obligations under the said MOU, even if it is considered as concluded. The petitioner was waiting for introduction of revised and fresh policies of MHADA as according to the petitioner, existing policies were not feasible for development. Various permissions were to be obtained by the petitioner from various authorities which have not been obtained by the petitioner which were required for the purpose of commencement and completion of the properties. The members of the respondent No. 1 society are from middle class and most of the members have retired. It is an admitted position that the condition of the buildings of respondent No. 1 was

dilapidated even on the date when MOU was entered into. In my prima facie view, members of the society having lost confidence in the petitioner and in view of no progress on the part of the petitioner, cannot be forced to go for redevelopment of the property through the petitioner.

47. Division bench of this Court in case of Shantilal J. Shah (Supra) has held that it would be far fetched to presume that the parties contemplated that the owners would have no more than a right to continue in occupation despite the failure of the developer to carry on development and the owners, tenants and occupants should only wait, stand by and see the building in their occupation collapsing as a result of the dilapidated condition of the structure. This Court in case of Gopi Gorwani (Supra) has held that the work of redevelopment of the housing society is such that the society must have a confidence in its developer and once members of the society have expressed loss of trust, faith and confidence in the developer on account of various deviations and violations done by the developer, society cannot be forced to get the redevelopment work done through the same developer. I am respectfully bound by the judgments of this Court referred to above which in my view squarely apply to the fact of this case.

48. In view of this Court having taken a prima facie view in this Judgment that the MOU was not a development agreement and no rights having been conferred under the said MOU, I do not propose to go into the issue whether specific performance of the development agreement itself can be granted by a Court or an arbitrator or whether it would require any stamping under the provisions of Maharashtra Stamp Act. I am thus not dealing with various judgments referred to and relied upon by the parties on this issue.

49. Division Bench of this Court in case of Gurudev Developers (supra) has held that even in case of a development agreement where the aim of the professional builder/contractor is to make a profit by completing building and selling the flat at profits and even if there is any breach of such agreement it can be compensated by damages. No interest in the land has been created by the defendants in favour of the developer. It is held that there was no concluded agreement and no specific performance could be granted.

50. Supreme Court in case of Aniglosa Yohallal (supra) has held that conduct of parties seeking specific performance has to be un-blamished all through out to make him entitled to the grant of specific reliefs. Supreme Court in case of N.P. Thirugnanam (supra) has held that remedy for specific performance is an equitable remedy and even the discretion of the Court has to be exercised according to settled principles of law and not arbitrarily. u/s 20 of Specific Relief Act, the Court is not bound to grant the relief just because there was a valid agreement of sale. Court has to see that there was continuous readiness and willingness on the part of the plaintiff which is condition precedent to grant the relief of specific performance. Court has to take into consideration the conduct of the plaintiff prior and

subsequent to the filing of the suit alongwith other attending circumstances. A perusal of the correspondence prima facie indicates that the petitioner was never ready and willing to comply with its obligations under the said MOU even if it is considered as concluded agreement and in any event not all through out. I am respectfully bound by the judgment of the Supreme Court referred to aforesaid which in my view is squarely applicable to the facts of this case.

51. Since I do not propose to grant any reliefs in favour of the petitioner, I am not proposing to go into the issue whether any reliefs can be granted against respondent No. 34 who is not party to arbitration proceedings or agreement. In my view merely because separate termination letter is not issued by members of the respondent no. 1 society, it would not amount to termination only by society and not by members. Members of the society had passed a resolution to terminate the Memorandum of Understanding. Members of the society acts through society.

52. In my view, balance of convenience is in favour of the respondents and against the petitioner. No case is made out by the petitioner for grant of interim measures. Petition is devoid of merits. I therefore pass the following order. Petition is rejected. No order as to costs.