



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL ARBITRATION PETITION (L) NO. 10432 OF 2023

Swashray Co-op. Housing Society Ltd. & Ors. ...Petitioners

Versus

Shanti Enterprises ...Respondent

WITH

COMMERCIAL ARBITRATION PETITION (L) NO. 15203 OF 2023

Shanti Enterprises ...Petitioner

Versus

Swashray Co-op. Housing Society Ltd. & Ors. ...Respondents

* * *

- Mr. Tushar Gujjar a/w Mr. Deepak Singh i/b. SL Partners, for the Petitioners in CARBPL/10432/2023 and for the Respondents in CARBPL/15203/2023.
- Mr. Milan Desai, for the Respondent in CARBPL/10432/2023 and for the Petitioner in CARBPL/15203/2023.

* * *

**CORAM : MANISH PITALE, J.
RESERVED ON : 26th SEPTEMBER, 2023.
PRONOUNCED ON : 03rd NOVEMBER, 2023.**

JUDGMENT :

1. These are two cross petitions filed under Section 9 of the Arbitration and Conciliation Act, 1996, for grant of interim measures, pending resolution of disputes through arbitration.

2. The disputes between the parties are typical of the disputes amongst co-operative housing societies and developers in the city of Mumbai, concerning redevelopment projects. For the sake of convenience, the parties are referred to as the Petitioner – Society

(Swashray Co-operative Housing Society Ltd. which is Petitioner in Commercial Arbitration Petition (Lodging) No. 10432 of 2023 and Respondent in Commercial Arbitration Petitioner (Lodging) No. 15203 of 2023) and Respondent - Developer (Shanti Enterprises i.e. Respondent in Commercial Arbitration Petition (Lodging) No. 10432 of 2023 and Petitioner in Commercial Arbitration Petitioner (Lodging) No. 15203 of 2023).

3. The brief facts leading to filing of the petitions are that the Petitioner - Society engaged the Respondent - Developer for redevelopment project concerning property of the society located in Borivali (West) Mumbai. The Petitioner - Society has 16 members and the current status of the project is a shell structure of ground plus seven floors existing at the site.

4. The Petitioner - Society passed unanimous resolutions appointing the respondent as developer for the redevelopment project. On 09th July, 2015, a Memorandum of Understanding (MoU) was executed between the parties. The terms of the MoU cast an obligation upon the Respondent - Developer to procure conveyance in favour of the Petitioner - Society and to incorporate the name of the Petitioner - Society in the property register.

5. On 06th August, 2015, the Respondent procured deed of

conveyance in favour of the Petitioner – Society. Thereafter, on 11th June, 2016, the Municipal Corporation, Greater Mumbai, issued notice under Section 354 of the Mumbai Municipal Corporation Act, 1881, due to which, the members of the Petitioner – Society had to vacate the building on the site and eventually, in the year 2017, the building was demolished.

6. According to the Petitioner – Society, as there was no progress in the redevelopment project and the Respondent – Developer failed to execute and register the development agreement, the Petitioner – Society passed a resolution in a General Body Meeting on 13th February, 2018 to terminate the MoU. As the Respondent – Developer assured that it would comply with its obligations, such termination of MoU was not acted upon. The Respondent – Developer and the Petitioner – Society eventually, on 04th May, 2018, executed the registered development agreement. The Intimation of Disapproval (IoD) was procured on 03rd August, 2018 by the Respondent – Developer and commencement certificate was also obtained on 12th October, 2018. At this stage, the Respondent – Developer could proceed in terms of development agreement so that redeveloped property could be made available to the members of the society and the Respondent – Developer could also proceed to complete the project.

7. The Respondent - Developer started defaulting and hence the Petitioner - Society called upon the Respondent - Developer to comply with the terms of the development agreement and to pay monthly rentals, as also to execute Permanent Alternative Accommodation Agreements (PAAA).

8. The development agreement required the Respondent - Developer to furnish bank guarantee. The Respondent - Developer was also required to complete the project within 18 months, with a further grace period of 6 months and to procure the occupation certificate within 24 months of the date of the commencement certificate. There was a penalty clause stipulating that the Respondent - Developer would have to pay penalty @ Rs. 2,50,000 per month from the date of the default and that the Development Agreement could be terminated on default.

9. It is the case of the Petitioner - Society that since the redevelopment work after issuance of commencement certificate was completely stalled and the Respondent - Developer started defaulting, the Petitioner - Society approached the Respondent - Developer, who sought relaxation from issuance of bank guarantee and in that light, on 28th November, 2019, a Supplementary Development Agreement was executed between the parties. It was stipulated therein that

instead of bank guarantee, the Petitioner – Society would have a charge on Flat No. 703 and it was further stipulated that sharing of Floor Space Index (FSI) would be discussed. The Respondent – Developer failed to make registered lien / charge on the flat and hence the aforesaid clause was also breached. As there was lack of consensus between the parties on sharing of FSI, the Petitioner – Society insisted on sharing the same as per the Development Agreement.

10. As the Respondent – Developer failed to take necessary steps under the Development Agreement and the Supplementary Development Agreement, on 18th May, 2020, the Petitioner – Society called upon the Respondent – Developer to start the redevelopment work, failing which the Petitioner – Society would be constrained to take appropriate steps in the matter. On 16th August, 2020, the Petitioner – Society sent another letter to the Respondent – Developer to rectify the breaches under the Development Agreement and the Supplementary Development Agreement. This included payment of arrears of rent and undertaking construction work for completion of the project, which was already delayed.

11. Since the Respondent – Developer failed to respond to the letters sent by the Petitioner – Society, as also reminders sent periodically, on 30th August, 2020, the Petitioner – Society called a

Special General Body Meeting and resolved to terminate the Development Agreement and the Power of Attorney. On 03rd September, 2020, the Petitioner – Society issued notice of termination of the Development Agreement to the Respondent – Developer.

12. Thereafter, the Respondent – Developer again approached the Petitioner – Society and requested the members of the Society not to take any adverse steps in the matter, further assuring that the Respondent would pay the entire arrears of monthly rent and the redevelopment project would be completed expeditiously. On 07th December, 2020, the Petitioner – Society recorded the fact that the Respondent – Developer had approached it with aforesaid proposals. On 31st December, 2020, The Respondent executed registered PAAAs with the 16 members of the Society. PAAAs providing for payment of transit rent, brokerage, transportation and hardship compensation to the members of the Petitioner – Society and it was recorded that the possession of the redeveloped premises would be handed over within 18 months plus grace period of 6 months.

13. It appears that the Respondent – Developer did pay some amount towards transit rent, but again started defaulting. The redevelopment work also did not progress on agreed timelines and therefore, on 26th February, 2022, the Petitioner – Society was constrained to call upon the Respondent to start the redevelopment

project and to pay the outstanding monthly arrears of rent. At this stage, with the new DCPR 2034 coming into effect, Respondent - Developer sought no objection from the Petitioner - Society for utilizing the additional FSI. On 16th January, 2023, the Petitioner - Society, through its Advocate, informed the Respondent - Developer that the offer made by the Respondent - Developer of giving Rs. 50,000 to each member of the Petitioner - Society for utilizing additional FSI, was rejected. The Petitioner - Society further called upon the Respondent to pay the arrears of transit rent and to proceed in terms of the agreement between the parties, specifically calling upon the Respondent - Developer to rectify the breaches.

14. On 20th March, 2023, the Petitioner - Society, in a Special General Body Meeting, unanimously resolved to terminate the Development Agreement, Power of Attorney, Supplementary Development Agreement and the PAAAs, due to loss of trust and confidence in the ability of the Respondent - Developer to complete the redevelopment project, particularly in the backdrop of various breaches committed by the Respondent - Developer. On 23rd March, 2023, the Petitioner - Society issued notice of termination through its Advocate. The grounds for termination were non payment of hardship compensation, non payment of transit rent / compensation, non payment of transportation charges, absolute failure in completing

the redevelopment project as per agreed timelines, failure to provide bank guarantee and refusal to share benefit of additional FSI under DCPR 2034. The Petitioner – Society also invoked the arbitration clause on 29th March, 2023. The Petitioner – Society caused publication of termination of Development Agreement in local newspaper.

15. In this backdrop, on 01st April, 2023, the Petitioner – Society filed its petition under Section 9 of the aforesaid Act. On 30th May, 2023, the Respondent – Developer filed affidavit-in-reply opposing the prayers made in the petition on behalf of the Petitioner – Society. On 07th June, 2023, the Respondent – Developer filed petition under Section 9 of the said Act, against the Petitioner – Society. The pleadings were completed in the petitions and the petitions were taken up for hearing.

16. Mr. Tushar Gujjar, learned Counsel appearing for the Petitioner – Society submitted that the narration of facts in the present case would show that the Respondent – Developer miserably failed to abide by its obligations under the Development Agreement and the Supplementary Development Agreement. The redevelopment project was to be completed within 24 months, including the grace period, from the date of the Development Agreement. It was submitted that only a shell structure of 7th floors has been constructed

and the Respondent - Developer has repeatedly defaulted. It was highlighted that the Respondent - Developer was liable to pay arrears of transit rent amounting to about Rs. 90,00,000 at the time when the notice of termination was published. Hardship compensation of about Rs. 25,00,000 was due and even transportation charges of Rs. 6,40,000 were due. It was submitted that the Petitioner - Society is a small society of only 16 members, who had placed their faith in the Respondent - Developer for redevelopment of the property of the society, when the existing structure was dilapidated and eventually demolished by the Municipal Corporation. The members of the Petitioner - Society were literally on the roads, while the Respondent - Developer committed repeated defaults under the Development Agreement as well as the Supplementary Development Agreement. It was submitted that the members of the Petitioner - Society, because of lack of resources, were constrained to negotiate with the Respondent - Developer, despite having terminated the Development Agreement and the Supplementary Development Agreement in September, 2020, itself. Even during pendency of the present petitions, the Respondent - Developer give an impression that it was ready to make amends but no positive steps were forthcoming, thereby showing that the action of termination of the Development Agreement and the Supplementary Development Agreement was justified.

17. It was submitted that the prayers made in the petition filed on behalf of the Petitioner – Society deserve to be granted, for the reason that the members of the Petitioner – Society cannot be forced to suffer at the hands of the Respondent – Developer, who has repeatedly defaulted, as a result of which the Society has lost faith and trust in the said Developer. It was submitted that in similar circumstances, this Court has granted mandatory reliefs even at the stage of petition filed under Section 9 of the said Act.

18. Reliance was specifically placed on judgments of this Court in the cases of *Borivali Anamika Niwas CHSL Vs. Aditya Developers & Ors.*¹, *Rajawadi Arunodaya CHSL Vs. Value Project Pvt. Ltd.*², *Gopi Gorwani Vs. Ideal Co-operative Housing Society Ltd. & Ors.*³, *The Jal Ratan Deed Co-operative Housing Society Limited Vs. Kumar Builders Mumbai Realty Pvt. Ltd.*⁴, *The New Aarti Co-operative Housing Society Ltd. Vs. Kabra Estate and Investment Consultants*⁵, *Heritage Lifestyle and Developers Ltd. Vs. Cool Breeze Co-operative Housing Society Ltd. & Ors.*⁶, *Goregaon Sukhhnivas Co-operative Housing Society Ltd. Vs. Sukushal Builders & Developers & Ors.*⁷, *Chaurangi Builders & Developers Pvt. Ltd. Vs. Maharashtra*

1 2019 SSC OnLine Bom. 10718
 2 2021 SCC OnLine Bom. 9572
 3 2013 SCC OnLine Bom. 1967
 4 2015 SCC OnLine Bom. 5928
 5 2015 SCC OnLine Bom. 5929
 6 2014 (3) Mh.L.J. 376
 7 2016 SCC OnLine Bom. 3366

*Airport Development Company Ltd.*⁸ and *Housing Development and Infrastructure Limited Vs. Mumbai International Airport Private Limited*⁹, as also judgment of the Hon'ble Supreme Court in the case of *Hammad Ahmed Vs. Abdul Majeed & Ors.*¹⁰.

19. On the other hand, Mr. Milan Desai, learned Counsel appearing for the Respondent - Developer submitted that the nature of reliefs sought in the petition filed on behalf of the Petitioner - Society under Section 9 of the said Act, amounted to granting final reliefs. It was submitted that if the said reliefs were granted, nothing would remain for the Respondent - Developer to agitate and therefore, this Court ought not to grant the reliefs claimed by the Petitioner - Society. It was submitted that one of the reasons for delay in completion of redevelopment project was the Covid-19 pandemic and that this Court ought to take into consideration the said aspect of the matter. It was further submitted that the Respondent - Developer had exerted from the very beginning when the MoU was executed between the parties and it was the Respondent - Developer who procured the deed of conveyance in favour of the Petitioner - Society. It was only on the basis of procuring such deed of conveyance that the redevelopment project could be undertaken and therefore, the Petitioner - Society cannot be permitted to turn around

8 2013 SCC OnLine Bom. 1530

9 2013 SCC OnLine Bom. 1513

10 2019 SCC OnLine SC 467

and terminate the Development Agreement or Supplementary Development Agreement, thereby completely shutting out the Respondent - Developer from the project. It was submitted that the structure upto 7th Floor is already constructed and the Respondent - Developer can complete the project. It was further submitted that the Respondent - Developer has acquired substantial interest in the property in question in terms of the Development Agreement and therefore, the Petitioner - Society cannot be permitted to terminate the Development Agreement in this manner.

20. By placing reliance on judgment of this Court in the case of *M/s. Viraj Kamman Real Estate Developers P. Ltd. Vs. Gopal Terrace Co-op. Housing Society Ltd. & Ors.* (judgment and order dated 05th April, 2023, passed in Commercial Arbitration Petition (Lodging) No. 37197 of 2022), it was submitted that the Respondent - Developer is entitled to enjoy the fruits of the development potential of the land in question, in view of the redevelopment agreement executed between the parties. It was submitted that the Respondent - Developer is entitled to sell the saleable component, over and above the premises to be made available to the members of the Petitioner - Society. Reliance was placed on Section 14(3) of the Specific Relief Act, 1963, to contend that the relief sought on behalf of the Petitioner - Society cannot be granted, in the facts and circumstances of the

present case.

21. By placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Sushil Kumar Agarwal Vs. Meenakshi Sadhu & Ors.* (judgment and order dated 09th October, 2018 passed in Civil Appeal No. 1129 of 2012), it was submitted that the Respondent - Developer was entitled to claim decree of specific performance against the Petitioner - Society and that if the petition under Section 9 of the said Act filed on behalf of the Petitioner - Society is to be allowed, there would be no scope for the Respondent - Developer to pursue his right to claim such a decree of specific performance. On this basis, it was submitted that the petition filed on behalf of the Petitioner - Society deserved to be dismissed and the petition filed on behalf of the Respondent - Developer deserved to be allowed. It was submitted that if the petition filed on behalf of the Respondent - Developer is allowed, the project could be completed in terms of the Development Agreement, executed between the parties.

22. Heard learned Counsel for the parties in the backdrop of the material placed on record. The nature of reliefs claimed by the Petitioner - Society and the Respondent - Developer in these two petitions, shows that granting relief in one petition would result in rejection of the other. Before considering the rival contentions in the light of the documents and material placed on record, it would be

appropriate to refer to the position of law governing such disputes. This Court is frequently called upon to decide such disputes, as there are rampant cases of members of Co-operative Housing Societies suffering due to gross delay in execution of the redevelopment projects, as such members are deprived of their existing tenements, with no hope of redeveloped premises being handed over to them. The suffering is compounded due to failure on the part of developers to pay transit rents and other monetary compensation, while repeated defaults are committed. While dealing with such situations and contentions raised on behalf of the developers that the society and its members cannot be permitted to terminate Development Agreement and seek self-redevelopment or redevelopment through other contractors, this Court has analyzed the aspect of lack of trust and faith in the concerned developers.

23. In the case of *Borivali Anamika Niwas CHSL Vs. Aditya Developers & Ors. (supra)*, this Court, while considering such a situation held as follows :

“18. But it is not just that. For a very long time, these society members have been expected to fend for themselves and not even been provided the contractually due transit rent or displacement compensation. If this was only a question of delay for this or that technical reason in obtaining an occupation certificate, perhaps different

considerations would arise. But non-payment of transit rent not only has the effect of leaving the society members twisting in the wind, but is a material breach of a core obligation under the development agreement. It is impossible to accept that a party that is in breach of a material contractual obligation should be entitled to any kind of equitable or discretionary relief. No Court of equity will ever countenance any such thing. The argument of the developer, in effect, runs like this: "I may be in breach. I may have not fulfilled my obligations, including my financial obligations. But because I have put some money into the project, the society members must continue to suffer so that I can, perhaps, some day, make a huge profit. Until I do so, the plight and condition of the society's members, some middle-class of limited means, some in retirement, should matter not at all." This is not a plea for justice. It is a demand that the court do injustice. On one side, money; on the other side, lives. It is clear to any court which matters the more."

24. In the case of *Rajawadi Arunodaya CHSL Vs. Value Project Pvt. Ltd. (supra)*, this Court relied upon observations made in the case of *Borivali Anamika Niwas CHSL Vs. Aditya Developers & Ors. (supra)*, and held as follows :

"64. I mention this (and some of this may indeed be speculation) because when one speaks of the

'balance of convenience', another umbrella term, one must attempt to give it some life and colour and actual societal context. This speaks of the comparative mischief or hardship to be weighed when granting or refusing relief. But there is nothing here but imbalance. The defaults by the Developer have undoubtedly caused immense prejudice and harm to the members of the Society. The hardship to the members is real and immediate; the so-called hardship to the Developers is notional. When it spent in the project, this was no altruism or charity. It was an investment toward great profit. Every investment involves risk. The Developer gambled on the project. Receiving monthly rent is not a sop, not a matter of 'convenience'. It is a matter of survival. Therefore, the non-payment of dues, the delays in project completion, and not paying transit rent for months together speaks to an inherent, and constantly growing, social injustice. It should not be allowed to continue. Therefore, apart from the exceptionally strong prima facie face that the Society makes out, the 'balance of convenience' is decidedly in its favour.

65. *These development agreements are, above all, in the nature of an entrustment. They are not entered into blindly. There is a long and laborious process of society notices, general body meetings, the appointment of a consultant as an advisor, calling for tenders, scrutinizing the bids, ensuring compliance with laws and regulations, looking at the*

proposals and so on to the end of the chapter. This is as it must be. For what is it that is actually happening here? The society is entrusting an outsider with the one single asset that justifies the society's existence, that actually defines the society : the society's property. This is not the entrustment of some other land on which to build so that the society can make handsome profits; no, this is the entrustment of the actual property being used by the society and its members, the very homes in which they live. The society's members agree to this upheaval, to move out altogether, to separate from each other while their new homes are built. The promise to them is that they will be looked after and provided for while their new homes are being built. Days, weeks, months and years pass; the members do not receive the promised rent. Thus begins the downward slide. The promised homes are delayed, then delayed further, and then delayed even further. This cuts at the root of the initial entrustment. A development project for a society demands commitment, fidelity, respect and honesty. When these being to disappear, the contractual relationship collapses. Where there was anticipation and confidence, there is no just bitterness, disappointment and despair. There is a breakdown of confidence, and there is only distrust. Loss of faith and confidence on account of contractual violations and breaches by a developer are sufficient grounds to find for the society and

against the developer.¹¹ Indeed, I would go a step further. There is urgency for the society. Therefore, the slightest delay in project completion, unless specifically accepted by the society, and even one single default in payment of transit rent or other dues is actually sufficient to warrant a termination. There is no such thing in these matters as 'substantial compliance'. That is not the principle of obligations in the realm of private law.

66. *If we, therefore, approach these two matters from this perspective, I do not believe it is even remotely possible to suggest that this Developer, persistently in default, persistently delaying, and never able to come up with actual money to make good the vast accumulated arrears of financial obligations should now be able to tell the society, "You will not be able to eject us from this project. When we will complete your homes, we cannot and will not say. When we will pay your dues, we cannot say. How we will raise finances is unclear. We have none with us now. When you will finally get what you are contractually due, we also cannot say. Even so, we are entitled to be here until we make our profits."*
67. *What is it that the society says on the other hand? In whatever manner the prayers are worded all that the Society says is, "Give back to us that which was ours. Allow us to get back our homes, and restore our lives."*
68. *That is an application that, in these circumstances,*

11 Gopi Gorwani v. Ideal Cooperative Housing Society Ltd., 2013 SCC OnLine Bom 1967

is impossible to resist.

69. *Mr. Khandeparkar is mindful, as am I, that the first prayer is for a mandatory injunction. This brings us within the frame of the law as declared by the Supreme Court in Samir Narain Bhojwani v. Aurora Properties & Investments¹² and Dorab Cawasji Warden v. Coomi Sorab Warden¹³. This has recently been explained in Hammad Ahmed v. Abdul Majeed¹⁴, to say that an ad-interim mandatory injunction is not to be granted lightly or for the asking; but it is also not forbidden. An exceptionally strong prima facie case has to be made out. If satisfied that withholding such an injunction would be unjust and unconscionable, resulting in a perpetuation of injustice, then a court of equity will indeed grant it. This, I believe, is a case that wholly warrants such an injunction.”*

25. Thus, it has been held that non payment of transit rent and other such monetary benefits to the members of the Society while committing delay in completion of the redevelopment project, is a substantial breach warranting issuance of appropriate orders in favour of the society, even at the stage of considering petitions filed under Section 9 of the said Act.

26. This Court has further proceeded to hold in the case of *Gopi Gorwani Vs. Ideal Co-operative Housing Society Ltd. & Ors.*

¹² (2018) 17 SCC 203

¹³ (1990) 2 SCC 117

¹⁴ 2019 SCC OnLine SC 467, paragraphs 57 and 58

(*supra*) that once members of a co-operative housing society lose trust, faith and confidence in the developer on account of various breaches and violations, the society cannot be forced to get redevelopment work done through such a developer. In the case of *The Jal Ratan Deed Co-operative Housing Society Limited Vs. Kumar Builders Mumbai Realty Pvt. Ltd. (supra)*, this Court permitted the society to carryout further redevelopment through a new developer, as the Society had lost faith in the existing developer due to the repeated defaults.

27. The learned Counsel for the Petitioner – Society has invited attention of this Court to similar orders passed by this Court, to which reference is made hereinabove.

28. In the case of *Hammad Ahmed Vs. Abdul Majeed & Ors. (supra)*, the Hon'ble Supreme Court considered the aspect of granting mandatory injunction at interim / ad-interim stage, when strong circumstances were brought to the notice of the Court. It was held that such a mandatory injunction can be granted at interim stage if the Court is satisfied that withholding such interim relief would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated. Therefore, in a given set of circumstances, even at interim stage, this Court can proceed to grant reliefs as claimed by the Petitioner Society in the present

proceedings.

29. The material brought to the notice of this Court shows that the members of the Petitioner – Society agreed to give repeated chances to the Respondent – Developer to abide by the obligations cast upon the Respondent – Developer under the Development Agreement, as also the Supplementary Development Agreement. This is evident from the fact that the Petitioner – Society agreed for a lien or charge on a particular flat, instead of furnishing of bank guarantee by the Respondent – Developer, as mandated under the Development Agreement. The Respondent – Developer failed to agree create such a registered lien or charge and even the said clause was breached. Even after passing a resolution on 30th August, 2020, to terminate the Development Agreement, the Petitioner – Society agreed to the requests made by the Respondent – Developer not to take any adverse step in the matter, on the promise that the Respondent – Developer would pay entire arrears of rent and that the redevelopment project would be expeditiously completed. The members of the Petitioner – Society agreed for execution of PAAAs, which also specified the manner in which the Respondent – Developer would pay transit rent, brokerage charges, transportation charges and hardship compensation, with a promise to complete the project within the period of 24 months.

30. The material on record would show that even after the Petitioner - Society agreed on such terms, the Respondent - Developer again repeatedly defaulted. At this stage, it is relevant to note that such defaults were after the Covid period and therefore, the excuse of covid-19 pandemic sought to be raised on behalf of the Respondent - Developer cannot be accepted. When the Respondent Developer repeatedly defaulted and started raising dispute with the Petitioner - Society as regards additional FSI available under the DCPR 2034, the Petitioner - Society had no other alternative in March, 2023, but to finally terminate the Development Agreement, as also other documents executed in favour of the Respondent - Developer.

31. The Respondent - Developer has not been able to dispute the amounts claimed by the Petitioner - Society before this Court as regards the arrears of rent and other monetary components. Even before this Court, while filing its own petition under Section 9 of the said Act or during hearing of the petitions, the Respondent - Developer was not forthcoming at all about taking any remedial measures, even at this stage as regards the glaring defaults in respect of the redevelopment project.

32. Thus, the Petitioner - Society has clearly made out a strong *prima facie* case in its favour as regards termination of the

development agreement and the necessity to take steps for working out the redevelopment project through other means. There is sufficient material on record to show that the Petitioner – Society has completely lost faith and trust in the Respondent – Developer about completion of the redevelopment project. The Petitioner – Society is not expected to be at the mercy of the Respondent – Developer. The Petitioner – Society cannot be shackled with a Development Agreement in which the Respondent – Developer indulges in repeated defaults, without any hope of the redevelopment project actually being completed. The members of the Petitioner – Society have been out of possession since the year 2017 and none of the timelines specified in the Development Agreement or the Supplementary Development Agreement or even PAAAs have been honored by the Respondent – Developer. There is nothing to show that the Petitioner – Society in any manner obstructed the Respondent – Developer in executing the project. Thus, the factual position in the present case is akin to cases in which this Court while exercising power under Section 9 of the said Act has granted directions that amount to mandatory injunctions at interim stage. The position of law expounded and confirmed by this Court repeatedly in the aforementioned judgments, inures to the benefit of the Petitioner – Society in the present case. Therefore, a clear case is made out by the Petitioner – Society for granting reliefs as claimed in its petition filed

under Section 9 of the said Act. For the same reasons, the reliefs sought by the Respondent – Developer deserve to be rejected. This Court is of the opinion that holding otherwise would grant a premium to a defaulting developer like the Respondent before this Court and the Petitioner – Society and its members would continue to suffer for no fault on their part. Even today the Respondent – Developer is liable to pay monetary benefits to the members of the Petitioner – Society under the documents executed between the parties. The Respondent – Developer was not forthcoming at any stage during pendency of the present petitions about making good such payments to the members of the Petitioner – Society.

33. As regards the judgments on which the learned Counsel for the Respondent – Developer has placed reliance, a perusal of the judgment in the case of *M/s. Viraj Kamman Real Estate Developers P. Ltd. Vs. Gopal Terrace Co-op. Housing Society Ltd. & Ors. (supra)*, would show that the aforesaid case concerned a situation where mutual obligations between the society and the developer were considered. After considering the facts of the said case, this Court found that the developer had not commenced development work and that by the time the question of interim reliefs was considered by the arbitral tribunal a further developer had come into the picture. It was found that the arbitral tribunal struck a balance between the

parties. The observations made in the said judgment cannot inure to the benefit of the Respondent – Developer.

34. In the judgment of the Hon'ble Supreme Court in the case of *Sushil Kumar Agarwal Vs. Meenakshi Sadhu & Ors. (supra)*, observations were made in the context of Section 14(3) of the Specific Relief Act and it was held that in such agreements not only the owner of the property but also the developer would be entitled sue for specific performance. The said position of law cannot inure to the benefit of the Respondent – Developer in the present case, in the face of the material available on record, which show glaring breaches committed by the Respondent – Developer indicating that a strong *prima facie* case is indeed made out by the Petitioner – Society. The members of the Petitioner – Society cannot be shackled with such a developer who has repeatedly defaulted and there is complete loss of faith and trust in the said developer.

35. In view of the above, Commercial Arbitration Petition (Lodging) No. 15203 of 2023, filed by the Respondent – Developer is dismissed, while Commercial Arbitration Petition (Lodging) No. 10432 of 2023 filed by the Petitioner – Society is allowed in terms of prayer clauses (a), (b), (c) and (d), which read as follows :

“(a) This Hon'ble Court be pleased to restrain the Respondent its partners, officers, servants, agents

and/or all or any persons claiming through and under them and/or any person acting on the instruction of the Respondent Developer by an order of temporary injunction from creating third party rights i.e. mortgages, sale, lien, leave and license, lease, gift and/or encumbrance of any kind whatsoever in respect of the said property i.e. the piece and parcel of land together with building known as swashray standing thereon being final plot no. 289 of Tps III, Borivali bearing Survey No. 13, Hissa No. 1 (part) CTS No. 347 of Village Borivali, Taluka Borivali in MSD, admeasuring approximately 464.80 sq. mtrs, Ram Mandir Road, Borivali West, Mumbai - 400 092 and building/s standing thereon known as "Swashray Co-operative Housing Society Ltd" in any manner whatsoever;

- (b) *This Hon'ble Court be pleased to restrain the Respondent its partners, servants, agents, contractors and/or all or any person claiming through or under them and/or any person acting on the instruction of the Respondent - Developer by way of a temporary injunction from intermeddling, interfering, obstructing in the redevelopment process, construction by the Petitioner No. 1 Society by appointment of a third party developer, contractor, completion by self-developer process and/or all or any other acts done on the said property and the said project by the Petitioner No. 1 and/or its assignees, nominees, agents, contractors, developers;*

- (c) *This Hon'ble Court be pleased to restrain the Respondent, its partners, servants, agents, contractors and/or all or any person claiming through or under them and/or any person acting on the instruction of the Respondent Developer by way of a temporary injunction from interfering in the possession of the Petitioner No. 1 Society and/or in manner dispossessing the Petitioner No. 1 Society and its members and/or its assignees, nominees, agents, contractors, developers etc. from the said project and said property;*
- (d) *This Hon'ble Court be pleased to direct the Respondent its partners, servants, agents, contractors and/or all or any person claiming through or under them and/or any person acting on the instruction of the Respondent - Developer to hand over possession of all the original documents (i.e. Re-Development Agreement, Power of Attorney, original approvals, original sanctions, original payment receipts and/or all or any documents/title documents in relation to the said property and said project) in the custody and possession of the Respondent and/or all or any other writing executed between the Petitioner No. 1 and Respondent which is in the custody and possession of the Respondent."*

(MANISH PITALE, J.)