IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 354 OF 2024

SSD Escatics Private Limited **.....PETITIONER ORIG. RESPONDENT**

: VERSUS :

Goregaon Pearl Cooperative Housing Society Limited **....RESPONDENT ORIG. CLAIMANT**

Mr. Rajiv Narula a/w. Mr. Abhishek Bhadang and Mr. Tarang Jagtiani I.b. Jhangiani Narula and Associates, for the Petitioner.

Mr. Mayur Khandeparkar i/b Mr. Tushar Gujjar a/w. Mr. Deepak Singh and Mr. Lancelot Lewis i/b St. Partners, for the Respondent.

CORAM : SANDEEP V. MARNE, J.

JUDG. RESD. ON: 9 MARCH 2026.

JUDG. PRON. ON : 30 MARCH 2026

JUDGMENT:

1) The Petitioner has filed this Petition under section 34 of Arbitration and Conciliation Act, 1996 **(Arbitration Act)** challenging the award of the learned sole arbitrator dated 24 June 2023. By the impugned award, the Arbitral Tribunal has declared the Termination Notice dated 9 June 2018 terminating the Development Agreement **(DA)** and Power of Attorney **(POA),** both dated 26 September 2007, and of the Consent

Terms dated 16 May 2017 as valid, legal and binding. The Tribunal has further declared that the contract of redevelopment is terminated with effect from 9 June 2018. The Arbitral Tribunal has restrained the Petitioner from interfering with possession of Respondent-Society over the land and building in question. Petitioner is directed to the handover all original documents relating to redevelopment of the Society. The Arbitral Tribunal has also awarded claim in the sum of Rs.7,08,53,695.03/- in favour of the Respondent-Society. The Arbitral Tribunal has awarded costs of Rs.9,65,250/- in favour of the Respondent-Society. The counterclaims of the Petitioner are rejected.

FACTS

2) Respondent is a Cooperative Housing Society registered under the provisions of the Maharashtra Cooperative Societies Act, 1960. The Society was formed by owners and occupiers of 60 flats in Buildings B-3, B-4 and B-5 at Survey No.7, CTS No.27 at Siddharth Nagar, Goregaon (West), Mumbai, which was a part of MHADA layout. The Respondent-Society had 60 original members, who owned and occupied flats in the building of the Society. The Respondent-Society decided to go for redevelopment of its building. By resolution adopted on 18 June 2005, the Special General Body Meeting of the Society appointed Petitioner as the developer to carry out redevelopment of its building. A Redevelopment Agreement was executed between the Petitioner-Developer and Respondent-Society on 26 September 2007. A separate Power of Attorney was also executed in favour of the Petitioner on the

same day. The Municipal Corporation issued the Intimation of Disapproval (**IOD**) on 16 August 2007. In October/November 2007, the members of the society vacated their respective flats and handed over the possession thereof to the Petitioner. On 5 January 2008, the Petitioner issued Bank Guarantee of Rs. 5 crores in favour of the Respondent-Society. Commencement Certificate for construction of a building having two wings - Wing-A and Wing-B was issued by the Municipal Corporation on 17 June 2008, which was revalidated from time to time. On 4 August 2011, a stop work notice was issued to the Petitioner alleging that it carried out construction beyond the permissions. According to the Respondent-Society, the construction activities accordingly came to a halt on 4 August 2011. In the meantime, MHADA issued no objection certificate for utilization of FSI 2.5 subject to various conditions. Petitioner purchased additional tit-bit land from the MHADA Authorities by paying consideration amount of Rs.8,18,03,435/- and by virtue of the same, the original plot area got increased from the original 2543 sq. mtrs to 3747.81 sq. mtrs. The Petitioner got the plans amended from MCGM for availing concessional/fungible FSI. According to the Petitioners, correspondence took place for execution of supplementary agreement for sharing the additional FSI between the Petitioner and Respondent-Society. By the year 2013, Petitioner had completed construction of RCC structure of 'A' Wing building upto 7 floors and RCC work of 'B' Wing building of 21 floors.

3) On 14 March 2014, MCGM issued offer letter approving proposal for utilization of pro-rata FSI of 3.5 on payment of premium of Rs.10,54,17,300/-. It appears that the said amount was not paid by the Petitioner. On 12 September 2014, Petitioner issued a letter to the Respondent-Society seeking its consent for amalgamation of adjoining project of Kapil Vastu Society with Respondent-Society's land. The Respondent-Society requested the Petitioner to complete the project as per 2.4 FSI and accommodate all 60 members by granting them possession by letter dated 28th January 2015. Thereafter, correspondence took place between the Petitioner and Respondent wherein the Respondent-Society complained about stoppage of entire work. The Petitioner cited the reason of pending issues for sanction of additional FSI. Apprehending that the Respondent-Society would encash the bank guarantee, Petitioner filed Suit (L.) No.921/2015 in this Court, which was withdrawn on 7 January 2016. Respondent-Society thereafter invoked and encashed the bank guarantee of Rs.5 crores and appropriated Rs.2.5 crores towards arrears of tent and balance 2.5 crores towards share of profits and utilization of additional 1.00 FSI. The Respondent revoked the Power of Attorney on 16 August 2016.

4) In the above backdrop, Respondent-Society filed Arbitration Petition (L) No. 160 of 2017 under Section 9 of the Arbitration Act seeking various interim measures. On 7 July 2017, parties arrived at an amicable settlement and filed Consent Terms under which the liability of the Petitioner was fixed at Rs.7.62 crores and it was agreed that out of the encashed amount of bank guarantee, Rs.2.5 crores would be adjusted

towards arrears of rent and balance Rs.2.5 crores towards Society's share of profits in the additional FSI. Petitioner gave commitment to clear the balance amount towards transit rent and issued postdated cheques. Petitioner agreed to complete A-Wing building with part Occupancy Certificate by 30 June 2018 plus grace period of 4 months. It also agreed to complete B-Wing building on or before 31 December 2017 with grace period of three months. According to the Respondent Society, Petitioner committed breaches of Consent Terms and all the postdated cheques issued towards payment of rent, etc were dishonored. The Society filed Contempt Petition (L) No.24 of 2018 before this Court wherein a direction was issued by this Court on 6 March 2018 for payment of sum of Rs.5,42,16,436/- in four monthly installments. According to the Respondent-Society, except paying sum of Rs.1,72,72,145/-, the Petitioner did not make the payment as directed by this Court in the Contempt Petition. On 3 June 2018, the Society resolved to terminate the Development Agreement, Consent Terms and Power of Attorney. The decision of termination was communicated to the Petitioner by notice dated 9 June 2018. The Respondent-Society filed Petition under Section 9 of the Arbitration Act seeking injunctive reliefs against the Petitioner post termination. By consent of the parties, the disputes were referred to arbitration by appointing a sole arbitrator by converting Section 9 petition into Section 17 application.

5) After the Arbitral Tribunal comprising of the sole Arbitrator was constituted, the Respondent-Society pressed its application for interim measures. The Arbitrator passed order dated 17 September 2018

under Section 17 of the Arbitration Act granting various injunctive reliefs in favour of Respondent-Society permitting the Society to engage new developer and directed Petitioner to handover possession of the entire project to the Society. Petitioner challenged the order of interim measures of the learned Arbitrator by filing Appeal before this court, which was dismissed by order dated 14 December 2018. The Hon'ble Apex Court also dismissed the SLP preferred by the Petitioner-Developer and this is how order of the Arbitrator making interim measures attained finality. The flat purchasers attempted to intervene in the arbitration but the learned Arbitrator rejected the intervention application by order dated 27 February 2019.

6) One of the flat purchasers filed a suit seeking specific performance of agreement for sale executed in her favour in which City Civil Court passed order of temporary injunction restraining the society from alienating or creating third party interests in the flat allotted to her by the Petitioner-developer. In Appeal from Order filed by the Society, the order of temporary injunction was set aside by this Court on 14 October 2019. The Special Leave Petition preferred by the developer was dismissed by the Apex Court on 20 January 2020 and the order passed in the Appeal from Order attained finality. The arbitral proceedings were conducted before the learned sole Arbitrator. At the conclusion of the proceedings, the Arbitral Tribunal has made Award dated 24 June 2023, upholding the termination of Petitioner-developer and restrained it from interfering with possession of the Society of land and building. Petitioner is directed to handover all original documents relating to

redevelopment to the Society. The Arbitral Tribunal has also awarded monetary claim in the sum of Rs. 5,13,20,822.32/- in favour of the Respondent-society comprising amount of Rs.55,58,211/- towards costs incurred, Rs.3,72,24,290/- towards amount agreed to be paid under the Consent Terms alongwith interest of Rs.85,38,321.52/-. The Arbitral Tribunal has also awarded costs of Rs.9,65,250/- in favour of the Respondent-society. All the counterclaims of the Petitioner have been rejected.

7) The Award has been corrected by the Arbitral Tribunal by order dated 26 June 2023 by correcting the figure of interest from Rs.85,38,321.52/- to Rs. 2,80,71,194.03/-. This is how the final claim amount has been enhanced to Rs.7,08,53,695.03/-.

8) Aggrieved by the Award dated 24 June 2023, as corrected on 26 June 2023, the Petitioner-developer has filed the present Petition under Section 34 of the Arbitration Act.

SUBMISSIONS

9) Mr. Narula, the learned counsel appearing for the Petitioner submits that the Award of the Tribunal is grossly perverse as being rendered contrary to the contractual terms, violates public policy doctrine and is patently illegal. He first attacks various findings recorded in the award relating to validity of the termination notice. He submits that the findings of the Arbitral Tribunal in para-103 of the award that

the FSI was pegged at 2.4 is contrary to the Development Agreement dated 26 September 2007, clause-2 whereof permitted utilization of all available FSI and additional TDR by dividing the benefits between the parties. That specific admissions were made by the witness of Respondent-Society in answer to Question Nos.94 and 95 in this regard. That finding recorded in para-121 of the Award about amendment of plans without intimation of Society is contrary to clauses-9(a) and 9(g) of the Development Agreement, which did not require any prior intimation for amendment of the plans. That Consent Terms dated 16 May 2017 only condoned the previous alleged breaches and therefore, supplemental terms were arrived at between the parties. That under clause 39 of the Consent Terms, Respondent was required to issue NOC to MHADA for grant of further FSI, but it failed to communicate the withdrawal of revocation of POA to MHADA. That clause 40 of the Consent Terms required the Society to withdraw the termination notice and grant unconditional NOC for additional FSI and clause 41 required the Respondent-Society to grant NOC for obtaining finance. That such NOCs were not issued by the society thereby breaching the conditions of the Consent Terms. That the agreement between the parties is reciprocal in nature and since Respondent-Society failed to adhere to its contractual obligations, provisions of Section 67 of the Indian Contract Act, 1872 **(Contract Act)** became applicable, thereby relieving the Petitioner of the consequences of any breaches on its part. He relies on judgment of the Apex Court in ***Nathulal vs. Phoolchand***[1].

[1] (1969) 3 SCC 120

10) Mr. Narula further submits that the findings of the Arbitral Tribunal in para-166 of the award about the arrangement for grant of NOC for additional FSI not being inflexible is contrary to the express conditions of the Consent Terms. That further finding of the arbitrator in para-169 of the award that Respondent-Society factually granted NOC is contrary to the record since NOC dated 28 July 2017 was delivered to the Petitioner only on 26 September 2017, by which date the due date to perform had already passed by. That the observations of the arbitrator in para-170 of the arbitral award about non-payment of premium is perverse and recorded in ignorance of payment of Rs.3,32,31,778/- which remained credited to the Petitioner's account. That in view of failure to issue NOC by the Society, Termination Notice was illegal and contrary to the agreed terms. That the Arbitral Tribunal ought to have dismissed Society's claim.

11) Mr. Narula further submits that the Arbitral Tribunal has construed the contract in such a way that no fair-minded person would ever do so. He relies on judgment of the Apex Court in ***Associate Builders Versus. Delhi Development Authority***[2]**.**

12) Mr. Narula then proceeds to attack the award by contending that non-return of amounts spent by the Petitioner in the project which are benefits enjoyed by the society is contrary to the fundamental policy of Indian law. He submits that the award permits the Society to unjustly enrich itself by retaining the amounts towards rent, cost of construction, cost of purchased FSI, etc . That the Arbitral Tribunal has grossly erred in

[2] (2015) 3 SCC 49

not treating the various amounts spent by the Petitioner as 'benefits' received by the Society. That Petitioner paid sum of Rs.8,18,03,435/- for acquiring additional tit-bit plot area and sum of Rs.20,61,140/- for FSI for R.G. area. That Petitioner also incurred huge amount of cost for construction of the two buildings. That additionally Respondent-Society appropriated amount of Rs.2.5 crores towards their share in the additional FSI. That all these amounts spent by the Petitioner which are ultimately enjoyed by the Respondent-society are erroneously not treated as benefits by the Society. He submits that Arbitral Tribunal's refusal for restoration of benefits to the Petitioner upon termination of contract and non-award of damages in view of Clause-22 of the DA is contrary to Sections 64 and 73 of the Contract Act. He relies on judgment of the Madras High Court in ***Mundakath Mathu vs. Chalora Illath Vishnu Nambudripad and others***[3] in support of his contention that upon avoidance of the contract, a party avoiding it is under statutory obligation to restore the benefits. He submits that a party cannot reject the contract yet retain the advances derived therefrom. Mr. Narula further submits that Clause 22 of the DA is in the teeth of provisions of Section 23 of the Contract Act as it seeks to prohibit a party from approaching the Court for recovery of damages which is against the public policy of India. That this issue was specifically raised before the Arbitrator. He also relies on judgments of the Apex Court in ***Asian Techs Limited vs. Union of India and Ors.***[4], ***Board of Trustees for the Port of Calcutta vs. Engineers-De-Space-Age***[5] and of Delhi High Court in ***MBL***

[3] AIR 1932 Mad 303
[4] (2009) 10 SCC 354
[5] (1996) 1 SCC 516

Infrastructures Ltd. vs. Delhi Metro Rail Corporation[6]**.** In support of his contention that any contractual terms which denies compensation is void and unenforceable, Mr. Narula relies on judgments of this Court in ***Mumbai Metropolitan Region Development Authority vs. Mumbai Metro One Private Limited***[7] and ***Regus South Mumbai Business Centre vs. Marie Gold Realtors Private Limited***[8].

13) That the Arbitral Tribunal has erroneously refused to treat the rent paid by the Petitioner as not a benefit received by the Society members. That the Arbitral Tribunal has erroneously relied on mere interim order passed by this Court in ***Borivali Anamika Niwas CHSL vs. Aditya Developers and Ors.***[9] wherein some observations are made for considering entitlement of parties to interim measures under Section 9 of the Arbitration Act. That the judgment in ***Borivali Anamika Niwas CHSL*** cannot be read to mean an abstract principle that construction costs incurred by a developer can never amount to benefit received by the society or its members. He submits that various judgments on the other hand clearly lay down a law for return of benefits under Section 64 of the Contract Act upon rescission of the contract. He relies on judgments in ***Chacko and Ors. vs. Sreeja and Anr.***[10], ***Mohammad Mumtaz Ali Khan and Anr. vs. Altaf-ul-Rahman Sheikh and Anr.***[11] and ***Muralidhar Chatterji vs. International Film Company Ltd.***[12] That costs

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6 2023 SCC OnLine 8044

7 Commercial Arbitration Petition No.427 of 2024 decided on 24 February 2026

8 Commercial Arbitration Petition No.439 of 2024 decided on 25 November 2026

9 2020 SCC OnLine Bom 10632

10 1990 SCC OnLine Ker 327

11 1922 SCC OnLine Oudh JC 87

12 1942 SCC OnLine PC 35

of construction and payments made by the Petitioner for purchase of FSI and additional FSI are benefits received by the Society, which must be returned upon termination of the contract. That it is clearly against public policy to permit a party terminating the contract to retain the benefits arising out of it.

14) Mr. Narula further submits that even if compensation is denied to the Petitioner under Section 73 of the Contract Act, the benefits received by the Respondent-Society must be returned under Section 64 of the Act. That there is no contractual prohibition between the parties for restoration of the benefits received by the Society. That in the present case, the Respondent-Society has unjustly enriched itself by retaining the entire construction put up by the Petitioner and also by utilising the FSI purchased by the Petitioner. That the learned Arbitrator has not considered the case of the Petitioner for restoration under Section 64 of the Contract Act and has conflated the same with the concept of compensation under Section 73 of the Act. That the Petitioner has made investment of over Rs.300 crores in the project and since the society has enjoyed the benefits of such investment, the same must be returned to the Petitioner upon rescission of the contract.

15) Mr. Narula relies on the provisions of Section 27 of the Specific Relief Act, 1963 in support of his contention that several third party rights have been created during subsistence of the contract and that the learned arbitrator ought to have invalidated illegal rescission of

the contract by the Society by taking into consideration the factum of third-party rights.

16) Lastly, Mr. Narula would submit that voluminous documentary evidence was produced by the Petitioner in support of the claim for damages and benefits to the Responding-Society. That no cross-examination was conducted on behalf of the Respondent-Society in respect of the evidence so led. However, the learned Arbitrator has erroneously not awarded loss of profits because of insufficiency of evidence, which finding is contrary to the judgment of this Court in ***Harish Loyalka and Another vs. Dilip Nevatia and Others***[13]. On above broad submissions, Mr. Narula would seek invalidation of the impugned award.

17) The Petition is opposed by Mr. Khandeparkar, the learned counsel appearing for the Respondent-Society. He submits that the Petitioner has failed to make out even a single valid ground of challenge as enumerated in Section 34 of the Arbitration Act for invalidating the impugned award. He submits that the Arbitral Tribunal has conducted an in-depth analysis of contractual provisions, correspondence between the parties and evidence before it and has thereafter arrived at a finding that the termination of the DA is legal and valid. He submits that despite execution of the DA on 26 September 2017, all that the Petitioner did by 9 June 2018 by which time DA was terminated, was to merely construct a bare shell rehab component building. That the construction at site had come to an absolute halt since 2011 and Petitioner-developer had

[13] 2014 SCC OnLine 1640

defaulted in payment of rent to the members. That in such circumstances, termination of the DA executed with the developer not causing any construction at the site is rightly upheld by the Arbitral Tribunal. That there was no construction at the site after the Municipal Corporation issued stop work notice on 4 August 2011. He submits that the Petitioner was forced to enter into Consent Terms after this Court noticed *prima facie* forgery and fabrication in the Commencement Certificate on 7 December 2016. However, none of the obligations under the Consent Terms are fulfilled by the Petitioner. That all the post-dated cheques issued by him towards payment of rent/ compensation were dishonoured. That even order passed in Contempt Petition for payment of sum of Rs.5.42 crores was not honoured by the Petitioner. That Respondent-Society, waited for more than a year for Petitioner to act in terms of the Consent Terms, finally was left with no other alternative but once again terminate the DA and POA on 9 June 2018. Mr. Khandeparkar places on record submissions filed before the Arbitral Tribunal and invites my attention to various breaches of the DA as well as of the Consent Terms highlighted therein.

18) Mr Khandeparkar further submits that the Arbitral Tribunal has taken note of material breaches committed by the Petitioner, both of the DA as well as of the Consent Terms. That findings of facts recorded by the Arbitral Tribunal in respect of such breaches do not warrant interference in exercise of jurisdiction under Section 34 of the Arbitration Act.

19) Mr. Khandeparkar then justifies the Arbitral Tribunal not awarding any damages and not returning the expenditure incurred by the Petitioner developer by inviting my attention to clauses-9(h), 22, 42 and 47 and 53 of the D.A. wherein the developer specifically agreed not to claim damages or compensation in the event of breach of contract. The Arbitral Tribunal is justified in not awarding the same by giving effect to the contractual terms agreed between the parties. He relies on judgment of the Apex Court in ***Steel Authority of India Ltd. versus. J.C. Budharaja, Government and Mining Contractor***[14] in support of his contention that it is not open to the arbitrator to ignore the agreed terms of contract which are binding on the contracting parties. He relies on Section 28 of the Arbitration Act in support of his contention that the Arbitral Tribunal was bound to render the award strictly in terms of the contractual stipulations agreed between the parties. He submits that in ***Borivali Anamika Niwas CHSL*** (supra), this Court has specifically held that mere investment of money into the project by the developer does not create any equity and the expenditure in the project is not a handout to the society members. He also relies on judgment of this Court in ***Rajawadi Arunodaya CHS Ltd. vs. Value Projects Pvt. Ltd.***[15] in support of his contention that mere creation of third-party rights by the developer does not make any difference as the developer takes the risk of satisfying those third-party purchasers who are strangers to principal agreements with no obligation on the Society. He submits that the society ultimately is the owner of the property. Mr. Khandeparkar further submits that if a law is declared even while making an interim order by

[14] (1999) 8 SCC 122

[15] 2021 SCC OnLine Bom 9572

this Court, the law declared therein cannot be ignored only on the ground that what court decided was a mere prayer for interim injunction. He relies on judgment of this Court in ***IREP Credit Capital Pvt. Ltd. vs. Tapaswi Mercantile Pvt. Ltd. and Anr.***[16] That therefore, the Tribunal has rightly relied upon judgment of this Court in ***Borivali Anamika Niwas CHSL***.

20) Mr. Khandeparkar further submits that the development agreements are special types of contracts, which cannot be interpreted like regular commercial contracts. That consideration under Section 2(d) of the Contract Act can also be negative consideration. That DA is a negotiated document under which parties have agreed on a condition that the developer will not make a claim for expenses/investments made in case of breach/termination, which forms negative consideration for execution of the contract. That various clauses of the DA were never challenged before the learned Arbitrator nor a declaration was sought that the same are void or contrary to law. That therefore, arbitrator being a creature of contract, cannot decide the claims against the terms of the contract.

21) Mr. Khandeparkar further submits that amounts allegedly paid by the Petitioner to MHADA/MCGM are claimed as a part of compensation in the counterclaim and not as restoration of benefits under Section 64 of the Contract Act. That therefore, Petitioner cannot now turn around and claim that the said amounts must be restored to it

[16] 2019 SCC OnLine Bom 5719

as a part of benefit under Section 64 of the Act. He further submits that the learned Arbitrator has therefore rightly treated the counterclaims raised by the Petitioner as claim for compensation within the meaning of Section 73 of the Contract Act. That the view taken by the learned Arbitrator in treating the counterclaims as compensation is plausible view not warranting any interference in exercise of powers under Section 34 of the Arbitration Act. Without prejudice, he submits that restitution would otherwise form compensatory damages, as held by the Madras High Court in ***E-merge Tech Global Services P Ltd. vs. M.R. Vindhyasagar and Anr.***[17].

22) Mr. Khandparkar relies on judgment of Division Bench of this Court in ***Vilayati Ram Mittal (P) Ltd. vs. Reserve Bank of India***[18] in support of the contention that clauses in the contract providing for non-payment of compensation are enforceable in law. He also relies on judgment of the Apex Court in ***Associated Engineering Co. vs. Government of Andhra Pradesh and Anr.***[19] He relies on judgment of the Apex Court in ***Union of India and Ors. vs. Larsen & Tubro Limited***[20] in support of his contention that the Apex Court has enforced covenant in the contract for non-payment of interest. Mr. Khandepakar further submits that the any dispute about Petitioner's entitlement to compensation contrary to various contractual clauses, would fall outside the jurisdiction of the arbitrator. That the entitlement of Petitioner to compensation and restoration of benefits is determined by the Tribunal

17 2021 SCC OnLine Mad 17022
18 2017 SCC OnLine Bom 8479
19 (1991) 4 SCC 93
20 2026 SCC OnLine SC 327

as per the contractual terms and that therefore even if the arbitrator commits any mistake in interpreting the terms of the contract, it would be an error within its jurisdiction not warranting interference by Section 34 Court. He relies on judgment of this Court in ***Goa Shipyard Limited vs. Shoft Shipyard Pvt. Ltd.***[21] in support of his contention that mere erroneous application of law by the arbitrator cannot be a ground for interference in the award.

23) Mr. Khandeparkar further submits that the rights of the developer during the term of DA are subservient and imperfect rights which get perfected only upon full compliance with the terms of DA and upon handing over of flats to the members. That the right of the developer has not been perfected in the facts and circumstances of the present case. He relies on judgment of this Court in ***Vaidehi Akash Housing Pvt. Ltd. vs. New D.N. Nagar Co-op. Housing Society Union Ltd. and Others***[22] in support of his contention that right of the Petitioner-Developer to sell flats and to earn profits does not get perfected until fulfilment of all obligations under the DA. That the developer has entered into the DA with full knowledge of non-entitlement for any compensation in the event of termination of contract on account of his breaches and therefore it cannot now be permitted to wriggle out of such contractual obligations.

24) Mr. Khandeparkar further submits that what is ultimately taken by the arbitrator in the facts of the present case is a plausible view

[21] Arbitration Appeal No. 38 of 2024 decided on 26 April 2024.

[22] 2014 SCC OnLine Bom 5068

which cannot be interfered with by Section 34 Court. In support, he relies upon judgment of the Apex Court in ***Consolidated Construction Consortium Ltd. vs. Software Technology Parks of India***[23]. He submits that even if any error is traced in construction of contractual terms by the Arbitral Tribunal, the same would at the highest be an error within the jurisdiction. He relies on judgment of the Apex Court in ***Ramesh Kumar Jain vs. Bharat Aluminium Company Limited (BALCO)*** [24] in support of his contention that even an award which is based on little or no evidence cannot be invalidated on that score and that even decisions taken by the arbitrator on equity which are just and fair cannot be overridden by Courts under Sections 34 and 37 of the Arbitration Act. He submits that in addition to clause 22 of the DA, the decision of the arbitrator not to return alleged expenses incurred by the Petitioner or alleged benefits received by the society is also justified on account of other contractual clauses in the agreement. He relies on judgment of the Apex Court in ***OPG Power Generation Pvt Ltd. Vs. Enexio Power Cooling Solutions India Pvt. Ltd. and Anr.***[25] in support of his contention that it is open for Section 34 Court to justify the underlying reasons in the arbitral award by taking into consideration the entire material produced before the Arbitral Tribunal. Mr. Khandeparkar further submits that the award of the Arbitral Tribunal results in a situation where the society has ultimately completed construction of the building and its members are put back in possession of their respective homes. That the Arbitral Tribunal has awarded mainly the claim for arrears of

[23] (2025) 7 SCC 757
[24] 2025 SCC Online SC 2857
[25] (2025) 2 SCC 417

rent which are expressly agreed in the consent terms. That the issue of rent not representing benefit to the society Members is settled by judgment of this Court while rejecting Petitioner's appeal against Section 17 order. He therefore submits that no case is made out by the Petitioner-developer for interference in the impugned award. He would pray for dismissal of the petition.

REASONS AND ANALYSIS

25) The present case is an example of a tragic saga where the hopes of members of the Respondent-society to secure bigger, better and more comfortable homes through redevelopment process resulted in a long ordeal where they were dishoused back in the year 2007 and were kept waiting for newly built homes for next 11 long years. The transit rent was stopped by the Petitioner-developer. The society terminated the DA and encashed the Bank Guarantee for recovery of arrears of transit rent. The parties however entered into consent terms and one more opportunity was given to the Petitioner-developer to complete the project. However, Petitioner was again unable to complete construction of the building and the Society once again terminated the DA and completed the balance construction of the building on its own. The Arbitral Tribunal has upheld the termination and has directed the Petitioner-developer to pay to the Society the amounts agreed to be paid under the Consent Terms towards arrears of rent, etc along with interest. The counterclaims of the Petitioner-developer were towards return of amounts spent in the project and damages/compensation for loss of

profit which have been rejected by the Tribunal. The Petitioner-developer is aggrieved by the impugned award and has filed the present Petition under Section 34 of the Arbitration Act.

26) The net result of the arbitral award is that the Petitioner is out of the project, it has lost all investments made in the project and the society is relieved of the liability towards third parties to whom the Petitioner had sold the flats. Petitioner is also made liable to pay the arrears of transit rent, etc to the society members.

VALIDITY OF TERMINATION OF DA

27) The principal issue before the Arbitral Tribunal was about validity of the termination notice dated 9 June 2018 by which the DA is terminated. Since the DA is terminated alleging breaches by the Petitioner-Developer, the Society was required to prove before the Tribunal commission of breaches of the contractual clauses of the DA and of the Consent Terms by the Petitioner. The Arbitral Tribunal has ruled in favour of the Respondent-Society by holding Petitioner responsible for breaches of DA and of Consent Terms and has held the termination notice to be valid.

28) It would be necessary to consider the broad contractual arrangement between the parties under the DA. The first recital to the DA indicates that MHADA had constructed the old buildings of the Society consisting of 60 flats and had allotted the same to various

allottees who collectively formed the Respondent Society. Under clause 2 of the DA, parties agreed that total FSI to be exploited was 2.4 and in the event the Developer was allowed to load any further TDR on the plot, the benefits accrued to it from additional/surplus construction shall be divided between the Developer and the Society in equal ratio. Under clause 9(e), Developer agreed to consult the Society in regard to the construction work carried out by it by providing copies of all letters and correspondence as well as plans/approvals without any specific request made by the Society. Under clause 9(f), the Developer provided unconditional undertaking to abide by provisions of Mumbai Municipal Corporation Act, 1888, Development Control Regulations, 1991, Maharashtra Housing and Area Development Act, 1976 which govern the use of FSI/TDR and indemnify the Society in respect of any violation thereof. Under clause 9(g), the Developer agreed that any modification/changes in the annexure attached to DA were to be mutually discussed with the Society and such changes made in the new annexure would replace the redundant annexure without modifying the other clauses of DA. Under clause 9(h), parties agreed that the Society shall have right to exploit all the rights and liberties of the Petitioner arbitrarily in case of any default on the part of the Developer. Under clause 9(k), the Society was absolved of any liability towards third party purchasers of flats.

29) Under clause 10(3) of the DA, the Developer was liable to pay compensation or license fee/rent towards alternate accommodation to all 60 members till they were put in possession of new flats after

obtaining full occupation certificate. Under clause 22, the Society was at liberty to terminate the DA in the event of Developer failing to complete the project even after three months extension and to appoint a new developer to complete the reconstruction. Most importantly, it was agreed between the parties that Developer will have no right to claim any damages or compensation from the Society and Developer would forgo its right to sell the commercial premises which are part of saleable portion of the flats. Under clause 27, an indemnity was given by the Developer to the Society. Under clause 42, the Developer agreed to bear and pay all costs of construction including all costs, charges and expenses for obtaining various approvals, permissions, etc. Under clause 47, the Developer agreed not to ask for any amount or contribution from the Society or its members towards expenses for putting of the construction. Under clause 53 (iii), it was agreed that the DA was not to be construed as partnership or joint venture or agreement of partnership and that the same was be on 'principal to principal' basis.

30) The Respondent-Society alleged various breaches of the DA by the Petitioner. The broad allegations of breaches are as under:

a. Breach of clause (2) by using 3.5 FSI contrary to agreed cap of FSI 2.4,

b. Breach of clause (3) by exceeding the maximum cap of 860 sq.ft. carpet area by constructing flats in A Wing of 866 sq. ft. and B Wing of 1006 sq.ft.

c. Breach of clause 9(f) by committing violation of planning norms leading to issuance of stop work notice by MCGM on 4 August 2011 and by executing work beyond CC,

d. Breach of clause 9(g) by changing the plans without the consent of the Society,

e. Breach of clause 10(1)(a) by committing default in payment of rent from 2014 onwards,

f. Breach of clause 10(1)(b) by not increasing the rental compensation by 10% despite passage of period of 25 months from the date of issuance of CC,

g. Breach of clause 22 by not completing construction within 25 months of issuance of CC dated 17 August 2002,

h. Breach of Annexure-I by not providing amenities listed therein.

31) As observed above, though disputes arose between the parties in the year 2017 and the society encashed the bank guarantee, the parties entered into Consent Terms before this Court on 16 May 2017 in Petition filed under Section 9 of the Arbitration Act. The broad agreement executed in the Consent Terms included fixing the total liability of Petitioner in respect of arrears of rent of Rs.7,62,20,000/- which was agreed to be paid by the Petitioner under two mechanisms. Petitioner agreed to pay sum of Rs.5,12,20,000/- in various instalments upto 30 November 2017. The balance amount of Rs.2,50,00,000/- was agreed to be adjusted from the amount of Rs.5,00,00,000/- encashed by the Respondent-Society towards bank guarantee. The rest of amount of Rs.2,50,00,000/- from Bank Guarantee was to be adjusted against

Society's share in respect of use of additional FSI by the Petitioner-Developer. Petitioner agreed to complete A and B Wings buildings within the extended timeline of 30 June 2018 (plus four months grace period) and 31 December 2017 (with three months grace period) respectively.

32) According to the Respondent-Society, Petitioner has committed following material breaches of the Consent Terms:

a. Payments agreed towards transit rent due on 30 August 2017, 30 September 2017, 30 October 2017 and 30 November 2017 are not paid,
b. Seven post dated cheques issued by Petitioner for Rs.24,00,000/- each for rent of seven months from 1 May 2017 to 31 December 2018 were dishonoured,
c. Brokerage of Rs.40,000/- per member as agreed under clause 4 of Consent Terms was not paid. Breach of clause 5 of Consent Terms which provided for payment of penalties for not paying the same,
d. Breach of clause 15 for construction of permanent wall as well as wall between Respondent-Society and Kapil Vastu Society, which was not constructed,
e. Breach of clause 17 for providing flats to the 32 members of A-Wing having a carpet area of minimum 1006/1010 sq.ft.
f. Breach of Clauses 24 (a) and (b) relating to timelines for completion of Wing A and Wing B.
g. Breach of Clause 33 relating to opening of escrow account.

33) The Arbitral Tribunal has done a detailed analysis of breaches committed by the Petitioner in respect of the Development Agreement. In paragraphs 102 to 111 of the Award, the Arbitral Tribunal has held that the Petitioner committed breach of contractual covenant of utilization of FSI 2.4 by carrying out construction in excess of the FSI cap. Mr. Narula has argued that there is perversity in this finding of Arbitral Tribunal since clause (2) of the DA envisaged use of FSI in excess of 2.4 and that the finding of the Arbitral Tribunal is contrary to the contractual stipulation. He has also relied upon admissions given by Respondent's witness in answer to question Nos.94 and 95 in support of his contention that finding is contrary to the evidence on record. In my view, however, clause (2) of the DA provided for sharing of benefit arising out of loading of any further TDR on the flat in equal proportions between Petitioner and Respondent. The Arbitral Tribunal has construed clauses (2), (3), 9(h) read with Schedule-I of the DA and has thereafter recorded a finding that the FSI was restricted to 2.4. As a matter of fact, breach of clause (2) can also be inferred from the fact that Petitioner subsequently agreed to shell out 50% amount of encashed bank guarantee towards share of Respondent-Society in the additional FSI. The amount was agreed to be shared only after the society encashed the bank guarantee and was not paid to the society contemporaneously when Petitioner carried out construction in excess of FSI 2.4. So far as the admissions by Respondent's witness are concerned, the Arbitral Tribunal has recorded a plausible finding that witness' understanding of the clause did not make any difference and that her answers were required to be understood in the context of answers to other questions. I

therefore do not find any perversity in the findings recorded by the Arbitral Tribunal *qua* the issue of FSI cap of 2.4. The Tribunal has constructed the contractual clauses of the DA and the said exercise is within its exclusive domain. The construction of contractual clauses by the Tribunal for recording findings about violation of FSI cap cannot be termed as so irrational that no fair-minded person would ever record the same. Reliance by Mr. Narula on judgment of the Apex Court in ***Associate Builders*** (supra) in this regard is therefore inapposite.

34) The Arbitral Tribunal thereafter considered the events that occurred during subsistence of the DA, amendments effected by the Petitioner to the status of project from composite to non-composite as well as amendments in the Plans. The Tribunal has held that the Plans were amended without prior intimation to the Respondent-Society nor consent of the Society was obtained before applying for the same. Mr. Narula has sought to rely on clauses 9(a) and 9(g) of the Development Agreement in support of his contention that prior intimation to the Society was not required to be given. However, the Arbitral Tribunal has held that clauses 9(a) and 9(g) of the DA required consultation with the Respondent-Society and its approval to the changes effected in the construction plans. The Arbitral Tribunal has accordingly held Petitioner liable for amendment of plans during subsistence of DA without consultation and approval of the Respondent-Society and I again do not find any element of perversity in the said findings recorded by the Arbitral Tribunal.

35) The Arbitral Tribunal thereafter considered various other breaches on the part of the Petitioner-Developer in paragraphs 134 to 150 of the Award. No attempt is made to indicate an element of perversity in respect of other breaches in paragraphs 134 to 150 of the impugned Award.

36) The factual findings recorded by the Arbitral Tribunal in respect of breaches committed by the Petitioner-Developer of various contractual obligations under the Development Agreement cannot be termed as perverse. It is not necessary to delve deeper into the findings of the Tribunal about breaches of DA by the Petitioner as commission of those breaches is an admitted position. This is clear from the plea is raised by the Petitioner before me that execution of Consent Terms dated 16 May 2017 condoned the previous breaches and such plea contains implicit admission of commission of various breaches of the DA by the Petitioner.

37) The Arbitral Tribunal thereafter considered allegations relating to breaches of the Consent Terms committed by the Petitioner-Developer in paragraphs 155 to 172 of the Arbitral Award. Mr. Narula has contended that there were reciprocal agreements in the Consent Terms and that the Respondent Society committed breach of its reciprocal obligations under the Consent Terms. It is contended that under clause 40 of the Consent Terms, the Society was supposed to withdraw the termination notice and grant unconditional NOC for additional FSI. It is contended that under clause 41 of the Consent Terms Respondent-

Society was supposed to grant NOC for obtaining finance. Petitioner contends that since both the obligations under clauses 40 and 41 of the Consent Terms are not fulfilled by the Respondent-Society, provisions of Section 67 of the Contract Act are attracted in the present case and the Petitioner would get excused of any neglect or refusal in respect of non-performance of contract. Reliance is placed in this regard on judgment of the Apex Court in ***Nathulal vs. Phoolchand*** (supra).

38) However, perusal of various findings recorded by the Arbitral Tribunal in the impugned Award would indicate that delay in issuance of NOCs by the Society as per clauses 40 and 41 of Consent Terms are raised more as pretext to escape the consequences of breaches of Consent Terms and that non-issuance/delay in issuance of NOC did not come in the way of Petitioner performing its contractual obligations under the Consent Terms. The Tribunal has taken note of the fact that while opposing Contempt Petition filed by the Society for breach of Consent Terms to pay various amounts, no grievance was raised by Petitioner about failure on the part of Respondent to issue NOC for additional pro-rata FSI. There is also no dispute to the factual position that NOC was actually issued by the Society in accordance with the Consent Terms. There is also nothing perverse in finding recorded in paragraph 166 of the Award that parties themselves understood the stipulation for grant of NOC for additional FSI which was not inflexible and that the NOC could be granted as and when needed. In any case, the alleged delay in issuance of NOC for additional FSI did not come in the way of Petitioner performing its contractual obligations.

39) Petitioner's reliance on provisions of Section 67 of the Contract Act does not cut any ice. Section 67 of the Contract Act provides thus:

> **67. Effect of neglect of promisee to afford promisor reasonable facilities for performance.—**
>
> If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

40) Section 67 of the Contract Act excuses the promisor only in respect of non-performance caused by the neglect or refusal by the promisee to afford reasonable facilities for performance of the promise. The Petitioner has not been able to demonstrate as to how delay in issuance of the NOC came in his way of making various payments towards arrears of transit rent to the members of the Society. Therefore, reliance by the Petitioner on judgment of the Apex Court in ***Nathulal vs. Phoolchand*** (supra) does not assist the case of the Petitioner. There is nothing in the Consent Terms to infer that obligations were to be performed in a certain sequence and that therefore delay in issuance of NOC had impact on performance of contractual obligations by the Petitioner-Developer.

41) The Arbitral Tribunal has held that MHADA's offer letter for additional FSI dated 16 April 2018 was issued as per the Society's NOC and that Petitioner was required to pay the requisite amount of premium to MHADA and/or to the Municipal Corporation. The Petitioner did not produce before the Arbitral Tribunal any documentary evidence about making of premium payment to MHADA and or to the Municipal

Corporation. Thus, despite grant of NOC by Society for release of additional FSI, it is Petitioner-Developer who failed to avail the same by paying requisite premium to MHADA/MCGM. Therefore, even if it is assumed arguendo that there was any delay in issuing of NOC by the Society, ultimately it is an admitted position that on 16 April 2018 MHADA did issue the offer letter for additional FSI and the Petitioner did not avail the same by making payment of premium.

42) Petitioner has sought to question finding of fact recorded by Arbitral Tribunal in paragraph 170 of the Award about failure to pay premium by contending that an amount of Rs.3,32,31,778/- was already paid by Petitioner to MHADA, which was lying to the credit of Petitioner's account and that a request was made by the Petitioner to the Respondent-Society to transfer the said credit.

43) MHADA's Offer Letter dated 16 April 2018 required Petitioner to pay premium of Rs.7,52,93,898/- in four instalments. The Offer Letter also required payment of offsite infrastructure charges to MCGM.

44) I have gone through letter dated 31 May 2018 addressed by the Petitioner to the Society. The said letter talks of making of Application dated 16 April 2018 by Petitioner to MHADA for transferring the unutilized balance FSI in favour of Goregaon Pearls CHS Ltd which was earlier issued in favour of Siddharth Nagar Kapil Vastu CHS Ltd. for total additional BUA of 2410.75 sq.m. Thus, letter dated 31 May 2018 was not for transfer of the amount of Rs.3,32,31,778/- allegedly lying credited

to Petitioner's account against offer letter issued by MHADA for additional FSI subject to payment of premium. In any case, how amount allegedly paid by Petitioner for amalgamation of another plot, for its own benefits, can be treated as discharge of liability to pay the demanded premium by MHADA for completion of construction of building of Respondent Society is incomprehensible. The plea in this regard sought to be raised by the Petitioner is thus totally baseless.

45) It is also admitted position that Petitioner-Developer did not comply with construction timelines as set out in clause 24 of the Consent Terms. In view of the above, I do not find any element of gross perversity in the findings recorded by the Arbitral Tribunal in paragraph 174 of the Award that Petitioner-Developer committed consistent breaches not only of clauses of Consent Terms but also of undertakings given to this Court.

46) In my view therefore, commission of breaches by the Petitioner of the DA and of the Consent Terms is rightly held to be proved by the Arbitral Tribunal. Termination of the DA, POA and of the arrangements under the Consent Terms by the Society is rightly upheld by the Tribunal. Petitioner has failed to make out any valid ground under Section 34 of the Arbitration Act for setting aside the said finding.

AWARD OF MONITORY CLAIM IN FAVOUR OF THE SOCIETY

47) As a direct consequence of holding the termination of the DA, POA and Consent Terms to be valid, the Arbitral Tribunal has awarded monitory claim in the sum of Rs. 7,08,53,695.03/ in Society's favour. The amount comprises of Rs. 55,58,211/- towards legal costs, Architect's fees and miscellaneous costs incurred by the Society, which have been duly proved by the Society before the Tribunal. Society's claim for Rs.3,72,24,290/- was towards the admitted liability of the Petitioner under the consent terms, which sum was agreed to be paid towards arrears of transit rent. The Petitioner had also agreed under the consent terms to pay interest @15% per annum under the consent terms and accordingly the Tribunal has awarded interest of Rs. 2,80,71,194.03 towards interest. Thus, award of monitory claim in the sum of Rs. 7,08,53,695.03 cannot be faulted. Society's claim for compensation for mental harassment is rejected by the Arbitral Tribunal. No submissions are canvassed before me about any error in award of the said amount. Petitioner's main plea before me is that the termination of the DA, POA and the consent terms is invalid and once the said contention is rejected, award of monitory claim in favour of the Society will have to be necessarily upheld.

ENFORCEABILITY OF CONTRACTUAL CLAUSE DENYING COMPENSATION /DAMAGES

48) Petitioner raised a counterclaim for losses and damages against the Society. The damages were sought both by way of reimbursement of expenses incurred as well as claim for loss of profits. Under Clause 22 of the DA, parties agreed specifically that the developer will have no right to claim damages or compensation from the society. Under clause 22 of the DA, it was agreed thus :

> 22. The Developers agree to complete the total re-construction work within a period of 22 months from the date of receipt of Commencement Certificate. In the event of the Developers failing to complete the re-construction work within the stipulated period of 22 months, then the Developers will have to pay a penalty of Rs.1,00,000/- per month of delay to the Said Society. In addition to this the Developers shall pay to each of the Members/allottees Rs. 22000/- (Rupees Twenty-Two Thousand Only) per month as compensation towards permanent alternate accommodation, until the Member is put in possession of the Permanent Alternate Accommodation in the said New Building. However if the developers extended period permitted with penalty after the stipulated 22 months for completion of the reconstruction work will be only for 3 months. **After expiry of these 3 months if the Developer has yet failed to complete the entire building R.C.C. work and the external and internal plastering work of the Building's (that is completed with entire brick work), then upon such event the said Society shall be at liberty to terminate this agreement and take over all rights in the said project and appoint a new Developer of its choice to complete the reconstruction work. In such a case, the Developers will have no right to claim any damages/compensation from the said Society.** The Developers shall also forego it's right to sell the flats/ commercial premises which are part of the saleable portion of the flats after proving the existing members 60 flats in the new building.
>
> *(emphasis added)*

49) Thus, clause 22 of the DA envisaged non-entitlement of the developer to claim any damages or compensation upon society

terminating the agreement and taking over rights of the project and appointing a new developer to complete reconstruction in the event of the developer not completing the project within 3 months' extension. The developer has also agreed to forego his right to sell the units falling in sale component in the event of termination of the DA. Thus, clause 22 seeks to deny damages or compensation to the developer in the event developer committing breach of the DA. In the present case, the Arbitral Tribunal has upheld termination of DA by the Society by holding that Petitioner-developer has committed breaches, both of DA as well as of the Consent Terms. Therefore, the Petitioner-developer is held not entitled to damages or compensation by the Arbitral Tribunal as per clause 22 of the DA.

50) Petitioner has sought to question enforceability of clause 22 of the DA submitting that the contractual stipulation which bars the remedy of the party of seeking damages is unenforceable.

51) The issue for consideration is whether the Arbitral Tribunal could have awarded damages or compensation in favour of the Petitioner contrary to clause 22 of the DA. Arbitrator is a creature of contract and cannot travel beyond the contractual terms. Under Section 28 of the Arbitration Act, the Tribunal needs to have regard to the contractual terms while making an award. For holding that it is bound by the contractual terms and cannot travel beyond the same, the Arbitral Tribunal has relied on judgment of this Court in ***Board of Control of***

Cricket India vs. Deccan Chronicle Holdings Ltd.[26]**.** The judgment of the Apex Court in ***Steel Authority of India Ltd. versus. J.C. Budharaja*** (supra) also lays down the same proposition.

52) In the present case, the Petitioner-developer has specifically agreed not to claim damages or compensation as well as to forego its right to sell units in sale component upon termination of contract due to breaches committed by it. Therefore the tribunal could not have awarded claim for damages/compensation in ignorance of clause 22. However it is Petitioner's case that clause 22 is unenforceable as it puts unreasonable restrictions. Mr. Narula has relied on judgment of the Apex Court in ***Asian Techs Limited*** (supra) in support of his contention that any clause in the contract which seeks to deny damages to party is contrary to the provisions of Sections 64 and 73 of the Contract Act. In case before the Apex Court, the delay in execution of the contract was solely accountable to the respondents therein. Though the appellant therein was not willing to execute work beyond the contract period, the respondent therein gave assurance to the appellant to continue the work with a promise that rates would be decided across the table once the appellant went ahead with the work. It is in the light of these peculiar circumstances that the Apex Court held that Clause 11(C) of the contract did not come in the way of the arbitrator awarding amount for work done beyond the contract period. Reliance by Mr. Narula on judgment of the Apex Court in ***Board of Trustees for the Port of Calcutta*** is also inapposite. The issue before the Apex Court was

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about arbitrator's power to award interest *pendente lite* in the light of clause in the contract prohibiting the Commissioner from granting interest on the amount of delayed payment to the contractor. The Apex Court held that the clause, upon strict construction, prohibited only the Department from granting interest but did not prohibit Arbitrator from granting interest.

53) Mr. Narula has also strenuously relied on judgment of the Delhi High Court in ***MBL Infrastructures*** in support of his contention that clauses in the contract which restrict right of the parties in claiming damages is a restrictive clause defeating the provisions of Sections 55 and 73 of the Contract Act. The case before the Delhi High Court involved performance of a contract for construction of Metro Station. Clause-8.3 of the General Conditions of Contract **(GCC)** provided the remedy of only extension of time in the event of delay. The Arbitral Tribunal had held that Clause 8.3 of the GCC did not provide for compensation to the Contractor by way of damages. The Delhi High Court disagreed with the arbitrator's finding and held that there was delay on the part of the Respondent therein to complete the project and the termination of the contract was wrongful. The Delhi High Court further held that the Respondent therein did not grant extension of time as per Clause 8.3 of the GCC before proceeding to terminate the contract. It is in the light of these peculiar facts that the Delhi High Court held in para-46 of the judgment that a clause in the contract not providing for remedy of damages is against public interest as it hindered the smooth operation of commercial transaction.

54) Reliance is also placed on behalf of the judgment of this Court in ***Regus South Mumbai Business Centre*** (supra) in which the issue was about correctness of award of damages by the arbitrator in the light of contractual clause in the Agreement providing for either termination or conversion of arrangement of running of business centre into a leave and license agreement. In the case before this Court there was no specific clause in the contract for non-payment of compensation or damages. Award of damages was sought to be criticised by the Petitioner therein contending that the clause provided for only two consequences of termination of Agreement and vacation of premises or conversion of agreement into leave and license and that directing the third consequence in the form of damages by the Arbitrator was like rewriting the terms of contract. This Court disagreed with the said contention and upheld award of damages. However in the present case, there is direct contractual clause No. 22 disentitling the Petitioner of damages or compensation in the event of termination of contract by the society.

55) Petitioner has also relied on judgment of this Court in ***Mumbai Metropolitan Region Development Authority Vs. Mumbai Metro One Pvt Ltd.*** (supra) in which again this Court noticed that though the contract provided for extension of concession period in the event of delay by MMRDA to provide the Right of Way, there was no specific prohibition in the contract for awarding damages.

56) Thus, all the judgments sought to be relied upon by the Petitioner can be distinguished on account of a specific clause in the DA disentitling the Petitioner from raising a claim for compensation or damages. On the other hand, judgments of the Apex Court in ***Associated Engineering Co.*** (supra) and ***Union of India vs. L&T*** (supra) hold contractual clauses for denial of compensation or interest to be enforceable. The judgment of Division Bench of this Court in ***Vilayati Ram Mittal*** (supra) also holds contractual clause for denial of compensation to be enforceable and goes a step further by holding that the arbitrator is bound by such clause and cannot travel beyond the same.

57) In my view, a clause in the redevelopment agreement for denial of damages or compensation to the developer can be enforced in law because of the peculiarity of the contract. In a redevelopment agreement, the developer undertakes the responsibility of rehousing the society members by demolishing the old building and by constructing a new one. In return, the developer secures right to sell the additional constructed units to recoup the expenditure and to earn profits. He has the responsibility of praying transit rent to the society members in the interregnum. Developer in an agreement for redevelopment does not secure ownership in the land and the Society continues to remain the owner. He has the primary responsibility of providing new houses to the members. His right to earn profits in the project crystallizes only after he fulfills the obligations of paying transit rent and putting back the society members in possession of reconstructed flats. If the developer fails to

perform the primary obligations, his right to earn profits by selling the flats remains imperfect. Therefore once the developer commits breach of obligation to provide constructed flats/units to the society members and once the DA is terminated on that count, the right of the developer to earn profits from the project continues to remain imperfect. In absence of right to make profits in the project, the developer cannot seek damages/compensation from the society. This is a reason why if the developer agrees not to claim compensation or damages in the event of termination of contract by the Society due to his defaults, such contractual clause would be enforceable in law.

58) Also in the present case, the Petitioner has admittedly failed to deliver possession of new flats to the members and has failed to pay the transit rent. Commission of breaches by the Petitioner both of the DA and of the consent terms is established. The termination of the DA is on account of defaults committed by the Petitioner. Therefore, even going by the provisions of Section 73 of the Contract Act, Petitioner is otherwise not entitled to claim any compensation or damages due to termination of the DA. In my view therefore the Arbitrator has rightly denied the counterclaim of the Petitioner for damages. Denial of claim for compensation and damages is justified both on account of provisions of Section 28 of the Arbitration Act under which the Arbitrator is bound to give effect to clause 22 of the DA as well as in accordance with provisions of Section 73 of the Contract Act, since termination of the DA is attributable solely to the acts of the Petitioner.

RESTORATION OF BENEFITS RECEIVED UNDER THE TERMINATED CONTRACT

59) In addition to the claim for compensation/damages, Petitioner also sought return of the amounts spent by it in the project. As against the claim for compensation/damages under Section 73 of the Contract Act, the claim for restoration of benefits is traceable to provisions of Section 64. Under Section 64 of the Contract Act, the party rescinding a voidable contract is bound to restore the benefits, which he has received from another party to such contract. Section 64 of the Contract Act provides thus:

> **64. Consequences of rescission of voidable contract.—**
>
> When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

60) Though Section 64 of the Contract Act uses the word 'voidable contract', the law is well settled that provisions of Section 64 apply even when a valid contract is rescinded. Section 64 of the Contract Act also applies to contracts that are initially valid but are rendered voidable at the option of the injured party due to a breach and is subsequently rescinded. Mr. Narula has relied on judgment of Privy Council in ***Muralidhar Chatterji*** (supra) in which the Privy Council has discussed the effect of provisions of Sections 64 and 65 of the Contract Act. The Privy Council has held that Section 64 applies even to cases

where a valid contract is rendered voidable by wrongful act of a party thereto and which has been rescinded by the opposite party. Thus, Section 64 of the Contract Act applies even to a situation where a contract is valid, but is rendered voidable on account of breaches committed by a party to contract and the injured party terminates the same. Thus even if the contract is terminated on account of breaches committed by a party, such party is still entitled to claim restoration of benefits received by the injured party under Section 64 of the Contract Act. Since termination is due to breaches committed by a party and though such party may be liable to pay compensation to the injured party under Section 73 of the Contract Act, he can nonetheless seek restoration of benefits received by the injured party under part performance of the contract.

61) Section 64 of the Contract Act provides for restoration of 'such benefit' which a party rescinding the contract has received from another party to the contract. The issue for consideration therefore is whether various expenses incurred by the Petitioner-developer in the project can be treated as 'benefits' received by the Respondent-Society which it must return under the provisions of Section 64 of the Contract Act. According to the Petitioner, the benefits received by the Society within the meaning of Section 64 of the Contract Act are as under :

(i) rent paid to members of the society

(ii) construction costs incurred by the Petitioner.

(iii) amounts spent by the Petitioner for procurement of FSI.

(iv) amount of Rs.2,50,00,000/-adjusted by the Society out of amount encashed under the bank guarantee towards benefit of extra FSI.

62) In its counterclaim, the Petitioner-developer claimed from the Society three amounts of Rs. 30,68,54,552/- (Exh.2), Rs. 118,39,97,856/- (Exh.3) and Rs. 29,09,70,826/-(Exh.4). The amount of Rs.30,68,54,552/- were branded 'restoration of benefits' in para-20 of the counterclaim, which reads thus :

> 20) The Respondent submits that Claimant Society and its members have received various monetary benefits which are enumerated at Exhibit-2 herein under the subject Development Agreement and Consent Terms. The Claimant Society is bound to return the various amounts to the tune of Rs.30,68,54,552/- as mentioned in Exhibit-2 hereto under the relevant provisions of the Contract Act governing restoration of Benefit given by one party to another party under a Contract.

63) The breakup of the amount of Rs. 30,68,54,552/- in Exhibit-2 to the counterclaim was set out by the Petitioner as under:

SR No	**Particulars of Claim**	**Amount**
1.	Monetary Benefits Received under the Subject Development Agreement by the Claimant Society and Members from the Respondent	
(A)	Benefit received under Clause 10.1.a,c,d Agreement -of Development Agreement- i.e. Rent, l.e Corpus and Brokerage(paid from 2006 till execution of Consent Term) (This Includes the increased rent paid)	Rs. 20,43,52,985/-
	TOTAL Rs	Rs. 20,43,52,985/-
2.	Monetary Benefits received under the Subject Consent Terms by the Claimant Society and Members from the Respondent.	
	Benefit received under Clause 7 of Consent Terms (Amount of bank -guarantee adjusted towards arrears of rent)	Rs. 2,50,00,000/-
	Benefit received under Clause 8A of Consent Terms.	Rs. 1,00,00,000/-

	Benefit received under Clause 8 of Consent Terms.	Rs. 24,00,000/-
	Benefit received under Clause 8 of Consent Terms.	Rs. 7,00,000/-
	Benefit received under Clause 8 of Consent Terms.	Rs. 17,00,000/-
	Benefit received under Clause 8B of Consent Terms.	Rs. 1,00,00,000/-
	Benefit received under Clause 8F of Consent Terms.	Rs. 16,39,422/-
	Benefit received under Clause 44A and C of Consent Terms and Minutes of order dated 6th March, 2018	Rs. 29,30,000/-
	Benefit received under Clause 44A and C of Consent Terms and Minutes of order dated 6th March, 2018	Rs. 29,30,000/-
	Benefit received-under Clause 8C and. D of Consent Terms and Minutes of order dated 6th March, 2018	Rs. 1,72,72,145/-
	Benefit received under Clause 44A and C of Consent Terms and Minutes of order dated 6th March, 2018	Rs. 29,30,000/-
	Benefit received under Clause 9 of Consent Terms	Rs. 2,50,00,000/-
B.	TOTAL Rs.	Rs. 9,95,71,567/-
	Total Monetary Benefits (A) plus (B)	**Rs. 30,68,54,552/-** (Rupees Thirty Crores Sixty Eight Lakhs, Fifty Four Thousand, Five Hundred and Fifty Two Only)
	ALONGWITH	
	Further interest @ 12% per annum from 1st November, 2018, till payment and/or realization on the above amount.	

64) The amount of Rs. 118,39,97,856/- was indicated in Exhibit 3 to the counterclaim as the expenses incurred by the Petitioner, whereas the amount of Rs.29,09,70,826/- was indicated in Exhibit-4 as the loss of profits on sale of 75 flats. Para-21 of the counterclaim in this regard reads thus:

> 21) In addition to the above, the Respondent further submits that the Respondent has suffered various losses/damages on account of the Purported Termination of the subject Development Agreement and Consent Terms as enumerated in Exhibit-3 and 4 hereto on account of expenses incurred for the development of the subject property till date, loss of profit and loss of reputation. The Claimant Society is hence bound and liable to pay to the Respondent the aforesaid Amount of Rs.118,39,97,856.- as damages in lieu of specific performance in the event the Arbitral Tribunal upholds the

Termination of the Subject documents alongwith damages for Loss of Reputation.

65) So far as the counterclaim for Rs. 29,09,70,826/- towards loss of profits on sale of 75 flats is concerned the same was clearly in the nature of compensation within the meaning of Section 73 of the Contract Act and I have already upheld denial of any compensation to the Petitioner both on account of clause 22 of the DA as well as on account of termination being attributable to breaches committed by the Petitioner. So far as the counterclaim for expenses of Rs. 118,39,97,856/- is concerned, the breakup of the same was provided by the Petitioner in Exhibit-3 as under:

SR No	Particulars of Claim	Amount
	Expenses incurred on Construction Till Date	Rs. 18,09,57,496/-
	Expenses Incurred on Project – Payment to MHADA, MCGM, Stamp Duty	Rs. 14,37,35,485/-
	Onsite Exp (Admin and Sales)	Rs. 30,40,09,774/
	Surrender of tenements	Rs. 24,24,40,549/-
	Expenses incurred for Litigation Proceedings	Rs. 60,00,000/-
	Rent and Corpus	Rs. 30,68,54,552/-
	Total	**Rs. 118,39,97,856/- Rupees One Hundred and Eighteen Crores, Thirty Nine Lakhs, Ninety Seven Thousand, Eight Hundred and Fifty Six Only)**
		ALONGWITH
		Further interest @ 12% per snnum from 1st November, 2018 till payment and/or realization on the above amount.

66) By relying on pleadings in Para 20 and 21 of the counterclaim, Mr. Khandeparkar has contended that only the claim for Rs. 30,68,54,552/- in Exhibit-2 was for 'restoration of benefits', whereas the Petitioner itself chose to claim the expenditure of Rs. 118,39,97,856/- incurred in the costs of construction and purchase of FSI as 'compensation' in para 21 of the counterclaim. I have already reproduced paras-20 and 21 of the counterclaim and Exhibits-2 and 3 relating to particulars of claim for Rs.30,68,54,552/- and Rs. 118,39,97,856/-. In para-20 of the counterclaim, the Petitioner claimed amount of Rs.30,68,54,552/- towards '*restoration of benefits*'. As against this, two amounts of Rs.118,39,97,856/- indicated in Exhibit-3 and Rs. 29,09,70,826/- indicated in Exhibit-4 to the counterclaim were pleaded jointly as *'expenses incurred for development of the subject property till date, loss of profits and loss of reputation'*. In para 21 of the counterclaim, the amount of Rs. 118,39,97,856/- was also pleaded as '*damages in lieu of specific performance*'. It is on account of these pleadings that Mr. Khandeparkar has contended that none of the amounts indicated in Para 21 or in Exhibit-3 can be treated as amounts towards claim for return of 'benefit' under Section 64 of the Contract Act. I am unable to agree. Merely because the Petitioner split the two amounts in Exhibits 2 and 3 and in Para 20 and 21 of the counterclaim, the same would not mean that the claim for return of expenditure incurred in the project can be treated as a claim for compensation. Even in Para 21 of the counterclaim, the Petitioner has described the amount of Rs. 118,39,97,856/- as '*expenses incurred'*. If any of those expenses allegedly incurred by the Petitioner in

the project forms part of the 'benefit' received by the society, it would be unfair to treat such claim as the one for compensation, when in law the claim is actually for return of benefits under Section 64. I would therefore prefer to go by the contents of the claim rather than giving importance to the form or nomenclature. Therefore the contention of Mr. Khandeparkar that none of the amounts under Para 21 and Exhibit-3 to the counterclaim could have been adjudicated as 'benefits' deserves rejection.

67) I now proceed to consider whether the claim of the Petitioner for restoration of benefits under Section 64 of the Contract Act could have been awarded. Petitioner's claim for restoration of benefits is essentially in three parts as under :

(i) restoration of the amount of transit rent paid to the members of the society.

(ii) restoration of expenses incurred in construction of the building.

(iii) restoration of amounts paid to MHADA and MCGM for purchase of additional FSI and TDR.

68) Before considering the claim of the Petitioner for restoration of benefits under each head, it is first necessary to decide whether Petitioner's claim for restoration of benefits can at all be considered in the light of the contractual stipulations agreed between the parties. I have already held that a contractual stipulation in the redevelopment agreement denying compensation/damages to the

developer upon termination of contract by the society is enforceable in law. The Petitioner however contends that its claim for restoration of benefits under Section 64 of the Contract Act is different and distinct than the claim for compensation under Section 73. I am inclined to accept the contention. Under Section 73 of the Contract Act, when a contract is broken, the insured party is entitled to receive from the party who has broken the contract, compensation for such loss or damage caused to him. What is payable under Section 73 of the Act is 'compensation for such loss or damage caused'. On the other hand, what is contemplated under Section 64 of the Contract Act is restoration of 'such benefits' which are received by the party rescinding the contract from the opposite party. No doubt, provisions of Sections 73 and 64 may concurrently apply in relation to termination of the contract. When a party to contract commits breach thereof, the opposite party can rescind the contract and claim compensation under Section 73. At the same time, if a party rescinding the contract has received any benefit under the contract, such party is liable to restore the benefit under Section 64. In a given case, therefore the claim for restoration of benefit can be set off against the claim for compensation under Section 73 of the Act.

69) Mr. Khandeparkar has sought to question the distinction between claims for 'compensation' and for 'restoration of benefits' and contends that both ultimately are the same. He contends that the claim for restoration of benefits under Section 64 of the Contract Act is in the nature of restitutionary compensation. I am unable to agree, for the reasons indicated above. The claim under Section 73 of the Contract Act

is by an injured party whereas the claim under Section 64 is by the party who is responsible for termination of the contract. In what form the return of benefits is granted is immaterial since the concepts under Sections 64 and 73 of the Act are entirely different. However, Mr. Khandeparkar has essentially attempted to fit the claim for restoration of benefits under Section 64 into 'compensation' so that the same can be denied under clause 22 of the DA. The attempt is however misplaced. Developer suffering losses and claiming compensation due to wrongful termination is a different concept than claim for return of benefits received by the society. Claim for compensatory damages may comprise of several components such as every penny spent in the project, loss of opportunity to make profits, claim for idling of manpower/machinery, etc. However, every amount spent by the developer may not necessarily be the benefit revoiced by the society. To illustrate, the amounts spent by the developer on his advocates fees, stamp duty, registration charges, running of sales office, security, etc would not enure to the benefit of the society. On the other hand if the developer spends amount of anything which is enjoyable and is enjoyed by the society fully, that thing would constitute a benefit for the society. Thus, the claim for return of benefits enjoyed by the society cannot be treated as the claim for compensation. Mr. Khandeparkar's reliance on judgment of the Single Judge of Madras High Court in ***E-merge Tech Global Services P Ltd.*** (supra) in support of contention of claim for restoration of benefits being claim for compensation is inapposite. The Madaras High Court has held in paras-24 and 25 of the judgment as under:

> 24. The learned counsel for the Plaintiff submitted that the Plaintiff is entitled to damages under the head of compensatory damages as also under the head of restitutionary damages by way of an account of profits. To test this contention, it is necessary to examine the concepts of compensatory and restitutionary damages.
>
> 25. Compensatory damages are awarded to redress the loss suffered by an aggrieved party. The restitutionary damages are more in the nature of directing the Defendants to disgorge the benefit accrued in his favour due to unjust enrichment at the expense of the Plaintiff. Compensatory damages normally present themselves with difficulties associated in computing a reliable assessment of the loss caused to the plaintiff. Sometimes, the loss is of such nature that an accurate assessment may well be out of the question.

70) The Madras High Court in ***E-merge Tech Global Services P Ltd.*** has thus considered the difference between the concepts of compensatory and restitutionary damages and has held that a party cannot be entitled to claim both compensatory damages, as well as restitutionary damages in ordinary circumstances. In case before the Madras High Court, the defendant therein was employed with the plaintiff. The defendant tendered his resignation but the plaintiff continued his services on consultancy basis. The defendant thereafter requested the plaintiff to relieve him from consultancy assignment, and this is how parties parted ways. The defendant thereafter floated a new company in which a client of the plaintiff was a subscriber. It was plaintiff's case that defendant was running the business of the company on identical business model as that of the plaintiff and plaintiff's main customer had become part of defendant's company. Plaintiff filed a Suit based on non-solicit, non-compete and confidentiality clauses. The High Court found that the Defendant committed breach of non-solicit, non-compete and confidentiality clauses and then proceeded to consider

plaintiff's claim for damages. Plaintiff had raised a claim for damages to the tune of Rs.2 crores on the ground of unjust enrichment and had also sought restitution of disgorgement of gains unlawfully made by the Defendants. In the context of the above factual situation, the Single Judge of the Madras High Court held that ordinarily plaintiff cannot claim both compensatory damages as well as restitutionary damages unless an exceptional case is made out. While doing so, the Madras High Court distinguished the concepts of restitutionary damages and compensatory damages. Thus, before the Madras High Court, there was no claim for restitution under Section 64 of the Contract Act. The case did not involve rescission of the contract by one party, nor raising of a claim by opposite party for restoration of the benefits. The judgment of Madras High Court rendered in the peculiar facts of that case cannot be read to mean that in every case a claim for restoration of benefits under Section 64 of the Contract Act would be a claim for compensation under Section 73 of the Act.

71) The Madras High Court in ***Mundakath Mathu*** (supra), on which reliance is placed by Mr. Narula, has held, by referring to the English Judgment in ***Clough Vs. London and North Western Rail Co***.[27] and to the commentary in ***Pollock and Mulla's Contract Act*** that the rule of restitution under Section 64 and 65 of the Contract Act is based on the rule of equity and good conscience as no man can treat at once the contract as avoided and retain the monies or other advantages received by it under the contract. Reliance by Mr. Narula on judgment of

[27] (1871) LR 7 Exch 26

Kerala High Court in ***Chacko & Ors.*** (supra) is also apposite in which it is held that the 'benefit' envisaged under Section 64 of the Contract Act means only the benefit received under the transaction directly contemplated by it and not any future benefits by any speculative or non-speculative investment of that benefit.

72) Thus, this Court is unable to treat the Petitioner's counterclaim for return of benefits as a claim for compensation which can be covered by Clause 22 of the DA. Clause 22 of the DA applies only to the right of the Petitioner to claim damages or compensation when the DA is terminated on account of commission of breaches by it. Thus, what can be denied under Clause 22 is only damages or compensation for breaches under Section 73 of the Contract Act. The same would not apply to Society's obligation to return the benefits under Section 64 of the Act.

73) Mr. Khandeparkar has contended that various clauses of the DA, when read together, disentitles the Petitioner from raising a claim for restoration of benefits under Section 64 of the Contract Act. It would therefore be apposite to reproduce the relevant clauses of the DA relied upon by him. Under Clause 9(h) of the DA, it was agreed between the parties that the Society shall have the right to exploit all the rights of the Petitioner arbitrarily in case of default on its part. Clause 9(h) of the DA reads thus :

> The Developers shall execute the entire redevelopment project as contemplated herein solely in the name of the society including and not limited to obtaining permissions for purchasing T.D.R. and/or tit-bit land,

> payment of premium etc. or any other right to give full effect to this agreement. **The society shall have the right to exploit these rights and liberties arbitrarily in case default on the part of the Developer.**
>
> *(emphasis added)*

74) Clause 10(8) of the DA provided for termination of the contract and for forfeiture of amounts spent by the developer in the event of failure to procure commencement certificate within 3 months of handing over possession of flats by the society members. Clause 10(8) of the DA reads thus:

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

75) Clause 22 of the DA has already been reproduced above. However, in the context of submission of Mr. Khandeparkar that parties have agreed for denial of even restitutionary benefits under Section 64, only relevant part of clause 22 of the DA is reproduced once again:

> **22. ... After expiry of these 3 months if the Developer has yet failed to complete the entire building R.C.C. work and the external and internal plastering work of the Building's (that is completed with entire brick work), then upon such event the said Society shall be at liberty to terminate this agreement and take over all rights in the said project and appoint a new Developer of its choice to complete the reconstruction work. In such a case, the Developers will have no right to claim any damages/compensation from the said Society.** The Developers shall also forego it's right to sell the flats/ commercial premises which are part of the saleable portion of the flats after proving the existing members 60 flats in the new building.
>
> *(emphasis added)*

76) Under Clause 42, the Petitioner has agreed to bear and pay all costs of construction, as well as of securing approvals, costs of acquiring additional TDR etc. Clause 42 of the DA reads thus:

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

77) Under Clause 47, it was specifically agreed between the parties that under no circumstances, the Petitioner would ask for any amount for contribution from the society or from its members towards expenses for putting up the construction. Clause 47 of the DA reads thus:

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

78) Under clause 53(iii) of the DA, parties agreed that the Agreement was not to be construed as partnership or joint venture and that the same was on Principal-to- Principal basis. Clause 53(iii) reads as under:

> iii. This Agreement shall not be construed as a Partnership or Joint Venture or Agreement of Partnership and the same shall be on Principal-to-Principal basis.

79) After going through the above clauses relied upon by Mr. Khandeparkar, I am unable to read any prohibition for the Petitioner-Developer from claiming restoration of benefits admissible under Section 64 of the Contract Act. Reliance by the Respondent-Society on Clause 9(h) of the DA does not inure to its benefit. Under Clause 9(h) of the DA, the Petitioner-developer agreed to execute redevelopment project solely in the name of the Society and Society was to become owner of all the purchased TDR and/or tit-bit land etc. In the event of default on the part of the Petitioner, Respondent-Society became entitled to 'exploit' those rights and liberties arbitrarily. The exact purport of Clause 9(h) is that in the event of commission of any default by the Petitioner-developer resulting in termination of the DA, the Society was entitled to 'exploit' (meaning consume) the purchased TDR and/or the tit-bit land. This would essentially mean that termination of agreement would not result in invalidation of permissions or invalidation of the purchased TDR or tit-bit land. Tit-bit lands refer to non-buildable lands, often adjoining, which MHADA sells to the societies for increasing the total layout size. Thus, under clause 9(h) of the DA, the purchases of the TDR and of tit-bit lands was to be made by the Petitioner-developer in the name of the society and in the event of termination of the DA, the society was free to exploit the same arbitrarily. This would mean that termination of DA would not automatically result in loosing of title in the purchased TDR or tit-bit land. Vesting of the purchased TDR and tit-bit land in the society is a concept distinct from the concept of returning the purchase price of such TDR or tit-bit land. Clause 9(h) does not walk a step further

and stipulate that the society shall not be liable to refund the price of purchased TDR or of tit-bit land.

80) Plans are approved and construction is effected by taking into consideration the purchased TDR, FSI and tit-bit land. Absent clause 9(h), the purchased TDR and tit-bit land would have reverted to the Petitioner-developer upon termination of the DA rendering the construction illegal. Clause 9(h) would therefore protect the construction carried out on the basis of permissions and TDR/tit-bit land purchased by the Petitioner-developer and Society does not have to scout in the market for securing fresh permissions or to procure the TDR or tit-bit land once again. Clause 9(h) cannot be read to mean an exception to Section 64 of the Contract Act. Clause 9(h) does not provide that if Society terminates the contract, Petitioner-developer shall not be entitled to claim return of any benefits received by the Society.

81) Clause 22 of the DA has the effect of denial of only compensation and does not provide for forfeiture of the expenditure incurred or denial of restoration of benefits received by the society. Clause 22 of the DA provides that '*In such a case, the Developers will have no right to claim any damages/compensation from the said Society*'. I have rejected the submission of Mr. Khandeparkar that restoration of benefits under Section 64 of the Contract Act is a species of compensation/damages as contemplated under clause 22 of the DA. Thus clause 22 of the DA cannot be read to mean as if the parties agreed that

upon termination of the DA, the society shall be entitled to retain all the benefits received by it from the Petitioner.

82) So far as reliance by the Society on clause 42 of the DA is concerned, the same merely poses a responsibility on the Petitioner-developer to bear all costs of acquiring additional TDR. This would mean that Petitioner was not to demand any monies from the Society or members for carrying out any construction or for purchase of the TDR. During performance of the DA, clause 42 put the responsibility of incurring all the expenditure *inter alia* for purchase of TDR, etc. on the developer. This does mean that after termination of the DA, Petitioner was prohibited from seeking return of amounts spent by him, which would fit in the expression 'benefit' used in Section 64 of the Contract Act. Thus clause 42 of the DA has no application in relation to Petitioner's demand for restoration of benefits under Section 64 of the Contract Act.

83) The Respondent-Society has also relied on clause 47 of the DA which prohibited the Petitioner-developer from demanding any money or contribution from the society or its members towards expenses for putting up such construction. In my view, Clause 47 is continuation of contractual arrangement under Clause 42 under which the Developer was not supposed to demand any monies or contributions from the Society or its members and was to bear all the costs by itself. Therefore, there is nothing in clause 42 or 47 which disentitles the developer from seeking return of benefits under Section 64 of the Contract Act.

84) Society's reliance on Clause 53(iii) of the DA again does not cut any ice. The said clause only provides for construction of the agreement as on principal-to-principal basis and not a partnership, joint venture or agreement of partnership. The clause only dissociates the Society from the business venture undertaken by the Petitioner-developer so as to safeguard the Society in respect of any claims made against the developer by third parties such as flat purchasers, financial institutions, Municipal Corporation etc. Clause-53 again does not impose any prohibition on Petitioner's right to seek restoration of benefits under Section 64 of the Contract Act.

85) Mr. Khandeparkar has also strenuously relied on clause 8 of the DA under which, if Commencement Certificate was not to be procured within 3 months of handing over possession by members, the DA was to stand terminated and the entire amount spent by the Petitioner-developer towards obtaining FSI/TDR and advance payments towards corpus funds was to be forfeited by the Society. However, this clause applies only for a period of 3 months from the date of vacation of possession of flats by the Society-members. No doubt, Clause 8 restricts the right of the developer to seek restoration of benefits under Section 64 of the Contract Act. Such restriction however applies only upto the stage of securing the Commencement Certificate. Parties thus consciously restricted prohibition on seeking restoration of benefits under Section 64 of the Contract Act only till a particular stage. This means that parties have consciously agreed not to restrict the right of the Petitioner-developer to seek restoration of benefits under Section 64

after the stage of procuring Commencement Certificate. In fact, clause 8 of the DA clearly indicates the conscious choice made by the Respondent-Society to restrict the prohibition on restoration of benefit under Section 64 only till the stage of securing the commencement certificate. There is no similar restriction in the DA after crossing the stage of commencement certificate.

86) In fact, the above quoted clause 8 of the DA clearly destroys Mr. Khandeparkar's contention that Clauses-9(h), 22, 27, 42, 47 and 53(iii) impose prohibition on restoration of benefits. If Clauses-9(h), 22, 27, 42, 47 and 53(iii) were sufficient to deny the restoration of benefits, there was no necessity to incorporate clause 8 in the DA. Therefore, the very factum of incorporation of clause 8 in the DA would clearly indicate a conscious choice made by the Society to restrict denial of restoration benefits only till the stage of procuring Commencement Certificate and not thereafter.

87) I am therefore of the view that there is no clause in the DA which imposes any restriction or prohibition on Petitioner-developer exercising right of restoration of benefits under Section 64 of the Contract Act.

88) Now I proceed to decide as to which of the claims of the Petitioner-developer would fit into the ambit of the expression 'benefit' appearing in Section 64 of the Contract Act.

WHETHER RENT PAID TO SOCIETY MEMBERS IS A 'BENEFIT'

89) Petitioner claimed amounts of Rs. 20,43,52,985/- towards rent, corpus and brokerage till execution of consent terms, Rs. 2,50,00,000/- towards adjustment for rent made under consent terms as well as various other amounts payable under the consent terms. However since several cheques towards those amounts are dishonoured, the claim towards rent in Exhibit-2 is essentially of Rs. 20,43,52,985/- and Rs. 2,50,00,000/-. However, Petitioner once again claimed amount of Rs. 30,68,54,552/- in Exhibit-3 to counterclaim and the Arbitral Tribunal has criticised it for double counting of the claims towards rent.

90) The Tribunal has considered and decided the issue as to whether the rent paid by the Petitioner to the members of the society could be treated as 'benefit' received under the performance of DA. The Tribunal had, in order dated 17 September 2018, taken a *prima facie* view while deciding the issue of interim measures that rent paid to members of Society could not be treated as a 'benefit'. That interim order was upheld by this Court while dismissing the Appeal of the Petitioner. Tribunal took note of the order of this Court dated 14 December 2018 upholding Section 17 order, in which this Court had held in para 27 as under :

> 27. In my view, this submission of Mr. Narula overlooks the fact that the respondent members had agreed to redevelopment in the hope of better prospects and payment was made only in inducement for the members of the society who agreed to redevelop and vacating their homes rather than continue in the premises during repairs that would have to be undertaken. Payment of rent cannot be in any manner considered to be a "benefit". It only

> facilitated the members to be housed in different premises. There is substantial collateral hardship that is associated shifting from one own home to rented premises and during the period that is to be taken for the new and permanent home to be constructed. The respondents are out of their homes for about 11 years. When they vacated their premises they were expecting to be back in their new homes within a reasonable period of time. Although shifting to rented premises may appear to be a formality to facilitate redevelopment, in fact it is a commitment made in anticipation of performance of the petitioners promises to rehouse them in permanent accommodation. While resolving to enter into such agreement, the members of the society, for that matter no home owner, would expect or tolerate delay of this nature.

91) Though the observations made by this Court in order dated 14 December 2018 were in the context of deciding the interim measures, the learned Arbitrator took note of ratio of the judgment of this Court in ***IREP Credit Capital*** (supra) in which it is held that the view expressed by a Court on legal position is binding and the stage at which the same is expressed is immaterial.

92) However, independent of the observations made by this Court in order dated 14 December 2018, I am also of the view that the rent paid by the developer to the members of a cooperative society during the period they are made to vacate their homes for reconstruction of the building cannot be treated as a benefit within the meaning of Section 64 of the Contract Act. The vacation of flats is required to be undertaken by the members for the purpose of enabling the developer to demolish the building and to reconstruct the same. For facilitating demolition and reconstruction, the developer makes a commitment to the members to provide them transit rent for making temporary arrangements during the redevelopment process. It is the cost paid by the developer to the member for denying him opportunity to reside in

his own house. The 'benefit' contemplated under Section 64 of the Contract Act must be the real benefit that accrues to the injured party terminating the contract, which, if retained, would constitute unjust enrichment for him. To illustrate, in a land sale transaction, if the agreement is terminated on account of delay by the purchaser in completing the transaction, the seller cannot retain the part consideration received under the Agreement and also retain ownership in the land. Retaining both would result in unjust enrichment for the seller. However, in a redevelopment contract, rent paid to the flat owners cannot be treated as 'benefit' received by them and retaining the same upon termination of the DA does not result in unjust enrichment for them. The new developer appointed to complete construction of the building undertakes the liability for rent from the date of execution of new DA and the members would not ordinarily receive rent twice for the same period. Therefore, in a case where the society members are not paid rent twice for the same period, the rent paid by the outgoing developer cannot constitute benefit received by them under Section 64 of the Contract Act. It may be an expenditure incurred by the developer, but the same would not constitute restitutionary benefit under Section 64 of the Act. If the rent is directed to be refunded to the developer whose DA is terminated due to defaults committed by him, it would tantamount to rewarding the developer for the breaches while putting already troubled society members into further difficulties, which is not the objective behind Section 64 of the Contract Act. Hence, rent paid by a developer to members of the society cannot be treated as a 'benefit' received within the meaning of Section 64 of the Contract Act.

Therefore, the Petitioner is not entitled to seek return or restoration of the transit rent or displacement compensation paid to the members. The Arbitral Tribunal has rightly rejected the counterclaim of the Petitioner for return of rent, corpus, brokerage etc.

WHETHER PURCHASED FSI CAN BE TREATED AS 'BENEFIT' UNDER SECTION 64 OF CONTRACT ACT

93) Petitioner has contended that it has paid following amounts to the Respondent-society towards purchased FSI which is utilised and enjoyed by the Society:

(i) Rs.8,18,03,435/- paid to MHADA for acquiring tit-bit land.

(ii) Rs.20,61,150/- paid to MHADA for acquiring FSI of R.G. area.

(iii) Rs.2,50,00,000/- adjusted by the Society against encashed bank guarantee towards FSI benefit.

94) According to the Petitioner-Developer, these three amounts spent towards purchase of FSI must be refunded to it under Section 64 of the Contract Act.

95) In my view, the counterclaim for return of all the three amounts of Rs.8,18,03,435/-, Rs.20,61,150/- and Rs.2,50,00,000/- would clearly be covered by the term 'benefit' under Section 64 of the Contract Act. The Respondent has undoubtedly utilised the FSI purchased by the developer. The purchase of FSI by the Petitioner was towards performance of the DA. As agreed in Clause 9(h) of the DA, the FSI

purchased by the Petitioner is not only in the name of the Respondent-Society, but has become a property owned by the Respondent-Society. In my view therefore, the entire FSI purchased by the Petitioner-developer for carrying out redevelopment work of society's building would clearly be a 'benefit' within the meaning of Section 64 of the Contract Act. Since the Society has decided to rescind the contract and even though rescission of contract by the Petitioner is found to be valid, the Society cannot retain the benefit of purchased FSI received under the rescinded contract and must return the same. Clause 9(h) ensures that the Society does not have to actually or physically return the FSI and can consume the same since the same is purchased in the name of the society. The clause also ensures that the construction already put up is not rendered illegal on account of termination of the DA. However the concept of 'non-return of FSI' is different and distinct from the concept of 'return of purchase price of FSI'. While the former would be protected under clause 9(h) of the DA, the latter is liable to be returned under Section 64 of the Contract Act.

96) In my view therefore, part of the Award which rejects the counterclaim for return of the amounts of Rs.8,18,03,435/-, Rs.20,61,150/- and Rs.2,50,00,000/- is in conflict with the fundamental policy of Indian law. The learned Arbitrator has erroneously conflated the issue of return of benefits received by the Respondent-Society under the terminated contract with the claim for compensation for the purpose of application of Clause 22 of the DA. It has erroneously relied on judgment of Division Bench of this Court in ***Vilayti Ram Mittal*** which

deals with the issue of compensation under Section 73 of the Contract Act and not with the issue of restoration of benefits under Section 64. For the same reason, reliance by Mr. Khandeparkar on judgment of the Apex Court in ***Associated Engineering Company*** is also inapposite as the said judgment also deals with the concept of validity of a clause in the contract denying compensation. Even the judgment of the Apex Court in ***Union of India vs. L & T*** relied on by Mr. Khandeparkar dealt with the issue of enforceability of a term in the contract which prohibited payment of interest. The judgment in ***Steel Authority of India vs. J. C. Budharaja*** (supra) is also an authority on the proposition of impermissibility for arbitrator to travel beyond the contractual clauses for awarding claims expressly prohibited in contractual clauses. However in the present case there is no prohibition of return of benefits received by the society in the DA. The prohibition on return of FSI was limited only upto the stage of procuring the commencement certificate, beyond which stage, there is no such prohibition. The prohibition in clause 22 is restricted only to claim for damages/compensation, which does not extend to return for benefits. Thus, part of the award which treats the prayer for restoration of costs of FSI purchased by the Petitioner as claim for damages or compensation and which denies the same is unsustainable.

97) It is sought to be contended on behalf of the Respondent-Society that the Petitioner never raised the issue of claim of restoration not being covered by Clause 22 of the DA. However, perusal of written submissions before the Arbitral Tribunal would indicate that the

Petitioner specifically urged before the Arbitral Tribunal that '*please note at this juncture that at any event the Respondent has not agreed to not claim restitution/restoration of benefits received by the Society under the DA in cl.22 of the DA. Thus, the right to seek restitution under Sections 64 and 65 of the Contract Act cannot be disallowed by the Tribunal in any circumstances*'. Though the issue of non-applicability of clause 22 of the DA to claim of restitution of benefits was specifically raised by the Petitioner, it appears that the Arbitral Tribunal has failed to consider claim for restoration of benefits under Section 64 of the Contract Act on an independent footing and unnecessarily confused the said claim as a claim for compensation by applying Clause-22 of the DA.

98) While the Arbitral Tribunal has conflated the claim for restoration of benefits with the claim for compensation, it has made certain observations in the Award as to why the cost of construction incurred by the Petitioner cannot be treated as 'benefit'. The Tribunal has refused to treat the same as benefit by relying on the judgment of this Court in ***Borivali Anamika Niwas CHSL***. The reasons for rejection of claim for restoration of benefits are to be found only in paras-215 and 216 of the impugned Award, which read thus:

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

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

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

99) Thus, by merely relying on judgment of this Court in ***Borivali Anamika Niwas CHSL***, the Arbitral Tribunal has proceeded to reject the claim for restoration of benefit by holding that construction costs cannot be treated as a benefit. Here, the Arbitral Tribunal has failed to distinguish the claim for restoration of price paid for purchase of FSI and claim for restoration of cost of construction. Both are treated as 'cost of construction' by the Arbitral Tribunal. This Court has used the expression 'expenditure on the project' in ***Borivali Anamika Niwas CHSL*** for holding that the same is not a handout to the society members. However, it must be observed that the observations made by this Court in ***Borivali Anamika Niwas CHSL*** are in the context of entitlement of Society to seek interim measures against the developer under Section 9 of the Arbitration Act. The observations made in the judgment cannot be used for holding that a developer can never claim any expenditure

incurred by him in execution of the project from the society after termination of the contract. At the stage when the judgment in ***Borivali Anamika Niwas CHSL*** was delivered, the issue of validity of termination of the DA was yet to be determined since the arbitral proceedings had not even commenced. This Court was considering the issue whether mere incurring of expenditure by the outgoing developer in the project was a reason enough for permitting the society to complete construction of building through another developer. In ***Borivali Anamika Niwas CHSL*** this Court ultimately made interim measures appointing Court Receiver in respect of the property and took away possession thereof from the outgoing developer. In my view therefore, the observations made by this Court in the judgment in ***Borivali Anamika Niwas CHSL***, while deciding the issue of interim measures, are of little relevance while adjudicating the claim of the developer for return of benefits under Section 64 of the Contract Act.

100) Mr. Khandeparkar has relied on judgment of this Court in ***Rajawadi Arunodaya CHS Ltd.*** which again is a judgment relevant for deciding grant of interim measures and cannot be relied on in support of contention that no part of investment made or expenditure incurred by the developer can ever be a benefit to the society or to its members under Section 64 of the Contract Act.

101) Whether the expenditure incurred by a developer in the project can be treated as a benefit within the meaning of Section 64 of the Contract Act and whether the developer is entitled to claim

restoration thereof would depend on facts of each case, particularly the contractual clauses. There cannot be an abstract proposition of law that no part of the expenditure incurred by the developer can ever be treated as a 'benefit' or that in every case, a society would be entitled to retain all the benefits it has received from the developer after termination of the contract. The facts of each case would decide as to which part of expenditure incurred by the developer would be a benefit to the society and the contractual arrangement between the parties would decide if such benefit needs to be returned by the society to the developer or not. In a given case, parties may agree that a particular benefit received by the society shall not be returned to the developer.

102) As held above, the purchase price paid by the Petitioner-developer to MHADA for securing tit-bit land, RG FSI as well as the amount of Rs. 2.5 crores adjusted by the society towards FSI benefit would be covered by the expression 'benefit' appearing in Section 64 of the Contract Act. There is no contractual prohibition in the DA for return of price of FSI purchased by the developer which is utilised by the Society. In that view of the matter, the Society is liable to return the price of purchased FSI to the developer.

103) When FSI is transferred to another party, it can give rise to actual and speculative benefits Actual benefit is the price that the buyer paid for purchase of FSI. On the other hand, speculative benefit is the profit potential of that FSI. After securing the FSI, the party to whom the same is handed over can utilise the same to construct additional area and

earn profits. The profit potential of such FSI would be speculative benefit. Under Section 64 of the Contract Act, what is required to be returned is the actual benefit and not the speculative benefit.

104) The conflict with public policy of India is writ large in the impugned award so far as rejection of claim for return of purchase price of FSI is concerned. The effect of the impugned award is that the Respondent-Society has retained and enjoyed the benefit of FSI purchased by the Petitioner. It is entitled to encash the same by completing construction of sale component building and by selling about 75 flats, construction of which can be completed by the society. If the additional FSI is transferable, the society can alternatively sell and monetize the same as TDR in the market. However since some part of construction of A wing (sale component) building is already constructed, the society can engage another developer/contractor and get the construction completed by utilizing the additional FSI purchased by the Petitioner. The society is thus in a position to enrich itself by using the FSI purchased by the Petitioner. Therefore, if restoration of purchase price of FSI is not directed, this would be a pure case of unjust enrichment for the Society. This exactly is the objective behind Section 64 of the Contract Act. Public policy of India requires that the party terminating the contract shall not enrich itself through such termination. In the present case, the Respondent-society has already enjoyed some fruits of redevelopment process since (i) the society has utilised the construction put up by the Petitioner-developer (*and I have refused to uphold the claim for return of construction cost in latter part of*

the judgment), (ii) society has received the arrears of transit rent with 15% interest, (iii) society has secured return of expenditure with interest, (iv) the society members are owners of bigger homes envisaged in the DA. On the top of all these, if the society is also permitted to utilize the additional FSI purchased by the Petitioner and to monetize the same by constructing and selling more flats, the same would tantamount to unjust enrichment. The delay in construction of the building would entail losses for the developer in the form of loss of opportunity to earn profits and non-return of most of the investments made by it in the project. However, this would not mean that the society can unjustly enrich itself by forfeiting the amount of purchased FSI, especially when there is no contract to that effect.

105) The Arbitral Tribunal has committed patent illegality in conflating the claim for return of FSI price with the claim for compensation. The award conflicts public policy of India as it enables the society to unjustly enrich itself in total contravention of Section 64 of the Contract Act. The view taken by the Tribunal does not pass the muster of 'plausible view'. Permitting the society to retain purchased FSI and to encash the same by unjustly enriching itself is something which no fair-minded person would ever permit. Reliance by Mr. Khandeparkar on judgment of ***Ramesh Kumar Jain*** (supra) would not save this part of the award. In my view therefore, the part of the Award which seeks to deny the counterclaim of the Petitioner for return of benefit of purchase price of FSI is in conflict with public policy, and also patently illegal. Only this part of the Award is liable to be set aside.

CLAIM FOR COST OF CONSTRUCTION

106) Petitioner had also claimed amount of Rs.18,09,57,496/- towards cost of construction from the Respondent-Society. The learned Arbitrator has denied the claim for return of cost of construction by referring to the judgment of this Court in ***Borivali Anamika Niwas CHSL***. As observed above, the observations made by this Court in ***Borivali Anamika Niwas CHSL*** are only in the context of society's entitlement to interim measures under Section 9 of the Arbitration Act and the same cannot be used for concluding that in every case, the Developer is not entitled to seek any part of expenditure incurred by it in the project. As observed above, it would all depend on facts of each case and particularly the nature of contractual arrangement between the parties. The Arbitrator has also denied the claim for return of cost of construction on account of absence of credible proof in respect of proof of costs presented by the developer.

107) Having held that Developer's entitlement to seek return of costs of construction from the Society would depend on facts and circumstances of each case and the nature of contractual arrangement between the parties, I proceed to examine whether the Petitioner's counterclaim for return of costs of construction could have been allowed in the facts and circumstances of the present case. Before proceeding to do so, it must be observed that the Arbitral Tribunal has once again conflated the issue of costs of construction with the concept of compensation/damages by applying Clause 22 of the D.A. Here again,

the claim for return of costs of construction incurred by a developer cannot be a claim for compensation under Section 73 of the Contract Act. In a given case, costs of construction incurred by a developer can fit into the term 'benefit' used under Section 64 of the Contract Act. However, it depends on facts of each case.

108) In the present case, the contract of redevelopment awarded to the Petitioner-Developer has been terminated by the Society. I have already upheld part of the Award which validates the termination effected by the Society. Petitioner admittedly did not complete construction of the building within the period stipulated in the DA or even within the extended period under the consent terms. During the period from 26 June 2007 till 9 June 2018 (11 long years), the Petitioner was able to construct a mere bare shell RCC structure of 21 floors in B wing and 7 floors in A wing, which was incapable of being used for residence by any of the members. The issue for consideration is whether expenditure incurred on construction of such bare shell RCC structure can be treated as a benefit received by the society within the meaning of Section 64 of the Contract Act? In my view, the answer to the question, in the facts and circumstances of the present case, will have to be necessarily in the negative. In a given case, where the construction of the building is virtually complete but the occupancy certificate is not issued and at that stage, if the DA is terminated and the society is in a position to secure the occupancy certificate without any modifications in the construction already erected, such construction by the developer may tantamount of benefit for the society. However, in the present case,

where the structure erected by the Petitioner-developer was not of use for the members of the society, such structure cannot be treated as benefit for the society. Thus, the key is to find out whether the constructed structure can be put to use by the society or by its members. In the facts of the present case, construction put up by the Petitioner cannot be treated as benefit for the members of the society. For the purpose of application of provisions of Section 64 of the Contract Act, the thing passed on to the opposite party must be complete in all respects, capable of being enjoyed by the opposite party. Consequently, the thing delivered to the other party which is incapable of being utilised in its delivered state, cannot be treated as a benefit received. In the present case, the Society and its members are required to further build upon the bare shell structure erected by the Petitioner which was not capable of being put to any use by the Society members. In the facts and circumstances of the present case therefore, the construction so erected by the Petitioner would not form a benefit to the Society within the meaning of Section 64 of the Contract Act and therefore Petitioner's claim for return of cost of construction is rightly rejected by the Tribunal.

109) Also, the arbitrator has rightly evaluated the evidence on record for holding that the Petitioner could not produce credible evidence of exact costs of construction incurred in respect of the project. The Petitioner is a professional developer undertaking several projects. It was incumbent for it to prove that a particular expenditure was incurred for the project in question. Mere presentation of invoices for

purchase of cement, steel etc cannot be a reason for inferring that the purchases was utilised for the project in the question. Thus, there is absence of any credible and reliable evidence for accepting the claim of the Petitioner that it incurred expenditure of Rs.18,09,57,496/ towards construction costs. Reliance by Petitioner on judgment of this Court in ***Harish Loyalka*** (supra) is inapposite. When there is no correlation between invoices and amount spent in particular project, mere absence of cross-examination is not sufficient to hold that every amount covered by invoices is spent on present project. Also failure to lead evidence is just an additional ground for rejection of counterclaim for return of cost of construction, which is otherwise not covered under Section 64 of the Contract Act.

110) Considering the facts of the case, the view taken by the Tribunal rejecting claim for return of cost of construction is a plausible view. Though the tribunal has essentially based the rejection of claim for returning the cost of construction by relying on observations made by this Court in ***Borivali Anamika Niwas CHSL*** , the conclusion can otherwise be justified on the basis of the material on record of the Tribunal and this Court can accordingly explain the reasons for the conclusion as per judgment of the Apex Court in ***OPG Power Generation*** (supra). In the facts of the present case therefore, rejection of counterclaim by the learned arbitrator in respect of return of cost of construction cannot be treated as patently illegal for this Court to interfere in exercise of jurisdiction under Section 34 of the Arbitration Act.

CONCLUSIONS

111) Considering the overall conspectus of the case, I am of the view that the Award upholding the Termination Notice dated 9 June 2018 and restraining the Petitioner from interfering with possession of the concerned land and the building by the Society does not warrant interference under Section 34 of the Arbitration Act. Similarly the award directing handing over of original documents, awarding monetary claim in the sum of Rs.7,08,53,695.03/- in favour of the Respondent-Society also passes muster under Section 34 of the Act. Rejection of counterclaims of Petitioner towards compensation (loss of profit), return of rent, return of cost of construction etc is also found to be in order. Petitioner has failed to make out a valid ground of challenge to the Award in respect of the above findings, and this part of the Award can be sustained.

112) While most of the Award is being upheld, only a small part thereof relating to rejection of counterclaim for return of cost of purchased FSI by the Petitioner-developer is found to be unsustainable for the reasons indicated above. The part of the Award rejecting the claim for return of purchase price of FSI is not inseparably intertwined with the other parts of the award. This Court has upheld Petitioner's right for restoration of benefits under Section 64 of the Contract Act. But only amount spent for purchase of TDR / tit-bit land can be treated as benefit and the amount of rent and cost of construction cannot be tretaed ass benefit. Therefore part of the award rejecting counterclaim

for return of price of purchased TDR/FSI/tit-bit land is easily separable without causing violence to the other part of the impugned award. Therefore, following the principles of Constitution Bench judgment in ***Gayatri Balasamy vs. ISG Novasoft Technologies Limited***[28], it is possible to severe bad part of the Award from the good part. Therefore while upholding the rest of the Award, only the part thereof which rejects Petitioner's counterclaim for return of Rs.8,18,03,435/- spent by it for purchase of tit-bit land, Rs.20,61,150/- spent by it for purchase of RG FSI and Rs.2,50,00,000/- adjusted by Society towards FSI benefit is liable to be set aside.

ORDER

113) I accordingly proceed to pass the following order:

(i) The Award of the learned Arbitrator dated 24 June 2023, except to the limited extent as indicated in para (ii) below, is upheld.

(ii) The Award is set aside only to the extent it rejects Petitioner's counterclaim for return of benefit received by the Respondent-society in the sum of Rs. 8,18,03,435/- for purchase of tit-bit land, Rs. 20,61,150/- for purchase of RG FSI and Rs. 2,50,00,000/- adjusted towards FSI benefit from bank guarantee amount.

[28] (2025) 7 SCC 1

114) With the above directions, the Petition is **partly allowed** and disposed of. Considering the facts and circumstances of the present case, I deem it appropriate not to make any further order as to costs.

[SANDEEP V. MARNE, J.]