BEFORE THE LEARNED ARBITRAL TRIBUNAL PRESIDED OVER BY THE HON'BLE JUSTICE DR. F.I. REBELLO - FORMER CHIEF JUSTICE, HIGH COURT OF ALLAHABAD

SOLE ARBITRATOR

Arbitration in between

Kabra Estate and Investment Consultants,
A firm registered under the provisions of
The Indian Partnership Act, 1932, and having
its Registered Office at Jash Chambers,
2nd Floor, Mumbai 400 001 .. Claimant

Versus

The New Aarti C.H.S. Ltd., a Society registered under the provisions of the Maharashtra Cooperative Societies Act, 1961, and having its registered address at Old Nagardas Road, Andheri (E) Mumbai 400 069 ..Respondent

Appearances:

For Claimant : Mr.Snehal Shah, Senior Advocate, a/w,
Mr.Nishant Sasidharan, Advocate
Mr.Kunal Mehta, Advocate.
Mr.Vignesh Kamat, Advocate.
Mr.Suraj Iyer, Advocate.
Ms.Debashree Mandpe,
i/b. Ganesh & Co.

For Respondent : Mr.Dinesh Purandare, Advocate a/w.
Mr.Nivit Srivastava, Advocate,
Mr.Nakul Jain, Advocate.
Mr.Prathamesh Kamat, Advocate.
Ms. Sneha Patil, Advocate,
i/b. Maniar Srivastava Associates.

A W A R D

Date: 26.10.2021.

PARTIES:

1. Claimant: The Claimant is a registered partnership firm carrying on business as builders and developers.

2. Respondent: The Respondent is a co-operative Housing Society registered under the provisions of the Maharashtra Co-operative Societies Act, 1960.

ARBITRAL CLAUSE :

3. The Redevelopment Agreement dated 18.03.2008 has a clause for arbitration being Clause 27, which reads as under:

"*27. In case any dispute or difference between the parties hereto including interpretation of any clause, the same shall be referred to Arbitration under the provisions of the Arbitration & Conciliation Act, 1996, or any statutory modification or re-enactment thereof. The Arbitration shall take place at Mumbai."*

The Claimant had moved an arbitration application for appointment of an arbitrator. The High Court of Bombay, by consent of parties, constituted the present Tribunal to adjudicate upon the disputes and differences between the parties.

PROCEDURAL DIRECTIONS:

4. On copy of the Order of the High Court being communicated to the Tribunal, a meeting was called for on 31.07.2014. Various directions were issued on that date.

5. The Claimant had moved an application under Section 9 before the High Court. The Learned Court by its order dated 07.05.2014 directed that the said application shall be treated as an Application under Section 17 of the Act. That application was disposed of by order dated 08.01.2015.

6. The Respondent moved an application that the claim of the Claimant be terminated on the ground that the Claim Statement had not been filed within the period of time granted by the Tribunal. That application was dismissed by order dated 13.10.2015.

7. After pleadings were completed including pleadings in the Counter Claim, issues were settled on 26.02.2016.

8. An Application was moved by the Respondent to reject the prayer for specific performance on the ground that the building which is subject matter of redevelopment was demolished on 28.11.2015 and possession of the society's property was handed over to M/s. Sheth & Sonal Developers. That application was dismissed by an order dated 01.04.2016.

9. On 23.06.2016 further directions were given in the matter of discovery/inspection/admission and denial of documents and filing of Affidavits of Evidence. Adjournments were sought in the matter of recording of evidence and as such a new time table was fixed for recording evidence.

10. The Respondents, on 25.01.2017, moved an application for adjournments of proceedings by 16 weeks. That application was rejected. Further letter was received from the Advocate for the Respondent seeking adjournment of 16 weeks on the ground that on 30.03.2006 an Administrative Committee had been appointed for the society replacing the Managing Committee. That application was rejected. Time for the Respondent to file Affidavits of Evidence was further extended.

11. The Claimant thereafter applied under Section 27 to move the competent court to summon a witness, that application was allowed on 14.03.2017 and the matter was posted for Claimant's evidence.

12. Even by 11.12.2017 the date fixed for the Claimant's evidence, Claimants had not filed their Affidavits of Evidence. Accordingly, the sittings from 11th to 15th December 2017 were adjourned and fresh dates were given for the parties to file their Affidavits of Evidence. Recording of Evidence commenced on 15.01.2018 and recording of evidence was concluded on 15.02.2018.

13. Arguments commenced on 26.11.2018 and concluded on 13.02.2019.

14. Parties were directed to file Written Submissions within 5 weeks from 13.02.2019. Written Arguments were received from the Claimant only on 06.02.2020. Thereafter on account of the pandemic, there was a lockdown. The Supreme Court has taken note of the same and excluded the period from 15.03.2020 till 02.10.2021 for the purpose of limitation. The Tribunal also had no access to its office for a longtime. The staff were also not available as they could not travel by road. This Award is not covered by Section 29-A of the Arbitration & Conciliation Act, 1996.

PLEADINGS:

15. **Claim Statement:**

(i) The Respondent is the owner of three buildings and is known as "The New Aarti C.H.S. Ltd." There were in all 93 flats, in the three buildings. On 27.11.2006, at an Extraordinary General Body Meeting, the Respondent society passed a Resolution constituting a New Building Project Committee ("**NBPC**"). By a Resolution dated 26.11.2006, the NBPC and the Managing Committee were authorized to call for fresh proposals for redevelopment of the said property. The Chairman, Secretary and

Treasurer of the Respondent society were authorized to sign and execute all deeds, documents, etc. and to register the same on behalf of the Respondent.

(ii) In or around June 2007, the Respondent floated the tender for redevelopment of the said property. The Claimant submitted its offer for redevelopment. On 16.07.2007, the Respondent issued certain clarifications to the earlier tender. On 27.10.2007, the Claimant submitted a revised proposal for redevelopment of the property.

(iii) At a Special General Body Meeting held on 04.11.2007, the majority of members of the Respondent society passed a resolution selecting the Claimant as preferred builder, to redevelop the said property. By the same Resolution, the members of the society also authorized the Managing Committee of the Respondent as well as the NPBC, to proceed further and negotiate more favourable terms for redevelopment with the Claimant and to, thereafter, execute a Redevelopment Agreement with the Claimant.

(iv) On 24.11.2007, the Respondent issued a letter of appointment, confirming the selection of the Claimant as builder and developer for the said work of redevelopment of the said property on the terms and conditions set out therein. On 18.04.2008, the Claimant and the Respondent executed a Redevelopment Agreement. The Redevelopment Agreement was duly stamped and registered. The Redevelopment Agreement was subsequently modified by a

Deed of Rectification dated 29.11.2010, which is also duly stamped and registered. Pursuant to the Redevelopment Agreement, the Respondent executed an Irrevocable Power of Attorney dated 06.05.2008.

(v) In June 2008, the Claimant submitted a tentative residential plan to the Respondent for the redevelopment of the property. Subsequently, a revised plan including a proposal to construct commercial saleable premises on the said property was submitted. The Respondents, however, were not agreeable to the same and it was rejected. Thereafter, various tentative alternative plans for redevelopment were submitted to the Respondent on 18.09.2008, 10.02.2009 and 07.04.2009.

(vi) According to the Claimant, the redevelopment scheme is heavily dependent on the co-operation of the tenant/member with the builder. The members of the Respondent society kept making new demands as a consequence of which the plans for redevelopment could not finalized. The members of the Respondent society were unable to agree on the allotment of flats in the proposed new building. The Claimant was prevented from applying for an IOD, until such time, flat allotments and buildings plans were not finalized and accepted by the Respondent. The process of allotment of flats was agreed in a meeting held on 26.09.2009.

(vii) On 21.12.2009, the Claimant submitted an application to the Municipal Corporation in order to obtain the I.O.D. The I.O.D. was

obtained on 02.03.2010. Pending the receipt of I.O.D., on 19.01.2010, the Claimant addressed a letter to the Respondent society and its members, requesting them to get ready to vacate their premises immediately upon the receipt of I.O.D. However, at the meeting of the Managing Committee and NBPC held on 26.01.2010, it was resolved that the members would not vacate the flats until the Claimant executed a Supplementary Agreement in order to meet the Respondent society's members new and additional demands.

(viii) Between the period June 2008 to April 2011, the Claimant acted on Redevelopment Agreement and POA and furtherance thereof had taken several steps towards commencement of redevelopment of the property.

(ix) The following are some of the events:

Date	**Nature of activity /permission/approval**
16.09.2009	Respondent's members gave their approval for the new building plans.
21.12.2009	The Claimant submitted an application for IOD to MCGM.
08.01.2010	Structural audit report obtained.
09.02.2010	Approval for sub-dividing the said Property obtained.
02.03.2010	IOD obtained.
09.03.2010	Approval for putting up tin sheets in terms of the IOD obtained.
29.03.2010	Civil Aviation permission obtained.
20.05.2010	Cheques for rent and corpus fund issued to the Respondent by the Claimant.
21.05.2010	NOC from Reliance Energy obtained.
July 2010	The Superintendent of Land Records carried out measurements of the said Property.
15.11.2010	Amalgamated new Property Card obtained.
29.11.2010	Deed of Rectification of Redevelopment agreement execute between the Claimant and the Respondent.

21.12.2010	Deed of Rectification of Redevelopment Agreement was executed.

(x) Between the month of April and July 2011, the Claimants entered into Individual Agreements with 17 members of the society.

(xi) Under the Redevelopment Agreement, the Claimant was obliged to purchase and load Transferable Development Rights (TDR) on the property. On 24.09.2011, an Agreement was entered into with Housing Development & Infrastructure Ltd. (HDIL). Under this Agreement, HDIL agreed to transfer FSI an area admeasuring 3030 sq. mts. On 18.11.2011, an Agreement for utilization of slum FSI was entered into between the HDIL and the Claimant for an area admeasuring 1810 sq. mts. On 17.01.2012, the Municipal Corporation recorded that the Claimant could legally and as per extent regulations load 1804.51 sq. mts. FSI on the property by way of TDR. On 17.03.2012, the Agreement dated 24.09.2011 with HDIL was cancelled in view of change in Government policy subsequent to 24.09.2011.

(xii) On 29.09.2011, the Claimant issued notice to the members of the Respondent's society to vacate their respective flats. The members failed to vacate. There were, thereafter, further reminders. 51 members of the Respondent's society failed and/or refused to vacate their respective flats. As the members of the Respondent's society failed and/or refused to vacate their respective flats, the Claimant was unable to perform its remaining obligations under Redevelopment Agreement. The work of the

redevelopment of the property has been held due to this non-cooperation of members.

(xiii) The Claimant was served with the Notice dated 08.02.2013, by the Respondent's Advocate informing that the Redevelopment Agreement and POA stand terminated with immediate effect and the Claimant had no right in respect of the said property either for redevelopment or otherwise. The Claimant replied to the said Notice by their Advocate's letter dated 23.02.2013 denying the various allegations set out in the Notice of Termination.

(xiv) The Claimant, thereafter, by a letter dated 03.04.2013 had invoked the arbitral clause. During the pendency of the arbitral proceedings, the Respondents entered into a subsequent development agreement with M/s. Sheth & Sonal Developers. It is the Claimants' case that the said agreement is not a valid document for various reasons. The Claimants have therefore prayed for various reliefs as set out in the prayer clauses.

Statement of Defence:

16. The Respondents' case is as under:

(i) The Claimant has approached the Tribunal with unclean hands and with ulterior and malafide motives, withheld/suppressed necessary and vital documents/details and have made false and baseless allegations. The Claimant is therefore guilty of suppresso veri and suggesto falsi and on this ground alone the claim is liable to be dismissed in limine.

(ii) The Redevelopment Agreement entered into on 18.04.2008 by Mr. Devendra Shah, Mr. Anil P. Jogi and Mr. Amit C. Shah as also the Power of Attorney dated 06.05.2008 by Devendra N. Shah and Mr. Anil Jogi and the Deed of Rectification dated 29.11.2009 by Devendra N. Shah, Anil Jogi and Amit Shah were purportedly executed by them when they were not at the relevant time the office bearers/committee members of the Respondent's society.

(iii) In or about 2006, in the selection of the Managing Committee was held, 7 members including Mr. Devendra N. Shah, Mr. Anil Jogi, Mr. Amit Shah were elected as Committee Members of the Respondent's society. All elected members of the Managing Committee are required under Section 73(1)(AB) of the Maharashtra Co-operative Societies Act, 1960 r/w Rule 58A of the Maharashtra Co-operative Societies Rules 1961 to execute bonds in Form No. 20 within 15 days of assuming office as the office bearers /committee members of the society. This Form was not executed and filed within the statutory period of 15 days thereafter. As such, the Managing Committee including the three persons abovenamed would be deemed to have vacated their office on expiry of 15 days of the appointment as members of the Managing Committee. As such, they had no right or authority to sign and/or execute any documents much less the Redevelopment Agreement, Power of Attorney and/or Deed of Rectification for and on behalf of the Respondent society, which are void ab initio and/or null and void for want of authority.

(iv) The case of the Respondent is that the Claimant failed to perform its part of the contract and as such is not entitled to any reliefs on account of the following breaches and/or default committed by the Claimant of the Redevelopment Agreement:

(a) The Claimant was obliged to obtain under Clause 9(c) Intimation of Disapproval within a period of three months from the date of execution of the Redevelopment Agreement i.e. on or before 19.07.2008. The IOD was obtained only on 02.03.2010 after a delay of approximately two years. Thus, the Claimants are in breach of this clause.

(b) Under Clause 5(a) of the Redevelopment Agreement, the Claimant had to purchase 100% TDR as per D.C. Regulations 1991 at their own costs and expenses in the name of the society within 60 days from the date of submission of Municipal Plan prior to handing over to the Claimant the vacant possession by the members of the society of their respective flats. The Claimant has not complied with the aforementioned clause and had not purchased the TDR till as late as 24.09.2011. The Claimant is guilty of non compliance of the said clause. Even after the Municipal Corporation issued IOD on 02.03.2010, the Claimant has till date failed to procure 100% TDR in accordance with the alleged Redevelopment Agreement dated 19.04.2008.

(c) There is a breach of clause 10 of the Redevelopment Agreement under which the Claimant was to pay a total sum of Rs.1,000/- per sq. ft. carpet area per member to the society as interest free deposit. The Claimant thus was liable to deposit an aggregate sum of Rs.3.8 Crores as interest free deposit with the Respondent society immediately on execution of the Redevelopment Agreement. Out of the Rs.3.8 Crores, a sum of Rs.1.9 Crores was payable to the Respondent society as compensation and balance Rs.1.9 crores was payable to obtain licence which was to be given by the Respondent to the Claimant to enter the property for the purpose of carrying out redevelopment. The Claimant has failed and neglected to make the said payment of Rs.3.8 Crores or any other sum in violation of the Redevelopment Agreement 19.04.2008.

(d) Under clause 21(b) and (e), the Claimant could have put up and/or sign boards on the property and also issue an advertisement in newspaper and other media only after purchase of 100% TDR by the developer announcing the same of saleable units on ownership basis in the new building that may be constructed by the developer. It is the case of the Respondent that only on complying with other clause of the Redevelopment Agreement, the Claimant was to obtain permission from the Respondent society for

the purpose of issuing advertisement in newspapers and other media informing the sale of the saleable units in the new buildings proposed to be constructed by the Claimant. The Claimant issued advertisement without complying with other compliances and thus has committed a breach.

(v) It is thus the case of the Respondent that the Claimants had failed to perform its duties under Redevelopment Agreement and as such the Respondent was justified in terminating the Redevelopment Agreement.

(vi) The Respondent thereafter has dealt para-wise, with the contents of the Claim Statement and denied the contents to the extent that it is inconsistent with their case.

Counter Claim and/or set off:

17(i) The Respondent has reiterated whatever is set out in the Statement of Defence.

(ii) The building in which the members of the Respondent society are residing was in a dilapidated condition and beyond repairs. Under the agreement, the entire redevelopment was required to be completed in stipulated time. The redevelopment work could not be commenced, due to the breaches committed by the Claimant who is Respondent in the Counter Claim. The Claimant's failure to abide by the obligations has resulted in delaying the project and redevelopment of the property. The members of the Respondent society had to suffer mental agony of continuing to stay in a dilapidated building and as such, this has frustrated the very purpose of redevelopment. The members of the

society suffered from various ailments due to the breaches committed by the Claimant. It is thus the case of the Respondent that every member of the Respondent society is required to be compensated to the tune of Rs. 1.00 Crore for mental agony, trauma, harassment aggregating to Rs. 93 Crores.

(iii) On account of delay and failure of the Claimant to fulfil their obligations under the Development Agreement, the Respondent was compelled to terminate the Agreement dated 18.04.2008 and appoint another developer M/s. Sheth & Sonal Developers for redevelopment of the property. In terms of the Redevelopment Agreement, the redevelopment was to be completed by July 2010 to enable the members of the Respondent society, to move in the newly constructed building and in their respective flats in the year 2010. The Claimant failed to redevelop and the demolition was carried out after 27.10.2015. The members of the Respondent society were deprived of new flats since July 2010 till they get the new flats under the Redevelopment Agreement dated 02.08.2014 which stipulates possession of the new flats within 30 months from the date of Commencement Certificate by Municipal Corporation of Greater Mumbai. The Claimants are therefore are liable to pay reasonable market rent to each of the members of the Respondent. In July 2010, the fair market rent was agreed at Rs.48/- per sq. ft. The Claimant is liable to pay fair market rent for a period of 8 years with reasonable escalation every year till date of possession. The Claimant is therefore liable to pay a sum of Rs.31,40,82,119/- (Rupees

Thirty One Crores Forty lakhs Eighty Two Thousand One Hundred Nineteen) as damages.

(iv) The Claimant is also liable to pay Rs.10,000/- per day, as penalty to the Respondent from the date of handing over possession i.e. July 2010 till the new flat is handed over to the members of the Claimant, which would be approximately for 8 years. The Claimant is therefore liable to pay to the Respondent Rs. 2,92,00,000/- (Rupees Two Crores Ninety Two Lakhs only) as per clause 5(b) of the Redevelopment Agreement.

(v) The Claimant is also liable for all the legal expenses and costs of litigation.

(vi) The Respondent also incurred expenses for protecting the building till demolition by putting tad patra and other material. The cost incurred in prosecuting the litigation and protected the building is Rs. 23,07,000/-.

(vii) The Claimant is therefore liable to pay to the Respondent by way of counter claim a sum of Rs. 1,27,55,89,119/- (Rupees One Hundred Twenty Seven Crores Fifty Five Lacs Eighty Nine Thousand One Hundred and Nineteen only).

Statement of Defence to the Counter Claim:

18(i) The Claimant apart from filing their Statement of Defence to the Counter Claim styled as “Affidavit in Reply to the Counter Claim” have also filed a Rejoinder. The Claimant has reiterated, what is set out in the Statement of Claim and in the Affidavit in Rejoinder to the Statement of Defence.

(ii) It is the case of the Claimant that the counter claim is premised on the basis that the Claimant was in breach of its obligations under the

Development Agreement dated 18.04.2008 read with the Deed of Rectification dated 29.12.2010 and the Power of Attorney dated 06.05.2008. The termination it is set out is contrary to the Development Agreement, bad in law and not binding on the Claimant.

(iii) The claim of Rs. 93.00 Crores and Rs. 32,40,82,119/- is not by the Respondent but on behalf of its members. These claims therefore are not based on any purported injury caused to the Respondent. The Claimant has no privity of the contract with the Respondent's members and thee claims are not arbitrable. On these grounds no relief cannot be granted in respect of these two counter claims.

(iv) Without prejudice, the claims are unmeritorious and no relief can be granted. The claim of Rs. 93.00 Crores is based on alleged mental agony, trauma and harassment. It is denied that the Respondent members have suffered any mental agony, trauma and harassment. The allegations are belayed by the Respondent's pleadings in Appeal from Order (L) No. 14508 of 2015, wherein the Respondent has acknowledged in writing that the buildings were in safe and sound condition and not in a dilapidated condition. The claim is also remote and as such no compensation can be granted on the basis thereof. Thirdly, save and except boldly alleging mental agony, trauma and harassment, the Respondent has not pleaded any actual damages suffered on account of purported grievances pleaded. In the absence of providing details of damages, no compensation can be granted.

(v) The Counter Claim of Rs. 31,40,82,119/- is premised on the Respondent members purported right to be in possession of newly constructed flat

since July 2010. This is denied based on the pleadings in the Statement of Claim and Affidavit in Rejoinder. Secondly, the claim is based on assumption that the Respondent's members were not put in possession of newly constructed flats since July 2010 and as such, they became entitled to compensation. This assumption is misconceived. Nowhere in the Development Agreement or Deed of Rectification is such a right contemplated. In absence thereof, the Respondent members cannot claim compensation on the basis of purported fair market rate. Save and except 17 members who had given possession of their respective flats to the Claimant, all the other Respondents members remained in possession of the flats in the existing building and have suffered no injury and/or loss and incurred no expenditure, as they continued to occupy their own flats. The Claim is not only remote but completely baseless and unrealistic.

(vi) The claim for penalty is based on clause 5(d) of the Development Agreement. This claim is plainly barred and misconceived as the said clause is attracted after the Respondent's members had handed over possession of respective flats to the Claimants. In spite of various requests, the Respondents member did not hand over possession of their flats to the Claimant. As such no occasion arose for the Claimant to even commence demolition of existing buildings and therefore the question of handing over possession of new flats in newly constructed building does not arise. In so far as the cost of litigation it is set out that the cost are within the discretion of the learned Arbitrator. The termination it is set out is wrongful and bad in law and the Claimant's

case is meritorious and it is the Respondent who must pay the Claimant's costs.

(vii) The Claimant has thereafter dealt with various counter claims of the Respondent and have denied the case of the Respondent to the extent it is inconsistent with the case of the Claimant.

(viii) The Respondent had sought a prayer to sue under Order 2 Rule 2 of the Code of Civil Procedure 1908. The Claimant had denied that the Respondent is entitled to get leave under Order 2 Rule 2 of C.P.C. For all aforesaid reasons, it is submitted that the Counter Claim should be dismissed.

19. The Claimant has sought to file a rejoinder to the Statement of defence. The Tribunal had not provided for filing a rejoinder to Statement of Defence as Section 23 of the Arbitration & Conciliation, 1996 does not provide for such a rejoinder. At any rate, it will open to the Claimant based on their pleadings in the Claim Statement and Statement of Defence to the Counter Claim to lead evidence on the pleas raised by the Respondent in their Statement of Defence to the Claim Statement and their Counter Claim.

ISSUES:

20. The following issues were framed with consent of parties.

"1. Whether the Claimant proves that they have complied with all the terms and conditions of Development Agreement dated 18th April, 2008 and the Deed of Rectification dated 29th November, 2008?

2. *Whether the Claimant proves that they are entitled to relief of specific performance of the Development Agreement dated 18th April, 2008 and the Deed of Rectification dated 29th November, 2008?*

3. *Whether in addition to specific performance, the claimant is entitled to damages i.e. the sum of 25 crores?*

4. *Whether in the alternative and without prejudice to the claimant's claim for specific performance and damages, claimant is entitled to payment as a sum of Rs. 80,62,00,000/- as per the statement of claim?*

5. *Whether the Claimant proves that, Termination of Redevelopment Agreement dated 18.04.2008 as modified by deed of Rectification dated 29.11.2010 and revocation of Power of Attorney dated 06.05.2008 as sought by notice of termination dated 8.02.2013 is illegal, null and void, unenforceable in law and not binding on the claimant?*

6. *Whether the Claimant proves that the Respondent, its successors, representatives, agents, servants and any persons claiming through, under, is or in trust for Respondent are liable to be injured and/ or restrained from disposing and/ or assigning its right in respect of suit property and interfering with claimants possession of suit property?*

7. *Whether the Respondent proves that there was failure on the part of Claimant to perform its part of the contract?*

8. *Whether the Respondent (in its Counter Claim) proves that it is entitled to damages for a sum of Rs. 1,27,55,89,119/- or any other sum?*

General:

9. *On the amount if awarded, what interest and at what rate and from what date?*

10. *Who will bear the costs of the Arbitral Proceedings and if so, in what proportion?*

11. *What relief and what order?"*

21. Before proceeding to answer the issues, it is necessary to decide some objections raised by the Respondent, but in respect of which no issues were framed.

22. Plea of suing in a Representative Capacity:

Though such a prayer was sought in paragraph 16 of the Counter Claim, this was not argued or order sought. Even otherwise it could not have been granted as only disputes between the Claimant and the Respondent could have been entertained.

Committee illegal

23. It is submitted that the Committee which entered into the Development Agreement (**DA**) dated 18.04.2008, the Deed of Rectification dated 29.11.2010 as well as the Power of Attorney dated 06.05.2008 were purportedly executed by Mr. Devendra N. Shah, Mr. Anil Jogi and Mr.

Amit Shah who at the relevant time were the office bearers/committee members of the Respondent Society. In 2006, selection of the Managing Committee was held and seven members were elected which included the aforementioned members. The elected members of the Managing Committee are required under Section 73 (1AB) of the Maharashtra Cooperative Societies Act, 1960 read with Rule 58A of the Maharashtra Cooperative Societies Rules, 1960 to execute bonds in Form No. 20 within 15 days of them assuming the office as the officer bearers/committee members of the Respondent Society. None of the committee members including the aforementioned three persons had executed the mandatory bond in Form No. 20 within the statutory period of 15 days or even thereafter. Therefore, the Managing Committee inclusive of the aforesaid three persons would be deemed to have vacated their respective office after expiry of 15 days from their date of appointment as members of the Managing Committee. Therefore, the aforesaid three persons had no right and/or authority to sign and/or execute any documents, much less the Development Agreement dated 19.04.2008, Power of Attorney dated 06.05.2008 and purported Deed of Rectification dated 29.11.2010 as it is sans any authority and therefore has no force of law and the said documents cannot be considered to be binding on the Respondent Society. Therefore the aforesaid three documents purportedly executed in favor of the Claimant are void ab initio and/or are null and void for want of authority.

24. The Respondent has led evidence of RW-1, Mr. Paresh Savla. Nowhere in the said Affidavit of Evidence (**AOE**) has the witness confirmed or

reiterated the pleadings in the Statement of Defence (**SOD**). On the contrary, in paragraph 7 of his AOE, the witness has deposed that the three persons referred to earlier were members of the Managing Committee of the Respondent Society from 2007 to 2011. In paragraph 8 of the AOE, the witness has deposed to the tenure of the Managing Committee coming to an end.

25. The Agreement as noted earlier was entered into on 18.04.2008, the Power of Attorney on 06.05.2008 and the Deed of Rectification on 29.11.2010 and thus according to the evidence of RW-1, the Managing Committee including the aforesaid persons were in management till 2011 and thus they had the authority based on the Resolution passed at the Special General Body Meeting held on 04.11.2007.

26. Alternatively, it is the competent authority under the Maharashtra Cooperative Societies Act, 1960 (hereinafter referred to as "**the Act**") who had to pass an Order based on documentary evidence before it that the members of the Managing Committee including the aforesaid three persons had failed to file the necessary documents, namely the bond in Form No. 20 and declare their posts vacant. It is not for the Tribunal to decide whether the Managing Committee had vacated their respective offices for noncompliance with the said requirement. Even otherwise, no order has been produced by the Respondent from the competent authority under the Act, holding that the committee were deemed to have vacated the office.

27. In paragraph 29 of the SOD, the Respondent has pleaded that the Dy. Registrar by order dated 24.10.2011 dismissed the Managing Committee on various grounds. It is not the allegation that the committee dismissed was the committee which was elected in 2007 and completed their tenure in 2011. On the contrary, from paragraph 8 of the evidence of RW-1, it would be clear from the following evidence that "*…after the tenure of the Managing Committee consisting of the said persons came to an end…..*" the committee had completed its term. Reference therefore in the pleading in paragraph 29 could only be to a subsequent committee.

28. In light of the above, the said objection has to be rejected.

Collusion by the office bearers with the Claimant

29. In paragraph 29 of the SOD in reply to the pleadings by the Claimant in paragraph 3.17 of the SOC that the Claimant had executed and registered individual agreements with 17 members of the Respondent Society, it was the case of the Respondent that the 17 members of the Respondent society were colluding with the Claimant. There is no averment by the Respondent in the SOD that the Managing Committee or the aforesaid office bearers were in collusion with the Claimant.

30. However, in paragraph 7 in the AOE of RW-1, RW-1 has pleaded that the erstwhile members of the Managing Committee of the Respondent society were in cahoots with the Claimant. It is further averred that Mr. Anil Jogi, Mr. Devendra Shah, Mr. Haresh C. Shah and Mr. C. Shah have colluded with the Claimant and have facilitated the Claimant with

documents which were obviously signed after the disputes had arisen between the Claimant and the Respondent.

31. Thus, in the SOD, there is no plea by the Respondent that there was a collusion between the then Managing Committee and/or the persons referred to in paragraph 35 that they were in collusion with the Claimant. In the AOE of RW-1, the plea of collusion is restricted to stating that certain documents were fabricated by the said persons.

32. Thus, there is no allegation that the DA, POA and the Deed of Rectification is a collusive document. Even otherwise, when the Respondent terminated the DA, POA and the Deed of Rectification, it was not the case of the Respondent that those documents were entered into in collusion, but the case was that the Claimant had committed breaches of the said documents. Thus, the plea of collusion has to be rejected.

Fabrication of Documents

33. It is alleged that some documents produced by the Claimant were fabricated. No such plea had been raised by the Respondent at the time of filing their SOD and has come for the first time in the AOE of RW-1 which was filed on 03.02.2018.

34. According to the evidence of this witness, the Managing Committee which signed the DA, POA and the Deed of Rectification were in office from 2007 to 2011 when their tenure came to an end (paragraphs 6 and 7 of AOE). In 2011, an Administrator was appointed and thereafter there have been different Managing Committees. The witness in his cross

examination in answer to Q.7, has deposed considering paragraph 1 of his AOE that he is aware of the affairs of the Respondent from 2014 onwards. He has further deposed that he is deposing prior to 2014 based on the records of the Society.

35. The witness was cross examined on his deposition in paragraph 9 that certain documents referred to therein were subsequently created by the Claimant in collusion with "the said persons". The said persons considering paragraph 7 of his AOE could mean Mr. Anil Jogi, Mr. Devendra Shah, Mr. Haresh C. Shah and Mr. Amit C. Shah. His answer in cross examination is relevant.

"(Attention of the witness is drawn to paragraph 9 of his Affidavit of Evidence)
Q.74 Please point out from the record available before this Hon'ble Tribunal the document(s) on the basis of which you have made this deposition?
Ans There is no particular document. My deposition is based on the fact that these documents are not on the society's records."

36. From the above, what emerges is that there is no specific allegation of collusion to fabricate document/documents against any particular individual, but generally against "other persons". The allegation was that these documents were prepared when disputes arose between the Claimant and the Respondent. It is impossible to accept such a vague allegation. Moreover in his cross examination as reproduced earlier, he does not state which document was fabricated or prepared in collusion. His only answer is that the documents are not on record of the Society. The witness filed his AOE on 03.02.2018. The "other persons" were not in charge of the society after their term came to an end in 2011. As has

come on record, an administrator was appointed for the society in 2011 and thereafter new Managing Committees have been elected. The buildings themselves were demolished after 27.10.2015 (paragraph 28 of AOE of RW-1). Even assuming that the documents are missing it is not possible for the Tribunal to arrive at a conclusion based on the solitary oral evidence of RW-1 that the documents referred to in paragraph 9 of his AOE were subsequently created by the "other persons".

37. Alternatively, there is no evidence on record that Respondent No. 1 assuming what RW-1 has stated is correct of having taken any action against "other persons". Normal human conduct considering the serious allegation of subsequently creating documents in order to help the Claimant would have been to immediately act against the "other persons". This has not been done. From paragraph 8 of the AOE, it has come on record that a letter was written by some members of Respondent No. 1, that after the tenure had come to an end, the said persons had taken away the records of the society, more particularly the record concerning the development of the Respondent society. However, in his cross examination in answer to Q.8, he has deposed that prior to 2014, his evidence is based on the records of the society. In other words, the society had come in possession of the records. The witness in his evidence has not stated that after the letter the documents of the Society were not returned by the said persons. Further considering the demolition of the society's buildings, the appointment of an Administrator and coming into office of other Managing Committees, it is

not possible for the Tribunal to accept the bare allegations of RW-1, that the documents referred to in paragraph 9 of his AOE were subsequently created by the Claimant in collusion with the said persons. Hence, this objection must also be rejected.

Effect of creating Third Party Rights in favor of M/s. Sheth & Sonal Developers qua the relief of Specific Performance

38. In paragraph 37 of the SOD, the Respondent had pleaded that the Respondent has entered into subsequent Redevelopment Agreement dated 02.08.2014 with M/s. Sheth and Sonal Developers after termination of the Redevelopment Agreement with the Claimant and has also handed over possession of the property to them under the Agreement. Thus, in the light of the Respondent having entered into an Agreement with M/s. Sheth & Sonal Developers, the claim of the Claimant for specific performance of the Redevelopment Agreement dated 18.04.2008 has become infructuous and is no longer tenable. RW-1 in paragraph 17 of his AOE has deposed of entering into the Agreement with M/s. Sheth & Sonal Developers on 02.08.2014 which is registered with the Sub-Registrar of Assurances. He has further deposed that subsequent to the Agreement, the buildings were demolished after 27.10.2015 and as on the date of his AOE which is 03.02.2018, the construction had been completed till the plinth level.

39. In view of these developments, the Claimant both in its oral arguments and in its written submissions has submitted that these subsequent events have affected the Claimant's claim to the extent that events may

have overtaken the ability of the Tribunal to grant specific performance as well as the ability of the Claimant to perform the DA assuming specific performance was granted and as such it has proceeded on the basis that the Claimant is entitled to compensation and damages in lieu of specific performance.

40. The Claimant has further submitted that fundamentally the legal position is that in a specific performance claim, even where the Claimant seeks compensation and damages in lieu of specific performance, the Claimant will still have to prove that it would otherwise be entitled to the relief of specific performance. Hence the scope of enquiry in the arbitration would remain the same. The only question to be decided, other things remaining the same, would be as to the appropriate relief to be granted in the context of these facts.

41. Considering that third party rights have been created and the construction has commenced on the Respondent's property and the third party is a not a party in these proceedings, it will not be possible for the Tribunal to grant the relief of specific performance. It will however be open to the Tribunal to consider the relief for damages if the Claimant proves that there was no basis for termination of the DA; that the Claimant had prior to and subsequent to the termination shown its readiness and willingness to perform its obligations under the DA; that all factors necessary for grant of specific performance have been fulfilled by the Claimant and the Claimant has proved and quantified the damages it is entitled to.

42. To answer the issues which arise in these proceedings, the following relevant clauses of the DA as rectified by the Deed of Rectification are reproduced.

Recital J:

"J. The Developer wishes to purchase 100% Transfer of Development Rights/Floor Space Index (TDR/FSI) entirely in the name of the Society from the open market subject to the provisions of the Development Contract Regulations of 1991 to be loaded onto the new buildings before demolition of the old buildings."

"*3. The Society hereby agrees to grant to the Developer, the license to enter upon the said property for the purpose of re-development on an "as is where is basis" by demolishing the old buildings and constructing new buildings and to handover to the Society their present area of 38,000, sq. feet carpet and minimum 15% additional carpet area, over and above Flower Bed, Dry Balcony & niche (F.B.) in the new buildings to be constructed by Developer, at their own costs.*

4. In case any existing member wants additional carpet area in new building. the Developer shall allot additional carpet area at a mutually agreed rate. Similarly if any member wants to sell his/her presently occupied Flat on carpet area basis to Developer, Developer will purchase the same as per the above mutual agreed rate.

"5. a)The Developer shall purchase the 100% T.D.R. as per the D.C. Regulations 1991, at their own cost and expense, in the name the Society, within 60 days from the date of submission of Municipal plan, prior to handing over to the Developer the vacant possession by the members of the Society of their respective flats. However, if after the Developer purchases T.D.R., the members are not able to give possession of their flats to them, then the Developer shall be entitled to sell said T.D.R. in open market and the Society shall immediately reimburse the entire price amount to Developer without any Stamp duty /registration charges/interest because the TDR stands in the Society's name.

b) Complete construction of the new buildings within 24 months after all the members vacate their flats, time being the essence of this Agreement, subject only to the occurrence of any of the force majeure conditions; riots, floods, earthquakes, storms, terrorist activity, war, acts of God pertaining directly or indirectly to the said property which may prevent the developer to develop the said property. In the event the redevelopment is not completed within the said 24 months, the grace time may be allowed up to a period of 3 months. However, in case of further delay by Developer beyond 27 months to 30 months, the Society will charge penalty @ Rs. 10,000/- per day over & above the agreed

Compensation payable to the existing members as per clause 8 & Annexure I to this Agreement. However, if the delay is above 30 months, the Society will have a right to terminate this agreement.

c) The Society will not be liable for any costs, or expenses incurred by the Developer in case of termination of this Agreement due to any reason whatsoever. Further the Society will have a right to forfeit all the deposits lying with it in case of termination due to the default by the Developer."

"9. The Developer will be liable for the following at their own cost and risk which will not be reimbursed by Society.

a) For construction, demolition, plans, approvals, land records, obtaining a revised P.R.Card in the name of Society especially as a portion of land has been yielded to the MCGM as set back area and all further permission required from the concerned authorities pertaining to the land, latest officials D.P. remarks, table survey by the concerned authorities.

b) For obtaining necessary permission intimation of disapproval (IOD) from the relevant department of the MCGM after the tentative plans of the whole redevelopment project is approved by the Society in principle for its aesthetics, practicality, fulfilment of all the present members flat area as promised by the Developer and overall safety measures.

10. The Developer shall pay a total sum of Rs. 1000/- per sq. ft. carpet area to the individual member as a compensation towards hardship during the redevelopment, the list of which is enclosed herewith as Annexure A.

The modality of payment of the sum of Rs. 1000/- per sq.ft. carpet area per member is as under:

(a) The said amount will be paid to each present member as a compensation for hardship during redevelopment @ Rs. 500/ per sq. ft. carpet area of the original flat and.

(b) The balance amount of Rs. 500/- per carpet area of the original flat will be paid for the license given to the Developer.

Rs. 1000 per sq.ft. carpet area per member at the time of vacating the flats by all the members will be given by the Developer, favoring individual Members as mentioned in the list enclosed & referred to as Annexure A. The said cheques, issued by the Developer, shall be in the custody of the society, and those members who does not have any outstanding dues, shall be entitled to immediate release of their individual cheque/s by the society, and those members having outstanding dues, shall have to sign, execute and deliver Indemnity Bond, duly notarized, and shall also deliver the cheque of outstanding dues paid in full with interest, to the society."

"18. The Developer covenants with society;

(a) …

(b) ….

(c) …

(d) The time prescribed for the payment of the compensation amount to the society and/or its members as per the said Agreement shall be of the essence of this Agreement.

(e) …

(f) …"

"*21. The society confirms that upon the execution of these presents, they have granted to the Developer, inter alia, the following rights and authorities, without any further or other act on the part of either of the parties."*

(a) …

(b) …

(c) to get the plans prepared for construction on the said property consuming total F.S.I. of the said property and/or T.D.R. from any other properties and get the same or any of them sanctioned from the concerned authority and get the same or any of them modified, altered, varied or amended from time to time. The Developer shall also be using and consuming entire FSI including which may be available by payment of premium, free FSI and any other FSI including for balconies, staircase, lift, lobby, passage, Society's office, servants toilets, watchman's cabin, garbage bin, flower beds by demolition of the said existing building and construct of such new buildings and provide to the existing members flats in the new building as per Annexure "H" hereto with amenities and facilities to each flat as set out in Annexure "L" hereto which will not be changed without written consent of the concerned member and agree to compensate the existing members for shifting to temporary transit accommodation to be obtained by the existing members till the construction is complete the manner provided hereinafter.

(d) to put up and/or erect signboards upon the said property as also issue advertisements in newspapers and other medias only after purchase of 100% T.D.R. by the Developer announcing the sale of saleable units on ownership basis in the new building that may be constructed by the Developer on the said property and which they are entitled to sell under this Agreement.

(e) to develop the said property to commence, carry on and complete construction by themselves, or any building contractors, subcontractors, agents, etc.

(f) …"

"26. All future rights of FSI/DRC/TDR and all additional benefits shall remain with society."

43. The relevant extract of Annexures I and J are as under:-

"(*) For 12 months at the rate of Rs. 40/- per sq. ft of existing carpet area per month per member by a single cheque within 15 days of receipt of the IOD.

(**) For the balance 12 months, a single PDC (Post Dated Cheque) at the time of vacating & handing over quiet, vacant & peaceful possession by members.

(***) In case of delay to complete the redevelopment of the said . property as stated in Clause 3 hereinabove, the Developer will pay @ Rs. 48 per sq. ft per month in advance of existing carpet area of the respective members as the new compensation amount per month, replacing the old agreed figure per month and to be paid in tranches of 3 months at a time through PDC. In case the Developer is able to complete the reconstruction on or before time, the Developer will deliver a month's notice for possession to the members to their last intimated available address after a period of 24 months from the date of receipt of vacant possession of flats."

44. The following issues as they are interconnected will have to be decided together.

"1. Whether the Claimant proves that they have complied with all the terms and conditions of Development Agreement dated 18th April, 2008 and the Deed of Rectification dated 29th November, 2008 ?

2. Whether the Claimant proves that they are entitled to relief of specific performance of the Development Agreement dated 18th April, 2008 and the Deed of Rectification dated 29th November, 2008 ?

5. Whether the Claimant proves that, Termination of Redevelopment Agreement dated 18.04.2008 as modified by deed of Rectification dated 29.11.2010 and revocation of Power of Attorney dated 06.05.2008 as sought by notice of termination

dated 8.02.2013 is illegal, null and void, unenforceable in law and not binding on the claimant ?

7. Whether the Respondent proves that there was failure on the part of Claimant to perform its part of the contract ?

45. Though as discussed earlier, Issue No. 2 will have to be answered in the negative, the Tribunal yet considering Issue No. 1 will have to consider the said issue.

46. The Tribunal will first proceed to decide Issue No. 5. The Respondent terminated the DA, POA and the Deed of Rectification by its letter of termination dated 08.02.2013. This termination according to the Respondent was pursuant to the Resolution of the General Body which was held on 20.01.2013 and this Resolution was confirmed by the Special General Body Meeting held on 24.02.2013. The Respondent in its SOD in paragraph 10 has set out the breaches / defaults which according to it were committed by the Claimant. These breaches may be briefly summarized as under:-

(i) Breach of clause 9(c) of the DA. It is the Respondent's case that under clause 9(c) of the DA, the Claimant was obliged to obtain Intimation of Disapproval (IOD) in respect of the plans for construction of new buildings within a period of 3 months from the date of the execution of Redevelopment Agreement, i.e. on or before 19.07.2008. The IOD was obtained only on 02.03.2010 after a delay of approximately 2 years. The IOD was also for the part construction.

(ii) Breach of clause 5(a) of the DA. In terms of clause 5(a) of the DA, the Claimant was liable to purchase 100% T.D.R. in the name of the Respondent society within 60 days from the date of submission of the Municipal Plans. The Claimant submitted the plans to the Municipal Corporation on 21.12.2009. The Claimant thus was liable to purchase 100% TDR in the name of the Respondent Society on or before 19.02.2010. The Claimant had not purchased the TDR till as late as 24.09.2011. The Claimant is thus guilty of noncompliance in obtaining TDR for a period exceeding 21 months. The Claimant has failed and neglected to purchase 100% TDR of the Respondent's property area of 3707.02 sq. mts. Even after the Municipal Corporation issued the IOD on 02.03.2010, the Claimant had failed to procure 100% TDR in accordance with the Redevelopment Agreement dated 19.04.2008.

(iii) Breach of clause 10. In terms of the said clause, the Claimant was liable to deposit an aggregate sum of Rs. 3.8 crores as an interest-free deposit calculated at Rs. 1000/- per sq. ft. of the carpet area of each member of the Respondent society. This sum of Rs. 3.8 crores was liable to be deposited with the Respondent society immediately on execution of the Redevelopment Agreement. Out of this Rs. 3.8 crores, a sum of Rs. 1.9 crores was payable by the Claimant to the Respondent Society as compensation, for the hardship suffered by the members of the Respondent society during redevelopment and the balance Rs.

1.9 crores was payable to obtain the license which was to be given by the Respondent to the Claimant to enter on the property for the purpose of carrying out redevelopment. The Claimant has failed and neglected to make the said payment of Rs. 3.8 crores or any other sum to the Respondent Society.

(iv) Breach of clauses 21(d) and 21(e) of the Development Agreement. The wordings of clause 21 indicate that the Claimant was obliged to comply with the earlier clauses of the Development Agreement and on compliance of those clauses, the Claimant was to obtain permission from the Respondent society, inter alia, for the purpose of issuing advertisements in newspapers and other media informing of sale of the saleable units in the new buildings proposed to be constructed by the Claimant on the said property. The Claimant in breach of the terms of the Development Agreement has issued advertisement without complying with the earlier part of the DA.

47. However, in paragraph 5 of the AOE, RW-1 has deposed that there were seven breaches on the part of the Claimant. In cross examination in answer to Q.121, the witness has confirmed that the seven grounds mentioned in paragraph 5 of his AOE are the only grounds for termination of the contract between the Claimant and the Respondent.

48. The seven breaches deposed to by RW-1 may be summarized as under:-

(i) Under clause 9(c), the Claimant was obliged to obtain IOD in respect of the entire plan for construction of new buildings within a period of 3 months from the date of execution of the DA, i.e. on or before 19.07.2008. The IOD was obtained only on 02.03.2010 after a delay of approximately 2 years. The IOD was also for part construction till the 4th floor whereas the building was to be of 14 floors.

(ii) As per the Claimant's case, the Claimant received finally approved plans from the Respondent in September 2009. Assuming the same to be true, the Claimant failed to take any steps thereafter and submitted an application to MCGM only on 21.12.2009. With this application, the Claimant submitted plans for construction of a building with only 4 floors which could not have accommodated all the 93 members of the Respondent. Thus, there was gross delay in applying for IOD and obtaining complete IOD. The IOD obtained on 02.03.2010 is only up to the 4th floor.

(iii) The Claimant thus not only delayed in making an application for sanction of plan and applying to MCGM for IOD, but also failed in obtaining the full IOD within the time stipulated under the Development Agreement. The Claimant's action and/or inaction are directly responsible for delaying the redevelopment of the Respondent's property.

(iv) The Claimant was required to purchase 100% TDR under clause 5(a) of the DA and load the same on the Respondent's property in the name of the Respondent on or before 19.02.2010. The Claimant has not complied with the aforesaid clause and had not purchased 100% TDR till date (3rd February 2018) or at any point prior to the Respondent terminating the DA. Even as of 03.02.2018, the date when the AOE was signed by RW-1, even after the Municipal Corporation issued IOD on 02.03.2010, the Claimant has failed to procure 100% TDR in accordance with the Development Agreement.

(v) The Claimant was under an obligation to obtain 100% TDR before issuing notices to the members of the Respondent society for them to vacate the premises. The said TDR was to be obtained in the name of the Respondent. As the Claimant failed to obtain 100% TDR on their entire plot, the notice dated 19.01.2010 issued by the Claimant even before IOD was obtained or before loading 100% TDR is contrary to the terms of the Development Agreement and is therefore illegal.

(vi) As per clause 10 of the Development Agreement, the Claimant was liable to deposit an aggregate sum of Rs. 3.8 crores as an interest-free deposit calculated at Rs. 1000/- per sq. ft. of the carpet area of each member of the Respondent society. This sum was liable to be deposited with the Respondent society immediately on execution of the Redevelopment Agreement. Out

of this sum of Rs. 3.8 crores, a sum of Rs. 1.9 crores was payable by the Claimant to Respondent society as compensation for the hardships suffered by the members of the Respondent society during redevelopment and the balance Rs. 1.9 crores was payable to obtain the license which was to be given by the Respondent to the Claimant to enter the property for the purpose of carrying out redevelopment. The Claimant has failed to make the said payment or any other sum and has thus violated the Development Agreement dated 18.04.2008.

(vii) The Claimant only on complying with the earlier clauses of the Development Agreement was to obtain permission from the Respondent society for the purpose of issuing advertisement in newspapers or other media informing sale of the saleable units in the new building proposed to be constructed by the Claimant in the said property. As the Claimant failed to comply with the earlier part of the DA, the Claimant's action for issuing advertisement for the sale is in breach of the DA.

49. On a perusal of the said grounds as set out in paragraph 5 of the AOE of RW-1, it would be clear that grounds (i) to (iii) arise from the same breach. Thus, basically it is 5 breaches which have been pleaded in the SOD and deposed to in the AOE of RW-1.

Breach of Clause 9(c) of the D.A.:

50. The 1st breach as alleged in paragraph 5, grounds (i) to (iii) is a breach of clause 9(c) of the DA. It consists of (a) failure to obtain IOD within 3 months of the DA and (b) failure to obtain IOD for all 14 floors.

51. The admitted position on record is that the IOD was issued by MCGM on 2nd March 2010 which was for 4 floors. The DA is dated 18th April 2008 and rectified on 21.12.2010.

52. The Respondent in the SOD has pleaded that the Claimant had to obtain IOD for construction of a new building within three months from the date of execution of the Development Agreement, i.e. on or before 19.07.2008.

53. RW-1 on behalf of the Respondent in his AOE has reiterated the plea as raised in the SOD. In addition, RW-1 has deposed that the Claimant had to obtain full IOD whereas the Claimant as on 02.03.2010 had received IOD from MCGM only up to the 4th floor.

54. This has been reiterated in the oral submissions. In the written submissions, it is the Respondent's case that the IOD sanctioned till the date of termination of the DA was for only 2390 sq. mts.

55. On behalf of the Claimant, it has been submitted that the interpretation sought to be given by the Respondent to clause 9(c) is erroneous and cannot be read in isolation, but has to be read with clause 9(d). The Claimant could have applied to MCGM for the IOD after tentative plans of the old redevelopment project were approved by the Respondent in principle for its aesthetics, practicality, fulfillment of all members' flat

areas. As such, until the Respondent approved the tentative plans of the entire project, the question for applying for IOD did not arise. Hence, clause 9(c) could only be calculated as 3 months from the date on which the tentative plans stood approved by the Respondent. It is further submitted that the period of 3 months would not be a time period which was the essence of the contract between the parties. This is because the issuance of the IOD would be an act of the MCGM and it being a governmental authority, it would not be within the Claimant's control as to the time it would take in approving plans and issuing the IOD. Such obligations can never be obligations in respect of which time would be the essence.

56. In the AOE of Mr. Manish Kabra, CW-1 the witness has deposed that in June 2008, the Claimant submitted to the Respondent tentative residential plans for redevelopment of the said property. The correspondence on record would show that there were constant reminders and there was no response from the Respondent. On 18.09.2008, the Claimant conveyed to the Respondent that it would be applying for the IOD on the basis of the original plans as per the Development Agreement. There was no response to the said letter. The Respondent subsequent to a meeting held on 13.01.2009 in the presence of the witness and about 17 members of the New Building Project Committee (NBPC) raised various queries and sought clarifications which were eventually communicated to the Claimant by Respondent's letter dated 15.01.2009 in relation to the building plans. The Claimant replied to the same by letter dated 20.01.2009. There was

further correspondence and after having factored and considered all the recommendations and demands made by the members of the Respondent, the plans for redevelopment were ready and despite that the same were not approved and finalized by the Respondent. A meeting of the members of the Respondent was held on 27.09.2009 as communicated to CW-1 by Mr. Anil Jogi and where the final plans were approved. This was communicated to the Claimant by Respondent's letter dated 20.10.2009.

57. Under the Development Agreement in recital A, the area of the Respondent's land was shown as 3675 sq. mts. In recital B, it was set out that the society has 3 buildings, namely A, B and C on the said plot of land admeasuring 3846 sq. mts. which had been constructed in the year 1968. In Schedule to the DA, the area of the land was shown as 3675 sq. mts. Under clause 9(a) of the DA, it was the obligation of the Claimant to obtain a revised PR Card. The revised PR Card was obtained on 15.11.2010 showing an area of 3707.2 sq. mts. The Redevelopment Agreement was thereafter rectified by the Deed of Rectification on 29.11.2010 and the Schedule to the DA was rectified to show that the area of the land to be 3707.20 sq. mts. or thereabouts.

58. In the course of cross examination of CW-1, in answer to Q.37, the witness deposed that IOD dated 02.03.2010 was for 2390 sq. mts. FSI which is 75% of 1 FSI and 25% FSI is only given after showing PRC in words and figures which they had submitted. The witness has further deposed that they had loaded 67% of FSI on 18.01.2012. The witness

was asked whether the Claimant made any application to obtain CC of 1 FSI to which the witness deposed that CC of 1 FSI could have been obtained after demolishing the building. There was no further cross on this aspect.

59. In the cross examination of RW-1, the witness has deposed that the area of the plot of the society is 3707 sq. mts. The witness agreed in answer to Q.54 that there is no provision in the Redevelopment Agreement or the Deed of Rectification which required the Claimant to load 100% TDR within 60 days of the submission of the municipal plans. He also agreed that the first municipal plans could be submitted by the Claimant without purchasing any TDR (Q/A 55). The witness further agreed that as of 18.01.2012, the Claimant had purchased and loaded 1810 sq. mts. of TDR on the Respondent's plot (Q/A 134) and in answer to Q.138 agreed that the 1 FSI equivalent to 3707.20 sq. mts. i.e. 39,900 sq. ft. available in respect of the plot plus the additional area of 1810 sq. mts. i.e. 19,482.84 sq. ft. purchased and loaded by the Claimant on the society's plot would be sufficient to construct society's entitlement (Q/A 138).

60. The question therefore for consideration is firstly whether in the context of clause 9(c), time was the essence of the contract. The Development Agreement in respect of specific clauses has made time the essence of the contract. As an illustration, clause 18(d) which sets out that the time prescribed for the payment of the compensation amount to the Society and/or its members as per the said Agreement shall be of the essence of this Agreement. Even otherwise IOD has to be obtained from the

MCGM. The Claimant has no control on the decision making process for issuing IOD by MCGM. Time could have been the essence if the obligation to perform was an act to be performed by the Claimant. In my opinion therefore, time could not have been the essence of the contract.

61. In the SOD, the Respondent had pleaded that the IOD had to be obtained within 3 months of entering into the Redevelopment Agreement which was entered into on 18.04.2008. A reading of clause 9(c) which has been reproduced in the earlier part of the Award would only show that IOD has to be obtained within a period of 3 months. From what date or event the said period would commence is not set out therein. On the contrary, as rightly pointed out by the Learned Counsel for the Claimant, on a reading of clause 9(b) of the DA, it would be clear that the Claimant could not have applied to the MCGM for IOD unless the tentative plans of the whole redevelopment project is approved by the Society in principle for its aesthetics, practicality and fulfillment of all the present members' flat areas. Apart from that under clause 9(a), the Claimant had to obtain a revised PR Card as in the Redevelopment Agreement, two different areas were shown and it is only after the PR Card was issued that in the Deed of Rectification on 29.11.2010, the correct area of the plot was shown as 3707.20 sq. mts. The evidence on record would show that the plans were submitted by the Claimant to MCGM on 01.12.2009. From the evidence of RW-1, paragraph 5(ii), the date has come as 21.12.2009. This date in terms of paragraph 30 of the AOE of CW-1 is the date of communication by the Claimant to the Respondent that it had applied for the IOD.

62. Thus on a conjoint reading of clause 9(c) read with clause 9(a) and 9(b) of the DA, the submission of the Respondent that the IOD had to be obtained within 3 months of the Redevelopment Agreement has to be rejected. The submission of the Claimant has been that the time should be calculated considering the approval of the plans by the Respondent which was granted by the Respondent's letter dated 20.10.2009 (Exhibit C-1-24).

63. In the Affidavit of Evidence, the Respondent has raised an additional plea of breach to contend that the Claimant failed to obtain full IOD.

64. A reading of clause 9(c) of the DA only speaks of obtaining the IOD. In cross examination of CW-1, the witness deposed that the IOD is for 2390 sq. mts. FSI which is 75% of 1 FSI and 25% FSI is only given after showing PRC in words and figures which as now come on record was obtained only on 15.11.2010. Thus, obtaining IOD is an ongoing process. In answer to Q.36, the witness has agreed that the IOD obtained on 02.03.2010 was for development of an area less than what was required to accommodate the existing members. The witness has however clarified that the concessions for the entire plot potential has been taken before IOD and IOD is always taken first on 1 FSI and after loading TDR amendment of IOD is done. There was no further cross examination of the witness on this aspect. This witness has further deposed in answer to Q.77 that concession plans were shown to the society of the stilt plus 14-storeyed building. He however agreed that there was no written record to show that the concession plans were

shared with the society. In cross examination of RW-1 in answer to Q.134, the witness has deposed that the Claimant had finally purchased and loaded 1810 sq. mts. of TDR on the Respondent's plot on 18th January 2012 and in answer to Q.138, the witness has agreed that 1 FSI equivalent to 3707.20 sq. mts. i.e. 39,900 sq. ft. available in respect of the plot plus the additional area of 1810 sq. mts. i.e. 19482.84 sq. ft. purchased and loaded by the Claimant on the Society's plot would be sufficient to construct Society's entitlement. There is also other evidence to indicate that obtaining IOD is for various stages as the building construction progresses. Thus much before the termination letter, the Claimant had loaded TDR, which would meet the requirements of all the Respondent members.

65. In my opinion, firstly the above plea was not raised in the pleadings, i.e. SOD. It is raised for the first time in the Affidavit of Evidence of RW-1 and even otherwise that would not be a ground that would fall under the expression "repudiatory breach" entitling the Respondent to terminate the DA.

66. Assuming that time was the essence of the contract for obtaining the IOD, the Respondent did not invoke its right to terminate, if any, and on the contrary allowed the Claimant to proceed to obtain the necessary permissions for carrying out the development without fixing another date for performance.

67. The Respondent therefore has been unable to prove that the Claimant has breached clause 9(c) either on account of the fact that the Claimant

failed to obtain IOD within 3 months of entering under the Development Agreement and/or to obtain full IOD as contended in the AOE of RW-1.

68. Breach of clause 5(a) of the DA, i.e. failure to purchase 100% TDR in the name of the Society within 60 days from the date of submission of the municipal plan prior to handing over to the Developer the vacant possession by the members of the Society of their respective flats.

69. The Respondent in paragraph 10(ii) of the SOD has pleaded that the Claimant was liable to purchase 100% TDR in the name of the Respondent society within 60 days from the date of submission of the municipal plans. The Claimant submitted the plans to the Municipal Corporation on 21.12.2009 and as such had to purchase the TDR on or before 19.02.2010. The Claimant had not complied with the aforesaid clause and had not purchased the TDR till as late as 24.09.2011. The Claimant is thus guilty of noncompliance of the said clause and there is delay in obtaining TDR for a period exceeding 21 months. Even after the Municipal Corporation issued IOD on 02.03.2010, the Claimant has failed to procure 100% TDR in accordance with the alleged Redevelopment Agreement dated 19.04.2008.

70. In the AOE paragraph 5(iv), RW-1 has deposed that the Claimant was required to purchase 100% TDR in the name of the Society and load the same on or before 19.02.2010. The Claimant had not complied with the aforesaid clause and had not purchased 100% TDR even as of 03.02.2013 or point prior to the termination of the DA. The Claimant therefore is in breach.

71. In addition, the Claimant was under an obligation to obtain 100% TDR before issuing notices to the members of the Respondent society for them to vacate the premises. The notice issued by the Claimant on 19.01.2010 before purchasing 100% TDR is contrary to the terms of the DA and is therefore illegal.

72. In their oral and written submissions, it is submitted on behalf of the Respondent as under:

(i) The Claimant had to purchase 100% TDR which works out to 3151.12 sq. mts. in the Respondent's name. The TDR actually purchased by the Claimant in Respondent's name on 18.11.2011 was 1810 sq. mts. which does not constitute 100% TDR and thus not in accordance with the DA.

(ii) The alleged purchase of TDR by the Claimant on 24.09.2011 was for 3030 sq. mts. The same cannot be termed as purchase of 100% TDR of the net plot area as mandated under the DA. Further, the purported Agreement of 24.09.2011 was subsequently cancelled on 17.03.2012. If the TDR purchased was in the Respondent's name, the Claimant could not have unilaterally cancelled it. The Power of Attorney executed with CW-1 was for purchase of TDR and there was no power for cancellation. This constitutes a breach and also shows absence of readiness and willingness on the part of the Claimant.

(iii) In respect of the purchase of TDR on 24.09.2011 between HDIL and the Claimant, Counsel has made reference to various clauses

of the Agreement to submit that TDR of 3030 sq. mts. was not purchased in the Respondent's name. It is also submitted that the payment of Rs. 5.79 crores for the TDR has not been proved. It is further submitted that the TDR Agreement dated 24.09.2011 was not in the Respondent's name or for its benefit and cannot be looked into for any purpose whatsoever.

(iv) As per recital J and clause 5(a) of the DA, the Claimant was liable to purchase and load the TDR before seeking vacant possession of flats as possession was sought for demolition of the old buildings. The Claimant was therefore liable to purchase 100% TDR before seeking vacant possession of the members' flats and on receipt of the IOD, simultaneously hand over cheques for rent for a period of 24 months to all the members. The Claimant failed to purchase and load 100% in the Respondent's name and hand over cheques for rent. These are essential obligations under the DA which the Claimant has failed to comply.

(v) The 100% TDR was to be purchased within 60 days from the date of submission of the municipal plans which were submitted to MCGM on 21.12.2009 according to the Claimant and thus the TDR was to be at least purchased by 20.02.2010. Ultimately, TDR of 1810 sq. mts. was purchased on 18.11.2011 and loaded on 18.01.2012. The Deed of Rectification was executed on 29.11.2010. Assuming that the period was extended in view of the Deed of Rectification, there is still a delay of 13 months in

purchase of TDR in the Respondent's name. There was also a shortfall as the requirement to purchase 100% TDR was 3151.12 sq. mts. which has not been done on the date of termination, thereby committing a breach.

(vi) The Claimant by various letters sought vacant possession from the members of their flats. These letters were issued by the Claimant without purchasing 100% TDR in Respondent's name or even offering rent. It is submitted that CW-1 in his cross examination has admitted that the members of the Respondent were required to vacate only after loading 100% TDR of the net plot area and has further admitted that the Claimant had to purchase 100% TDR within 60 days from the date of submission of municipal plans which the Claimant has failed to do. This conduct of the Claimant would show committing breach of the essential terms of the contract by acting contrary to the DA.

(vii) Dealing with the Claimant's submission that loading was after vacating the premises, it is submitted the Claimant could not have loaded 1804 sq. mts. The Claimant itself has admitted that 100% FSI was to be loaded before members were required to vacate. This would establish that loading of the TDR was to be done before seeking vacant possession of the flats of the members.

(viii) The Respondent has next dealt with the submission on behalf of the Claimant that no prejudice would be occasioned to the Respondent if 100% TDR is not loaded as long as the area of the

members was secured. This submission it is submitted is to call on the Tribunal to rewrite the terms of the Contract.

(ix) The Respondent thereafter has dealt with various documentary and oral evidence on record in the context of obtaining permission or purchasing FSI considering the change of policy. This will be dealt with to the extent they are necessary to be dealt with.

73. On behalf of the Claimant, in respect of the arguments advanced on behalf of the Respondent in respect of TDR, it is submitted as under:-

(a) Clause 1 of the DA clearly stipulates that the recitals form part of the Agreement. The recitals will have to be read with the contractual clauses to understand what was the agreement between the parties vis-à-vis the Claimant's obligation to purchase TDR. A perusal of recital J would demonstrate that it was the Claimant's wish to purchase TDR/FSI entirely in the name of the Respondent from the open market subject to DCR permitting and this TDR/FSI was to be loaded onto the new building before demolition of the old building. From this recital, it must be seen that the parties had used the phrase "TDR/FSI" and hence the Claimant could load 100% either TDR or FSI available on the land prior to demolition of the old building. Also the obligation to load was prior to demolition. There is a clear distinction between purchase and loading.

(b) It is submitted that clause 5(a) has to be read with recital J. If so read, it would be clear that the Respondent's members would not

give possession of the flats to the Claimant until the Claimant had purchased 100% TDR in the Respondent's name. Importantly, handing over the possession of the flats is juxtaposed against the Claimant's obligation to purchase TDR, whereas the right to demolish the old buildings is juxtaposed against the Claimant's obligation to load TDR on the said property. A meaningful interpretation of these 2 contractual provisions would mean that the Claimant first purchases TDR and thereafter receives possession of the flats from the Respondent's members and it is thereafter that the Claimant loads the TDR on the property and only then demolishes the old building. For the aforesaid reasons, the 60 days period stipulated in clause 5(a) within which the Claimant had to purchase the TDR was not a time period which was the essence of the contract between the parties.

(c) It is submitted that the controversy between the parties as to what was the meaning of 100% TDR and whether the Claimant was entitled to achieve the objective of loading 100% TDR by mixing up the obligation into partly purchasing TDR and partly purchasing FSI from the corporation by paying a premium which it had done in the present case, reliance is placed on clause 21(c). A perusal of the said clause, it is submitted, would indicate that the Claimant would purchase FSI on payment of premium, but it was also mandated that the Claimant utilize the entire FSI which became available on the said property, including by way of payment of premium. No wrong therefore can be imputed on the

Claimant having purchased 0.33% premium FSI. In any event, it is submitted during arguments that the Respondent's counsel had conceded that it was not alleging breach of the obligation to purchase 100% TDR on the basis that the Claimant could not have opted for purchasing 0.33% premium FSI. The question then to be decided by the Tribunal is what area would represent 100% TDR / FSI and whether the quantum of area was purchased by the Claimant within reasonable time and if the Claimant has successfully discharged this obligation. It will also have to be decided whether Respondent breached its reciprocal obligation of having to hand over possession of flats to the Claimant despite the Claimant having purchased 100% TDR / FSI. Reliance is also placed on clause 26 which according to the Claimant stipulates FSI beyond 2 of the Respondent's entitlement. If therefore the base FSI is taken to be 1, the Claimant's obligation to load 100% TDR/FSI would be equivalent to 1 subject to possibility under DCR.

(d) Dealing with the submission on behalf of the Respondent by the Learned Counsel that the Claimant would construct up to 76,565 sq. ft. FSI/TDR in any manner the Claimant deemed fit and placing reliance on the LOA dated 24.11.2007, it is submitted that CW-1 has accepted in his cross examination that the Claimant found the contents of the LOA acceptable and that it intended to develop 76,565 sq. ft. on the plot. Thereafter, the DA was entered into which governs the rights and obligations of the parties. Under

clause 21(c) of the DA, the Claimant is entitled to consume the entire FSI of the plot and/or TDR including by utilization of FSI available by payment of premium. The only limitation is clause 26. It is submitted that on a joint reading of clauses 26(c) and 26(d) of the DA could only mean FSI and additional benefit available in the future which increased the development potential of the plot beyond 1.85. Saumil Jhaveri (CW-5) the Project Architect has calculated the total built-up area permissible to be constructed on the plot as 73822.96 sq. ft. The witness has not been cross examined on this point. Thus the intention of the parties was that the Claimant could utilize the entire 1.85 FSI available on the plot. It was the Claimant's right to consume and utilize the same in any manner the Claimant deemed fit.

(e) In the matter of calculation of 100% TDR, it is submitted that the gross area of the plot is 3707.20 sq. mts. The net area of the plot considering the gross area and 15% deduction towards compulsory recreation ground works out 3151.12 sq. mts. If no TDR/additional FSI is added to the plot, then the plot is capable of sustaining construction only to the extent of 3151.12 sq. mts. The aggregate Built-Up Area (BUA) of the existing buildings was 3830.44 sq. mts. The project was being developed under Regulation 33(6) of the Development Control Regulations of Greater Mumbai, 1991 ("**the DCR**"). MCGM was permitting the Claimant to construct 3830.44 sq. mts. to re-accommodate the Respondent's members without purchasing TDR. Thus, the area

permitted to be constructed by MCGM without utilizing TDR is 3830.44 sq. mts.

(f) The TDR capable of being loaded on the plot works out as under:-

Sr. No.	Statement	Area (sq. mts.)	% of area
(i)	Gross area of plot	3707.20	100
(ii)	Excess area permitted to be constructed by MCGM without utilizing TDR.	679.32	18.32
(iii)	BUA equivalent to 0.33 premium FSI (33% of (i))	1223.37	33
(iv)	Permissible BUA for construction on the plot by loading of TDR ((i) – (ii) – (iii))	1804.51	48.68

As per Regulation 32 read with Regulation 33(6) and 35 of DCR, 1804.51 sq. mts. was the maximum extent to which TDR could be loaded on the plot.

(g) It is next submitted that it is the Respondent's case that there was a delay in purchasing 100% TDR for the plot area of 3707.20 sq. mts. on or before 19.02.2010. RW-1 has also deposed to this in his evidence, but has further added that the TDR was not loaded on the plot. The DA itself evidences as set out earlier, there is a dispute as to whether the area was 3846 sq. mts. or 3675 sq. mts. On survey by the Claimant, the actual area was found to be 3707 sq. mts. On 09.02.2010, the Sub-Divisional Officer allowed the application for amalgamation and assigned the plot CTS No. 1358 and its area was revised to 3846.30 sq. mts. No PRC was issued on that day. The IOD was obtained on the basis that the area of

the plot is 3846.30 sq. mts. A revised PRC was issued on 04.11.2011 and the area of the plot was revised to 3707.20 sq. mts. and this is reflected in the Deed of Rectification dated 29.11.2010. By letter dated 10.06.2011, the Respondent conveyed its Architect's approval for purchase of TDR by the Claimant. The Claimant by an Agreement of 24.09.2011 with HDIL purchased 3030 sq. mts. of TDR for a consideration of Rs. 5,87,06,856/-. This was informed to the Claimant by letter dated 28.09.2011. By an Agreement dated 18.11.2011, the Claimant purchased 1810 sq. mts. of TDR. The State of Maharashtra introduced a concept of 0.33 FSI by payment of premium. On 18.01.2012, MCGM approved utilization of 0.33 FSI and balance TDR to the extent of 1804 sq. mts. of TDR. Thus there was no delay in purchase of TDR.

(h) The TDR as contemplated by the DA was purchased, 3030 sq. mts. on 24.09.2011 and 1810 sq. mts. on 18.11.2011 which constituted 100% TDR for the project as per the Development Rules & Regulations then in force. Under the DA, the Claimant had to purchase 100% of Development Rights whether in the form of FSI and/or TDR. This did not include FSI which was inherent in the land. As such FSI would not be required to be purchased from the open market, much less to be loaded on the plot.

(i) The 0.33 FSI available on the land on payment of premium is 1223.37 sq. mts. This became available pursuant to the

notification dated 24.10.2011 by the Government of Maharashtra. Once 0.33 FSI is utilized on the plot, only 1804.51 sq. mts. of TDR could be loaded on the plot. The said TDR had been purchased on 18th November 2011. Thus, the cancellation of TDR of 3030 sq. mts. purchased on 24.09.2011 would be of no consequence. It is also pointed out that there was some confusion as to whether it was mandatory to utilize 0.33 FSI on the plot subsequent to 24.10.2011 as the Claimant had already purchased 3030 sq. mts. of TDR on 24.09.2011. The notification was not immediately available and this led to the confusion. Reliance is placed on evidence of CW-1 and CW-3.

(j) The Claimant had completed the process and received approval for utilization of 0.33 FSI. For that purpose, reliance has been placed on the testimony of CW-3 and CW-5 which according to the Claimant remained unshaken on that point. As per the practice, considering the deposition of CW-1, CW-3 and CW-5, the premium of 0.33 FSI could be paid at the time of obtaining CC.

(k) It is therefore submitted that there was no delay in purchase of TDR by the Claimant and the TDR purchased by the Claimant was 100% TDR contemplated under the DA. The Claimant did not breach the DA and termination on this ground is wrongful, if not malafide.

74. The first question to be considered is the interpretation of clause 5(a) which has been reproduced earlier. In recital I to the DA, it is set out that it is the Developer who wishes to purchase 100% TDR/FSI in the name of the society from the open market to be loaded on to the new buildings before demolition of the old buildings. Under clause 1 of the DA, the recitals form an integral part of the Redevelopment Agreement. Thus, it would be clear from this clause that it is the Developer who expressed his desire/intention to purchase TDR/FSI from the open market to be loaded onto the buildings before demolition. The intent of such loading would be to enable the Developer to meet his obligation under the DA, the development costs and make profits on the project. In terms of the LOI dated 24.11.2007, after meeting the requirements of providing flats to the members of the Respondent which at the time of the Agreement was 37965.68 sq. ft. carpet area and additional minimum 15% carpet area, the balance was to be the Developer's share to be sold. In fact, in paragraph 8 of the LOI, it is set out based on the then existing plot area of 3846 sq. mts. that the Developer will not have any right to construct in excess of 76,565 sq. fts. In Annexure A and H to the D.A., the carpet area occupied by the members is shown as 37965.68 sq. fts. and their entitlement is 43666.53 sq. fts. based on 15% additional area. CW-1 in his evidence in cross examination has also agreed to this as set out earlier. This restriction however is not reflected in the DA. Thus a reading of the recital would mean that the 100% TDR/FSI would be subject to the provisions of DCR, 1991. In other words, whatever is available under the DCR. The TDR was to be loaded on to the new

buildings before the demolition of the old buildings. In other words, though the TDR had to be purchased, first the loading would be before demolition of the old buildings. In other words, after the members of the Respondent had vacated and handed over possession to the Claimant. The record would show that this event did not happen as the DA was terminated by the Respondent before the flats were vacated by the members of the Respondent. The evidence on record would show that the Claimant had exercised his option to purchase 0.33 FSI which became available on the land pursuant to the notification by the Government of Maharashtra. This FSI is not from the open market as set out in the preamble. The Claimant had purchased TDR of 1810 sq. mts. on 18.11.2011 and the same was loaded on 17.01.2012. The earliest purchase of TDR was on 24.09.2011 in an area of 3030 sq. mts., which was subsequently cancelled due to the additional FSI becoming available on the land.

75. With the above background, clause 5(a) needs to be interpreted. Unlike clause 18(d) of the DA, performance under clause 5(a), time has not been made the essence of the contract. Clause 5(a) has two parts. Firstly that the Developer had to purchase 100% TDR from the open market as per the DC Regulations at its own cost and expense within 60 days from the date of submission of the municipal plan and secondly prior to o handing over to the Developer vacant possession of the flats. This would mean purchasing 100% TDR from the open market which is available to be purchased under the DCR in the name of the society. The 100% would have to be considered in the context of what can be

loaded. This clause will also have to take into consideration the subsequent notification of the Government of Maharashtra which allows 0.33 FSI to be utilized on the land itself on payment of premium as the purchase was to be in terms of the DCR. Thus, the 100% purchase from the open market will necessarily mean less the 0.33 FSI available from the land. This balance was 1804.51 sq. mts. The Municipal plan was submitted in December 2009. The Deed of Rectification showing the actual area of the plot as 3704 sq. mts. was signed on 29.11.2010. The actual TDR available on the plot would be known only on 29.11.2010. This part of the claim was incapable of performance within 60 days.

76. The second part of clause 5(a) sets out that this purchase though 60 days from the date of submission of municipal plans, has to be prior to handing over to the developer the vacant possession of the flats by the members of the society. Thus, the purchase is interlinked also with the vacation of the flats by the members of the Respondent. The vacation of flats under clause 9(d) is on intimation of receipt of IOD to the society, the members will vacate their respective flats within 30 days of being notified by the developer to do so. Intimation of IOD can only be after submitting the plans.

77. The third part of the clause contemplates that even after purchasing TDR, if the members do not give possession of their flats, then the developer shall be entitled to sell the said TDR in the open market. In other words, even if the developer purchases the TDR and the flat

purchasers do not vacate their flats, the only consequence is that the developer has the right to sell the TDR in the open market.

78. On a proper construction of clause 5(a), the Claimant had to do the following:

a) Purchase 100% TDR as per the DC Regulations, 1991 at its own cost and expense in the name of the Society; and

b) Within 60 days from the date of submission of Municipal Plans, prior to handing over to the Developer the vacant possession by the members of the Society of their respective flats.

79. On a reading of the second part of clause 5(a), it is not possible to read the words “within 60 days from the date of submission of the Municipal Plans” de hors the second part which is “prior to handing over to the Developer the vacant possession by the members of the Society of their respective flats”. As has been discussed earlier, the revised PRC was issued on 4th November 2010 and the area of the plot was revised to 3707.20 sq. mts. as reflected in the Deed of Rectification dated 29th November 2010. The Claimant therefore would have not been in a position to know what was the 100% TDR that could be available before the revised PRC. A cumulative reading of the clause therefore would mean that the TDR had to be purchased at the latest before the vacant possession was given by the members of their respective flats to the Claimant which event never occurred.

80. On a reading of those clause referred to earlier, the proper construction would be that the clause was provided substantially for the benefit of the Respondent.

81. A reading of this clause therefore does not lead to the conclusion that time is the essence of the contract and a breach of this clause is repudiatory. On the contrary, the construction on a reading of the preamble would show that it is basically for the benefit of the Developer. On the members of the Respondent failing to perform their reciprocal obligations under the contract, the Developer has the right to sell the TDR purchased in the open market.

82. Even assuming that time was of the essence of the contract as alleged by the Respondent, the Respondent did not invoke its rights, if any, under the contract on the expiry of 60 days from the date of submission of the plan and on the contrary, allowed the Claimant to proceed to apply for the necessary permissions. As the record would demonstrate that before the date of termination, the Claimant had entered into an Agreement and purchased 3030 sq. mts. of TDR from HDIL on out of DRC No. SRA/960/L dated 16.09.2011. The Respondents by letter dated 10.06.2011 informed the Claimant that its Architect had conveyed approval to the Claimant's proposal to purchase TDR. The Claimant had informed the Respondents by letter dated 30.07.2011 that it had signed MOU with HDIL and would execute the BMC Agreement for loading of TDR. The Claimant had loaded 1810 sq. mts. of TDR on 17.01.2012. The Claimant had further exercised its right of purchasing 0.33 FSI

available in terms of the amended DCR and had even obtained challans for making the payment. As has come on record from the evidence of CW-1 as also CW-3, the premium could be paid at the time of obtaining CC. In the cross examination of CW-3 in answer to Q.10, the witness has deposed that the purchase of 0.33 additional FSI can be made immediately on the issue of challan and demand note. He has further deposed that generally nobody pays immediately, but it is paid at the time of obtaining CC. In answer to Q.11, the witness has deposed that plans for additional 0.33 FSI can be approved without payment of premium and in that case, premium can be paid at the time of CC.

83. In the alternative, has the Claimant committed a breach of clause 5(a) of the DA, considering that the project was being developed under Regulation 33(6) of the Development Control Regulation of Greater Mumbai, 1991 ("**the DCR**"). The MCGM was permitting the Claimant to construct 3830.44 sq. mts. on the plot to re-accommodate the Respondent's members without purchasing TDR and a further excess area which was permitted to be constructed by MCGM without utilizing TDR was 679.32 sq. mts. The position can be demonstrated from the chart below.

S. No.	Statement	Area (sq. mts.)
(i)	Gross area of the plot	3707.20
(ii)	15% deduction towards compulsory recreation ground	556.08
(iii)	Net area (i) – (ii)	3151.12
(iv)	Area permitted to be constructed by MCGM without utilizing TDR	3830.44

(v)	Excess area permitted to be constructed by MCGM without utilizing TDR	679.32
(vi)	BUA equivalent to 0.33 premium FSI, i.e. 33% of gross plot area.	1223.37
(vii)	Permissible BUA for construction on the plot by loading TDR	1804.51

As per Regulation 32 read with Regulation 33(6) and 35 of the DCR, 1804.51 sq. mts. was the maximum extent to which TDR could be loaded on the plot. (Paras 3 to 5 and 10 of the AOE of CW-5).

84. Thus, from the above it would be apparent that the Claimant could construct on the plot without utilizing TDR, an area admeasuring 3830.44 sq. mts. Apart from that, the additional FSI/TDR considering the potential of the plot was 3707.20 sq. mts. The permissible built-up area which could be constructed on the plot (1.85 FSI) (would be 6858.32 sq. mts. which in sq. ft. would be equivalent to 73822.96 sq.ft.). This has emerged from the evidence of CW-5 who has not been cross examined on these aspects.

85. Under clause 21(c) of the DA, the Claimant could consume the entire FSI of the said property and/or TDR from any other properties. Under clause 26, future rights of FSI/DRC/TDR and all additional benefits shall remain with the Society. At the time of entering into the DA, the Claimant therefore could have loaded 3707.20 sq. mts. on the plot.

86. On 15.11.2010, the City Survey Office issued the Property Card (135A) in respect of the said property and accordingly its area was rectified. By a letter dated 15.11.2010, the Claimant informed the Respondent that it had received the amalgamated Property Card and new PR Card. By

letter dated 02.12.2010, the Claimant informed the Respondent that it was in the process of purchasing TDR and had prepared a short list. On 23.12.2010, the Deed of Rectification was entered into and registered. By letter dated 10.06.2011, the Respondent conveyed its approval and gave a go ahead to the Claimant regarding the purchase and loading of TDR. In this letter, it was set out that due to internal dispute between the members of the Society, there was a delay in responding to Claimant's letter dated 02.12.2010.

87. On 24.09.2011, the Claimant entered into an Agreement for transfer/utilization of FSI slum (TDR) with Shri Waryam Singh on behalf of Housing Development & Infrastructure Ltd. ("**HDIL**"). Under this Agreement, HDIL agreed to transfer utilization of FSI for area admeasuring 3030 sq. mts. out of DRC No.SRA/960/L dated 16.09.2011. This was intimated to the Respondent by letter dated 28.09.2011 that it had purchased TDR in the Respondent's name. In his cross examination in answer to Q.27, this has been reiterated in answer to Q.28 and Q.29, the witness has deposed that area of 3030 sq. mts. was purchased by Agreement dated 16.09.2011. The following Q.30 would be relevant.

"Q.30 Would it be correct to say that the Claimant had purchased the TDR in the name of the Respondent?

Ans Yes."

Thus, it would be clear from the above that the Respondent has accepted that in fact TDR of 3030 sq. mts. had been purchased by the Claimant in the name of the Respondent. The Agreement with HDIL has

been produced on record as set out in paragraph 60 of the AOE of CW-1.

88. From the evidence of CW-5, Soumil Zaveri, in paragraph 5 it has come on record that on 24.10.2011, the Urban Development Department of the State of Maharashtra issued a notification under Section 37(2) of Maharashtra Regional and Town Planning Act, 1966 ("**MRTP**") whereby the DCR was amended and the Floor Space Index was permitted to exceed up to 1.33. The subject plot could avail of the said FSI as is evidenced from paragraph 9 of AOE of CW-5 who informed him that FSI available should be purchased. The same amendment also provided that a premium would be charged for utilization of 0.33 FSI and that the premium would be shared between the State Government and MCGM on 50:50 basis.

89. CW-1 in paragraph 67 of his Affidavit of Evidence has deposed that by letter dated 01.11.2011, had informed the Respondent that there had been a change in the DCR Rule whereby in place of 100% TDR, the Claimant could purchase 67% TDR and balance 33% as FSI for a premium from the BMC at a later stage.

90. On 18.11.2011, HDIL and the Respondent (through the Claimant as its Constituted Attorney) entered into an Agreement for transfer/utilization of FSI Slum (TDR) for an area admeasuring 1810 sq. mts. The Agreement was signed by CW-1 and it is on record.

91. CW-1 in paragraph 71 of his AOE has deposed that MCGM on 17.01.2012 issued a detailed note regarding the utilization of

Development Rights out of DRC No. SRA/960/Land on the said property. As per this note, the Claimant could load 1804.51 sq. mts. of FSI on the property by way of TDR.

92. The Claimant thereafter as it had already purchased 1810 sq. mts. TDR from HDIL by Agreement dated 17.03.2012 cancelled the prior Agreement dated 24.09.2011 whereby it had purchased 3030 sq. mts. of TDR from HDIL.

93. CW-5 in para 13 of his AOE has deposed that he had prepared the proposal for utilizing 0.33 FSI and the proposal had been approved by MCGM. The witness has relied on the Note dated 17.01.2012 issued by the Executive Engineer, DP Department. Though there was some admissibility of this Note, there has been some cross examination of the witness on the note. The witness has further deposed that by letter dated 07.12.2011, the Assistant Engineer (Building Proposal) had informed the RBI that a proposal for utilization of the premium FSI by Claimant was under consideration and requested RBI to accept 50% payment towards additional FSI premium amounting to Rs. 73,64,700/- on account of the Urban Development Department, Government of Maharashtra. The letter and the challan issued by the Executing Engineer Building Proposal (W.S.) K Ward has been placed on record. In cross examination, this witness was asked whether the Claimant could have paid the premium demanded under document C-VIII-1 to C-VIII-3 immediately upon issuance of the challan and the demand note. The witness answered “Yes”. At the same time, witness also deposed that it

is not necessary to pay immediately and that it can be paid when the builder decides to go ahead with the process. In cross examination of CW-1 on the aspect of purchasing 0.33 FSI, the witness was asked in Q.107 whether there was any regulation which prohibited the Claimant from purchasing and loading 100% TDR instead of utilizing the 33% premium FSI, the witness' answer was no, the witness however added that at that time, there was a confusion whether 100% TDR can be loaded or 33% had to be taken from MCGM and that is why they had to cancel the purchase agreement for 100% TDR and instead buy 67% TDR during this period and 33% was to be purchased from MCGM by paying premium. The witness was further asked in Q.109 that the process of loading additional FSI by paying premium was less expensive than loading 100% TDR, the witness answered yes, but further observed that at that time the TDR rates were also same as Ready Reckoner rates and it did not make much difference. Exhibit C-V-68 which is the Note prepared by MCGM was put to this witness and his explanation sought in answer to Q.112, the witness answered that this is a note prepared by MCGM for utilization of 67% TDR.

94. From the above, it would be clear that immediately after the area of the plot was rectified, the Deed of Rectification was entered into and soon after the Respondent gave the go ahead for loading of TDR. The Claimant first purchased 100% TDR which it later canceled after having purchased the TDR which could be loaded in an area of 1810 sq. mts. and the balance utilization of 0.33 FSI which became available from the land itself. It is true that CW-1 in answer to Q.101 agreed that the

Claimant had to purchase 100% TDR within 60 days from the date of submission of the Municipal Plan and it had not done so. To my mind, this really would not be relevant in the context that the purchase of TDR was substantially for the benefit of the Claimant and that as of 18.01.2012, TDR of 1810 sq. mts. had been loaded and that was including the area could be built upon the land was sufficient to meet the requirements of the members of the Respondent. This is evidenced from answer to Q.138 of RW-1. Apart from that, even assuming that time was of the essence of the contract, the Respondent did not exercise its right if any, but allowed the Claimant to proceed with the process of development, including obtaining IOD. As on the date of the termination, the Claimant apart from loading 1810 sq. mts. had also completed the process of utilizing 0.33 FSI available on the land in terms of the amended DCR and all that remained was the formality of making the payment which as deposed to by CW-1 was to be paid at the time of CC (Q&A 64). There is no evidence brought on record by the Respondent to the contrary.

95. Thus, the Respondent has failed to prove, notwithstanding the admission by CW-1 in Q/A 101 that the Claimant had failed to purchase TDR within 60 days from the date of submission of the Municipal Plans that the Claimant committed any breach by not purchasing 100% TDR. As on the date of submission of the Municipal Plans which has come on record as 2009, the area of the plot had not been settled and it came to be settled only on 15.11.2010 when the City Survey Officer issued the Property Card. It would only be after 15.11.2010 that the Claimant

would be certain as to the exact FSI/TDR which could be loaded. Whether the Claimant had to purchase the entire TDR from the open market or to take advantage of 33% available on the land and 67% TDR from the market was a decision for the Claimant and would be irrelevant as to how the Claimant would opt. Insofar as the Respondent is concerned, all that the Claimant was obliged was to construct and give to the members the area that they were entitled to in terms of the DA.

96. Thus it must be held that there has been no breach of clause 5(a) of the DA and at any rate the Respondent has failed to discharge its burden that the Claimant was in breach of clause 5(a).

Breach of clause 10

97. The Respondent in paragraph 10(iii) of the SOD has pleaded that the Claimant was in breach of clause 10 of the DA. Clause 10 as reproduced by the Respondent reads as under:-

"*10. The Developer shall pay a total sum of Rs. 1000 per sq. ft. carpet area per member to the Society as interest-free deposit. Instead of paying the above amount directly to each individual member, such amounts will be kept by the society till the occupation certificate is obtained by the Developer.*
…."

This clause was subsequently substituted / rectified by the Deed of Rectification, as reproduced in para 42 of this Award.

98. The clause as rectified has been reproduced earlier. That clause requires that the Developer will issue a cheque at the rate of Rs. 1000/- per sq. ft. carpet area per member at the time of vacating the flats by all the members. This event never occurred. There could therefore be no breach.

99. In the Affidavit of Evidence of RW-1 in paragraph 5(vi), the witness has deposed that the Claimant was to deposit an aggregate sum of Rs. 3.8 crores as an interest-free deposit calculated at the rate of Rs. 1000/- per sq. ft. of the carpet area of each member of the society immediately on execution of the Redevelopment Agreement.

100. On a proper reading of clause 10 before its rectification, the construction sought to be given by RW-1 is not supported. All that the clause says is that the developer shall pay a total sum of Rs. 1000/- per sq. ft. carpet area per member to the society as an interest-free deposit instead of paying the amount directly to each individual member. Such amounts would be kept by the society till the Occupation Certificate is obtained by the Developer. The point of time when this compensation of Rs. 1000/- per sq. ft. is to be paid/deposited is not set out in clause 10. All that is set out is that after the Occupation Certificate is released, the Society will release to the Developer, the respective pro-rata amounts from the said interest-free deposit for payment to the individual members. In the absence of a date specified in the clause before its rectification, for deposit of the said amount, there could be no breach.

101. On the contrary, in terms of clause 10 as rectified by the Deed of Rectification, the sum of Rs. 1000/- per sq. ft. carpet area was payable at the time of vacating the flats by all the members. Even otherwise, CW-1 has deposed in para 42 of his AOE that he had given the signed cheques for the corpus event to Mr. Jogi and Mr. Devendra Shah, which were signed by him. The Claimant was informed by letter dated

10.07.2010, that at the EOGM of the Respondent on 10.05.2010, the cheques for rent and corpus, were offered to the members. The members however did not accept the cheques and that the cheques were being returned. The cheques have been produced on record. The only cross to the witness is whether he handed over the cheques by any forwarding letter.

102. Thus, the Respondent has failed to prove that the Claimant breached clause 10 of the DA.

103. In their written arguments, the Respondent has sought to rely on Annexures I and J of the Development Agreement. Annexures I and J relate to clause 11, which is that the Developer shall pay to each present member compensation for the temporary alternate accommodation as per Annexure I. To the Development Agreement are annexed Annexures I and J, to which there is a note which sets out that the rent for 12 months at the rate of Rs. 40 sq. ft. of existing carpet area per month per member by a single cheque within 15 days of receipt of the IOD. Such a plea of breach of clause 11 or Annexures I and J has not been raised as a ground for termination nor has RW-1 led any evidence on that aspect. The Claimant therefore had no opportunity to deal with this aspect. This is also not a breach as alleged by the Respondent in the SOD or in his cross examination in answer to Q.121 wherein he sets out that the grounds mentioned in paragraph 5 of his Affidavit of Evidence are the only grounds for termination of the contract. In paragraph 5, there is no breach pleaded in respect of clause 11 of the

Development Agreement. Even otherwise, in the AOE of CW-1, he has deposed that on 10.05.2010, he had handed over to Mr. Jogi, Mr. Devendra Shah, signed cheques in various sums including towards the rent (for the 1st year) as well as the corpus amount, which were returned by the Respondents by letter dated 10.07.2019, as the members were not willing to accept the cheques. Thus, even otherwise there was compliance. Reliance on Annexures I and J is therefore misplaced.

Breach of clause 21(d)

104. The said clause has been reproduced earlier. In its Statement of Defence after reproducing clause 21(d), it is set out that the wording of clause 21 clearly indicates that the Claimant was obliged to comply with the earlier clause of the Redevelopment Agreement and on compliance of those clauses, the Claimant was to obtain permission from the Respondent society, inter alia, for the purpose of issuing advertisements in newspapers and other media informing sale of the saleable units in the new buildings proposed to be constructed by the Claimant on the said property. Without complying with the earlier part of the Redevelopment Agreement, the Claimant issued advertisement for sale in breach of the Redevelopment Agreement.

105. In the Affidavit of Evidence of RW-1 - paragraph 5(vii), the same allegations have been reiterated.

106. CW-1 was not cross examined in respect of this alleged breach. In its written submissions, the Claimant agrees that issuing of advertisement announcing sale of saleable units in the new building could be done only

after purchase of 100% TDR. It is submitted that even assuming that there has been a breach, this would not entitle the Respondent to terminate the DA.

107. The record does not show that the Claimant issued any advertisement. The material produced by the Respondent does not so indicate. Even assuming that it could be said to be an advertisement, termination could have been only for a repudiatory breach. A breach of clause 21(d) cannot be said to be a repudiatory breach. This contention also will have to be rejected.

108. It would thus be clear from the findings recorded in respect of the breaches alleged by the Respondent and consequent termination of the contract that the termination has to be held to be illegal.

109. Even if the Tribunal arrives at the conclusion that the termination is illegal to grant *the r*elief of specific performance, the Tribunal will have to examine whether the Claimant performed its part of the obligations and was ready and willing to perform its obligations.

110. The Claimant in paragraph 4.2 of the SOC has pleaded that the Claimant has always been and continues to be ready and willing to perform its obligations under the Redevelopment Agreement. Further, the conduct of the Claimant has been unblemished throughout. In paragraphs 4.5 and 4.6 of the SOC, the Claimant has pleaded that it has taken a number of constructive steps for getting the property ready for redevelopment which include obtaining various sanctions, permissions and approvals from the statutory and other authorities concerned with the project as

have been set out in paragraph 3 of the SOC. The Claimant has purchased 100% TDR which equates to 1810 sq. mts. on 24.09.2011. Apart from paying rental costs for rehousing the tenants who had vacated the premises in the sum of Rs. 1,25,00,000/-, the Claimant has further expended a sum of Rs. 5,82,22,388/- which totals Rs. 7,07,24,389/- till the date of filing the Statement of Claim.

111. The Respondent in response to the Claimant's pleading in paragraph 4.2 of the SOC has pleaded that since time is the essence of the contract, the Claimant has failed to abide by its obligations and performed the obligations under the Redevelopment Agreement. The conduct of the Claimant cannot be said to be unblemished throughout and as such the Respondent denies that the Claimant was and continues to be ready and willing to perform its obligations under the Redevelopment Agreement. The Respondent has denied that the Claimant has spent the monies in the sum of Rs. 7,07,24,388/- towards the redevelopment till date and/or that the purchase of 1810 sq. mts. TDR constitutes 100% of the TDR as contemplated under clause 5(a) of the Redevelopment Agreement. The Claimant it is submitted has miserably failed to comply with its obligations under the Redevelopment Agreement.

112. The Respondent had terminated the Development Agreement alleging various breaches on the part of the Claimant. The Tribunal has dealt with the same in the earlier part of the Award and has specifically held that there has been no breach which would amount to a repudiatory breach and further that the Respondent has failed to prove that the

Claimant was in breach of the Development Agreement as alleged by the Respondent.

113. The Claimant has also disclosed its financial capacity by filing the IT Returns for Assessment Year 13-14 to Assessment Year 16-17 which are Exhibits C-VI-2 to C-VI-5 which show the various heads being purchases, advances from others, finished goods, sale of services, work in progress and closing stock which in AY 2013-14 was Rs. 50,59,92,711/- became Rs. 108,85,25,805/- for AY 2016-17.

114. CW-1 in his Affidavit of Evidence dated 30.12.2016 has deposed that on 10.05.2010, he on behalf of the Claimant handed over to Mr. Anil Jogi (Respondent's then Secretary) and Mr. Devendra Shah (Respondent's then Chairman) signed undated cheques in various sums towards the rent (for the 1st year) as well as the corpus amount to be paid by the Claimant as per the Development Agreement. All cheques were signed by him. He has further deposed that by letter dated 10.07.2010, the Respondent recorded at its EOGM of 20.05.2010, it had offered to all its members, rent and corpus cheques from the Claimant before the members vacated their flats as agreed in the Development Agreement. As the members were not convinced and did not accept the cheques, the Respondent was returning the cheques to the Claimant. The letter was signed by Mr. Anil Jogi. Then by letter dated 21.12.2010, the Claimant had recorded that a Deed of Rectification had been registered and that the individual agreements were also ready along with rent and corpus fund cheques and had called upon the Respondent's members

to come for signing of the individual agreements before 10.01.2011. The letter was signed by him and hand delivered to the Respondent's office and it has been received by Mr. Anil Jogi. The 17 members of the Respondent Society entered into individual/permanent alternate accommodation agreements. Photocopies of the agreements have been produced.

115. In cross examination, the witness has deposed that in July 2011 they had signed an MOU for purchase of TDR and that in fact they purchased 3030 sq. mts. of TDR in the name of the Respondent. This was subsequently cancelled as by virtue of the amendment to the DCR, 33% additional FSI could be purchased from the land itself and 67% from open market. The witness has deposed as to why this Agreement was cancelled and has produced documentary evidence that it had invoked the right to purchase 33% FSI from MCGM. In answer to Q.73, that from the execution of the DA till the execution of the Rectification Deed, the Claimant did not pay or offer to pay the amount as set out in clause 10 of the DA to the Society, the witness agreed but explained that the Respondent wanted to rectify the DA in respect of payment to members. The Deed of Rectification would evidence that clause 10 of the Development Agreement required the Developer to pay a total sum of Rs. 1000/- per sq. ft. carpet area per member to the Society as interest-free deposit. Under the Deed of Rectification of 29.11.2010, the Developer was to pay a total sum of Rs. 1000/- per sq. ft. carpet area to the individual member as compensation towards hardship during the redevelopment. The said amount was to be given per member at the

time of vacating the flats by all the members. The evidence of CW-1 that he had forwarded the cheques for 1 year rental and the premium amount there has been no serious cross examination. The only defence of the Respondent seems to be a suggestion that the correspondence relied on by the Claimant showing the receipt of correspondence with Mr. Anil Jogi on behalf of the Respondent had been obtained by the witness after the dispute with the parties had commenced. The witness denied the suggestion. Thus, there is evidence on record that even before the members had vacated the premises, the Claimant in fact had forwarded to the Society cheques for the rental compensation for 1 year and for the compensation of Rs. 1000/- per sq. ft. which were returned to the Claimant as the members were not willing to accept the same.

116. It has been next submitted by the Respondent that the relief of specific performance is a discretionary remedy and the Claimant has to prove that it has performed or has always been ready and willing to perform the essential terms of the contract. In the earlier part of the Award dealing with the breaches as alleged to have been committed by the Claimant, the Tribunal has held against the Respondent. The Claimant has made the necessary pleadings in the Statement of Claim. The Claimant has produced both documentary and oral evidence to show that it has performed its obligations under the contract to the extent that they could be performed before the termination of the DA by the Respondent. The Claimant has obtained the IOD, got the Property Card corrected to correctly reflect the area of the property and obtained other permissions. The Claimant had earlier entered into agreement to

purchase 3030 sq. mts. of TDR. Ultimately, due to the change in DCR, the Claimant purchased the necessary TDR which could be loaded in an area of 1807 sq. mts. and had taken all steps to purchase 33% FSI from MCGM in respect of which challans were issued. In the oral evidence, it has come on record that the amount could be paid even at the stage of obtaining the CC. The Claimant has shown its financial capacity by producing its IT Returns. The Claimant had also expended monies for development which have been detailed earlier.

117. Another submission on behalf of the Respondent has been that time was the essence of the contract. While dealing with the clauses of the contract, more specifically clauses 5(a) and (b) and clause 9(c), the Tribunal has held that insofar as those clauses are concerned, time would not be of the essence of the contract and as such it is not necessary once again to further discuss the same proposition.

118. It has been further submitted that there was a delay in performance of the DA by the Claimant. This aspect has also been dealt with by the Tribunal in the earlier part of the Award. The Claimant could apply for the IOD only after the Respondent approved the plans and after approval the IOD was obtained. Obtaining the IOD is dependent on the municipal authorities sanctioning the IOD. All that the Claimant could do is to submit the plans and await the approval from the Municipal Authorities.

119. It has also been submitted that CW-1 was authorized to construct and create interest in the new building. The Claimant was to be reimbursed for the expenses in addition to profit by sale of the free sale component.

No plans were sanctioned creating the sale component in favor of the Claimant, therefore no interest was created "*in the immovable property within the meaning of Section 202 of the Indian Contract Act, 1872*."

120. As set out in the recital of the DA, the Respondent by its letter of 24.11.2007 accepted the offer made by the Claimant in its letter dated 17.10.2007. In terms of clause 3 of the DA, the Respondent's members were to be given their present carpet area and minimum 15% additional carpet area over and above flower bed, dry balcony and niche (F.B.) in the new building. In terms of the letter dated 24.11.2007, the Developer did not have any right to construct in excess of 76,565 sq. ft. CW-1 in his cross examination in answer to Q.169 has agreed that the Claimant was entitled to develop a maximum of 76,565 sq. ft. on the Respondent's plot. The Agreement does not specifically set out that the developer cannot retain part of the developed area. It has further come in the evidence of the Claimant in paragraph 76(q) that the Claimant had purchased two flats from Mukundrai Damani and Nandlal Trivedi. Merely because the IOD was not obtained for the full area of the building would not mean that the Claimant would have no right in the immovable property. Apart from that, the Tribunal has now held that the termination is illegal as the grounds for termination cannot be sustained.

121. Both parties have relied on several authorities which to the extent required will be referred to if required and necessary.

122. On behalf of the Claimant in support of the proposition as to when time would be the essence of the contract, reliance has been placed on the following authorities.

(i) *Govind Prasad Chaturvedi vs. Hari Dutt Shastri & Anr.* (1977) 2 SCC 539, paragraph 5;

(ii) *Madhya Pradesh Housing Board vs. Progressive Writers & Publishers* (2009) 5 SCC 678, paragraph 27;

(iii) *Saradamani Kandappan vs. S. Rajalaxmi & Ors.* (2011) 12 SCC 18, paragraphs 20-21;

(iv) *Kailashnath Associates vs. Delhi Development Authority & Anr.* (2015) 4 SCC 136, paragraph 20;

(v) *Bastian Construction vs. Nusli N. Wadia & Ors.* MANU/MH/3543/2015, paragraphs 11 and 12;

On behalf of the Respondent, reliance is placed on the following judgments:-

(i) *M/s. Hind Construction Contractors vs. State of Maharashtra* (1979) 2 SCC 70;

(ii) *Chand Rani vs. Kamal Rani* (1993) 1 SCC 519;

(iii) *K. S. Vidyanandam vs. Vairavan* (1997) 2 SCC 1;

(iv) *P. R. Deb & Associates vs. Sunanda Roy* (1996) 2 SCC 423; and

(v) *Govind Prasad Chaturvedi vs. Haridutt Shastri* (1997) 2 SCC 539

123. The Tribunal has dealt on facts, on the issue of time being the essence of the contract and has dealt with the same in the earlier part of the Award. The present DA created an interest in immovable property.

124. The Claimant has relied on the following judgments in support of the proposition as to readiness and willingness to perform the essential part of the contract.

i) *Coromandel Indag Products Pvt. Ltd. vs. Garuda Chit & Trading Company Pvt. Ltd. & Anr.* (2011) 8 SCC 601, paragraph 20;

ii) *Nathulal vs. Phoolchand* (1969) 3 SCC 120, paragraphs 6 and 12;

iii) *J. P. Builder & Anr. vs. A. Ramdas & Anr.* (2011) 1 SCC 429, paragraphs 22 and 26;

iv) *P. D'Souza vs. Shondrilo Naidu* (2004) 6 SCC 649, paragraphs 19 and 21;

Respondent has relied on the following judgments.

i) *H. P. Pyarejan vs. Dasappa* (2006) 2 SCC 496;

ii) *Aniglase Yohanna vs. Ramlatha & Other* (2005) 7 SCC as quoted and approved in *Sitaram & Ors. vs. Radheshyam* (2007) 14 SCC 415;

iii) *N. P. Thirugnanam vs. Dr. R. Jaganmohan Rao & Ors*. (1995) 5 SCC 115, paragraph 5;

iv) *Vishal Kumar Kakad vs*. *Shankar Kubde* (2008) 1 BOM CR 513;

v) *Margappa Wale & Ors. vs. Tukaram Gavali* 2013 (5) All MR 261; and

vi) *Surinder Kaur vs. Bahadur Singh*, (judgment in Civil Appeal Nos. 7424-7425 of 2011 dated 11.09.2019, paragraphs 5 and 12) (**The Tribunal does not find that this judgment was referred to in the course of the arguments or made available to the Tribunal along with the written arguments.**).

125. The Tribunal has dealt on the facts and has recorded a finding that the Claimant had performed its obligations, which had to perform and its further obligations.

126. Claimant also relied on the following judgment in support of the proposition that breach of contract by one party does not terminate the obligation under the contract and the injured party has the option of treating the contract as alive.

State of Kerala vs. Cochin Chemical Refineries Ltd. AIR 1968 SC 1361, paragraph 10;

127. There can be no dispute on this proposition.

128. On behalf of the Respondent as to interest in the immovable property, reliance is placed on the following judgments:-

i) *Nirmal Infrastructure Ltd. vs. Aanant Developers Pvt. Ltd.* in Arbitration Petition (L) No. 1932 of 2015 decided on 26th

November 2015 by the Hon'ble Bombay High Court. Reference is made to paragraph 64;

ii) *Barses J.A. D'Souza vs. Municipal Corporation of Greater Mumbai,* 2003(4) MHLJ 451, paragraphs 7 and 10;

iii) *Ashok Kumar Jaiswal vs. Ashim Kumar Kar* (2014) 1 HCC (Cal) (56);

iv) *Heritage Lifestyle & Developers vs. Cool Breeze Cooperative Housing Society* 2014 (3) MHLJ 376, paragraphs 47 to 50;

129. Considering that there was a DA with right to the developer, a certain area for sale, it would create a right in immovable property.

130. It is the submission of the Respondent that it is the duty of the party to lead best evidence in his possession which could throw light on the issue and in case such material is withheld, the court may draw adverse inference against such party. For that purpose, reliance is placed on the following judgment:

Union of India vs. Ibrahim Uddin & Anr. (2012) 8 SCC 148

131. This issue will be considered on the facts of each case. The Claimant has produced the necessary evidence in support of its case.

132. It is further submitted that the truth and correctness of a public document shall be proved separately. Reliance is placed on the following judgment:

Om Prakash Berlia vs. Unit Trust of India, AIR 83 BOM 1

Under the provisions of the Act, the Tribunal is not bound by the strict rules of evidence, though the Tribunal will consider the principles thereof in considering what weightage is to be given to a document, whether public or private.

133. In the present case, considering the nature of the Development Agreement the same would create a right in immovable property as set out by the Division Bench of High Court of Bombay in paragraph 12(a) in *Chedda Housing Development Corporation vs. Bibijan Shaikh Farid & Ors.* 2007 (3) (MHLJ) 402.

134. The Tribunal does not propose to deal with the various judgments individually as the Tribunal has taken into consideration the ratios of these judgments and has dealt with the various aspects which need to be considered in granting a relief of specific performance.

135. In the opinion of the Tribunal, the Claimant was ready and willing and had performed its obligations which were to be performed in the course of the contract till the date of termination of the DA by the Respondent.

136. Considering the discussion, the Claimant in the ordinary course would have been entitled to a decree of specific performance, but for the subsequent events, the Tribunal cannot grant the relief of specific performance. However, the Claimant would be entitled to damages on account of the illegal termination of the D.A. by the Respondent. What

damages the Claimant would be entitled to will be discussed hereinbelow.

Issue Nos. 3 and 4

"3. Whether in addition to specific performance, the claimant is entitled to damages i.e. the sum of 25 Crores ?"

4. Whether in the alternative and without prejudice to the claimant's claim for specific performance and damages, claimant is entitled to payment as a sum of Rs. 80,62,00,000/- as per the statement of claim ?"

137. These two issues are dealt with together considering the claim for damages as also for the expenses incurred by the Claimant till the date of termination.

138. In terms of the documentary evidence on record, considering the recital to the DA and the letter dated 24.11.2007 from the Respondent to the Claimant, the Claimant had no right to construct in excess of 76,565 sq. ft. In terms of the said letter and as thereafter set out in the DA, the Claimant's members would be entitled to an area of 38,000 sq. ft. plus minimum 15% additional carpet area which would work out to 43,700 sq. ft. The Claimant thus would be entitled to the balance area of 32,865 sq. ft.

139. It is, however, the case of the Claimant as reflected in the oral evidence of CW-1 in paragraph 77 of the Affidavit of Evidence dated 30.12.2016, that the Claimant would be entitled to develop an area of 99,653 sq. ft.

and if the Claimant was to allocate 43,700 sq. ft. that would leave a saleable area of 55,953 sq. ft. In his cross examination in answer to Q.169, the witness CW-1 has agreed that the Claimant was entitled to develop a maximum of 76,565 sq. ft. However, considering the amendment to the DCR where 35% fungible FSI was notified, the Claimant would be entitled to develop 99,653 sq. ft. Even if the Claimant's case is considered, considering the acceptance of the Claimant's offer by the Respondent by their letter dated 24.11.2007 in the event there was any additional increase in FSI beyond the existing plot area of 3846 sq. mts. due to any changes in the Government policies after the date of signing of the Development Agreement, such additional increase in FSI exclusively belong to the Respondent. It is true that the Development Agreement does not reflect paragraph 8 of the letter dated 24.11.2007. The issue however is whether the subsequent amendment to the DC Rules whereby the concept of fungible FSI was created would be applicable. The concept of fungible FSI was basically created as to recompensate for considering the FSI of the balconies, etc. This concept was introduced pursuant to the directives by the Government of Maharashtra and after receiving suggestions and objections, it was notified and the circular was issued by the Municipal Corporation on 12.01.2012. The termination was by letter dated 08.02.2013. That would have to be considered for the purpose of computing damages.

140. At any rate what the Claimant would be entitled to would be to claim damages for the area of 32,865 sq. ft.

141. What is the evidence before the Tribunal, for the Tribunal to work out the damages that the Claimant would be entitled to.

142. The Claimant has firstly claimed for the expenses incurred by the Claimant in relation to the redevelopment of the property as reflected in paragraphs 76 of its Affidavit of Evidence. The Claimant has claimed expenses in an amount of Rs. 6,06,00,054/-. In support thereof, the Claimant has relied on the bank statements. The only cross of this witness on this aspect is Q.168. The witness was asked that the documents showing the expenses incurred in paragraph 76(a)(ii)(e) had not been produced on the record. The witness answered that apart from the bank statements, there is no other document. The witness further deposed that a separate account was maintained for Respondent society building. In other words, the expenses as reflected are for the account maintained for the Respondent society building. The various amounts are as set out in paragraph 76 of the AOE which gives the day and the amount which was paid. With the written arguments, at Annexure 3 the Claimant has filed a list of admitted expenses based on the admission of documents by the Respondent. That sum works out to Rs. 4,67,38,772/-.

143. On behalf of the Respondent, it is submitted that the Claimant is not entitled to refund of monies as per clause 5(c) of the DA. That clause provides that the Respondent will not be liable for any costs and expenses in case of termination due for any reason whatsoever. In the instant case, due to the default committed by the Claimant, the Claimant

is not entitled for the costs incurred by it. Alternatively, the Claimant has not proved the alleged expenses incurred. The Claimant has not produced the bank statement of the contemporaneous period in order to prove its alleged expenses. The bank statement produced by the Claimant is from April 2013 onwards which is after the termination of the DA. CW-1 in his cross examination has admitted that there are no other documents produced by him to claim the alleged expenses as set out in paragraph 76(a) to (e).

144. The Respondent would have been right in relying on clause 5(c) of the DA if the Tribunal had upheld the termination by the Respondent for the various breaches committed by the Claimant as alleged by the Respondent. The Tribunal has recorded a finding as discussed in the earlier part of the Award that the Respondent has failed to prove the breaches and/or there were no breaches of the D.A. committed by the Claimant. Clause 5(c) would therefore not bar the Claimant from claiming the expenses incurred for the project.

145. Even considering the contention of the Respondent that the bank entries are from 2013, the Claimant based on the documentary evidence on record and the admission and denial of the Claimant's documents as reflected in Annexure 3 of the written arguments and which was also handed over at the time of oral arguments, has set out the various documents which the Respondent has admitted, both as to existence and contents. Considering the same, the Claimant has at least proved

a sum of Rs. 4,67,38,772/-. This amount will have to be refunded by the Respondent to the Claimant.

146. The next question is what is the loss of profits that the Claimant would be entitled to on the area of 32,865 sq. ft. The Claimant in paragraph 77 of his Affidavit of Evidence has proceeded on the footing that he would be entitled to the profits on the entire saleable area of 55,953 sq. ft. at the then prevailing rate of Rs. 35,000 – Rs. 37,000 per sq. ft. The witness has claimed a profit of approximately Rs. 79.2 crores based on his experience as a developer and builder.

147. The Claimant in support of his claim for profits has examined as CW-2 Arvind Madan Mahajan, Retired Chief Engineer of MHADA who has submitted a valuation report regarding the estimate cost of project for construction of a high rise building on the subject property. He has fixed the date of estimation to be 01.07.2015 and has given the projected cost of the property on an area of 4595.3 sq. mts. as Rs. 93,98,12,375/- and expenses as Rs. 36,46,49,187/-, hence has worked out the cost margin as Rs. 57,51,63,188/-. From this report, it would be evident that the valuer has taken into consideration, fungible FSI to the extent of 35% for residential development. It has further come on record that this concept of fungible FSI has been created to compensate as areas of balcony, flowerbeds, terraces, voids, niches, etc. will be counted in the FSI. The total fungible built-up area claimed is 2595.036 sq. mts. In his cross examination, he has deposed that the portion available to the developer under the DA is 4467.14 sq. mts. He corrected himself to state that it

would be 3829.146 sq. mts., both of which are built-up areas. In the matter of his valuation, CW-2 for the purpose of finding out the prices of properties in answer to Q.25 has referred to some websites. He has also deposed that he is aware of the saleable rates of the properties in the vicinity of the location. In his opinion the rates reflected in the registered deeds and/or ready reckoner is lower than the market rates. He has deposed that he has considered the cost of construction as Rs. 2800/- per sq. ft. for sale building and Rs. 2200/- per sq. ft. for rehab building with an average cost of Rs. 2500/- per sq. ft. as per the Ready Reckoner of 2015.

148. The next witness examined is Shailesh Vinodkumar Wani (CW-4) who is Government registered valuer and Chartered Engineer. He has prepared two valuation reports on the instruction of the Claimant, one if construction had commenced in April 2013 and the other if construction had commenced in July 2015. In his opinion, if the construction had commenced in April 2013, the profit would be Rs. 52,74,00,000/- and if the construction had commenced in July 2015, the profit would be Rs. 61,99,00,000/-, subject to the assumptions and limiting conditions set out in the report. In paragraph 12, he has deposed that he has visited the website www.magicbricks.com and has searched for residential property rates for the periods October – December 2016, January – March 2015, January – March 2018 and January – March 2012.

149. The parties had advanced arguments as to what would be the area that would be available for development and the free sale component for the

Claimant. I have been unimpressed with the arguments advanced by the Claimant. The admitted position is that the Claimant could not construct more than 76,565 sq. ft. carpet area. The Respondent (its members) would be entitled to 43,700 sq. ft. carpet area. The builder would thus be entitled to 32,865 sq. ft. carpet area.

150. When the contract was entered into, the concept of fungible FSI had not been notified. At any rate, considering that the building has not been constructed and under the circular at S. No. 2 if IOD had been granted, owner had the option to continue the last approved plans, there was a choice to the owner. The Claimant at no point of time had intimated to the Respondent for their consent for use of fungible FSI. Even otherwise from the said circular at the highest if fungible FSI was to be used, considering direction No. 7 of the circular, it would only be for the Claimant's share. I am of the opinion that as no building plans were submitted to use the fungible FSI before the letter of termination, the Claimant cannot base its calculation to include the fungible FSI.

151. CW-4 has submitted two valuation reports, the first valuation report as on 01.04.2013. This valuation report will have to be considered, considering the date of termination. The valuation report proceeds on the basis that the total BUA available is 99,659 sq. ft. and the saleable BUA of the developer would be 62,958 sq. ft. What has to be considered are the terms of the DA under which the Claimant would be entitled to 32,865 sq. ft. carpet area. Otherwise considering his evidence, including

cross-examination, I am inclined to substantially accept his evidence based on sq. ft. carpet area calculations but with some modifications.

152. In the expense calculations, the construction cost is based on 99,659 sq. ft. built-up area multiplied by Rs. 2000, which works out to Rs. 19,93,18,000/-. Considering the other heads of expenses as given by the valuer, this will work out to Rs. 47,98,98,000/-.

153. CW-4 has taken Rs. 25,600/- per sq. ft. for saleable carpet area. For built-up area Rs. 21,333/- per sq. ft. and Rs. 16,000/- per sq. ft. for super built-up area. However, considering that the Claimant was entitled to 32,865 sq. ft. of carpet area, the valuation based on sale per sq. ft. of carpet area would have been the resalable basis. However, as the Claimant did not put up the construction, in my opinion, the reasonable method would be to consider the carpet area, but use the valuation for per sq. ft. of built up area, for computing the sale price, per sq. ft. of carpet area. This would work out to Rs. 70,11,09,045/- (Rs. seventy Crores eleven lakhs nine thousand forty five only). Thus, after subtracting the expenses towards construction which CW-4 has calculated as Rs. 47,98,98,000/-, the profit which the Claimant would be entitled to would be Rs. 22,12,11,045/-.

154. Thus the Claimant by way of loss of profits would be entitled to a sum of Rs. 22,12,11,045/- (Rs. twenty two crores twelve lakhs eleven thousand forty five only).

Issue No. 6:

"6. Whether the Claimant proves that the Respondent, its successors, representatives, agents, servants and any persons claiming through, under, is or in trust for Respondent are liable to be injured and/ or restrained from disposing and/ or assigning its right in respect of suit property and interfering with claimants possession of suit property ?"

155. In the instant case, admittedly, the Claimant is not in possession of the suit property as at least subsequent to the termination, another developer has entered on the property and commenced development. The Claimant's relief as held by the Tribunal is basically for breach of contract and therefore damages. The question whether the Respondent, its successors, etc. is or in trust for Respondent does not arise and consequently granting of the relief as prayed for is not possible. The issue has therefore to be answered in the negative and against the Claimant.

Issue Nos. 7 and 8:

"7. Whether the Respondent proves that there was failure on the part of Claimant to perform its part of the contract ?

8. Whether the Respondent (in its Counter Claim) proves that it is entitled to damages for a sum of Rs. 1,27,55,89,119/- or any other sum?"

156. While answering the Counter Claim, the Claimant to the Counter Claim will be described as the Respondent and the Respondent to the Counter Claim will be described as the Claimant.

157. Insofar as Issue No. 7 is concerned, the only case of the Respondent in the SOD/Counter Claim and in the oral evidence of RW-1 was that the Claimant had committed breaches and those were the only breaches as discussed in the earlier part of the Award. The Tribunal has rejected the Respondent's case and has held that the termination is illegal. The Respondent thus has been unable to prove that there was failure on the part of the Claimant to perform its part of the contract.

158. The Respondent by way of Counter Claim has alleged that the members of the Respondent society had to suffer mental trauma of continuing to stay in a dilapidated building and were unable to afford to move out especially on account of the breach of the Claimant. The members of the Respondent suffered from various ailments due to the breaches committed by the Claimant. Therefore, every member of the Respondent society is required to be compensated to the tune of Rs. 1 crore each for mental agony, trauma and harassment aggregating to Rs. 93 crores.

159. The Claimant in reply to this Counter Claim has denied that it has failed to perform its obligations under the DA. The Respondent it is submitted is not entitled to raise the issue of structural stability of the buildings on the property in the light of the stand taken by it in Appeal from Order (L) No. 14508 of 2015 in the Hon'ble Bombay High Court and the proceedings from which the said Appeal from Order arose.

160. The first question that would arise would be whether the Respondent can claim on behalf of its members. The dispute is between the Claimant

and the Respondent. Even considering the arbitral clause, the disputes between the Claimant and the members of the Respondent cannot be the subject matter of a dispute which would fall within the arbitral clause for the Tribunal to consider. This claim on this count itself should be rejected.

161. Secondly, the Counter Claim has to arise if there was a breach by the Claimant in the performance of its duties under the DA. The Tribunal has recorded a finding that there is no merit in the breaches as alleged by the Respondent. The question therefore of there being a cause of action on account of failure by the Claimant to perform the obligations does not arise.

162. In the cross examination of RW-1, Paresh Savla, it has emerged as under. The averments in the Counter Claim have been reiterated in paragraph 28 of his Affidavit of Evidence. In his cross examination, from Q. 153 to Q. 162, it has come on record that it was the Respondent's case as set out in Civil Application No. 14509 of 2015 in Appeal From Order (L) No. 14508 of 2015 that the 3 buildings were not in a dilapidated condition and that the Respondent members vacated the 3 buildings on 27.10.2015. He has also admitted that he has filed an Affidavit in connection with those proceedings that he was residing in his flat at his own risk. Another question that other members had also filed similar affidavits, he deposed that he does not know. He however admitted in answer to Q.158 that the stand of the Respondent in the suit from which the Appeal arose, the Respondents had taken the stand that the

buildings are capable of habitation. In answer to Q.151 he has admitted that the members of the Respondent had refused to vacate the premises despite the Claimant's notice requesting to vacate the premises and that the members of the Respondent were residing in spite of the notice by the Claimant asking them to vacate of their own free will and volition. Apart from this, no other member has been examined in support of the plea of mental agony and trauma nor has any medical reports been produced to that effect.

163. The evidence on record would clearly demonstrate that the members of the Respondent continued to reside in the building as in their opinion it was habitable and they continued to reside therein of their own free will and volition. There is also no medical evidence in support of the plea that the members have suffered mental trauma. The entire case of the Respondent was that its members suffered mental trauma of continuing to stay in a dilapidated building, whereas RW-1 in his cross examination has come on record to show that the buildings were habitable and the members chose to reside of their own free will and volition. This Counter Claim will therefore have to be rejected.

164. It is then pleaded that the demolition was carried out after 27.10.2015 and that under the new Redevelopment Agreement dated 02.08.2014, the possession was to be given within 30 months from the date of the commencement certificate to be issued by MCGM. The Claimant it is pleaded is therefore liable to pay reasonable market rent of the entitled area under the said Development Agreement. The fair market rent for

July 2010 agreed between the parties was Rs. 48/- per sq. ft. The Claimant is liable to pay fair market rent for the period of 8 years as the newly constructed building/respective flats shall be available only in 2018, i.e. 8 years from the agreed date of delivery of the respective flats under the Redevelopment Agreement dated 18.04.2008. The Claimant therefore it is submitted is liable to pay a sum of Rs. 31,40,82,119/- to the Respondent as damages for the loss suffered by reach member on account of breaches committed by the Claimant.

165. The Claimant in its reply to the Counter Claim has denied the case of the Respondent.

166. This claim again is espoused by the Respondent on behalf of its members and not on behalf of itself. This claim will have to be rejected also apart from merits on the same reasons given as set out in paragraphs 151 and 152 of the Tribunal's findings in respect of the 1st Counter Claim.

167. It may also be noted that pursuant to the agreement between the Respondent and M/s. Sheth & Sonal Developers dated 02.08.2014 under Clause 5.3 thereof, M/s. Sheth & Sonal Developers were to pay to the members of the Respondent for temporary alternate accommodation and under clause 5.4 the new developers were also to pay brokerage as a one-time measure for temporary alternate accommodation.

168. Also the Respondent terminated the DA with the Claimant by notice dated 08.02.2013. Under that Agreement, the Claimant was liable to

pay rentals in terms of the DA to the members of the Respondent towards rental accommodation for their alternate accommodation during redevelopment. The Claimant in fact was paying rental accommodation for 17 members, who had vacated the flats. The other members chose not to hand over possession and continued to reside in the premises and only vacated the premises after the Respondent had entered into a new Development Agreement with another Developer in 2015. The question therefore of the Claimant having to pay rent to the Respondent's members when the contractual obligation between the Claimant and the Respondent under the DA was terminated by the Respondent in February 2013 will not arise. This counter claim also will have to be rejected.

169. The next counter claim as claimed by the Respondent is to pay Rs. 10,000/- per day towards penalty to the Respondent from the agreed date for handing over possession, i.e. July 2010 as per the Redevelopment Agreement with the Claimant till the date the new flat is handed over to the members of the Respondent. There would be a delay of approximately 8 years in receiving the new flats. The Claimant is thus liable to pay Rs. 2,92,00,000/- to the Respondent as per clause 5(b) of the Redevelopment Agreement.

170. The Claimant in its reply to the Counter Claim has denied its liability and/or that July 2010 was the agreed date of handing over possession and that it is liable for any penalty till the new flat is handed over to the

members of the Respondent or that there was a delay of approximately 8 years in receiving the new flats.

171. Under clause 5(b) of the DA between the Claimant and the Respondent, the complete construction of the new building was to be within 24 months after all the members vacate their flats. There would be a further grace period of 3 months. In the event there was a delay beyond 27 months to 30 months, the Respondent would charge penalty at the rate of Rs. 10,000/- per day over and above the agreed compensation payable to the members in terms of the Agreement.

172. A reading of the said clause would therefore make it clear that the time to hand over possession of the newly constructed buildings would be 24 months after all the members of the Respondent vacate their flats. It is an admitted position that the members of the Respondent barring 17 did not vacate their flats. Clause 5(b) therefore would not be attracted. Alternatively the Respondent has not led any evidence of the loss suffered, if any considering Section 74 of the Indian Contract Act. This Counter Claim therefore will also have to be rejected.

173. The next Counter Claim is towards the costs towards litigation expenses. The amount has not been quantified.

174. The issue whether the Respondent is entitled to costs will be considered by the Tribunal while awarding costs.

175. The Respondent has also claimed expenses for protecting the building till it was demolished by putting tad patri and other material in a sum of

Rs. 23,07,000/-. The Claimant in its reply to the Counter Claim has denied that it is liable to pay the said amount.

176. The Respondent has been unable to prove how it is entitled to claim the said expenditure from the Claimant. As seen while discussing other counter claims, it was the case of the Respondent itself that the buildings were habitable and that they vacated the premises only in October 2015. This claim will therefore have to be rejected.

Issue No. 9

"9. On the amount if awarded, what interest and at what rate and from what date?"

177. The Tribunal whilst answering Issue Nos. 3 and 4 has held that the Claimant would be entitled to a sum of Rs. 4,67,38,772/- which are the expenses incurred by the Claimant for development of the property till its termination. The Claimant pursuant to the termination had invoked the arbitration clause by letter dated 03.04.2014. The DA does not provide for any interest. Under Section 31(7)(a) of the Arbitration and Conciliation Act, 1996, the Tribunal has discretion to award interest at such rate as it deems reasonable. In the instant case, based on the Development Agreement, the Claimant had expended monies. The Claimant therefore would be entitled to reasonable interest at the rate of 9% on the sum of Rs. 4,67,38,772/- from 03.04.2013 till the date of the Award.

178. From the date of the Award, the said sum of Rs. 4,67,38,772/- along with the interest calculated from 03.04.2013 till the date of the Award, will

carry further interest at the rate of 7% p.a. till final payment or realization considering the present rates on Fixed Deposits.

179. The Tribunal has also awarded damages in the sum of Rs. 361,446,000/-. The said sum will carry interest at 7% from the date of Award till final payment and/or realization.

Issue No. 10

"10. Who will bear the costs of the Arbitral Proceedings and if so, in what proportion?"

180. The Claimant has partly succeeded. The Respondent's Counter Claim has been rejected. The Claimant would be entitled to reasonable costs. The Tribunal called on the parties to submit their Bills of Costs in these proceedings. The Claimant has submitted its Bill of Costs in a sum of Rs. 2,52,24,500/- inclusive of Tribunal fees. In my opinion, reasonable costs to be awarded would be Rs. 1,50,00,000/-.

A W A R D

(a) The Respondent is directed to pay to the Claimant a sum of Rs. 4,67,38,772/- (Rs. four crores sixty seven lakhs thirty eight thousand seven hundred seventy two only) with interest thereon from 03.04.2013 till the date of the Award at 9% p.a. and further interest at 7% from the date of the award on the principal sum along with the interest awarded from the date of the Award, till final payment and/or realization.

(b) The Respondent is further directed to pay to the Claimant a sum of Rs. 22,12,11,045/- (Rs. twenty two crores twelve lakhs eleven thousand forty five only) with interest thereon at 7% p.a. from the date of the Award till final payment or realization.

(c) The Respondent to further pay to the Claimant costs quantified in a sum of Rs. 1,50,00,000/- (Rs. one crore fifty lakhs only). If the said amount is not paid to the Claimant within three months of the communication of the Award to the Respondent, the costs would carry interest at the rate of 7% p.a. from the date of the Award till final payment or realization.

(d) All other claims are rejected.

(e) All counter claims are rejected.

JUSTICE DR. F.I. REBELLO
SOLE ARBITRATOR

Place: Mumbai

Date: 26.10.2021