IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION (L) NO. 37842 OF 2025

Khimchand Prithviraj Kothari ....Petitioner
Versus
M/s. Earth Realtors ....Respondent

Mr. Rohan Sawant *a/w. Rakesh Agrawal, Aagam Mehta, Sandeep Nirban & Pallak Ranawat, for Petitioner.*

Mr. Rohaan Cama *a/w. Kunal Mehta, Chirag Saraogi & Shubham Shah i/b. Tushar Goradia, for Respondent.*

CORAM: SOMASEKHAR SUNDARESAN, J.

DATE : February 24, 2026

JUDGEMENT:

1. This Petition has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (***"the Act"***) challenging the Order dated October 28, 2025 passed by the Learned Arbitral Tribunal under Section 17 of the Act (***"Impugned Order"***).

2. In terms of the Impugned Order, the Learned Arbitral Tribunal disposed of two Interim Applications, one filed by each of the parties. Effectively, the Learned Arbitral Tribunal stayed the effect, implementation and operation of a notice dated June 4, 2024 (***"Termination Notice"***) issued by the Petitioner, Khimchand Prithviraj

Kothari (***"Owner"***) to terminate the Development Agreement dated November 25, 2011 (***"Development Agreement"***) executed with the Respondent, M/s. Earth Realtors (***"Developer"***).

3. The Owner's primary grievance is that the Impugned Order was passed as if the Development Agreement in question were a routine Development Agreement, conventionally executed between co-operative housing societies and developers, without appreciating that the very substratum of the Development Agreement which entails the exercise of volition by each party, has been eroded, rendering it impossible to perform.

4. The Development Agreement entails development of a building comprising a ground floor and five storeys, occupied by 84 tenants and occupants. The building has been constructed in 1940. The land in question is said to measure around 608.70 square metres ("***Subject Land***"). The Owner acquired the land and came into ownership on December 12, 2001.

5. The Owner was paid a lumpsum consideration of Rs.2.25 crore for appointing the Developer under the Development Agreement and agreeing to convey the property in favour of various purchasers and allottees of units in a new building to be constructed on the said land. The expenses were to be shared equally between the parties and, after

adjusting all expenses, the net revenues were to be distributed in the ratio of 45:55 between the Owner and the Developer. As regards, the tenants who are occupying the building, a Tripartite Permanent Alternate Accommodation Agreement (***"PAAA"***) was to be executed with each of them. The Developer had the liberty to amalgamate the Subject Land with any other adjoining property to frame a comprehensive scheme of development.

6. The Developer was entitled to sell on an ownership basis, the redeveloped premises constituting the sale component of the redevelopment on terms and conditions *to be mutually agreed* between the Owner and the Developer. As and when the new building would be constructed, the conveyance of the Subject Land was to be effected in favour of the cooperative society to be formed by the acquirers of the new premises.

7. It is the case of the Petitioner that the Learned Arbitral Tribunal lost sight of the fact that the parties had contemplated that the only mode of development of the Subject Land was for it to be developed independently. Even the sale of the freely saleable units which the Developer was entitled to effect, contemplates the exercise of volition on the part of the Owner in determining the terms and conditions of such sale.

8. According to the Owner, the Development Agreement also restricts the scope and ambit of the Power of Attorney, to obtaining permissions from various authorities for the redevelopment and not for executing any PAAA with any tenants. The Owner would also contend that the Developer wrote a letter to the Owner to execute a letter agreement on March 20, 2012 ("***2012 Letter Agreement***"), whereby it was agreed that the Developer would first contribute a sum of Rs.6.25 crore towards expenses to be incurred on the redevelopment, after which the parties would effect equal contributions for subsequent expenses. Even such expenses were to be incurred only on terms mutually agreed by the parties, again indicating joint oversight and exercise of volition by both parties.

9. The Letter Agreement is said to have been reached on the basis that the property would be valued at Rs.8.5 crore. Since only a sum of Rs.2.25 crore had been paid to the Owner, the differential amount of Rs.6.25 crore was to be dealt with by the Developer first incurring the same, after which the parties would share the expenses equally.

10. Under the applicable regulations governing development, the Subject Land would have been required to cede a six-metre wide open space around any structure that was to come up. It is common ground that such a component of open land could have been reduced to 1.5

metres with the prior permission of the Municipal Commissioner. Such a requirement is said to be applicable to land admeasuring 600 sq. metre or less. The constitutional validity of such a provision enabling the Municipal Commissioner to grant concessions came to be challenged. The Supreme Court, in the case of ***Kohinoor CTNL***[1], struck down the enabling provision for the grant of such concessions.

11. According to the Owner, since the Subject Land is greater than 600 sq. metres, the judgement in ***Kohinoor CTNL*** would have no implication for the Subject Land, while the Developer takes the diametrically opposite position by contending that the judgement in ***Kohinoor CTNL***, specifically regarding the proviso which enabled the concession on the open land, had implications for the Subject Land. It is common ground that before the Supreme Court's ruling in ***Kohinoor CTNL***, the Municipal Commissioner had granted concession on the open space in respect of the Subject Land.

12. The calculations of the open space and the bearing on the height of the building are a subject matter governed by and subject to compliance with regulatory framework governing redevelopment. The Development Agreement envisages a building with a height of 69.65 mtrs.

[1] *Municipal Corpn. of Greater Mumbai v. Kohinoor CTNL Infrastructure Co. (P) Ltd.* – *(2014) 4 SCC 538*

13. In September 2018, the new Development Control and Promotion Regulations ("***DCPR, 2034***") came into force. According to the Developer, the new regulations governing redevelopment have legislatively reset the regulatory requirements. The Development Agreement envisages a building with a height of 69.95 mtrs. According to the Developer, under the new regulations, an open space of 1.5 metres would indeed be feasible for buildings with a height below 32 metres. The upshot of this submission is that no permission of any nature is necessary, if the building height is restricted to 32 metres.

14. The Developer further submits that, in any case, the parties were always aware that it would be impossible for even the existing tenants to be rehabilitated solely on the Subject Land. This difference of position between the parties is relevant, because at the heart of the dispute between the parties lies the contention of the Owner that the Development Agreement has now been transformed into a financial contract, with the Impugned Order rewriting the contract into one that envisages exploitation of the development rights attributable to the Subject Land by treating them as Transferable Developmental Rights ("***TDR***"), rather than actual redevelopment.

15. The Developer, on the other hand, would contend that the Development Agreement was always a joint venture and it was always

known to the parties that, within the regulatory framework, the sale component of the development rights was to emerge from elsewhere upon being utilised, consistent with peculiar and specific terms of the Development Agreement.

16. According to the Owner, citing the implications of the judgment in ***Kohinoor CTNL***, the Developer stalled the redevelopment of the Subject Land. Since many tenants shifted elsewhere due to the danger to their lives and property, MHADA was requested to provide transit accommodation, for which the Developer agreed to bear the expenses. Towards this end, a letter dated February 15, 2014, from the Owner to the Executive Engineer of the Rehabilitation Board, is claimed by the Owner to have been merely signed at the behest of the Developer in his capacity as the owner of the land, while the Developer would contend that this letter would indicate the Owner being fully involved in the decisions during the litigation impasse, with no stalling by the Developer.

17. On August 4, 2008, the Municipal Corporation of Greater Mumbai ("***MCGM***") had issued a pre-demolition notice in respect of the building. Eventually, on April 10, 2023, a revised No Objection Certificate from MHADA was received, after which an Intimation of Disapproval ("***IOD***") was received on July 6, 2023. At this stage, a Draft

Supplementary Agreement, prepared by the Owner on a without-prejudice basis, was shared with the Developer to document an updated bargain between the parties. The Developer responded to the proposal, but the Supplementary Agreement was not signed.

18. However, the parties have differences of opinion on how to interpret the overture by the Owner with the Supplementary Agreement – whether it constitutes a proposed shift in the Owner's position or a commitment to a new position, or whether it constitutes a proposal to move forward only if the Developer also moves from his position.

19. In August 2023, the building was demolished. The Owner claims that it was only after the demolition that the Developer indicated for the first time that the freely saleable component would not be constructed on the Subject Land. Thereafter, the Developer issued a notice to the Owner on October 9, 2023, calling upon the Owner to execute the PAAA with the tenants and accusing the Owner of failing to contribute towards the expenses of the project.

20. The Owner would contend that such an assertion completely ignores the 2012 Letter Agreement and pretends that the revision in the bargain simply did not exist. According to the Owner, the Developer attempted to pressurise the Owner by getting the 50 tenants to write to the Owner calling upon him to execute the PAAA. On December 21,

2023, the Owner asserted that the PAAA would be executed only subject to the parties executing the Supplementary Agreement. Since the Supplementary Agreement was never executed, the Developer is said to have executed the PAAA with multiple tenants purportedly using the Power of Attorney which, to begin with, did not authorise the execution of any PAAA, but merely enabled the execution of any agreements in the course of settling any litigation in connection with the subject matter of the redevelopment.

21. The Owner would contend that the PAAA, purported to have been signed by the Owner through the purported constituted attorney i.e. the Developer, is in conflict with the Development Agreement and indicates an amendment of the Development Agreement without the Owner's consent. The PAAAs are said to have explicitly recorded that only the rehabilitation building of ten floors would be constructed on the Subject Land and that the development rights attributable to the Subject Land would be utilised on some other property to be developed by the Developer. This, the Owner would contend, is in conflict with the Development Agreement and was never agreed to by the Owner.

22. The Owner also claims ignorance of any other commercial terms contracted between the Developer and the tenants. The upshot of this position is that the Owner's grievance is that, despite being the owner of

freehold land, the Owner has been ousted from his own property. Furthermore, the Impugned Order grants full rights to the Developer to incur expenses as he chooses (only requiring him to keep accounts for the Owner), and even allows him to develop the property by exercising the development rights elsewhere, reducing the construction on the Subject Land to a mere rehabilitation building.

23. It is in this context, that the Owner indicates that the Termination Notice was issued. The Termination Notice asserted that the very basis of the Development Agreement was that the free-sale component would be constructed on the Subject Land. While the development potential might be transferred from the said land, it was stated that it became apparent that the Development Agreement, as envisaged, could no longer be performed. A cheque for the sum of Rs.2.25 Crore (originally paid by the Developer) was issued as a return of the monies received under the terminated Development Agreement. On the same date, the Owner also wrote to the Executive Engineer of the MCGM and to the Mumbai Building Repairs and Reconstruction Board (***"MBRRB"***), annexing a copy of the Termination Notice and intimating that no further permission or sanctions with respect to the said project should be issued.

24. The Developer replied to the Termination Notice asking the Owner to withdraw the same and also calling upon the owner to pay an outstanding amount of Rs. 3.13 Crore (inclusive of interest) as the Owner's share towards costs and expenses for the redevelopment of the Subject Land. Following this, 50 tenants wrote to the Owner requesting him to withdraw the Termination Notice, and the Developer issued a public notice dated June 21, 2024, refuting the termination by the Owner.

25. While the parties then traded correspondence and held without-prejudice discussions to try and resolve the issue, the MCGM wrote to the Owner on July 30, 2024, stating that in the absence of any restraint order from an authority of competent jurisdiction, the MCGM could not be stopped from processing the pending applications. Eventually, a new IOD was issued on December 18, 2024, and on January 10, 2025, even a Commencement Certificate (CC) was issued.

26. On April 15, 2025, the Developer called upon the Owner to contribute towards alleged expenses incurred by the Developer, also contending that the Owner had waived the termination. A similar letter was again issued on May 26, 2025. The Owner recorded in a letter dated June 3, 2025, that the execution of the PAAA in the exercise of the Power of Attorney was unlawful and was in conflict with the terms of the

Power of Attorney granted, and that no waiver of rights had been effected by the Owner.

27. On June 14, 2025, a Petition under Section 9 of the Act was filed in this Court by the Owner, and on July 3, 2025, with an observation that no construction was likely to come up within ten days, the dispute was referred to arbitration in disposal of the Section 9 Petition, leaving it to the Learned Arbitral Tribunal to consider the grant of ad-interim reliefs.

28. On July 17, 2025, the Learned Arbitral Tribunal refused to grant ad-interim reliefs, mainly on the ground of delay in seeking such reliefs. The Learned Arbitral Tribunal also passed another order on August 1, 2025, rejecting the application of various tenants seeking to be impleaded as parties in the arbitration proceedings.

29. Eventually, the Impugned Order was passed under Section 17 of the Act in the following terms :-

> *84. In the interest of justice and with a view to balance equities, both applications are disposed of in the following terms:*
>
> *a) The effect, implementation and operation of the Termination Notice dated 4th June 2024 issued by the Claimant is stayed and the Claimant is restrained from acting in furtherance thereof, including entering into any agreement with any third party or creating any third party rights or encumbrance in relation to the Suit Plot.*

b) On or before 15th November 2025, the Respondent shall file an affidavit disclosing details and copies of all approvals, permissions, sanctions and plans obtained for redevelopment of the Suit Plot.

c) *On or before 15th November 2025, the Respondent shall file an affidavit providing details and accounts of all expenses incurred in relation to redevelopment of the Suit Plot upto 1st November 2025. This affidavit shall include a tabular summary of expenses incurred and also include supporting bills/invoices along with proof of payment*

d) For expenses towards redevelopment incurred for every month from 1st November 2025 onwards, the Respondent shall file an affidavit disclosing details and accounts of all such monthly expenses by the 15th of the following month [i.e. affidavit disclosing expenses for November 2025 shall be filed by 15th December 2025 and so on]. This affidavit shall include a tabular summary of expenses incurred and also include supporting bills/invoices along with proof of payment.

e) The Respondent shall not sell the TDR/DRC generated from the Suit Plot without providing the Claimant a notice with details of the proposed sale [including details of the TDR, price and buyer] at least four weeks prior to the proposed sale. Within a period of four weeks after receiving the notice from the Respondent, the Claimant shall be at liberty to get a buyer for the TDR/DRC at a higher price.

f) The TDR/DRC generated from the Suit Plot will be sold at the higher price ascertained in (e) above. The Respondent shall deposit the money generated from the sale of the TDR/DRC in a separate bank account to be opened with any nationalised bank. The Respondent shall use the funds generated from the sale of TDR/DRC only towards costs for the redevelopment of the Suit Plot and for no other purpose. The Respondent shall provide the Claimant with

monthly account statements of this bank account before the 15th day of the following month.

Owner's Contentions:

30. I have heard Mr. Rohan Sawant, Learned Advocate for the Owner and Mr. Rohaan Cama, Learned Advocate for the Developer at length and with their assistance, examined the material on record. Three volumes of compilation of documents tendered by the Owner were taken on record for review, with the assistance of the Learned Advocates.

31. Mr. Sawant's assault on the Impugned Order is essentially based on the following contentions :-

A] The Development Agreement is incapable of specific performance, rendering the grant of interim reliefs as perverse;

B] The directions issued under the Impugned Order are not in consonance with the Development Agreement and the 2012 Letter Agreement. Effectively, the learned Arbitral Tribunal has unilaterally rewritten and created a new contract between the parties;

C] The Learned Arbitral Tribunal has grossly misinterpreted the Development Agreement by permitting the development of

only the rehabilitation component on the Subject Land and the sale of the development rights in the open market;

D] The Power of Attorney dated November 25, 2011 has been grossly misinterpreted, since it does not provide any power to the Developer to execute the PAAA with the tenants;

E] In any case, the conduct of the Developer is not without blemish, inasmuch as the Developer suppressed the 2012 Letter Agreement. The Developer having suppressed the 2012 Letter Agreement, has simply refrained from making any pleadings on the same. Instead of this becoming the basis for denying relief to the Developer, this suppression escaped consideration in the Impugned Order; and

F] Findings on the facet of delay for denying relief are perverse, and the Learned Arbitrator has grossly misread the factual matrix in this regard.

32. Mr. Sawant would submit that Clauses 2(c) and 11 of the Development Agreement squarely contemplate the volition of the parties and require mutual agreement on facets such as the sale of the redevelopment units as well as the share of expenses to be incurred. The 2012 Letter Agreement reaffirms such exercise of volition by the Owner along with the Developer. Therefore, under Section 14(1)(b) of

the Specific Relief Act, 1963 ("***Specific Relief Act***"), the grant of specific performance is explicitly barred. Towards this end, he would rely on the following extracts from the judgement in ***Sushil Kumar Agarwal***[2]:

> *13. The consistent position of the common law is that* ***courts do not normally order specific performance of a contract to build or repair****. But this rule is subject to important exceptions, and* ***a decree for specific performance of a contract to build will be made only upon meeting the requisite requirements under law****. According to Halsbury's Laws of England [Halsbury's Laws of England, Fourth Edn., Vol. 44(1), para 801.] , the discretion to grant specific performance is not arbitrary or capricious; it is governed by the principles developed in precedents.* ***The Judge must exercise the discretion in a judicious manner. Circumstances bearing on the conduct of the plaintiff, such as delay, acquiescence and breach or some other circumstances outside the contract, may render it inequitable to enforce it****. The position as elucidated in Halsbury's Laws of England [Halsbury's Laws of England, Fourth Edn., Vol. 44(1), para 806.] is thus:*
>
> > *"406. ... the court does not normally order the specific performance of a contract to build or repair. However, this Rule is subject to important exceptions, and* ***a decree for specific performance of a contract to build will be made if the following conditions are fulfilled : (1) that the building work is defined by the contract between the parties; (2) that the plaintiff has a substantial interest in the performance of the contract of such a nature that he cannot be adequately compensated in damages; (3) that the defendant is in possession of the land on which the work is contracted to be done."***
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> *17. The expression "Development Agreement" has not been defined statutorily. In a sense, it is a catch-all nomenclature which is used to be*

[2] *Sushil Kumar Agarwal v. Meenakshi Sadhu & Ors. – 2019 2 SCC 241*

describe a wide range of agreements which an owner of a property may enter into for development of immovable property. As real estate transactions have grown in complexity, the nature of these agreements has become increasingly intricate. Broadly speaking, (without intending to be exhaustive), Development Agreements may be of various kinds:

17.1. An agreement may envisage that the owner of the immovable property engages someone to carry out the work of construction on the property for monetary consideration. This is a pure construction contract;

17.2. An agreement by which the owner or a person holding other rights in an immovable property grants rights to a third party to carry on development for a monetary consideration payable by the developer to the other. In such a situation, the owner or right holder may in effect create an interest in the property in favour of the developer for a monetary consideration;

17.3. An agreement where the owner or a person holding any other rights in an immovable property grants rights to another person to carry out development. In consideration, the developer has to hand over a part of the constructed area to the owner. The developer is entitled to deal with the balance of the constructed area. In some situations, a society or similar other association is formed and the land is conveyed or leased to the society or association;

17.4. A Development Agreement may be entered into in a situation where the immovable property is occupied by tenants or other right holders. In some cases, the property may be encroached upon. The developer may take on the entire responsibility to settle with the occupants and to thereafter carry out construction; and

17.5. An owner may negotiate with a developer to develop a plot of land which is occupied by slum dwellers and which has been declared as a slum. Alternately, there may be old and dilapidated buildings which are

occupied by a number of occupants or tenants. The developer may undertake to rehabilitate the occupants or, as the case may be, the slum dwellers and thereafter share the saleable constructed area with the owner.

18. When a pure construction contract is entered into, the contractor has no interest in either the land or the construction which is carried out. But in various other categories of Development Agreements, the developer may have acquired a valuable right either in the property or in the constructed area. The terms of the agreement are crucial in determining whether any interest has been created in the land or in respect of rights in the land in favour of the developer and if so, the nature and extent of the rights.

24. Various High Courts have interpreted the requirements under Section 14(3)(c) of the Act and opined on the maintainability of a suit by the developer for specific performance against the owner of the property for a breach in the conditions of the Development Agreement. A common thread that runs through the analysis in decided cases is the following:

24.1. The courts do not normally order specific performance of a contract to build or repair. But this rule is subject to important exceptions, and a decree for specific performance of a contract to build will be made only upon meeting the requirements under law;

24.2. The discretion to grant specific performance is not arbitrary or capricious but judicious; it is to be exercised on settled principles; the conduct of the plaintiff, such as delay, acquiescence, breach or some other circumstances outside the contract, may render it inequitable to enforce it;

24.3. In order to determine the exact nature of the agreement signed between the parties, the intent of the parties has to be construed by reading the agreement as a whole in order to determine whether it is an agreement simpliciter for construction or an agreement that also creates

an interest for the builder in the property. Where under a Development Agreement, the developer has an interest in land, it would be difficult to hold that such an agreement is not capable of being specifically enforced; and

24.4. A decree for specific performance of a contract to build will be made if the following conditions are fulfilled:

24.4.1. the work of construction should be described in the contract in a sufficiently precise manner in order for the court to determine the exact nature of the building or work;

24.4.2. the plaintiff must have a substantial interest in the performance of the contract and the interest should be of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

24.4.3. the defendant should have, by virtue of the agreement, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

25. The issue before this Court is whether Section 14(3)(c)(iii) is a bar to a suit by a developer for specific performance of a Development Agreement between himself and the owner of the property. The condition under Section 14(3)(c)(iii) is that the defendant has, by virtue of the agreement, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed. If the rule of literal interpretation is adopted to interpret Section 14(3)(c)(iii), it would lead to a situation where a suit for specific performance can only be instituted at the behest of the owner against a developer, denying the benefit of the provision to the developer despite an interest in the property having been created. This anomaly is created by the use of the words "the defendant has, by virtue of the agreement, obtained possession of the whole or any part of the land" in Section 14(3)(c)(iii). Under a

Development Agreement, an interest in the property may have been created in favour of the developer. If the developer is the plaintiff and the suit is against the owner, strictly applied, clause (iii) would require that the defendant should have obtained possession under the agreement. In such a case if the developer files a suit for specific performance against the owner, and the owner is in possession of the land by virtue of a lawful title, the defendant (i.e. the owner) cannot be said to have obtained possession of the land by way of the agreement. This would lead to an anomalous situation where the condition in Section 14(3)(c)(iii) would not be fulfilled in the case of a suit by a developer. Application of the literal rule of interpretation to Section 14(3)(c)(iii), would lead to an absurdity and would be inconsistent with the intent of the Act.

27. By giving a purposive interpretation to Section 14(3)(c)(iii), the anomaly and absurdity created by the third condition will have no applicability in a situation where the developer who has an interest in the property, brings a suit for specific performance against the owner. The developer will have to satisfy the two conditions laid out in sub-clauses (i) and (ii) of Section 14(3)(c), for the suit for specific performance to be maintainable against the owner. This will ensure that both owners and developers can avail of the remedy of specific performance under the Act. A suit for specific performance filed by the developer would then be maintainable. Whether specific performance should in the facts of a case be granted is a separate matter, bearing on the discretion of the court.

[Emphasis Supplied]

33. Mr. Sawant would submit that the reliance by the Learned Arbitral Tribunal on Section 14(3)(c) of the Specific Relief Act is contrary to law and perverse, inasmuch as the said provision does not

override Section 14(1)(b) of the Specific Relief Act, and therefore, is of no avail to get over the prohibition on the grant of specific relief in respect of matters involving volition of the parties, and mutual agreement of the parties. Mr. Sawant would also submit that the Impugned Order has embarked upon creating new rights by way of a new contract by permitting the Developer to transact with the development rights attributable to the Subject Land by merely giving a notice of four weeks, within which the Owner is to bring a higher offer or accept it, without having a say in the transfer of such rights.

34. Such an arrangement, Mr. Sawant would submit, is *ex facie* contrary to Clause 11 of the Development Agreement, and indeed, the 2012 Letter Agreement governing the incurring of expenses by the Developer. Merely keeping accounts of expenses, he would submit, is *ex facie* contrary to Paragraphs 7 and 8 of the 2012 Letter Agreement. Therefore, he would contend, the arrangement put in place in the Impugned Order is contrary to the contract between the parties. When the Owner brought up the 2012 Letter Agreement in the proceedings, Mr. Sawant would submit, it was sought to be dismissed by the Developer on the premise that since the Development Agreement is a registered document, any modification of that instrument would also

need to be registered. This was accepted by the Learned Arbitral Tribunal, leaving the issue for deeper consideration at the stage of trial.

35. Mr. Sawant would submit that the Development Agreement never envisaged development of the free sale component of the project on any property outside the Subject Land. The new building and the co-operative society were to come up on the Subject Land and it was required to be conveyed upon completion of the development. The Development Agreement also invokes amalgamation of other properties with the Subject Land i.e., an inward movement of rights, but never entailed an outward movement of the development rights to a location outside the Subject Land. Therefore, the Learned Arbitral Tribunal has constructed a contract completely different from the Development Agreement.

36. Mr. Sawant would submit that it is wrong to hold that the Owner's actions envisage any delay, since the Owner was engaged with the Developer, who continued to act in contravention despite such engagement. Raising of an objection is adequate to counter an allegation of acquiescence, and the Owner was protesting at all times against the Developer acting contrary to the Development Agreement, the Power of Attorney, and the 2012 Letter Agreement. Despite the Termination Notice being issued as long ago as June 4, 2024, the

Developer continued to take steps towards the development, with the IOD being obtained after the Termination Notice, and therefore, the Developer took the risk of such decisions.

Developer's Contentions:

37. In sharp contrast, Mr. Cama would contend that at the time of the Development Agreement, it was writ large to the parties that it would be impossible to effect the redevelopment as envisaged on the site of the Subject Land under the then-applicable Development Control Regulations. Any building on a plot of 600 square metres with a height of more than 24 metres would need to provide, on at least one side other than the road side, a clear open space of six metres at the ground level. The Subject Land measured more than 600 square metres but only marginally higher by 8 square metres, and therefore, the developer validly made requisite applications seeking a concession from the six-metre open space requirement.

38. The very fact that such an application was made, would evidence, according to Mr. Cama, that the parties were aware that, as the plot size and building height stood, it would not be possible to develop the free sale component on the Subject Land and that a concession from the Municipal Commissioner would be necessary. The Municipal Commissioner in fact granted such a concession on September 5, 2013,

and it was the Supreme Court judgement in ***Kohinoor CTNL*** that struck down the power of the Municipal Commissioner to grant such a concession.

39. According to Mr. Cama, although the provision that was struck down was one that applied to buildings on an area admeasuring 600 square metres or less, the effect of striking down the enabling provision was visited upon even in cases such as the Subject Land, since the open space required had been reduced by the Commissioner in such marginally different cases. As a matter of fact, Mr. Cama would contend that on December 20, 2013, the Municipal Commissioner directed the municipal officials to abide by the judgement in ***Kohinoor CTNL.*** Conscious of this position, Mr. Cama would submit, it was the Owner who wrote a letter to the MCGM recognising that the relaxations granted for the redevelopment had been jeopardised pursuant to the judgement in ***Kohinoor CTNL*** and the redevelopment had been stalled.

40. Much later, on September 20, 2016 the MCGM also acknowledged that the building construction could not be carried out owing to the judgement in ***Kohinoor CTNL.*** However, after the new DCPR, 2034 came into force, the parties engaged with various authorities to enhance the prospect for redevelopment. Not once throughout the period between 2013 and 2023 did the Owner ever accuse the Developer of any

delay in the development or a breach of the Development Agreement, and yet, the Termination Notice is purportedly based on delay in implementing the project, when the Owner and the Developer were both engaged in the process of accommodating the regulatory issues that arose with the project.

41. The IOD issued on July 6, 2023 was based on plans for construction of a building with a height of 32 metres in terms of the DCPR 2034, which allows buildings of this height to be constructed without the requirement of a six-metre open space, Mr. Cama would submit. Within this framework, all the tenants could be rehabilitated in that building, and it is on that basis that the building was demolished.

42. The upshot of Mr. Cama's submissions is that, right since the execution of the Development Agreement and even after the introduction of the DCPR, 2034, and indeed after the judgement in ***Kohinoor CTNL***, the parties were well aware that it would not have been possible to have the full redevelopment on the Subject Land, and necessarily, development potential beyond what could be utilised on site would arise, and it would need to be exploited elsewhere. Therefore, he would submit, the Owner's claim that he came to know for the first time about the free sale component not being constructed on the site of the

Subject Land only when the building was demolished, is totally untrue and baseless.

43. Mr. Cama would submit that delays were occasioned by the Owner's conduct, since it was the Owner who refrained from executing the PAAA, which was clearly an obligation envisaged in the Development Agreement. Despite the issuance of a notice by the Developer to the Owner on October 9, 2023, alleging breach of the Development Agreement by the Owner for not signing the PAAA and not contributing to the costs and expenses, the Owner, apart from sending a holding letter dated October 17, 2023, did not at all respond to counter the allegations.

44. The draft of the Supplementary Agreement sent by the Owner would evidence that the Owner himself attempted to deviate from the Development Agreement. In any case, the Developer simply refused to sign the same and the PAAA was held to ransom by the Owner on the anvil of the draft Supplementary Agreement. The Developer's execution of 55 PAAAs by February 29, 2024, in purported usage of the Power of Attorney, is defended by Mr. Cama on the basis that the Power of Attorney was in fact conferred on the Developer in the context of taking steps to vacate the premises, and thereby, to undertake various acts, including filing suits, obtaining consent decrees, and executing any

other agreement or arrangement with the tenants in connection with vacating the premises. This, it is contended, squarely empowered the execution of the PAAA; and in any case, the references to the development taking place outside the Subject Land was a matter well known to the Owner, which need not have resulted in the use of the Power of Attorney to be a violative one.

45. Mr. Cama would contend that while the Owner relies upon the 2012 Letter Agreement to assert existence of volition of the parties even on incurring of expenses, even the Termination Notice makes no mention of the 2012 Letter Agreement. The Termination Notice alleges delay and frustration, but does not contain a whisper about the 2012 Letter Agreement. Likewise, even while invoking the arbitration the Owner made no mention of the 2012 Letter Agreement. Indeed, according to Mr. Cama, despite issuance of the Termination Notice in June 2024, and in spite of the MCGM also clarifying that without an order of a competent authority or Court, they would not stop processing the application for the development, the Owner took no steps to move any forum despite being aware that plans were under active consideration of the MGCM. The IOD had been issued, demolition had already been effected, the Commencement Certificate had been received, and work towards development had started by the time (in June 2025), the Owner filed an application under Section 11 and a

Petition under Section 9 of the Act. The very first time that the Owner alludes to the 2012 Letter Agreement was in an additional affidavit filed in the Section 9 Petition, which called into question the manner of reliance by the Owner on the 2012 Letter Agreement.

46. Mr. Cama would submit that the arbitrator has examined it from the perspective of a *prima facie* assessment of the quality and quantity of evidence, has returned a plausible *prima facie* view, and has made an arrangement which broadly balances the competing interests of the parties. Clause 11 of the Development Agreement, he would submit, squarely allowed the Developer to undertake expenses towards the redevelopment, without any need for consultation with the Owner. That apart, Clause 2(d) of the Development Agreement permitted the Developer the liberty to amend the building plans, taking into account planning constraints, suggestions of architects, and the requirement of planning authorities, while of course keeping the Owner informed. He would submit that under Clause 2(c) of the Development Agreement, the parties were to equally share all the expenses and costs, yet share the net revenues between the Owner and the Developer in the ratio of 45:55. This Clause squarely provides that if the Owner failed to pay and contribute to the construction costs, the Developer may incur such costs and recover the same from the net revenues to be shared with the Owner along with interest @18% per annum.

47. Mr. Cama would submit that the Development Agreement indeed envisages that the parties would avail of the entire development potential in respect of the Subject Land, sharing it in the ratio of 45:55, while Clause 2 provides for conveyance of the property in favour of the co-operative housing society. That Clause did not mean that any exploitation of the development rights outside the site of the Subject Land was never envisaged in the Development Agreement. He would also contend that Clause 11 of the Development Agreement entitles the Developer to sell all the premises of the saleable component in the open market at such price and on such terms and conditions as the parties mutually think fit and agree. He would contend that it is the Developer who was entitled to receive all the sale proceeds and to execute ownership agreements under the MOFA with the counterparties and thereafter share the revenues with the Owner.

48. Mr. Cama would submit that the Learned Arbitral Tribunal merely dealt with the terms on which any unreasonable withholding of consent would be worked out. Mr. Cama would submit that since the Developer was fully entitled to incur expenses upon the failure of the owner to contribute, subject to keeping accounts, no fault can be found with the Learned Arbitral Tribunal putting in place the framework set out in the Impugned Order. The sale of the TDR, coupled with the right

of first refusal, Mr. Cama would submit, only adjusts for and protects the interests of the Owner.

49. Mr. Cama would submit that the Subject Land was in the possession of the Developer when the Termination Notice was issued. The Termination Notice was rejected by the Developer. The MCGM informed the Owner that it would continue to process the applications. Yet, the Owner did not file any application in any forum to seek protective relief to obtain any order. Therefore, the findings of the Learned Arbitral Tribunal regarding delay on the part of the Owner could not be faulted.

Analysis and Findings:

50. This Court's jurisdiction under Section 37 of the Act is to examine whether such assessment by the Learned Arbitral Tribunal is reasonable, plausible and not arbitrary. If the approach and analysis by the Learned Arbitral Tribunal were to be reasonable, it is not for the Section 37 Court to substitute the wisdom of the Learned Arbitral Tribunal with its own wisdom on what would be a more preferable competing plausible view.

51. Having heard the Learned Advocates and having examined the material on record with their assistance, I find that the Learned Arbitral Tribunal has had to walk a tightrope to examine how to adjust for the

competing interests and claims of the parties. Towards that end, the Learned Arbitral Tribunal has had to examine the facts in hand, the contentions about interpretation of the terms of the Development Agreement, adjust for the conduct of the parties, and firm up what would, in his view be a reasonable interlocutory arrangement that would preserve the subject matter of the arbitration agreement.

52. The Learned Arbitral Tribunal was presented with two competing Section 17 Applications. The Owner sought injunction against development by the Developer and further action based on the Development Agreement. The Developer sought injunction against Termination Notice and against any appointment of any other developer.

53. The Learned Arbitral Tribunal has come to a *prima facie* view that the Development Agreement is amenable to specific relief taking into account that the Developer has gained interest in the development of the Subject Land. Extracts from ***Sushil Kumar Agrawal*** have already been set out above. The Learned Arbitral Tribunal examined the same and applied the principles enunciated to the facts of the case to find that the Development Agreement was not a mere construction contract for consideration of a fee, but one in which the Developer had gained significant interest in the development of the Subject Land, with a 55%

revenue share. Indeed, there are provisions entailing active involvement of the Owner in certain facets of the development, but I cannot find fault with the Learned Arbitral Tribunal for concluding that the Developer had a strong driving force and role in the development contracted for the agreement to be wished away as a mere construction contract for a fee.

54. The Developer has been in possession, the Developer has worked on the project and obtained sanctions for plans, executed PAAAs with the tenants, had the building demolished, and it is at an extremely advanced stage that the Learned Arbitral Tribunal was presented with the competing applications for interlocutory relief. The view that the Owner's role in the Development Agreement lies in the operational facets of the contract, and that this cannot negate the significant and material contractual role for the Developer, is again a logical and fair reading of the Development Agreement.

Specific Relief Act:

55. In my view, the provisions of Section 14(3)(c) of the Specific Relief Act would indeed have application to this case as held by the Learned Arbitral Tribunal. Indeed, this provision overrides the provisions of Sections 14(1)(a), 14(1)(c) and 14(1)(d), which explains Mr. Sawant's endeavour to fit the case into Section 14(1)(b), which is not referred to in

the *non-obstante* component of Section 14(3)(c). However, if the principles contained in Section 14(3)(c) are met, it would not follow that grant of specific relief cannot be granted. It is necessary to see if the ingredients of Section 14(1)(b) are attracted, which is what the Owner hopes to invoke by claiming an active volition being necessary on his part. At this *prima facie* stage, it cannot be forgotten that the Development Agreement indeed provides for the Developer incurring expenses if the Owner does not meet the same. Even if one were to accept the 2012 Letter Agreement as binding without further need to examine evidence to appreciate the context and content, one cannot lose sight of the fact that the incurring of expense is a matter of keeping accounts and can be adjusted for, particularly when the Development Agreement envisaged that precise nature of activity for the subject of incurring of expenses.

56. Therefore, even adopting the 2012 Letter Agreement at its face value (leaving aside why the Owner did not invoke it until well into the arbitration proceedings and also leaving aside the contention of the Developer not having made any pleading on that instrument), the element of incurring of expenses is not a matter of such dependence on volition that material terms of the Development Agreement are incapable of being enforced. The Learned Arbitral Tribunal has to examine at this interlocutory stage, on a *prima facie* basis, whether the

Development Agreement is so dependent on volition of the parties or contains such minute details that its material terms could simply never be enforced in terms of specific relief, and the finding that the Development Agreement could indeed be amenable to specific relief cannot be faulted. If one were to take a blanket acceptance of the Owner's proposition, it would necessarily follow that no development agreement could ever be amenable to specific relief. In contrast, the Learned Arbitral Tribunal has indeed formed a *prima facie* view at this stage, leaving some facets of detail to minute consideration at the stage of trial. The Learned Arbitral Tribunal ought to have such play in the joints to examine the material at trial rather than shut out any such consideration at this very stage, to render the Developer exposed without any interim protection.

57. The Learned Arbitral Tribunal has also rendered a reasonable finding that despite the "no termination clause" in the Development Agreement, the contract was indeed capable of termination on account of any material breach. I also note that the Learned Arbitral Tribunal has examined Clause 16 of the Development Agreement (which empowers the Developer to incur expenses and call on the Owner to share in them) and the effect of the 2012 Letter Agreement (which contemplates the Developer incurring the first Rs. 4 crore of expenses and the Owner having a say in the expenses). Indeed, the Learned

Arbitral Tribunal has explicitly kept the issue for detailed consideration at the stage of trial and found that prima facie, there is nothing to show the absence of readiness and willingness on the part of the Developer to perform. To my mind, this approach cannot be faulted and it would be inappropriate to conclude that the Impugned Order is contrary to the contract. The material terms of the Development Agreement do not *prima facie* get rendered as being incapable of specific performance due to the minutiae of detail in the expenses.

In Situ Development:

58. I have carefully examined the Learned Arbitral Tribunal's analysis of the contentious issue of extent of *in situ* development on the Subject Land. The Learned Arbitral Tribunal has factored in the bigger picture of the development potential and constraints on development on the Subject Land and in that light also taken a *prima facie* view on the use of the term "allottee" and "purchaser" to indicate that the allottees of flats in lieu of their existing rights i.e., the tenants were intended to be housed in the premises to be built on the Subject Land.

59. The Learned Arbitral Tribunal has noticed that even with the regulatory changes that took place, the Owner did not invoke impossibility of performance and frustration of contract. Right since September 2018 until the Termination Notice, the Owner never cited

frustration of contract – as rightly noticed by the Learned Arbitral Tribunal. The Owner, far from claiming that the contract stood frustrated, sought a bargain in the form of the draft Supplementary Agreement. This would indicate that the Owner would have liked to continue with the contract provided the amendments he sought were accepted.

60. The parties had jointly invested in the idea of the exemption from the Municipal Commissioner and indeed even obtained one, which got disturbed after the ruling in ***Kohinoor CTNL.*** The issue is not one of pure question of law with analysis of whether that judgement ought to have implications for the project, but is, in fact, a question of fact as to whether the outcome in ***Kohinoor CTNL*** had an impact on the project on the ground. As a matter of fact, the judgement had an impact and the concession obtained by the parties was lost. Put differently, the Owner knew a concession was needed or beneficial when executing the contract; benefitted from the concession; suffered from its revocation; could not reverse the loss of benefit; did not call frustration at that stage; attempted to get a modification to the bargain; and therefore, the Owner cannot contend that the judgement, as a matter of law cannot have a bearing on the matter since the Subject Land is 8 square metres more in area than the threshold stipulated in the enabling provision that was struck down.

61. The Owner is the author of the letter dated February 15, 2014 to the MCGM, representing that the project had been stalled due to ***Kohinoor CTNL***, and indeed the Owner never claimed frustration from that point right until the Termination Notice in 2023. Even correspondence from the Developer citing ***Kohinoor CTNL*** as the basis for the project having been delayed did not meet with any record of protest from the Owner.

Usage of Power of Attorney:

62. As regards the usage of the Power of Attorney to execute the PAAAs, what strikes me is that the Owner held off executing the PAAAs and eventually the Developer executed them. *Prima facie*, the Power of Attorney empowered the Developer to settle with the tenants in connection with the development, and the execution of the PAAA is a step in that direction. Indeed, if there is any provision that places the Owner in a position that is worse off than what is envisaged in the Development Agreement, the Learned Arbitral Tribunal could well examine the same along with evidence and rule appropriately. However, it cannot be said, *prima facie*, that the usage of the Power of Attorney was an outright breach of the scope of the power. Indeed, the Developer has committed and bound himself to the position that the PAAA could not be relied upon to vary or alter the Development

Agreement with the Developer signing on behalf of the Owner. The Learned Arbitral Tribunal has held the Developer to that statement, and therefore the perceived risk stands adjusted for.

Prima Facie Validity of Termination:

63. For the reasons already discussed above, I also cannot find fault with the Learned Arbitral Tribunal's *prima facie* view that the Termination Notice was not justified – the grounds of substantial breach, delay and frustration – not being made out by such a degree that no interlocutory protection is to be warranted. The Learned Arbitral Tribunal has also refused to accept the Developer's stand of waiver and asserted that these issues would be considered at the trial stage.

Facet of Delay for Interim Relief:

64. The Learned Arbitral Tribunal has also returned reasonable findings on the acute delay in the Owner asserting the claims it has now made. In Paragraph 82 of the Impugned Order, the Learned Arbitral Tribunal has returned a meticulous analysis of the facet of delay in seeking relief. To avoid prolixity, I am not setting out the contents to explain my view that they represent a reasonable approach. Indeed, delay alone is no basis to deny relief in a meritorious case, but equally, delay is not irrelevant when an Arbitral Tribunal examines the nature of

interlocutory protection to be granted to preserve the subject matter of the arbitration agreement.

Tribunal's Conclusive Directions:

65. Therefore, in the final analysis, the Learned Arbitral Tribunal has restrained the Owner from acting upon the Termination Notice and entering into any other agreement in reliance upon the Termination Notice. The Learned Arbitral Tribunal has enforced full disclosure of all information on plans, approvals, sanctions and permissions for the redevelopment. Likewise, a full disclosure of all expenses with proper classification and supporting documentary evidence has been directed. Ongoing disclosures of expenses by way of affidavits have also been directed.

Interference with Right of First Refusal:

66. The Learned Arbitral Tribunal has correctly restrained the Developer from alienating any TDR as a balancing protective measure. Since the deployment and monetisation of such rights forms subject matter of the arbitration agreement, the Learned Arbitral Tribunal has provided for a four-week window for the Owner to get a better price with a competing offer.

67. Indeed, the proceeds are directed to be kept in a special account from which funds are to be used only for the project, with accounts

being provided on a monthly basis. But one cannot help but agree with the Owner that the four-week right of first refusal is a facet where the Owner may have a point about a new bargain having been created in the process of adjusting the interlocutory arrangement.

68. While the powers under Section 17 of the Act are identical to the powers of the Court under Section 9 of the Act, and that entails provision of "*such other interim measure of protection as may appear to the Court to be just and convenient*", a plain reading of the right of first refusal framework contained in sub-Paragraphs (e) and (f) of Paragraph 84 would indicate a new contractual arrangement that has been created. Price discovery, a right of first refusal, and completion of sale would be a *conclusive* measure rather than an *interim protective measure*.

69. Therefore, to my mind, this is the only element of the Impugned Order that poses a vulnerability of the Impugned Order being capable of attack for being contrary to contract, by devising a newly designed element of the contract. However, this vulnerability can be cured by intervention under Section 37 of the Act, which is a full appeal, subject, of course, to not interfering with any otherwise reasonable view.

70. Therefore, to save the Impugned Award from perversity on the ground of being contrary to contract, Paragraphs 84(e) and 84(f) are hereby marginally modified and substituted by the following (*the*

deleted words are depicted as being struck through in bold and the insertions are depicted as words underlined in bold):

> *e) The Respondent shall not sell the TDR/DRC generated from the Suit Plot without providing the Claimant* ***and the Arbitral Tribunal,*** *a notice with details of the proposed sale [including details of the TDR, price and buyer]* ~~***at least four weeks prior to the proposed sale***~~*. Within a period of four weeks after receiving the notice from the Respondent, the Claimant shall be at liberty to get a buyer for the TDR/DRC at a higher price****, and issue a notice with details of the proposed sale [including details of price and buyer] to the Respondent and to the Arbitral Tribunal****.*
>
> *f) The TDR/DRC generated from the Suit Plot will be sold at the higher price ascertained in (e) above****, subject to approval of the Arbitral Tribunal****. The Respondent shall deposit the money generated from the sale of the TDR/DRC in a separate bank account to be opened with any nationalised bank. The Respondent shall use the funds generated from the sale of TDR/DRC only towards costs for the redevelopment of the Suit Plot and for no other purpose. The Respondent shall provide the Claimant* ***and the Arbitral Tribunal*** *with monthly account statements of this bank account before the 15th day of the following month* ***in the form of an affidavit****.*

71. The aforesaid modification would bring these elements within the ambit of protective interim measures and leave it to the Arbitral Tribunal to be the best judge of run of the protection. The Learned Arbitral Tribunal would then be able to apply its mind to the factual position arising out of the terms of the proposed sale of TDR and be able

to mould and apply such conditions as it deems necessary to preserve the subject matter of the arbitration agreement.

72. But for the aforesaid partial modification and to that extent the Appeal being allowed, no other interference with the Impugned Order is warranted. For the reasons set out above, with the aforesaid analysis and modifications to the Impugned Order, the Petition is ***finally disposed of***. No costs are warranted but the Learned Arbitral Tribunal shall be at liberty to factor in costs for this round of litigation in the final analysis in the proceedings.

73. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]