



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 395 OF 2025

1. Shruti Surendra More
Age: 57 years, Occupation: Housewife,
Indian Habitant, residing at Flat No. 202,
New Deepali Co-operative Housing Society Ltd.,
Navin Thakkar Cross Road, Vile Parle (East), Mumbai
400 057 and
Presently residing at 709, Kankuwadi SRA Co-
operative Housing Society Ltd., P.M. Road,
Kankuwadi, Vile Parle East, Mumbai – 400 057,
through Power of Attorney Holder, Mr. Surendra
More.

2. Mr. Purushottam M. Makwana,
deceased through his legal heirs:
 - 2a. Smt. Manjula Purushottam Makwana, Adult,
Indian Inhabitant, residing at 1C-91 Kalpatru Garden,
Ashok Nagar, Opp. Ganesh Temple, Kandivali (East),
Mumbai 400101 through Power of Attorney Holder,
Mr. Mayur P. Makwana

 - 2b. Mr. Shailesh Purushottam Makwana,
residing at Room No. 7, Vile Parle, (East), Mumbai –
400047, through Power of Attorney Holder,
Mr. Mayur P. Makwana

 - 2c. Mr. Chandresh Purushottam Makwana
Adult, Indian Inhabitant, residing at 1C-91 Kalpatru
Garden, Ashok Nagar, Opp. Ganesh Temple,
Kandivali (East), Mumbai 400101 through Power of
Attorney Holder, Mr. Mayur P. Makwana

2d. Mr. Mayur Purushottam Makwana,
Adult, Indian Inhabitant, residing at 1C-91 Kalpatru
Garden, Ashok Nagar, Opp. Ganesh Temple,
Kandivali (East), Mumbai 400101 through Power of
Attorney Holder, Mr. Mayur P. Makwana

...Petitioners

Versus

1. M/s. Akme Properties
A. Partnership Firm having Office at 1st Floor,
Woodhouse, Above Nexworld, Near Haryana
Bhavan, Charkop, Sector 6, Kandivali
(West), Mumbai – 400067

2. New Deepali Co-operative Housing Society
Ltd., Navin Thakkar Cross Road, Vile Parle (East),
Mumbai – 400 057.

...Respondents

*Mr. Anoshak Daver, a/w, Mr. Dhaval Shethia, Mr. Sachin Masurkar & Mr.
Nimish Achrekar, i/b, Sachin Masurkar, for the Petitioners.*

Ms. Vinaya More, for the Respondent No. 1.

CORAM : SHARMILA U. DESHMUKH, J.

RESERVED ON : February 03 , 2026

PRONOUNCED ON : March 06, 2026

JUDGMENT :

1. By this Arbitration Petition filed under Section 34 of the Arbitration and Conciliation Act 1996 (for short "Arbitration Act"), the challenge is to the Arbitration Award of Learned Sole Arbitrator dated 17th December 2022.

2. The arbitration proceedings were initiated at the instance of the Respondent No. 1 invoking the arbitration clause contained in the Development Agreement dated 30th July, 2016 executed between the Respondent No 1 and Respondent No. 2-Co-operative Housing Society. Clause 26.1 of the Development Agreement provided that all disputes and differences between the society and the developer in connection with the agreement shall be referred to the arbitration of three arbitrators one to be appointed by society and one to be appointed by the developer and the arbitrators so appointed to appoint a third arbitrator to act as the presiding arbitrator.

3. The present Petitioners are members of the Respondent No. 2 Society. The building of the society was extremely dilapidated and notice was issued by the Corporation under Section 354 of Mumbai Municipal Corporation Act. The present Petitioners and one other member were non consenting members and no agreement for permanent alternate accommodation was signed by them with Respondent No. 1. The other members of the Respondent No 2 Society executed the agreement for permanent alternate accommodation with the Respondent No 1 and handed over possession of their respective premises.

4. The Respondent No 1 initiated proceedings under Section 9 of the Arbitration Act and vide order dated 23rd March 2018, the present

Petitioners and one Mr. Singh were directed to vacate their flat within 48 hours. Subsequently, the building was demolished by the Corporation on 28th March, 2018.

5. The Respondent No. 1 filed an application under Section 11 of Arbitration Act for appointment of arbitrator and this Court vide order dated 16th September, 2018 appointed the sole arbitrator. The Respondent No 1's claim was that the non-cooperative and obstructive conduct of the present Petitioners and Mr. Singh had caused extensive hardship not only to Respondent No 1 but also to the majority of the society members and led to escalation and additional expenses resulting in affecting the financial viability of the project which turned into loss making venture. The reliefs sought in the Statement of Claim reads as under:

(a) That this Hon'ble Tribunal may be pleased to order and direct the Respondent No 1 to pay to the present Claimants for an amount of Rs. 1,76,78,020/- towards the proportionate loss suffered by these present Claimants due to non co-operation by Respondent No1 under the redevelopment project called "New Deepali CHSL."

(b) That this Hon'ble Tribunal may be pleased to order and direct the Respondent No 2 to pay to the present Claimants for an amount of Rs. 1,76,78,020/- towards the proportionate loss suffered by these present Claimants due to non co-operation by Respondent No 2 under the redevelopment project called "New Deepali CHSL."

(c) That this Hon'ble Tribunal may be pleased to order and direct the Respondent No 3 to pay to the present Claimants for an amount of Rs. 1,76,78,020/- towards the proportionate loss suffered by these present Claimants due to non co-operation by Respondent No 3 under the redevelopment project called "New Deepali CHSL."

(d) That this Hon'ble Tribunal may direct the Respondent No 1 to make the payment of outstanding purchase considerations for the additional area purchased under the registered Development Agreement on or before or at the time of execution of the Tri-partite Agreement for Permanent Alternative Accommodation for Flat No 202 and further direct the Respondent No 1 to attend the office of Sub Registrar of Assurance for the purpose of registration of their individual Tri-partite Agreement for Permanent Alternative Accommodation.

(e) That this Hon'ble Tribunal may direct the Respondent No 2 to make the payment of outstanding purchase considerations for the additional area purchased under the registered Development Agreement on or before or at the time of execution of the Tri-partite Agreement for Permanent Alternative Accommodation for Flat No 102 and further direct the Respondent No 2 to attend the office of Sub Registrar of Assurance for the purpose of registration of their individual Tri-partite Agreement for Permanent Alternative Accommodation.

(f) That this Hon'ble Tribunal may direct the Respondent No 3 to make the payment of outstanding purchase considerations for the additional area purchased under the registered Development Agreement on or before or at the time of execution of the Tri-partite Agreement for Permanent Alternative

Accommodation for Flat No 11 and further direct the Respondent No 3 to attend the office of Sub Registrar of Assurance for the purpose of registration of their individual Tri-partite Agreement for Permanent Alternative Accommodation.

(g) That pending the hearing and final disposal of the present proceedings, this Hon'ble Tribunal may be pleased to direct Respondent Nos 1, 2 and 3 each to furnish the Bank Guarantee and/or furnish an equivalent security (including fixed term deposit) for the guaranteed amount of Rs. 1,76,78,020/- each (Aggregate amount of Rs 5,30,34,060/) i.e. proportionate loss suffered by these present Claimants due to non co-operation by Respondents No 1, 2 and 3 each under the redevelopment project called "New Deepali CHSL." and /or direct the Respondent No 1 to deposit the same in a separate bank account.

6. The Petitioners filed common statement of defence claiming that the appointment of developer was by way of misrepresentation and fraud. The counter claim sought declaration that the Development Agreement dated 30th July, 2016 is void, illegal and not binding, for damages and compensation in the sum of Rs. 50 Lakhs each and security in the form of bank guarantee till the development is complete. Alternatively, it was prayed that, in event, the Development agreement is found binding, the Respondent No 1 to provide to the Petitioner No. 2, flat admeasuring 712 sq. ft. as per his entitlement and the third alternate prayer was to provide all benefits and entitlement as are provided to other members of the society.

7. The Learned Arbitrator allowed the statement of claim in terms of prayer clause (d), (e) and (f) i.e. direction to the present Petitioners and Mr. Singh to make payment of outstanding purchase consideration for the additional area purchased under the registered development agreement and rejected prayer clauses (a) to (c) for making payment towards the proportionate loss. The costs were quantified at Rs. 1 Lakh to be paid by each of the Petitioners and Mr. Singh within a period of two months failing which, interest to be paid. The counter claim filed by the present Petitioners was dismissed with cost of Rs. 1 Lakh each to be paid within a period of two months failing which, payment of interest was directed.

8. Mr. Daver, learned Counsel appearing for the Petitioners would submit that the findings of the impugned Award are contradictory in as much as having rejected the claim for payment of proportionate loss, the Learned Sole Arbitrator could not have come to a finding of delay in handing over possession. He submits that there is patent illegality as the Learned Arbitrator has travelled beyond the terms of the contract and made the payment of monthly displacement subject to execution of permanent alternate agreement without any reasoning and contrary to Clause 4.1 and 4.2 of the Development Agreement.

9. He would submit that the impugned Award denies the benefit of corpus funds/hardship compensation payable under Clauses 1.4 and 1.5

of the Development Agreement to the Petitioners on ground of hardship despite absence of forfeiture clause in the Development Agreement. He submits even accepting the Petitioners admitted reluctance in the cross-examination to sign the permanent alternate accommodation, the same was justified as the Development Agreement itself was under challenge. He submits that once the Development Agreement is held to be valid, the terms are to be enforced strictly and the learned Sole Arbitrator could not have decided on principles of equity unless expressly provided in the contract. He would further submit that as the Respondent No 1 has failed to prove any loss, the denial of hardship compensation and monthly displacement compensation on the ground of alleged hardship amounts to equitable relief rather than enforcing the contract which renders the award perverse and patently illegal. In support, he relies on the following decisions:-

(I) Associated Engineering Co., Vs. Government of Andhra Pradesh & Anr.¹

(II) Ramnath International Construction Pvt. Ltd. Vs. Union of India & Anr.²

(III) Vilayati Ram Mittal (P) Ltd. Vs. Reserve Bank Of India³.

1 S.C.R. (1991) 924

2 S.C.R. (2006) 570

3 2017 SCC OnLine Bom 8479, (2017) 6 AIR Bom R 619

10. *Per contra*, Ms. More, learned Counsel appearing for the Respondent No 1 would submit that under Clause 9.2 of the Development Agreement, it was binding upon the members to sign the permanent alternate accommodation agreement and not having done so, the learned sole Arbitrator has rightly held that no monthly displacement compensation would be payable until execution of the agreement. She further submits that now the stage of execution of permanent alternate accommodation is passed as the building is completed and what is only required to be executed is tripartite agreement between the member, developer and the society. She submits that there is finding of fact about obstruction caused by the Petitioners which cannot be re-appreciated under Section 34 of the Arbitration Act. She would submit that the delay in re-development was attributed to the Petitioners as rightly held by the learned Arbitrator and in view of the hardship caused to Respondent No 1, the benefit of corpus funds/hardship compensation has been denied. She submits that the Respondent No 1 has expended substantial funds by paying stamp duty on the prior unstamped agreements of the present Petitioners. She submits that it is only in March 2018, upon an order passed by this Court that the Petitioners vacated their flats and being non co-operative are not entitled to monthly displacement compensation. She would further submit that flats have been given for

fit-out possession in 2023 and therefore no rental amount can be claimed.

11. Rival contentions now fall for determination:

12. The challenge in the present Petition is confined to the findings in paragraph 99 of the impugned award, which answers Issue No 5 as framed in arbitration proceedings against the Petitioners regarding the entitlement of the Petitioners to benefits under the Development Agreement on par with other members. Paragraph 99 of the impugned Award is reproduced for ease of reference:

“99 From the above discussion, it is thus abundantly clear there was a delay in obtaining possession of Flat nos.202, 102 and 11 by the Society from Respondents no.1, 2 and 3. Also there was excessively obstructive attitude displayed by these Respondents. There can be no doubt that the delay would lead to increase in the expenses to be incurred for the project of redevelopment. However, the evidence produced by the Claimant before the Tribunal on the extent of damages is not sufficient. In the circumstances, Issue No.4 is answered in the affirmative. Issue No.6 is answered as 'Not proved and Issue No.7 is answered in the negative. As regards Issue No.5, since Respondents no.1 to 3 had not handed over possession of their respective premises until the order of the High Court dated 23 March 2018 and they are yet to execute agreement for Permanent Alternate Accommodation no Monthly Displacement compensation will be payable to them until execution of the agreement. In the present facts of the case, payment of Monthly Displacement compensation to Respondents no.1 to 3 can start only from the date of execution of agreement for Permanent Alternate Accommodation. These Respondents will not be entitled to any amount for the prior period. As regards the benefits of corpus fund / hardship compensation under Clause 1.4-1.5 of the Development Agreement, apparently the first installment thereof has already been paid to the members in advance prior to signing of the Development Agreement. The

balance however will not be payable to these Respondents since they have caused hardship to the Claimant. Issue No.5 is therefore answered accordingly.”

13. The impugned Award thus makes the payment of monthly displacement compensation contingent upon signing of permanent alternate accommodation agreement and denies corpus fund/hardship compensation on ground of hardship caused to Respondent No.1. Mr. Daver has premised the Petitioner’s entitlement to the monthly displacement compensation and the corpus fund/hardship compensation on the express terms of the contract. The relevant clauses of the Development Agreement in this context reads as under:

“1.4 In consideration of the Society granting and transferring to the Developer the aforesaid Balance Saleable Entitlements as stated above, the Developer has agreed to pay the members for alleviating hardship total monetary consideration/compensation of Rs. 2500/- (Rupees Two Thousand Five Hundred only) per square feet/foot of existing carpet area of the members (**"Corpus Fund/Hardship Compensation"**) as more particularly set out in Column No. 6 of the **Annexure "D"** hereto.

1.5 The aforesaid consideration/compensation is a predetermined lump sum amount for having given concurrence, consent for and grant of the rights to undertake the Re-development Project under the terms contained herein and is inclusive of i) compensation for alleviating hardship suffered by the Members for shifting/re-shifting, ii) compensation for allowing the Developer to demolish their flats and iii) compensation for having agreed to share the common areas with more persons after the completion of the Re-development Project. iv) consideration for utilizing the said Balance Saleable Entitlements. The aforesaid consideration will be paid as follows-

(a) Rs. 1,50,000/- out of the total amount already paid to the members in advance prior to signing of this Agreement in order to cause assistance to procure temporary alternate accommodation.

(b) Eighty-Five percent (85%) (after deducting the above said amount of Rs. 1,50,000/- already paid to the members as mentioned in (a)) to each members as set out in Column No. 7 of Annexure "D" on handing over the complete vacant possession of the flats along with lock and keys by the members to the Developer after procurement of IOD for demolishing the existing structure, however, the cheque (undated) for the same shall be handed over to the society at the time of giving notice to vacate within 3 days upon receipt of IOD and subject to confirmation from society about upto date payment of taxes and rates and out to all the members and the same shall handed over by the Society to the respective members on the IOD subject to confirmation from society about up to date payment of taxes and rates and outgoings by the existing members and

(c) Balance Fifteen percent (15) on the Developer handing over possession of new flats to all the Members after receipt of Occupation Certificate from MCGM Competent Authority as set out in Column No. [8] of **Annexure "D"**

"4.1 The Developer shall pay compensation to all the members of Rs. 100/- (Rupees One Hundred only) per square foot of their existing carpet area, as per list attached, as "**Monthly Displacement Compensation**" at the time of execution of this Agreement. However, it is an admitted position that the society previously has received notice u/s. 354 several times of the Competent Authority Act and that the members and the society have requested the Developers to give monthly compensation to each of the member commencing from the date of the Re-Development Agreement. The said notices issued u/s 354 are annexed herewith as **Annexure "J"**. The Developer, at the request of the members and the society and considering humanitarian reasons, have agreed to grant the monthly compensation to each of the members upon execution of the Re-Development Agreement. The Developers shall give post dated cheques for a period of twelve months from the date of execution of the Re-Development Agreement.

4.2 The Monthly Displacement Compensation shall be enhanced by 10% after expiry of every 12 months till obtaining Full Occupation Certificate for the Members' area and offering possession of new premises to all the members of the Society and the said compensation shall be paid to the members till handing over the possession of the new flat.

4.3 The amount of Monthly Displacement Compensation shall be paid by the Developer in the following manner:

(i) Monthly Displacement Compensation for first 12 months shall be paid in advance by the way of 12 (twelve) Postdated cheques at the time of execution of this Development Agreement

(ii) Monthly Displacement Compensation for next 12 months shall be paid by the Developer with 10% increase i.e.Rs.110/- per square foot of their existing carpet area (after expiry of the first 12 months by way of 20 (twenty) Post Dated Cheques which shall be handed over one month before the expiry of the period of twelve months.

(iii) The details of the Monthly Displacement Compensation payable to the members are more particularly provided in column 9 and 10 of **Annexure "D"** to this Agreement.

(iv) For the sake of clarity, it is provided that if any of the issued cheque gets dishonored by the Developer, then same amount shall be reimbursed to the members within 15 days from the date of intimating the same to the Developer.

(v) The parties herein agree that the developer shall obtain Occupation Certificate and offer possession to the respective member of the Society. The parties further agree that the developer in the process of obtaining Occupation Certificate shall intimate the society and respective members about taking possession of taking new flats in the newly constructed building on the said property. It is further clarified that the developer shall not be liable to pay monthly

compensation from the date of which the developer has offered possession. It is further clarified that from the date the developer has offered possession of respective member shall not deposit the post dated cheques which have been received by the members towards monthly compensations. It is further clarified that all such postdated cheques shall be returned by the respective member to the developer. In the event, the member does not return any of such post dated cheques then the developer shall be authorized to give stop payment instruction to their banker in respect of such postdated cheques issued by the developer to the member.”

14. The agreement between the parties regarding payment of corpus fund/hardship compensation as set out in Clauses 1.4/1.5 reproduced above is in consideration of the grant and transfer to the Developer, the balance saleable entitlements. The compensation amount was not linked only to the concurrence and consent given by the members to Respondent No 1 but was also based on grant of rights to redevelopment. The impugned Award denies the Petitioners the benefit of balance corpus fund/hardship compensation on the ground that hardship was caused to the Respondent No 1. Pertinently, the Learned Sole Arbitrator rejected the claim of the Respondent No 1 for proportionate loss by reason of non-co-operation of the Petitioners. The effect of denial of the benefits under the Development Agreement to the Petitioners results in indirectly allowing the Respondent No. 1’s claim for proportionate loss.

15. The finding of fact in the impugned Award is the delay in obtaining possession of the flats from the Petitioners. There must be some evidence on record to justify that delay in handing over possession has resulted into hardship. The finding of hardship is devoid of any reasoning and suffers from perversity. The question to be considered was whether the terms of the contract provide for forfeiture of the corpus fund/hardship compensation for delay in handing over possession. There is no clause in the development agreement pointed out to this Court which makes the payment of corpus fund/hardship compensation dependent on timely handing over possession of their respective flats by the members. The contract is also silent on the consequence of failure of the members to hand over possession of their flats for purpose of redevelopment. The denial of benefits amounts to forfeiting the Petitioner's right to the payments which forfeiture can take place only under the express terms of the development agreement. Having held that the Development Agreement was valid and binding, the Learned Arbitrator was bound to enforce the contract strictly in accordance with its terms including the grant of benefits thereunder.

16. Insofar as the payment of monthly displacement compensation is concerned, Clause 4.1, 4.2 and 4.3 of development agreement makes is

clear that the liability to make payment under the head of monthly displacement arose upon execution of the development agreement and the execution of permanent alternate agreement was not the *sine qua non* for the said payment. The Learned Sole Arbitrator has linked the payment of the monthly displacement compensation with the execution of permanent alternate accommodation without any such clause in the development agreement which amounts to re-writing the terms of the contract. At the highest, the Learned Sole Arbitrator could have granted the monthly displacement compensation from the date of handing over possession of 23rd March 2018 as the terminology itself suggests that the compensation is required to be paid for displacement. In any event, the contention of Ms. More is that there is no question of execution of permanent alternate arrangement as the possession of the building has already been handed over. The Learned Arbitrator even otherwise could not have linked the payment to the execution of permanent alternate accommodation.

17. As the Issue No 5 framed by the Learned Arbitrator was in respect of entitlement of the Petitioners to rent and other benefits, the entitlement was to be adjudicated in consonance with the terms of the contract. The Learned Arbitrator being creature of contract was mandated to enforce the contract strictly in accordance with the terms of the contract and disregarding the express terms of the contract

constitutes jurisdictional error vitiating the Award. The findings of the Learned Arbitrator on disentitlement of the Petitioners is not premised on interpretation of various clauses of the development agreement but is a case of disregard of the express terms of the contract. In case of interpretation of terms of the contract, the error, if any, would be an error within jurisdiction incapable of interference under Section 34 of Arbitration Act, unless there is error apparent on the face of the award.

18. The findings make it clear that the denial of the benefits under the Development Agreement is premised on the principles of equity which is not permissible under Section 28(2) of the Arbitration and Conciliation Act which provides that the Arbitral Tribunal shall decide *ex aequo et bono or amiable compositeur* only if the parties have expressly authorised it to do so. The adjudication of the Petitioner's claim outside the terms of the contract and based on principles of fairness, equity and natural justice, suffers from perversity.

19. In ***Associated Engineering Company vs Government of A.P.*** (supra), the Hon'ble Apex Court has held that the sole function of Arbitrator is to arbitrate in terms of the contract and conscious disregard of provisions of contract from which he has derived his authority vitiates the award.

20. In light of the settled position in law, if the findings of the

learned Arbitrator are considered, the impugned award, to the extent of findings rendered in answer to Issue No 5 suffers from patent illegality as the Learned Arbitrator has travelled beyond its jurisdiction by disregarding the binding terms of the contract. The impugned Award to the extent of findings in answer to Issue No 5 is hereby quashed and set aside.

21. In *Gayatri Balasamy vs ISG Novasoft Technologies Ltd*⁴, the Constitution Bench has held that it is permissible for Court exercising powers under Section 34 of Arbitration Act to sever bad part of the Award while retaining the good part so long as the bad part is not inseparably intertwined with the good part. In the present case, the finding of the Arbitral Tribunal denying the benefits of corpus fund/hardship compensation and monthly displacement compensation is not inseparably intertwined with the other findings and arises out of specific demand raised in the counter claim. Therefore the Award needs to be modified by awarding the claim for corpus fund/hardship compensation and monthly displacement compensation in favour of the Petitioner.

22. Resultantly, Petition succeeds. The claim of the Petitioners for corpus fund/hardship compensation is allowed on par with other members of Respondent No. 2. Insofar as the monthly displacement

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compensation is concerned, the same is allowed from 23rd March, 2018. The Respondent No 1 is directed to pay to the Petitioners the sum due as observed in this order within period of eight weeks.

[SHARMILA U. DESHMUKH, J.]