IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION (L) NO.34791 OF 2024
WITH
INTERIM APPLICATION (L) NO.27998 OF 2025
IN
COMMERCIAL ARBITRATION PETITION (L) NO.34791 OF 2024

Lotus Logistics and Developers Pvt. Ltd. ...Petitioner

V/s.

Evertop Apartments Co-operative Housing Society Limited ...Respondent

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Mr. Janak Dwarkadas and Mr. Prateek Seksaria, *Senior Advocates with Mr. Ankit Lohia, Mr. Dharam Jumani, Mr. Arun Panickar, Mr. Rohit Agarwal, Mr. Vijay Nair and Mr. Mihir Nerurkar for the Petitioner.*

Mr. Ravi Kadam, *Senior Advocate with Mr. Piyush Raheja, Mr. Vikramjit Garewal, Mr. Aadil Parsurampuria, Mr. Tejas Agarwal, Ms. Ria Goradia, Ms. Tejaswi Pania and Mr. Ishaan Choudhary i/b. M/s. IC Legal for the Respondent.*

CORAM: SANDEEP V. MARNE, J.

RESERVED ON: 24 DECEMBER 2025
PRONOUNCED ON: 13 JANUARY 2026

JUDGMENT:

1) By this Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, Petitioner has sought invalidation of the Arbitral Award dated 16 August 2024 passed by the learned sole Arbitrator. By the impugned Award, the Arbitral Tribunal has directed Petitioner to have the building plans amended and approved in consonance with the sanctioned plan dated 17 September 2008 for the purpose of issuance of occupation

certificate for the building. The Tribunal has directed the Petitioner to take all necessary steps for procurement of occupation certificate for wing 'A' building in accordance with building plans sanctioned on 17 September 2008. In the event of non-grant of occupation certificate in respect of wing 'A' building, the Tribunal has directed the Petitioner to take steps to get the area shown as 'open to sky ducts' in the living rooms and bedrooms, regularaised at its cost within three months of rejection of application for occupation certificate. In the event of non-grant of occupation certificate and rejection of regularisation of 'A' wing building, Petitioner is directed to pay to the Respondent-Society sum of Rs.128,98,00,000/- within three months of such rejection alongwith interest @ 8% per annum. The Petitioner is also directed to pay to the Respondent-Society monthly compensation @ Rs.80/- per sq.ft. per month per society member in respect of the period from February-2014 to October-2015 alongwith interest @ 8% per annum. The Petitioner is also directed to pay to the Respondent-Society sum of Rs. 45,82,500/- being the loss on account of shortfall in area alongwith interest @8% per annum. The Petitioner is also directed to pay to the Respondent-Society property taxes for the period from November 2008 till 15 October 2015. Arbitral Tribunal has also declared plans dated 9 May 2009 and 25 March 2011 as well as Rectification Deed dated 3 November 2010 as illegal and void and not binding on the Respondent-Society.

FACTS

2) The Respondent is a cooperative housing society registered under the Maharashtra Co-operative Societies Act, 1960. The Respondent is the owner, seized and possessed of land bearing Plot No.9/10/11 admeasuring 31,603 sq.ft.(2930 sq.mtrs.) bearing CTS No.834/1, 834/2 and 822/1, J.P. Road, Andheri (W), Mumbai-400 053. On the said plot of

the society, there were three buildings consisting of ground plus 3 floors having total 58 tenements. The Respondent-Society resolved to go for redevelopment of its buildings and invited offers from developers. The Petitioner is a developer and submitted its offer to the Respondent-Society and offered 52% additional usable carpet area (including flower beds, duct area, dry balcony, niches, etc.) to every member over and above the area occupied by them in the old buildings. The Respondent-Society resolved to appoint the Petitioner as the developer for redevelopment of its buildings. In 2008, the Petitioner-Developer furnished plans including floor plans in respect of the proposed building, under which it was proposed to construct a tower/building for members of the Respondent-Society comprising of basement, stilts, podium and 15 floors with four flats per floor with amenities such as society office, community hall, gymnasium, garden, amenity area, children's playground, jogging track, etc. On 3 May 2008, Development Agreement was executed between the Petitioner and the Respondent -society. Power of Attorney was also executed by the Respondent -Society in favour of the Petitioner. Under the Development Agreement, Petitioner agreed to provide to 58 members of the Society 52% additional usable carpet area over and above their flats. The redevelopment was to be completed by securing occupation certificate within 24 months with further grace period of six months. The Petitioner-developer agreed to pay monthly compensation to each member @ Rs.40/- per sq.ft. per month for first 12 months, Rs.44/- per sq.ft. per month for next 12 months and Rs.52/- per sq.ft per month for extended period of six months. Beyond the period of 30 months also, monthly compensation @ Rs.52 per sq.ft. per month was agreed to be paid. The Petitioner was to construct wing 'A' building for members of the Society whereas wing 'B' building was to be constructed as free sale component. Petitioner submitted plans for approval to the Municipal Corporation of Greater Mumbai (**MCGM**) and Intimation of Disapproval (**IOD***)* on 17 September 2008 was issued by the MCGM.

3) According to the Respondent-Society, the Petitioner-Developer failed to complete redevelopment within agreed period of thirty months. Some of the members voiced concerns about delay in completion of the redevelopment process. Letters dated 21 June 2012 and 7 July 2012 were addressed by some of the members to the Petitioner-Developer. The Petitioner-Developer relies upon Deed of Rectification dated 3 November 2010, which according to the Respondent-Society was unauthorisedly executed by the erstwhile secretary. By the said unregistered Deed of Rectification, some of the clauses of the Development Agreement were sought to be altered. The Petitioner-Developer stopped paying monthly compensation to the members from January-2014. 'A' wing building for members of the Society was apparently constructed and it is claimed that on account of failure by the Petitioner-Developer to pay monthly compensation after January-2014, some of the members were left with no other alternative but to occupy flats in the newly constructed wing 'A' building in absence of issuance of occupation certificate.

4) It is the case of the Respondent-Society that information relating to various plans submitted by the Petitioner-Developer was secured under the Right to Information Act, 2005, which revealed that plan dated 21 May 2009 was submitted by the Petitioner-Developer to MCGM in which 'open to sky ducts' were shown in the flats of the members thereby reducing the built up area for wing 'A' building and using the same in wing 'B' building with built up area. It was further revealed that another plan dated 25 March 2011 was sanctioned in which proposed built up area of wing 'A' was shown as 3604.77 sq.mtrs and for wing 'B' building as 2266.80 sq.mtrs. Both the 2009 and 2011 plans showed 'open to sky ducts' in the living rooms and bedrooms of the flats of members of the Respondent-Society, which were not indicated in the first approved plan of

17 September 2008. It is the case of the Respondent-Society that wing 'A' building has been constructed in accordance with the first approved plan dated 17 September 2008 without actually constructing any 'open to sky ducts' in the living rooms and bed rooms, but in the subsequent approved plans of 2009 and 2011 the Petitioner-Developer transferred the built up area from wing 'A' building to wing 'B' building by showing 'open to sky ducts' in 'A' wing building. The Respondent-Society consulted a consultant, whose report indicated that the last approved plan dated 25 March 2011 envisaged grant of only 32.10% additional area to the members of the Society. It is the case of the Respondent-Society that the Petitioner-Developer submitted one more set of plans to MCGM, which was rejected on 21 July 2015.

5) According to the Respondent-Society, Petitioner-Developer committed several breaches of the Development Agreement by failing to provide car lifts for accessing podium level for parking of cars, by failing to provide stack parking mechanism for accommodating 58 cars, by failing to construct various amenities, by not paying monthly compensation and damages as agreed in the Development Agreement, by not paying monthly rent from January-2014 onwards, by not keeping Bank Guarantee alive till securing of occupation certificate and by opening bar-cum-restaurant on first floor of 'B' wing Building contrary to the Development Agreement in addition to violating the first approved plan dated 17 September 2008 and not securing the occupation certificate. In the above background, the Respondent-Society terminated the Development Agreement, Power of Attorney and other documents vide notice dated 15 October 2015.

6) The Respondent-Society filed Arbitration Petition (L) No.1969 of 2015 under Section 9 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) seeking various interim measures including restraint

order on sale of units in 'B' wing building. During the course of hearing of the said Petition, a statement was made on behalf of the Petitioner-Developer that steps would be taken for obtaining occupation certificate in respect of the building in consultation with the Respondent-Society. This Court constituted Arbitral Tribunal of learned sole Arbitrator and disposed of the Petition by order dated 20 October 2015.

7) The Respondent-Society filed its Statement of Claim on 1 March 2017 seeking prayers *inter alia* for procurement of occupation certificate for 'A' wing building, challenging plans dated 9 May 2009 and 25 March 2011, seeking sum of Rs.158,25,25,000/- in the event of building being liable for demolition, seeking rent of Rs.83,29,841/-, damages of Rs.65,37,00,000/- and Rs.125,28,00,000/-for delay in handing over possession, sum of Rs.68,25,000/- towards shortfall and deficiency in area and sum of Rs.1,13,02,889/- towards property taxes. The Respondent-Society also sought restraint order against the Petitioner-Developer from handing over possession of any premises to the purchasers of wing 'B' building.

8) The Petitioner-Developer filed its Statement of Defence on 2 September 2017 stating *inter alia* that it was ready and willing to act in accordance with the statement made before this Court subject to cooperation from the Respondent-Society. The Petitioner-Developer also raised the defence of non-entitlement of the Respondent-Society to seek specific performance after termination of the Development Agreement. Based on the pleadings, the Arbitral Tribunal framed issues. The Respondent-Society examined four witnesses i.e. two of its own members, a Project Management Consultant and a Valuer. Petitioner led evidence of its Director.

9) After considering the pleadings and documentary and oral evidence, the Arbitral Tribunal has made Award dated 16 August 2024. The Arbitral Tribunal has directed the Petitioner-Developer to amend the last approved plan dated 25 March 2011 and to bring the same in consonance with the first approved plan dated 17 September 2008 for the purpose of securing occupation certificate for wing 'A' building. The Petitioner-Developer is directed to take steps for obtaining occupation certificate for 'A' wing building. The Petitioner-Developer is restrained from submitting any plans to MCGM contrary to the first sanctioned plan of 17 September 2008. The subsequently approved plans dated 9 May 2009 and 25 March 2011 are declared null and void and not binding on the Respondent-Society. In the event of non-grant of occupation certificate, the Petitioner-Developer is directed to take steps to get the area shown as 'open to sky ducts' in the living and bed rooms regularised at its cost within a period of three months of rejection of occupation certificate and in the event there being any shortfall area, the Petitioner-Developer is directed to pay amount of Rs.23,500/- per sq.ft. to the Respondent-Society alongwith interest @ 8% per annum. In the event of rejection for proposal for regularisation of wing 'A' building, Petitioner-Developer is directed to pay Rs.128,98,00,000/-. The Petitioner-Developer is also directed to pay to the Respondent-Society monthly compensation @ Rs.80 per sq.ft. per month per member for the period from February 2014 to October-2015 alongwith interest. The Petitioner-Developer is also directed to pay to the Respondent sum of Rs.45,82,500/- being the loss on account of shortfall area. Petitioner is also directed to pay to the Respondent property taxes for the period from November-2008 to 15 October 2015. The Rectification Deed dated 3 November 2010 is declared as void and not binding on the Respondent-Society. The Petitioner-Developer is aggrieved by the Award dated 16 August 2024 and has filed the present Petition under Section 34 of the Arbitration Act.

SUBMISSIONS

10) Mr. Dwarkadas, the learned Senior Advocate appearing for the Petitioner-Developer submits that the impugned Award of the Arbitral Tribunal is in conflict with public policy of India and is patently illegal as the same seeks to grant specific performance of Development Agreement, which was terminated by the Respondent-Society on 15 October 2015. That it is fundamental policy of Indian law that specific performance of terminated contract can neither be sought nor granted by the Court. That the direction for taking steps for obtaining occupation certificate for 'A' wing building as per the sanctioned plan dated 17 September 2008 is patently illegal as it is impossible for the Petitioner-Developer to even apply for the occupation certificate in the light of termination of the Development Agreement and more importantly, the Power of Attorney. That if the Respondent-Society believed that the Petitioner committed breach of the contract, it had two choices i.e. to put an end to the contract by terminating the same or to seek its specific performance. That the Respondent-Society made a conscious election to put an end to the contract by serving termination notice dated 15 October 2015. He submits that the consequence of election of termination of contract is not only that consenting party discharges itself from further performance of the contract, but that party is thereafter precluded from seeking specific performance not only by virtue of Section 16(1) (b) but also on account of Section 16(1)(c) of the Specific Relief Act of 1963. Having itself acted in variance with contract in question, the Respondent-Society cannot seek specific performance thereof.

11) Mr. Dwarkadas would further submit that statement made by the Petitioner before this Court at the time of disposal of the Arbitration

Petition (L) No.1969 of 2015 did not amount to revival of contract, which was terminated on 15 October 2015. That for revival of contract, reinstatement of Power of Attorney was essential as the said authority could alone enable the Petitioner to apply for occupation certificate/regularisation. That the Respondent-Society did not reinstate Power of Attorney in any manner. On the contrary, it persisted with the election made on 15 October 2015 while filing the Statement of Claim. Mr. Dwarkadas would therefore submit that directions issued by the Arbitral Tribunal in operative paragraphs of (a)(i), (a)(ii), (e) and (f) are clearly in the nature of specific performance, which could not have been granted being contrary to provisions of Sections 16(1)(b), 16(1)(c) and Section 21 of the Specific Relief Act.

12) In support of his contention that specific performance of terminated contract cannot be sought, Mr. Dwarkadas relies on judgment of the Privy Council in ***Ardeshir H. Mama V/s. Flora Sasoon***[1] and of the Apex Court in ***PT. Prem Raj V/s. D.L.F. Housing and Construction (Private.) Ltd and Another***[2]***.*** In support of his contention that once damages are sought for breach of contract, party cannot apply for specific performance thereof, Mr. Dwarkadas relies on judgment of Madras High Court in ***K.S. Sundaramayyar V/s. K. Jagadeesan and another***[3]***.*** Mr. Dwarkadas further submits that breach of contract by one party does not automatically terminate the obligation under the contract and that the injured party has the option either to treat the contract as still in existence or regard himself as discharged. Once the injured party opts to have himself discharged from the contract, he cannot thereafter seek specific performance. In support, he would rely upon judgment of the Apex Court in ***State of Kerala V/s. Cochin Chemical Engineers Ltd.***[4]

[1] Vol.XXXII Calcutta Weekly Notes 953
[2] AIR 1968 SC 1355
[3] AIR 1965 MADRAS 85.
[4] AIR 1968 SC 1361

13) Mr. Dwarkadas would further submit that by terminating the Development Agreement, the Respondent-Society made it abundantly clear that it was not ready and willing to perform its part under the contract and that therefore, it was not entitled to seek specific performance of terminated Development Agreement. That mere vague statement of readiness and willingness in Statement of Claim, which is contrary to the conduct, is irrelevant. In support, he relies on judgment of Kerala High Court in *Ayissabi V/s. Gopala Konar*[5].

14) Mr. Dwarkadas would further submit that the Respondent-Society first terminated the contract and thereafter sought specific performance and that therefore mere sequencing of prayers for specific performance followed by damages is inconsequential. He would submit that termination signifies expression of willingness to perform the contract. In support, he would rely upon judgment of this Court in *Andheri Bridge View Co-op. Hsg. Society Ltd. V/s. Krishnakant Anandrao Deo and others*[6].

15) Mr. Dwarkadas would further submit that the Petitioner had specifically raised the defence of impermissibility to consider prayer for specific performance in respect of terminated Development Agreement. That the Arbitral Tribunal framed Issue No. (viii) and perversely held that Society's prayer clause (a) could be considered even after termination of the Development Agreement. Inviting my attention to the findings recorded in paragraph 69 of the Arbitral Award, Mr. Dwarkadas would submit that the Arbitral Tribunal itself has recorded a finding that the Respondent-Society did not seek specific performance in the Statement of Claim. He would further submit that a clear finding is recorded in favour of the Petitioner-

5 1988 SCC OnLine Ker 127
6 1990 SCC OnLine Bom 305

Developer in paragraph 69 of the Award that mere denial of validity of termination by the Petitioner-Developer did not mean that terminated Development Agreement automatically revived. That the Arbitral Tribunal has thus recorded contradictory findings in the Award, which is patently illegal. If specific performance was not sought in the Statement of Claim, the Arbitral Tribunal ought not to have granted the same. Similarly, if the termination of contract remained valid, there was no question of granting specific performance of terminated Development Agreement.

16) Mr. Dwarkadas would further submit that the Arbitral Tribunal has not held that the terminated Development Agreement stood revived on account of statement made by the Petitioner-Developer before this Court and that therefore the Respondent -Society cannot be permitted to contend so. That even otherwise, statement made before this Court cannot amount to revival of the terminated Development Agreement. That revival of a contract requires mutual agreement between the parties to revive terminated contract. That the termination letter has not been withdrawn by the Respondent-Society and therefore there is no question of revival of terminated Development Agreement. That in any case the Arbitral Tribunal has held that the terminated Agreement did not revive. He would further submit that statement made before this Court cannot amount to new contract. That if argument of the statement made before this Court amounting to contract is accepted, the Arbitral Award would be without jurisdiction as there is no arbitration clause in the alleged new contract. That the Society cannot seek hybrid relief arising partly out of Development Agreement and partly out of the statement made before this Court.

17) So far as direction for payment of rent is concerned, Mr. Dwarkadas would submit that direction for payment of rent @ Rs.80 per

sq.ft. is contrary to contractual term, which envisaged payment of rent @52 per sq.ft. per month. That since the Arbitral Tribunal has travelled outside the contractual terms, the Award is contrary to the provisions of Section 28(3) of the Arbitration Act. Furthermore, while Society sought sum of Rs.83,00,000/- towards rent, the Arbitral Tribunal has awarded sum of Rs.4.99 crores contrary to the Society's prayers.

18) Mr. Dwarkadas would further submit that the direction of the Arbitral Tribunal in paragraph 87(j)(i) of the Award for payment of sum of Rs.45,82,500/- on account of shortfall in area is contrary to the relief granted in paragraph 87(e) under which shortfall is already taken care of by directing payment of amount @ Rs.23,500/- per sq.ft. That thus, the arbitral Award is riddled with inconsistencies and on this count also, same is liable to be set aside.

19) Mr. Dwarkadas takes strong exception to Arbitral Tribunal's direction for payment of Rs.128.98 crores to the Respondent-Society in the event of non-regularisation of 'A' wing building. He would submit that the amount of Rs.128.98 crores is arrived at by the Arbitral Tribunal by taking into consideration Valuer's report based on comparable instances. Thus, the market value of the land and building is awarded in the event of impossibility of regularisation of the building. Inviting my attention to provisions of Section 73 of the Contract Act, 1872, Mr. Dwarkadas would submit that the Arbitral Tribunal could have, at the highest, awarded such sum which would meet the costs of demolition of constructed building and its reconstruction. That there is no pleading that it is impossible to obtain occupation certificate or seek regularisation of the building. That therefore direction in paragraph 87(g) of the Award is patently illegal. That the direction is speculative in nature and could not have been granted. He would submit that measure of damages must necessarily be on the principle

of restitution by putting back the party in the same position, which he would be had the contract not been broken. That therefore if the building is incapable of being regularised and is required to be demolished, the Society ought to have sought damages to the extent of costs of demolition and reconstruction of the building. That no evidence was led by the Respondent-Society to prove costs required for demolition and reconstruction of the building. That since the irrelevant evidence (value of land and building) is taken into consideration while awarding damages, the Award suffers from patent illegality.

20) Mr. Dwarkadas would further submit that the Arbitral Tribunal has erroneously held Rectification Deed to be illegal and void. That it is a part of indoor management of the Respondent-Society in securing approvals for decision taken by the Managing Committee. In support, reliance is placed on judgment of Division Bench of this Court in ***Kantu Shankar Dessai and Another V/s. Sociedade Agribola Dos Gauncares De Cuncolim E Veroda and Others***[7] as followed by this Court in ***Green Garden Apartments Co-operative Housing Society Limited V/s. Nitin Chaudhari and Others***[8]. Lastly, Mr. Dwarkadas submits that no directions in the award are separable from one another. That direction for payment of Rs.128.98 crores is inseparably intertwined with the directions for specific performance. That therefore the entire Award is liable to be set aside as held by the Apex Court in ***Gayatri Balasamy V/s. ISG Novasoft Technologies Limited***.[9] Mr. Dwarkadas would accordingly pray for setting aside the impugned Arbitral Award.

21) The Petition is opposed by Mr. Ravi Kadam, the learned Senior Advocate appearing for the Respondent-Society. He would submit

[7] 2019 (6) Mh.L.J. 910
[8] Interim Application (L) No.5342 of 2025, decided on 3 October 2025
[9] (2025) 7 SCC (1)

that the Arbitral Tribunal has rightly granted the relief of specific performance on account of Petitioner-Developer's admitted failure to procure occupation certificate in respect of wing 'A' building and damages in sum of Rs.128.98 crores in the event of impossibility of grant of occupation certificate and/or regularisation. He would submit that the Petitioner-Developer's contention of impermissibility to seek specific performance after terminating the Development Agreement is misconceived and is raised in ignorance of its own case expressing readiness and willingness to perform the Development Agreement to the fullest. He would submit that the Respondent-Society wanted to stick to its decision of termination of the Development Agreement and had accordingly filed Petition under Section 9 of the Arbitration Act to restrain the Petitioner-Developer from selling the flats in wing 'B' (sale component) building. However, it was Petitioner, who made a statement before this Court that it would secure occupation certificate in respect of entire building. That parties were driven to arbitration after recording Petitioner's statement of procuring of occupation certificate and therefore constitution of Arbitral Tribunal was primarily for the purpose of adjudication of disputes relating to occupation certificate. Mr. Kadam would therefore submit that having driven the Respondent-Society in the direction of specific performance by making voluntary statement before this Court, the Petitioner-Developer cannot now turn around and contend that the Society cannot seek specific performance of the Development Agreement which was terminated on 15 October 2015. Mr. Kadam would submit that Respondent's formulation of the claim before the Arbitral Tribunal must be understood in correct perspective where the statement made on behalf of the Petitioner-Developer led to scenario where it became incumbent for the Respondent to seek specific performance of that statement. He would take me through the averments in paragraph 30 of the Statement of Claim where the Respondent-Society specifically pleaded that the Society was compelled

to seek regularisation through Petitioner as per statement made by it before this Court despite termination and despite continuing breaches by the Petitioner on account of Petitioner's expertise and Respondent-Society's lack of knowledge. He would also take me through the response given by the Petitioner-Developer in paragraph 33 of the Statement of Defence in which it was averred that the Petitioner was willing to act in accordance with the statement made before this Court. That therefore, issue No. (viii) has rightly been framed by the Arbitral Tribunal and answered in favour of the Respondent-Society holding that the Society is entitled to seek direction for procurement of occupation certificate even after termination of the Development Agreement. That the view taken by the Arbitral Tribunal is a plausible view not warranting interference in exercise of powers under Section 34 of the Arbitration Act.

22) Mr. Kadam would further submit that representation made by party, who has committed breach of contract subsequent to termination can create right in favour of the injured party to seek specific performance. In support, he would rely upon judgment of Delhi High Court in ***Sanjay Agrawal V/s. Union of India and Others***[10] in which Delhi High Court has not agreed with the opinion of Ministry of Law and has held that there is nothing in the Contract Act,1872, which prohibits a party to the contract to reconsider its decision to terminate the contract on representation made by the opposite party. He would rely upon judgment of this Court in ***Deccan Chronicle Holdings Limited and Another V/s. Tata Capital financial Services Ltd.***[11] in support of contention that an admission or acknowledgment made during judicial proceedings creates a right in favour of the injured party to seek direction for specific performance of such admission/acknowledgment. He relies on judgment in of the Apex Court ***Sangramsinh P. Gaekwad and Others V/s. Shantadevi P. Gaekwad (Dead)***

[10] 2019 SCC OnLine Del 11723
[11] 2016 SCC OnLine Bom 5319

through LRs and Others[12] in support of his contention that a judicial admission by itself can be made foundation of rights of the parties. Mr. Kadam would further submit that after making the statement before this Court on 20 October 2015, the Petitioner-Developer addressed letter to the Respondent-Society on 18 February 2016 seeking Respondent-Society's cooperation for fulfillment of obligation of securing occupation certificate expressed before this Court. He would also rely upon Society's response dated 29 February 2016 seeking details of all correspondence made with MCGM for obtaining Occupation Certificate. That in addition to said correspondence, Petitioner-Developer also maintained in the Statement of Defence its position that it was ready and willing to act in accordance with the statement made before this Court. That in the light of this conduct exhibited by the Petitioner-Developer, it was impermissible for it to contend before the Arbitral Tribunal that specific performance of terminated Development Agreement could not be sought. Mr. Kadam would therefore submit that formulation of claim by the Respondent-Society before the Arbitral Tribunal was thus in consonance with Petitioner's conduct at the time of disposal of the Arbitration Petition (L) No.1969 of 2015, correspondence made thereafter and more importantly stand taken in the Statement of Defence.

23) So far as Award of sum of Rs.128.98 crores is concerned, Mr. Kadam would submit that the Award of the said sum applies only in the event of non-grant of occupation certificate by MCGM and impossibility of regularisation of construction of 'A' wing building. That the primary direction is for procuring the occupation certificate. In the event, MCGM rejects occupation certificate, Petitioner-Developer still has an option of going for regularisation of 'A' wing building. It is only when both the means of performance fail and the building is rendered completely illegal,

12 (2005) 11 SCC 314

liability to pay damages in the sum of Rs.128.98 crores kicks in. He would submit that award of sum of Rs.128.98 crores is well supported by evidence of expert, which is considered by the Arbitral Tribunal. It is not that award of sum of Rs.128.98 crores is unsupported by any material on record. That once the Arbitral Tribunal considers expert evidence of Valuer and awards a particular sum, Section 34 Court cannot second-guess the awarded sum by holding that some other figure could also have been awarded as damages. That there are multiple yardsticks, which could have been applied while determining quantum of damages. Cost of reconstruction could only be one such available yardstick and not the only yardstick for determining quantum of damages. If multiple yardsticks are available and the Arbitral Tribunal chooses one of them, the Award cannot be interfered with, only because some other yardstick could also be applied in the facts of the case. Mr. Kadam would further submit that the Respondent-Society had also relied on report of the Valuer showing cost of reconstruction of the building as Rs.169.11 crores. However, the Arbitral Tribunal chose to rely upon lesser cost of Rs.128.98 crores. Therefore, there is no warrant for interference in the award of sum of Rs.128.98 crores by way of last resort by the Arbitral Tribunal. That award of such sum was necessary as the Respondent-Society would be left remediless if Petitioner-Developer fails to secure occupation certificate or to get 'A' wing building regularised. That award of monetary claim not only puts necessary consequences for the Petitioner-Developer but ensures that the Society will be in a position to rebuild the building in case it is found that the same is constructed in total violation of building norms. The 2009 and 2011 plans are submitted and got approved by Petitioner-Developer in such a manner that there are voids in living room and bed room of the members. That Petitioner-Developer has acted in gross arbitrary manner by stealing the sanctioned built-up area from 'A' wing building and loading the same in 'B' wing building. That therefore though the flats in reality have covered slabs, 2009 and 2011 plans

indicate void therein since FSI in respect of 'open to sky ducts' is utilised in sale component building. That direction to pay sum of Rs.128.98 crores apply only if the Petitioner-Developer continues to act negligently and fails to secure occupation certificate. That the findings recorded by the Arbitral Tribunal in paragraph 76 would indicate that earlier plans for regularisation of 'A' wing building have already been rejected by the MCGM.

24) Mr. Kadam would further submit that the findings recorded by the Arbitral Tribunal in paragraph 69 of the Award are sought to be misrepresented by the Petitioner-Developer. What is meant by the Tribunal is that the Respondent-Society was seeking compliance in terms of the statement made by the Petitioner-Developer before this Court. That the observation of the Respondent-Society not seeking specific performance in Statement of Claim is made while rejecting its contention that Petitioner could not have opposed the prayer for specific performance after having contended that termination was wrongful. That the Arbitral Tribunal has rightly understood the frame of the entire claim, which was for the purpose of enforcing statement made by the Petitioner before this Court that it would secure occupation certificate of Society's building. That the Arbitral Tribunal has rightly appreciated the position that statement made before this Court is the foundation for seeking specific performance of the Development Agreement. That if any gap is noticed by this Court in the Arbitral Award, the same can be explained by this Court in exercise of powers under Section 34 of the Arbitration Act and in support he would rely upon judgment of the Apex Court in ***OPG Power Generation Private Limited V/s. Enexio Power Cooling Solutions India Private Limited and Another***[13]**.** Relying on the same judgment, he submits that mere erroneous application of law or wrong appreciation of evidence is not a ground to set aside the Award. He would submit that approach of this Court ought to be

[13] (2025) 2 SCC 417

to respect the finality of the Arbitral Award rather than interfering in the same as if this Court is exercising appellate power over the Arbitral Award. Mr. Kadam would submit that contention of the Petitioner-Developer about non-revival of Power of Attorney is misconceived. That the Petitioner-Developer never wrote to the Respondent that reinstatement of Power of Attorney was required for submitting proposal for occupation certificate. On the other hand, pleadings, correspondence and affidavit of evidence emphatically expressed Petitioner's willingness to act in accordance with statement made before this Court. Even while seeking cooperation from the Respondent-Society vide letter dated 18 February 2016, the Petitioner-Developer never demanded reinstatement of the Power of Attorney.

25) Lastly, Mr. Kadam would submit that the Arbitral Tribunal has taken a reasonable view in directing Petitioner-Developer to fulfill the obligation of procuring occupation certificate in respect of 'A' wing building. That sum of Rs.128.98 crores is awarded *in terrorem* to ensure that the Petitioner-Developer does not run away from responsibility of procuring occupation certificate. A Developer, who mischievously amended the plans and showed voids inside the living rooms and bed rooms in 'A' wing flats by stealing the sanctioned built up area is made to ensure that the occupation certificate is issued by the Planning Authority to ensure that members of the Respondent-Society lawfully occupy the same. It is only in extreme event of Petitioner's refusal to secure occupation certificate or to get 'A' wing building regularised, consequence of damages in the sum of Rs.128.98 crores are imposed. That this approach by the Arbitral Tribunal cannot be treated as so unreasonable that no fair-minded person would ever adopt the same. He would accordingly pray for dismissal of the Arbitration Petition.

REASONS AND ANALYSIS

26) Petitioner-developer seeks annulment of the Arbitral Award by filing the present Petition under Section 34 of the Arbitration Act. The main dispute between the parties is about Petitioner's failure to procure occupation certificate in respect of the building of Respondent-Society. The impugned Award is rendered by the Arbitral Tribunal in the context of a situation where members of the Respondent-Society are unable to enjoy ownership and occupancy rights in respect of their flats in the building constructed by the Petitioner-Developer on account non-grant of occupation certificate thereto by the MCGM. Before considering the objections to the Award, it would be necessary to analyse the reason why no occupation certificate is granted in respect of society's building.

WHY SOCIETY'S BUILDING IS WITHOUT OCCUPATION CERTIFICATE?

27) The case involves a unique fact situation where Petitioner-Developer initially secured development permission on 17 September 2008 and constructed 'A' wing Building in accordance thereof. However, during currency of its construction, the Petitioner got the plans modified on 9 May 2009 and 25 March 2011 indicating 'open to sky duct' areas inside the flats of society's members and shifted that portion of built-up area (**BUA**) sanctioned for 'A' wing building and loaded the same in 'B' wing sale component building. This is done by the Petitioner-Developer possibly for the purpose of putting in additional construction in 'B' wing building for being sold to the outsider purchasers.

28) 'A' wing building is not being granted occupation certificate because the same is constructed in accordance with earlier sanctioned plan dated 17 September 2008, but that plan got subsequently modified by the

Petitioner and in the modified plan, 'A' wing building is depicted differently than the one it is actually constructed. In the modified plans, 'A' wing building is shown to have 'open to sky ducts' (which are FSI free) but in reality, there are no such 'open to sky ducts' in the building. The BUA saved/excepted by showing such 'open to sky ducts' is shown to have been utilized in 'B' wing building. It appears that the 'B' wing building is constructed by utilizing such shifted BUA from 'A' wing building.

29) Since the construction of 'A' Wing building is not in accordance with the existing sanctioned plan, the occupation certificate is not being granted by the planning authority. The 'open to sky duct' areas indicated in the last plan dated 25 March 2011 are physically and actually not at the site and the said areas are covered with slabs. The Petitioner-developer was required to either puncture those slabs to effect 'open to sky ducts' in society's building or bring in FSI from outside to have those areas regularised in 'A' wing building. Petitioner has done neither. Puncturing the 'A' wing building slabs appears to be an impossibility for two reasons of (i) affecting structural stability of the building and (ii) flat layout going for a toss since those 'open to sky ducts' will have to be created right within the living and bedrooms of flats of the members. The MCGM has accordingly refused to grant occupation certificate to 'A' wing building as construction thereof is not in accordance with last approved plan dated 25 March 2011.

30) Thus, Petitioner-Developer is accused of an act of deceit and misrepresentation . It faces allegation of deceiving not just the Respondent-Society but also the MCGM. Petitioner-Developer first got sanctioned development permission dated 17 September 2008 and constructed 'A' wing building in conformity thereof. However, behind the back of the Respondent-Society, it modified the plan of 17 September 2008 on 9 May 2009 and 25 March 2011 and is accused of stealing the BUA sanctioned for 'A' wing building and selling the same to outsiders. This is like getting

sanctioned plans for 20 storey building, actually constructing 20 storey building at the site, but later getting the plans modified from planning authority showing that the first building would only be of 10 floors and getting sanction for second 10 storey building in the plot. Thus, though on the plans, the two buildings would ultimately comprise of 10+10 = 20 floors, factually what would stand on the plot are building No.1 of 20 floors and building No.2 of 10 floors = 30 floors and there is no FSI available for sustaining the 10 additional floors, rendering the 10 floors of the first building illegal. Similar act appears to have been committed by Petitioner-Developer, on account of which, Respondent-Society and its members are deprived of right to use and occupy their flats.

31) The reason for describing the above acts of the Petitioner-Developer in the opening part of analysis is because there is not much factual dispute to the position that some portion of BUA of 'A' wing building is deleted in subsequent plans after construction of that building and loaded in 'B' wing sale component building. Having appreciated the exact reason why 'A' wing building is not being granted occupation certificate by the Planning Authority, now I proceed to consider the objections raised by the Petitioner to the impugned Arbitral Award.

PETITIONER'S OBJECTIONS TO THE AWARD

32) Though several grounds are pleaded in the Petition, there are only two major challenges raised before me during the course of submissions canvassed by Mr. Dwarkadas on behalf of the Petitioner-Developer. The *first* objection is in respect of grant of relief of specific performance of the Development Agreement, which was already terminated by the Respondent-Society on 15 October 2015. It is contended that if the Respondent-Society believes that the Petitioner has breached the contractual obligations under the Development Agreement, it had the

choice of either putting the contract to end and seek damages for breaches allegedly committed or to treat the contract as subsisting and seek specific performance thereof. It is contended that once an election is made by terminating the Development Agreement, the Respondent-Society cannot turn around and seek specific performance of such terminated agreement. *Second* point, strenuously canvassed by Mr. Dwarkadas, is in respect of award of sum of Rs.128.98 crores in the event of non-grant of occupation certification and non-regularisation of 'A' wing building. It is contended that the sum awarded by the Tribunal represents the cost of the land and 'A' wing building as the Tribunal has considered Valuer's report based on comparable sale instances and not the cost of reconstruction of the building.

33) Apart from the above two major challenges, Mr. Dwarkadas has raised two relatively less significant points. Petitioner questions the rate at which rent is directed to be paid to the members of the Respondent-Society contending that Development Agreement envisaged payment of rent @Rs. 52 per sq.ft. per month whereas the learned Arbitrator has directed payment of rent @ Rs.80 per sq.ft. per month. It is contended that direction for payment of Rs.45,82,500/- in respect of shortfall area of 195 sq.ft. could not have been granted since the Arbitral Tribunal has already granted relief in paragraph 87(e) in respect of shortfall area. These are the only four broad challenges raised on behalf of the Petitioner-Developer before me.

OPERATIVE DIRECTIONS IN THE AWARD

34) Before proceeding to decide each of the challenges raised by the Petitioner-Developer, it would be necessary to consider the exact directions issued by the Arbitral Tribunal in the operative part of the

Award. The operative directions of the Tribunal in paragraph 87 of the Award read thus:

> 87. In the aforesaid premises, following Award is passed:-
>
> AWARD
>
> (a)(i) Respondent are directed to take all steps as may be necessary, at their own costs, for amending the plans dated 25th March 2011 of Wings A and B of the subject property known as Evertop Apartments and bearing Plot No. 834/1, 834/2 and 822/1 and situate at Sahakar Nagar, J.P. Road, Andheri (West), Mumbai 400053 and/or to get fresh plans prepared of Wings A and B, in consonance with the sanctioned plan dated 17th September 2008 so as to ensure that the Occupation Certificate is granted for the entire area of flats allotted to the members of Claimant in A Wing as per the plans sanctioned on 17th September 2008.
>
> (a) (ii) Respondent are further directed to take all steps as may be necessary at their own cost, to obtain Occupation Certificate in respect of Wing A of the building Evertop Apartments and bearing Plot No. 834/1, 834/2 and 822/1 and situate at Sahakar Nagar, J.P. Road, Andheri (West), Mumbai 400053, within 6 (six) months of the receipt of this Award, in consonance with the plans as may be sanctioned in terms of prayer (a) above, under the supervision of Claimant and/or Architect appointed by Claimant.
>
> (b) The Respondent are restrained by a permanent order and injunction from submitting any plans to MCGM contrary to the building plans sanctioned on 17th September 2008 for the purpose of obtaining Occupation Certificate of Wing A.
>
> (c) It is declared that the plans dated 9th May 2009 and 25th March 2011 are null, void and not binding on the Claimant.
>
> (d) Respondent are directed to handover to Claimant all the original / certified copies of IOD, CC, plans submitted to and correspondence with MCGM in respect of Wings A and B within 1 (one) month of obtaining of the Occupation Certificate.
>
> (e) In the event Occupation Certificate is not granted in terms of prayer (a)(ii) above, in such an event, Respondent are directed to, at their own cost, take step to get the area shown to be covered by open to sky ducts in the living room and bed room, regularised at Respondent's cost, within 3 months of rejection of application for Occupation Certificate and if there is any shortfall in the area which is required to be provided under the sanctioned plan dated 17.09.2008 then Respondent are directed to pay an amount of Rs.23,500/- per square feet to Claimant for such short fall within 3 months of the date of regularization.
>
> (f) If the amount of shortfall is not paid within 3 months of the date of regularisation, Respondent shall pay the said amount with interest thereon @ 8% per annum from the expiry of period of 3 months till payment or realisation thereof.

(g) In the event, the aforesaid regularization is rejected. Respondent are directed to pay to the Claimant Rs. 128,98,00,000/- within 3 months of such rejection.

(h) In the event, the said amount of Rs.128,98,00,000/- is not paid within 3 month of such rejection, Respondent shall pay the said amount with interest @ 8% p.a from the date of expiry of 3 months till payment of realisation thereof.

(i) (i) The Respondent are directed to pay to the Claimant monthly compensation @ Rs.80/- per square feet per month per member of Claimant for the period from February 2014 to October 2015 (both months inclusive) and interest thereon @ 8% per annum from the date of the Statement of Claim till date of Award, within 3 (three) months from the date of the receipt of the Award.

(ii) In case of Respondent's failure to pay the said amounts or any part thereof within the time stipulated above, Respondent to pay the same with interest thereon @ 12% per annum from the expiry of 3 months from the date of the receipt of the Award, till the date of payment or realisation thereof.

(j) (i) Respondent are directed to pay to Claimant a sum of Rs.45,82,500/- (Rupees Forty Five Lakh Eighty Two Thousand Five Hundred only) being the loss on account of shortfall in area within 3 (three) months from the date of the receipt of Award.

(ii) In the event of Respondent's failure to pay Rs.45,82,500/- (Rupees Forty Five Lakh Eighty Two Thousand Five Hundred only) within the time stipulated above, the Respondent shall pay the said amount with interest thereon @ 8% per annum from the date of the expiry of 3 months from the date of receipt of the Award, till payment or realisation thereof.

(k) Respondent are directed to pay to Claimant property tax payable to the MCGM, for the period from November 2008 till its termination i.e 15.10.2015. within 3 (three) months of the date of receipt of this Award.

(l) In the event of Respondent's failure to pay the aforesaid amount of Property Tax within the time stipulated above, the Respondent shall pay the said amount with interest thereon @ 12% per annum from the expiry of 3 months from the date of receipt of the Award, till payment or realisation thereof.

(m) It is declared that the Rectification Deed dated 3rd November 2010 is void, illegal, bad in law and not binding on Claimant.

(n) The Respondent are directed to hand over the Rectification Deed dated 3rd November 2010 to the Claimant for cancellation, within 3 months from the date of receipt of this Award.

(o) Respondent are directed to pay to Claimant Rs.35,00,000/- (Rupees Thirty-Five Lakh only) as cost to the Claimant, within 2 (two) months from the date of the receipt of Award.

35) The above operative directions issued by the arbitral tribunal may appear to be slightly complex. However, broadly the directives of the tribunal are in the following three parts:

A) Directives in the nature of specific performance where Petitioner is directed to-

(i) procure occupation certificate in respect of 'A' wing building by getting the plans amended in consonance with first approved plan dated 17 September 2008.

(ii) in the event of refusal to issue occupation certificate by the MCGM, directive to Petitioner to apply for regularisation of areas shown in plan dated 25 March 2011 as open to sky ducts in living rooms and bed rooms (possibly by procuring outside FSI) and in the event of any shortfall in the area required to be provided under plan dated 17 September 2008, the directive to pay amount of Rs. 23,500/- per sq.ft to Respondent-Society in respect of shortfall area.

(iii) if directives in A (i) and (ii) above fail and in the event of non-grant of occupation certificate and non-regularisation of open to sky ducts, pay to the Respondent-Society sum of Rs.128.98 crores.

(B) Direction for payment of rent @ Rs.80 per sq.ft. per month per member for the period from February-2014 (when payment of rent was stopped) till October -2015 (when the Development Agreement was terminated).

(C) After regularization of open to sky ducts, shortfall area as compared to the area promised in the development agreemed is quantified as 195 sq.ft., for which amount of Rs.45,82,500/- is awarded @ Rs.23,500/- per sq.ft.

(D) Direction for payment of property taxes from November-2008 to 15 October 2015.

36) Apart from above four broad directions, two declarations are also issued by the Arbitral Tribunal holding that plans dated 9 May 2009 and 25 March 2011 and Rectification Deed dated 3 November 2010 are void and not binding on the Respondent-Society. The Arbitral Tribunal has also granted consequential injunction against the Petitioner-Developer from submitting any plans to MCGM contrary to building plan sanctioned on 17 September 2008 while procuring occupation certificate of 'A' wing building. Rest of the claims of the Respondent-Society have been rejected by the Tribunal.

37) Now I proceed to examine each of the four challenges raised by the Petitioner before me.

PERMISSIBILITY TO SEEK SPECIFIC PERFORMANCE AFTER TERMINATION OF DEVELOPMENT AGREEMENT

38) In the present case, the Respondent-Society terminated the Development Agreement vide notice dated 15 October 2015. However, in its Statement of Claim filed before the Arbitral Tribunal, it sought directions for procuring occupation certificate in respect of 'A' wing building '*as per representation made to it under Agreement dated 3rd May 2008*'. The Respondent-Society has thus, sought specific performance of

contractual obligations under the Development Agreement dated 3 May 2008. Prayer Clauses a(i) and a(ii) in the Statement of Claim sought specific performance of contractual obligations under the Agreement dated 3 May 2008 and they read thus:-

> 49. The Claimant therefore prays that:-
> a. The Respondent be ordered and directed to;
>
> (i) Amend the existing plans of wings A and B and/or obtain approval on fresh plans of Wings A and B, so as to ensure that the Occupation Certificate is granted for the entire area of flats allotted to the members of the Claimant in Wing A is **as per representation made to the Claimant under the said Agreement dated 3rd May 2008** and the Plans sanctioned in 2008;
>
> (ii) After such sanction/amendments to plans, obtain Occupation Certificate from MCGM in respect of Wing A within 6 months from the date of the Award or within such other time as this Honourable Tribunal may grant, and do and perform all such acts, deeds, matters and things a are required to be done and perform for obtaining such Occupation Certificate from MCGM, including demolition of such area in Wing B on the said land, as may be required, to bring Occupation Certificate for the Wing A under the supervision of the Claimant and/or the architect nominated or appointed by the Claimant;
>
> *(emphasis and underlining added)*

39) On account of prayers made by the Respondent-Society for specific performance of Development Agreement dated 3 May 2008, the Petitioner-Developer has raised an objection that after termination of the Development Agreement by notice dated 15 October 2015, the Respondent-Society could not have sought specific performance thereof. Petitioner has invited my attention to following pleadings in paragraphs 18 and 19 of the Statement of Claim, to bring home the point that the claim for specific performance was 'notwithstanding termination':-

> 18. In spite of various demands and opportunities given to the Respondent for rectifying breaches and defaults, the Respondent failed and neglected to rectify the breaches and defaults. **The Claimant therefore, by its letter dated 15th October, 2015 after pointing out some of the facts and breaches, terminated the subject Agreement and all other**

> **documents signed or purported to be signed by the Claimant.** The Claimant craves leave to refer to and rely upon the Termination Notice dated 15th October, 2015 at the time of hearing.
>
> 19. Notwithstanding the aforesaid termination, as can be seen from what is enumerated herein below, **the Claimant has performed and at all times, been ready and willing to perform its obligations. under the said Agreement** in accordance with the terms and conditions thereof as well as plans approved by the members of the Claimant/s. The Respondent has however, in breach of the terms and conditions of the said Agreement inter alia, got the approved plans, modified/amended by the MCGM (without the permission, knowledge and authority of the Claimant), has illegally in the final/amended approved plans of MCGM, sought to reduce the areas available to the Claimant and its members inter alia, by introduction of Open to Sky Duct and Voids, illegally transferred the FSI arising there from to the Wing B, committed various illegalities in the construction of the Wing B, illegally given possession to the occupants of the commercial premises in Wing B without first obtaining Occupation Certificate in respect of the Wing A, illegally sold commercial premises in Wing B for a bar sought regularization of the commercial premise without obtaining Occupation Certificate for the Wing A i.e. the rehab building, etc. It is in these circumstances that the Claimant was compelled to terminate the said Agreement. It is however, reiterated that if the Respondent rectifies all its breaches, and pays compensation as claimed / determined by this Hon'ble Tribunal, the Claimant is and has always been ready and willing to have specific performance of the said Agreement as per the terms and conditions. In any event, notwithstanding the aforesaid termination, it is respectfully submitted that having received the benefits under the said Agreement, having demolished the premises originally owned by the Claimant and/or its members, having dispossessed them, having failed to pay compensation to them on or after January, 2014, having constructed Wing B and having illegally handed over possession thereof to the occupants thereof, the Respondent continues to be bound and obliged to get the Wing A regularized with the MCGM in accordance with the original plans approved by the Claimant and to do all things that may be necessary for the said purpose, including if necessary, to have the commercial building or such part thereof as may be necessary demolished or made unusable. In addition to the above, the Respondent is also liable to pay to the Claimant compensation / damages sought hereunder:
>
> (*emphasis and underlining added*)

40) Thus, in paragraph 19 of the Statement of Claim, the Respondent-Society contended that though it was compelled to terminate the Development Agreement, it was still ready and willing to have specific performance thereof if the Petitioner-Developer was to rectify all its breaches and pay compensation. On account of the above pleadings, it is contended by the Petitioner-Developer that it was impermissible for the

Respondent to seek performance of the Development Agreement after having terminated the same.

41) Ordinarily, once a contract is broken, the injured party is required to make an election in respect of two choices it has. It can either treat the contract as having ended and seek damages for breaches committed by the opposite party. In the alternative, the injured party can treat the contract as subsisting and seek specific performance thereof. Once former choice is made by terminating the contract, the injured party cannot turn around and seek specific performance of terminated contract. In other words, the act of termination is antithesis of relief for specific performance.

42) Section 16 of the Specific Relief Act, enumerates the eventualities in which specific performance can be denied and it provides thus:-

> **16. Personal bars to relief.**—Specific performance of a contract cannot be enforced in favour of a person—
>
> (a) who has obtained substituted performance of contract under section 20; or
>
> (b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
>
> (c)who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.
>
> **Explanation**.—For the purposes of clause (c),—
>
> (i)where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;
>
> (ii)the plaintiff must prove performance of, or readiness and willingness to perform, the contract according to its true construction.

43) Thus under clause (b) of Section 16, where a party wilfully acts in variance with the contract, specific performance thereof cannot be

enforced in his favour. By terminating the contract, the injured party essentially acts at variance with the contract and therefore he is not entitled to seek specific performance thereof. Under clause (c) of Section 16 of the Specific Relief Act, a party failing to prove readiness and willingness to perform essential terms of the contract is not entitled to specific performance thereof. Therefore the very act of termination of contract conveys that the injured party is not ready and willing to perform its part of contract.

44) Section 21 of the Specific Relief Act deals with Court's power to award compensation in certain cases and it provides thus:-

> **21. Power to award compensation in certain cases.**—
> (1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach in addition to such performance.
>
> (2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.
>
> (3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.
>
> (4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872 (9 of 1872).
>
> (5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:
>
> **Provided that** where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.
>
> **Explanation**.—The circumstances that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

45) Ordinarily, compensation under Section 21 of the Specific Relief Act can be claimed by the Plaintiff in addition to prayer for specific performance and the same can be granted only if specific performance of contract is denied for any reason. Thus alternate prayer for compensation can be raised under Section 21 of the Act only when prayer for specific performance is maintainable, but cannot actually be granted in the facts of the case. Thus in a suit which is not maintainable in respect of prayer for specific performance, the relief of compensation under Section 21 can also not be granted. Maintainability of suit for specific performance is thus *sine qua non* for seeking alternate relief of compensation under Section 21.

46) Thus, there is clear distinction between damages for breach of contract under Section 73 of Contract Act and compensation for Court's inability to grant specific performance under Section 21 of the Specific Relief Act. Therefore Plaintiff suffering breach of contract at the hands of the Defendant must choose whether (i) to sue for damages for breach by treating the contract as having come to an end and by discharging himself of all obligations under that contract or (ii) to sue for specific performance of contract by treating the same as subsisting and by proving readiness and willingness to perform Plaintiff's contractual obligations. It is only to the latter remedy that Section 21 of the Specific Relief Act applies. Since termination of contract by Plaintiff is antithesis to the remedy of specific performance, Plaintiff cannot sue for three alternate reliefs in following sequence:

(a) award damages by declaring that Plaintiff's termination of contract for breaches committed by Defendant is valid

Or alternatively,

(b) grant specific performance of contract, if contract is held to be not validly terminated by Plaintiff

And

(c) if specific relief cannot be granted in the facts of the case, award compensation in terms of Section 21 of the Specific Relief Act.

The Plaintiff alleging breach of contract by Defendant must make an election to opt for remedy (a) or (b) above. Remedy (c) is only an alternative to remedy (b) and can be sought in same suit for remedy (b). However, Plaintiff cannot ordinarily seek specific performance (remedy 'b') as an alternative to the prayer for damages for breach of contract (remedy 'a'). He cannot first try his luck to prove that the contract is validly terminated and if he fails in such attempt, seek to establish in the alternative that he is ready and willing to perform his part of contract and that therefore specific performance be granted in his favour. This is primarily because by electing to terminate the contract, Plaintiff acts in variance with the contract, discharges himself from his remaining contractual obligations and thereby disables himself from establishing that he is ready and willing to perform his part of contract.

47) To illustrate, if Plaintiff decides to buy a land for establishing a factory and enters into agreement for sale of land with the landowner-Defendant. The sale transaction is made subject to the condition of Defendant securing statutory permissions. Defendant delays obtaining the permissions and Plaintiff believes that it is suffering losses on account of non-construction of factory due to delay in completion of sale transaction. Plaintiff has to elect one out of the two available remedies. *First* remedy is to terminate the agreement and to discharge himself from remaining contractual obligations of making balance payment and seek damages for losses suffered due to delay in completion of sale transaction. *Second* remedy is to seek specific performance of the agreement by establishing that

the Plaintiff was and is ready and willing to perform its part of contract by paying the balance consideration. If Plaintiff elects to exercise the second remedy, he can also seek the prayer for compensation under Section 21 of the Specific Relief Act in the event of non-grant of specific performance. However, Plaintiff cannot terminate the agreement, discharge himself from contractual obligations and then seek to plead that he is ready and willing to perform his part of contract and seek specific performance. Once he elects to choose the first remedy, he disables himself from pleading or establishing readiness and willingness and is therefore estopped from seeking the second remedy of specific performance.

48) The above position in law is borne out from several judicial pronouncements. The lead judgment on the issue is of Privy Council in ***Ardeshir H. Mama V/s. Flora Sasoon*** (supra). The Privy Council has drawn a distinction between suit for specific performance and suit for damages for breach by discussing the English and the Indian Law. The case before the Privy Council involved suit for specific performance of contract for sale of valuable land at Malbar Hill in Mumbai, in which Plaintiff had also claimed damages additionally or alternatively in terms of Section 19 of the Specific Relief Act, 1877 (*which was pari materia to Section 21 of the Specific Relief Act, 1963*). Plaintiff had pleaded readiness and willingness to perform his part of contract in the Plaint. However, during pendency of the Suit, Plaintiff's solicitor formally notified the Defendant that Plaintiff had decided to abandon his claim for specific performance and he would only claim damages against the Defendant for breach of contract. The Trial Court decreed the Suit ordering the Defendant to return the deposit paid by the Plaintiff and further awarded sum of Rs.7,00,000/- as damages for the Defendant's breach of contract. In appeal, the decree was reversed. Plaintiff appealed to the Privy Council against the decree of the Appellate Court. The issue before the Privy Council was whether the Plaintiff could claim

damages having given up the claim for specific performance. The Privy Council held that according to common law of England, the only legal right, which arose upon non-performance of the contract in favour of the party injured by its breach was a claim for damages. It is held however that the English Law had gradually evolved and specific performance could also be granted, particularly in relation to contracts relating to land. The Privy Council took note of codification of this development in law in Indian Specific Relief Act, 1877.

49) The Privy Council in ***Ardeshir H. Mama V/s. Flora Sasoon*** then took note of twin remedies of institution of a Suit in *equity* for specific performance or to bring action at *law* for breach. The Privy Council held that Plaintiff's conduct and attitude towards the contract and towards the Defendant differs fundamentally in accordance with the choice the Plaintiff makes. It is held that where the injured sues *at law* for breach, he thereby elects to treat the contract as having been put an end and discharges himself from obligations arising out of the contract. However, in a suit for specific performance based on *equity*, Plaintiff needs to prove continuous readiness and willingness to perform the contract. The Privy Council held that once Plaintiff elects to sue for damages, he makes a definite election to treat the contract as at an end and thereafter no suit for specific performance can be maintained by his election. Plaintiff precludes himself even from making an averment of readiness and willingness. It is further held that power to give damages as an alternative to specific performance did not extend to a case in which plaintiff had debarred himself from claiming specific performance. In case where Plaintiff makes an election of treating the contract as at an end and sues for damages, he can neither claim specific performance nor damages as alternative to specific performance. The Privy Council has held as under:-

> According to the common law of England, the only legal right which arose upon the non-performance of a contract in favour of the party

injured by its breach was a claim for damages. The inadequacy in many cases of that remedy for the purposes of justice supplied the incentive to a Court of Conscience, as the Chancellor's Court has been called, to decree, when applied to in particular cases, the more complete remedy of specific performance. As a result of a long course of decisions by Chancellors and other equity Judges, there was gradually evolved in England a body of settled principles and rules governing the exercise of that jurisdiction, so that in course of time its limits were settled almost as definitely as if they had been embodied in a statute. By 1877, and in most respects long before, this stage had been reached. It need hardly be re-called that amongst the contracts to which an order for specific performance was always regarded as peculiarly appropriate were contracts relating to land or an interest therein, such, for instance, as the contract alleged in the present case. It is, however, interesting to note that this appropriateness is re-affirmed in sec. 12 of the Indian Act, so closely does it follow the parent system.

All this is, historically, the explanation of the fact, that in relation to a contract to which the equitable form of relief was applicable, a party thereto had two remedies open to him in the event of the other party refusing or omitting to perform his part of the bargain. **He might either institute a suit in equity for specific performance, or he might bring an action at law for the breach.** But—and this is the basic fact to be remembered throughout the present discussion—**his attitude towards the contract and towards the Defendant differed fundamentally according to his choice.**

Where the injured party sued at law for a breach, going, as in the present case, to the root of the contract, he thereby elected to treat the contract as at an end and himself as discharged from its obligations. No further performance by him was either contemplated or had to be tendered.

In a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit. Thus it was that the commencement of an action for damages being, on the principle of such cases as *Clough* v. *L. & N.W.R.* [L.R. 7 Exch. 26.] and *Law* v. *Law* [[1905] 1 Ch 140.], **a definite election to treat the contract as at an end, no suit for specific performance, whatever happened to the action, could thereafter be maintained by the aggrieved Plaintiff. He had by his election, precluded himself even from making the averment just referred to proof of which was essential to the success of his suit.** The effect upon an action for damages for breach of a previous suit for specific performance, will be apparent after the question of the competence of the Court itself to award damages in such a suit has been touched upon.

XXX

The limited effect of the section was not long left in doubt, wide as are apparently its terms. In a series of decisions it was consistently held that

> just as its power to give damages *additional* was to be exercised in a suit in which the Court *had* granted specific performance, **so the power to give damages as an *alternative* to specific performance did not extend to a case in which the Plaintiff had debarred himself from claiming that form of relief, nor to a case in which that relief had become impossible.** In the present instance, their Lordships are disposing of a case in which the **Plaintiff had debarred himself from asking at the hearing for specific performance, and in such circumstances, notwithstanding Lord Cairns' Act, the result still was that with no award of damages—the Court could award none—the order would be one dismissing the suit with no reservation of any liberty to proceed at law for damages.** See per Lord Selborne, *Hipgrave* v. *Case* [28 Ch. Div. 356, 362 (1885).] . In other words, the Plaintiff's rights in respect of the contract were at an end.
>
> From all of which it appears that in England in a suit like the present, after the Appellant had written his letter of the 19th March 1924, if that letter is to be interpreted as their Lordships think it should be, he could neither have obtained a decree in the suit nor damages anywhere else.
> (*emphasis added*)

50) Thus, in ***Ardeshir H. Mama V/s. Flora Sassoon*** (supra) the Privy Council has held that once Plaintiff makes an election by treating the contract as at an end, he cannot even plead readiness or willingness, and cannot claim specific performance of contract nor can ask for damages as an alternative to specific performance. The judgment in ***Ardeshir H. Mama V/s. Flora Sassoon*** (supra) is followed by the Supreme Court in ***PT. Prem Raj*** (supra), in which it was contended by the Appellant therein that it was open for him to pray for a decree for specific performance if the court did not accept his case that impugned Agreement was illegal and void. Relying on provisions of Order VII Rule 11 of the Code of Civil Procedure, 1908 it was contended that the Plaintiff was entitled to pray for inconsistent reliefs. The Apex Court referred to provisions of Section 37 of the Specific Relief Act of 1877 and held as under:-

> 4. In support of this appeal it was argued, in the first place, that under Order 7 Rule 7 of the Civil Procedure Code the appellant was entitled to claim a relief in the alternative on the facts stated in the plaint and it was open to him to pray to the court that a decree for specific performance should be granted if the court did not accept his case that the impugned agreement dated June 11, 1958 was illegal and void. It is true that under Order 7, Rule 7 of the Civil Procedure Code it is open to a plaintiff to pray

for inconsistent reliefs. But it must be shown by the plaintiff that each of such pleas is maintainable. So far as the relief of specific performance is concerned, the matter must be examined in the light of the provisions of the Specific Relief Act. In this connection reference may be made to Section 37 of the Specific Relief Act (Act 1 of 1877) which is to the following effect:

> "A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the court, if it refuses to enforce the contract specifically may direct it to be rescinded and delivered up accordingly."

It is expressly provided by this section that a plaintiff suing for specific performance of the contract can alternatively sue for the rescission of the contract <u>but the converse is not provided</u>. It is therefore not open to a plaintiff to sue for rescission of the agreement and in the alternative sue for specific performance. Section 35 of the Specific Relief Act, 1877 states the principles upon which the rescission of a contract may be adjudged. But there is no provision in this section or any other section of the Act **that a plaintiff suing for rescission of the agreement may sue in the alternative for specific performance. In our opinion, the omission is deliberate and the intention of the Act is that no such alternative prayer is open to the plaintiff.** This view is borne out by the following passage in "Fry on Specific Performance, 6th Edn., p. 493":

> "It remains to remark that the plaintiff, bringing an action for the specific performance of a contract, may claim in the alternative that, if the contract cannot be enforced, it may be rescinded and delivered up to be cancelled, provided that the alternative relief is based on the same state of facts, though with different conclusions as to law. When the action is brought by the vendor, and the purchaser has been in possession, this alternative claim may embrace an account of the rents and profits. But, for the reason already stated, a suit to set aside a transaction for fraud or, in the alternative, for specific performance of a compromise could not be sustained in the Court of Chancery. And notwithstanding the provisions of the Rules of the Supreme Court as to alternative claims for relief, it seems probable that the same conclusion would still be arrived at, on the ground that the claims were inconsistent and embarrassing."

The same principle is enunciated in Cawley v. Poole [71 ER 23] in which it was held by the Court of Chancery that in a case where a bill alleges a judgment obtained by fraud, and a subsequent compromise, and seeks to set aside the whole transaction on the ground of fraud, or in default to have the compromise carried out, and the court is of opinion that the case of fraud fails, it will not enforce the compromise, but the whole bill must be dismissed.

5. There is also another reason for holding that the appellant has made out no cause of action with regard to the relief of specific performance of the contract. It is well-settled that in a suit for specific performance the

plaintiff should allege that he is ready and willing to perform his part of the contract. In the present case, no such averment is made in the plaint. On the other hand, the plaintiff has alleged that the agreement was a result of fraud and undue influence and was not binding upon him. For these reasons it must be held that so far as the relief of specific performance is concerned, the plaintiff has no cause of action. The legal position has been stated by Lord Blanesburgh in pronouncing the opinion of the Judicial Committee in ***Ardeshir Mama v. Flora Sassoon*** [55 IA 300, at p 372] as follows:

> "Where the injured party sued at law for a breach, going, as in the present case, to the root of the contract, he thereby **elected** to treat the contract as at an end and himself as **discharged from its** obligations. No further performance by him was either contemplated or had to be tendered. In a suit for specific performance, on the other hand, he treated and was required by the court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a **continuous readiness** and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit. Thus it was that the commencement of an action for damages being, on the principle of such cases as Clough v. London and North Western Railway Co. [(1871) LR 7 Ex. 261] and Law v. Law [(1904) 1 Chapter 140] a definite election to treat the contract as at an end, no suit for specific performance, whatever happened to the action, could thereafter be maintained by the aggrieved plaintiff. He had, **by his election,** precluded himself even from making the averment just referred to, proof of which was essential to the success of his suit. The effect upon an action for damages for breach of a previous suit for specific performance will be apparent after the question of the competence of the court itself to award damages in such a suit has been touched upon."

It was pointed out by Lord Blanesburgh that the Indian law on the subject as contained in the Specific Relief Act, 1877 is not different from the English law. At p. 375 of the same Report Lord Blanesburgh states:

> "Although, so far as the Act is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England (Section 24(b) is the nearest), it seems invariably to have been recognized, and, on principle, Their Lordships think rightly, that the Indian and the English requirements in this matter are the same : see, e.g., Karsandas v. Chhotalal [25 Bom LR 1037, 1050] ."

In the present case there is absence of an averment on the part of the plaintiff in the plaint that he was ready to perform his part of the contract. In the absence of such an averment it must be held that the plaintiff has no cause of action so far as the relief for specific performance is concerned.

(emphasis and underlining added)

51) Thus in ***PT. Prem Raj,*** the Apex Court held that Plaintiff suing for specific performance of contract can alternatively sue for rescission thereof but the converse is not provided. It is held that it is not open for the Plaintiff to sue for rescission of the Agreement and in alternative, sue for specific performance. It is held that omission permitting converse situation of Plaintiff suing for rescission of Agreement claiming alternative relief for specific performance is deliberate. Relying on the judgment of the Privy Council in ***Ardeshir H. Mama V/s. Flora Sassoon*** (supra) the Apex Court has added one more reason in paragraph 5 of the judgment for stating principle of law of impermissibility to claim specific performance as alternate relief to rescission of contract. The Apex Court held that the Plaintiff suing for rescission of contract cannot plead readiness and willingness to perform his part of contract. Thus, in ***PT Prem Raj*** (supra) the Apex Court has held that Section 37 of the Specific Relief Act, 1877 did not permit Plaintiff to claim alternate relief of specific performance in a suit for rescission of contract. Additionally, it is held that once Plaintiff walks out of the contract and claims relief of rescission of contract, he cannot even plead readiness and willingness in the Plaint.

52) The Division Bench judgment of the Madras High Court in ***K.S. Sundaramayyar*** (supra) also follows the principle laid down by the Privy Council in ***Ardeshir H. Mama V/s. Flora Sassoon***. It is held by the Division Bench that when a party to contract makes a claim for damages on the footing of breach of contract by the other party, the same amounts to deliberate election on his part to treat the contract as at an end and thereafter no suit for specific performance could be maintained by him. It is held that by making an election of claiming damages for breach of contract, Plaintiff disables himself from even making an averment of readiness and willingness. The Madras High Court has held as under:

Even assuming that time was not the essence of the contract and that the first responded was guilty of breach, it is clear from the above letter that the appellant had decided not to keep the contract subsisting but, the other hand, had put an end to it and demanded damages for an alleged breach by the first respondent. Such a demand for return of the advance paid is quite inconsistent with the subsistence of the contract. It cannot be said, therefore, that the appellant was ready and willing to perform his part of the contract.

The subsequent correspondence between parties only confirms this view. Three days latter, the first respondent wrote a long letter, Ex. B. 7, to the appellant setting out his version of the case and reiterating his original decision for forfeiting the advance amount and claiming further damages. That elicited a reply from the appellant on 10th June, 1958 Ex. B. 8, which charged the first respondent with a breach of the terms of the contract and reiterating the stand taken by him in his notice dated 22nd May, 1958. He then called upon the first respondent to comply with the demands made in that notice.

It was only more than six months thereafter that the appellant completely changed his case and issued a notice, Ex. A.2, through his Advocate claiming specific performance of the contract by the first respondent within three days therefrom after receiving the balance of the sale price. He claimed that as he was a rich man, the sale price must have been always ready with him and proceeded to state:

"My client hereby withdraws the notice he gave you for the refund of the advance and the compensation money as he is advised that he can obtain specific performance itself".

This statement itself amounts to an admission that by the previous notice the appellant had put an end to the contract by claiming a return of the advance amount paid by him. **It will not be open to a party to a contract, who has once elected to accept the breach—assuming there was a breach on the part of the other side to cancel that election and treat the contract as if it were subsisting.** We regard the notice dated 22nd May, 1958 as amounting to a definite abandonment by the appellant of his right to obtain specific performance of the contract. As pointed out by the Privy Council in ***Ardashir Mama*** **v.** ***Flora Sassoon*** *[52 Bom.597=28 L.W.257(P.C.]* **the plaintiff in a suit for specific performance should always treat the contract as still subsisting; he has to prove his continuous readiness and willingness,** from the date of the contract to the time of the hearing of suit, to perform his part of the contract and a failure to make good that case would undoubtedly lead to a rejection of his claim for specific performance. **Where, therefore, a party to a contract of sale made a claim for damages, on the footing of its breach by the other party it would amount to a definite election on his part to treat the contract as at an end and thereafter no suit for specific performance could be maintained by him, for, by such election, he had disabled himself from making the averment that he had always been ready and willing to perform his part of the contract.**

Learned Counsel for the appellant, however, contended that, so long as the injured party had not chosen his remedy and obtained satisfaction for

> the breach of the contract by the other party, specific performance could be granted. He relied, in this connection, on S. 24 (c) of the Specific Relief Act. **But the question in the present case is not, whether the appellant had not availed himself of one remedy or another; it is even more fundamental than that. The appellant had, as we said, put an end to the contract and demanded a return of the advance amount paid by him and made a further claim for damages.** If the contract were to be held as subsisting, he would have no right to insist upon a return of the advance amount. We are unable to find anything in the decision in *Calcutta Improvement Trust* v. *Subabala Debi* [44 C.W.N.541], to support the contention that, notwithstanding the election by a party to a contract to accept the breach by another he could still revive, at his choice, the contract and insist upon a specific performance thereof. We are, therefore, of opinion that the learned Subordinate Judge was correct in his view that the appellant was not entitled to relief by way of specific performance.
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> (*emphasis added*)

53) In ***State of Kerala V/s. Cochin Chemical Refineries Ltd.*** (supra), the Apex Court has held that breach of contract by one party does not automatically terminate the obligation under the contract and that the injured party has the option either to treat the contract as still in existence or to regard himself as discharged. Once the injured party accepts the discharge of other party, the contract is at an end. However, if he does not accept the discharge, he can insist for performance. The Apex Court held in paragraph 10 as under:-

> 10. The argument that because the amount was not advanced by the State to the Company, the mortgage was void or ineffective therefore cannot be accepted. Nor do the terms of the indenture justify the plea that the liability of the State to purchase 3,000 tons of groundnut cake from the Company was conditional upon the State advancing Rs 2,50,000. The two transactions incorporated in the indenture were undoubtedly inter-related. The price payable for the supplies of groundnut was to be adjusted towards the amount advanced or to be advanced by the State. But by failing to advance the amount the State could not avoid liability to carry out the obligation to purchase the goods contracted to be purchased. Even if it be assumed that the indenture incorporated reciprocal promises — the State to advance Rs 2,50,000 and the Company to deliver 3000 tons of groundnut cake — in the absence of any express provision to that effect the contract could not be terminated by the default of the State. **Breach of contract by one party does not automatically terminate the obligation under the contract : the injured party has the option either to treat the contract as still in existence, or to regard himself as discharged. If he accepts the discharge of the contract by the other party, the contract is at an end. If he does not accept the discharge, he may insist on performance :** see the judgment of the House of Lords *White and Carter*

> *(Councils) Ltd.* v. *McGregor* [(1962) AC 413 : (1961) 3 All ER 1178]. The case before the House was a Scottish case, but the law of Scotland is not different on the matter under consideration from the English law, and the Indian Contract Act closely follows the English Common Law in that matter. It cannot, therefore, be said that by refusing to advance the loan which the State had undertaken to advance, the obligation to purchase groundnut cake from the Company came to an end.
>
> (*emphasis added*)

Thus as held by the Apex Court in ***State of Kerala V/s. Cochin Chemical Refineries Ltd.***, once contract is broken, the injured party has two choices. He can accept the discharge/breach of other party and thereby treat himself as discharged from contract and the contract is as at an end. Alternatively, the injured party can refuse to accept the discharge of other party and sue for specific performance. The necessary corollary of this principle is that once the former choice is made by the injured party by treating himself as discharged by putting an end to the contract, specific performance cannot be sought.

54) In ***Ayissabi V/s. Gopala Konar*** (supra) learned Single Judge of Kerala High Court was tasked upon to decide a substantial question of law in a Second Appeal as to whether Plaintiff, who had repudiated the contract and claimed damages, could turn back and seek specific performance. The learned Single Judge relied upon judgment of the Privy Council in ***Ardeshir H. Mama V/s. Flora Sassoon*** and held in paragraphs 6, 7 and 8 as under:-

> 6. It is true that in the plaint and in the box plaintiff made a vague statement of readiness and willingness. Absolutely no such statement is there in Ext. A2 which is mainly a repudiation of the contract and election to sue for damages. Specific performance is an equitable and discretionary relief. It is necessary for the plaintiff not only to allege but also to prove if traversed that he has performed all the conditions which under the contract he was bound to perform and that he has been ready and willing at all times from the time of the contract down to the date of suit to perform his part of the contract. This principle is set out successfully in S. 24(b)(15(b)) of the Specific Relief Act and expanded by

> judicial decisions. In a suit for specific performance, the plaintiff is also bound to treat the contract as subsisting at all times. Continuous readiness and willingness from the date of contract to the time of hearing without any interruption is the requisite for the grant of the equitable remedy. Plaintiff must treat the contract as subsisting always. After repudiating the contract as was done in Ext. A2 and electing to sue for damages he cannot turn round and claim specific performance at his sweet will and pleasure.
>
> 7. As was held in *Ardeshir H. Mama* v. *Flora Sassoon*, AIR 1928 PC 208, failure to make up such a case and commencement of an action for damages or an attempt for that purpose as in Ext. A2 by repudiating the contract amounts to an election to treat the contract as at an end. The election precluded the plaintiff from reverting back and claiming specific performance when Ext. A2 is having the effect of treating the contract as at an end. No suit for specific performance will thereafter lie. On the merits also there is nothing to show that plaintiff was ready and willing and performance could not be had only on account of the conduct of the defendant. Plaintiff is the man who approached the court for relief and the conduct of the defendant arises only when the plaintiff discharges his burden of establishing his right to get the remedy.
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> 8. In granting an equitable relief of this type as held in *Srish Chandra Roy* v. *Banomali Roy* (1904) ILR 31 Cal 584 (PC) the conduct of the plaintiff is relevant and it may disentitle him to the relief. He must take the consequences of his acts. Default alone is not the criterion, conduct including unclean hands will disentitle the remedy. A conduct at variance with the contract or tending to its rescission and the subversion of the relation established by it will be sufficient for refusal of the relief. Such conduct and circumstances could be put forward as successful defences.

55) Thus, in ***Ayissabi V/s. Gopala Konar*** (supra), the Kerala High Court has held that once the contract is repudiated and election is made to sue for damages, Plaintiff cannot turn around and claim specific performance. It is further held that the conduct of the Plaintiff in repudiating the contract debars him from even raising a claim of readiness and willingness to perform his part of the contract.

56) In ***Andheri Bridge View Co-op. Hsg. Society Ltd.*** (supra) the learned Single Judge of this Court has dealt with a case where Plaintiff had terminated and annulled the Agreement but still claimed specific performance thereof. This Court held in paragraph 22 and 24 as under:-

> 22. Issue No. 18: The crux of the matter arising here is the question whether the plaintiffs themselves have terminated and cancelled the

> agreement if so they are entitled to specific performance or any other relief. From a different angle the question would be whether the plaintiffs, after the coming into existence of the agreement of March 1983 have disentitled themselves from obtaining the relief of specific performance of that agreement. The plaintiffs through their Advocate Rameshchandra P. Dikshit wrote letter dated 14th July 1984 to the defendants. In this letter a grievance is made that inspite of the plaintiffs having paid 20% of the agreed total price defendants Nos. 4, 5 and 6 have failed to execute the conveyance deed of the property in question in favour of the plaintiffs. It is then stated "since you have committed the breach of the agreement by not executing the conveyance deed in favour of my client, my client is now left with no alternative but to terminate the said contract of construction of the building by you. Accordingly by this notice my clients have terminated the agreement with regard to the construction of the building on the plot and my clients are now free to make the future construction of the building. My clients are willing to pay off the cost of the construction made by you and for that purpose you should send to my clients the detailed bill for the said amount. You are hereby asked not to carry out any construction work of the said building hereafter since the agreement has been terminated". **Clearly, categorically and unequivocally the plaintiffs purported to terminate the agreement and expressed their willingness to pay the price for the work done till then. How would it be open to the plaintiffs to seek specific performance of that same agreement?**
>
> xxx
>
> 24. It was urged by Shri Angal that there cannot be a termination of a part of the contract and, therefore, though the plaintiffs wrote that the contract had been terminated by them, this in law does not amount to termination of the contract. Now, what is necessary to be seen for the purpose of a suit for specific performance is whether the plaintiffs in such a suit aver that they are ready and willing to perform their part of the contract and if this averment is traversed by the defendants whether they prove that they are ready and willing to perform their part of the contract. By purporting to terminate the agreement by their letter dated 14th July, 1984 and maintaining and confirming the termination in their letter of 5th September 1984 the plaintiffs clearly expressed their unwillingness to perform their obligation under the contract in respect of work contemplated in the agreement of March 1983 remaining incomplete.
>
> (*emphasis added)*

57) This Court in ***Andheri Bridge View Co-op. Hsg. Society Ltd.*** (supra) referred to the judgment of the Privy Council in the ***Ardeshir H. Mama V/s. Flora Sassoon*** and of the Apex Court in ***PT. Prem Raj*** and concluded in paragraphs 25 to 27 as under:-

> 25. What is the effect of the above state of affairs? The answer to this is in *Ardeshir H. Mama* v. *Flora Sassoon*, AIR 1928 PC 209. The facts in that

case were as follows: Flora Sassoon's agent had agreed to sell immovable property to Ardeshir, Mama. Since Flora Sassoon refused to sell the property Ardeshir Mama filed suit for specific performance. The suit was filed on 10th January 1920. Flora Sassoon contended that the agreement on which Ardeshir Mama was relying was without her authority. On 19th march 1924 Ardeshir Mama through his Solicitor wrote letter to Flora Sassoon that Mr. Mama would abandon his claim for specific performance and instead claim damages of Rs. 7,00,000/-. When the trial commenced Ardeshir Mama obtained an order to amend his suit and claimed damages of Rs. 7,00,000/-. The prayer for specific performance, however, was retained so also the averments stating that Mama was ready and willing to perform his obligation under the contract. The trial Court granted the decree for Rs. 7,00,000/-. In the appeal filed by Flora Sassoon the decree was set aside. Mama therefore filed appeal to the Privy Council. Two questions were considered by the Privy Council (i) whether the defendant's agent had no authority to enter into an agreement for sale and (ii) whether the plaintiff by his letter dated 19th March 1924 had disentitled him from obtaining any relief in the suit. As regards question No. 1 it was held that the defendant's agent had no right to enter into an agreement for sale on behalf of the defendant. In view of this answer the suit required to be dismissed and the other question would not survive. However, the Privy Council discussed the second question also. While discussing the second question the Privy Council discussed the common law of England and the equity law and pointed out as follows: On refusal by a party to a contract to perform his part, the "party thereto had two'remedies open to him in the event of the other party refusing or omitting to perform his part of the bargain. He might either institute a suit in equity for specific performance, or he might bring an action at law for damages for the breach. But……. his attitude towards the contract and towards the defendant differed fundamentally according to his choice". By resorting to the second kind of suit he elected to treat the contract as at an end and himself as discharged from his obligations. By resorting to the first kind of suit he treated, and was required by the Court to treat the contract as still subsisting. He has to allege, and if that fact was traversed, to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on is part. The filing of a suit for damages means as election to treat the contract as at an end and thereafter no suit for specific performance could be maintained by the aggrieved plaintiff. "He had by his election precluded himself even from making the averment just referred to, proof of which was essential to the success of his suit". The Privy Council then referred to Lord Cairu's Act which was passed in 1858 and observed that the change was one in procedure only and enabled every Division of the High Court to give both legal and equitable remedies. The Privy Council then pointed out that the Indian Specific Relief Act, 1877 enacted the same law. The distinction between the two kinds of action was maintained, specific performance of a contract cannot be enforced in favour of a person who has already chosen his remedy and obtained satisfaction for the alleged breach of contract". So also a suit for specific performance of a contract "shall bar the plaintiffs rights to sue for compensation for the breach of such contract". The Privy Council then discussed S. 19 of the Specific Relief Act, 1877 and observed — "……..except as the case provided for in the explanation…….the section embodies the same principle as Lord

Carie's Act, and does not, any more than did the English Statute, enable the court in a specific performance suit to award 'compensation for its breach' where at the hearing the plaintiff had debarred himself by his own action from asking for a specific decree". On the footing that the amendment did not operate to convert the suit from one for specific relief to one for 'damages for breach' the Privy Council hold — It follows that in their Lordships' judgment there was, after the letter of 19th March 1924, no power left in the trial judge…….to award the plaintiff at the hearing any relief at all". Now the instant suit is one for specific performance of the contract. Having shown unwillingness to perform the second "stage" of the contract by the letter of termination referred to above, the plaintiff-society has debarred itself any relief in this suit for specific performance.

26. It would be useful also to refer to *Prem Raj* v. *the D.L.F. Housing and Construction (Private) Ltd.*, AIR 1968 SC 1355. The facts there were as follows: On 11th June 1958 there was an agreement under which a vendor agreed to sell 22 plots of land to the purchaser. On 8th June 1961 the purchaser gave notice to the vendor repudiating the agreement dated 11th June 1958 as void alleging that the deed was unlawful and void and inoperative against him as they were executed as a result of undue influence and coercion exercised upon him. He filed a suit praying for a decree for a declaration that the deed was unlawful and void and inoperative against him, and in the alternative he prayed for a decree for specific performance of the agreement and damages. The defendant raised a preliminary objection that the plaintiff, having claimed that the suit contract was void, could not, in the same suit, pray for specific preformance of that contract even though that may be an alternative claim. The trial Court rejected this preliminary objection raised by the defendant. The defendant filed civil revision application to the High Court. The High Court upheld his objection. Therefore the plaintiff filed an appeal to the Supreme Court. The Supreme Court upheld the defendant's objection and dismissed the plaintiff's appeal. As regards the plaintiff's reliance upon Order 7 Rule 7 of the Civil Procedure Code it has stated that it was true that under those provisions it was open to the plaintiff to pray for inconsistent reliefs, but it must be shown by the plaintiff that each of such plea is maintainable, that so far as the relief of specific performance is concerned the matter must be examined in the light of the provisions of the Specific Relief Act, that S. 37 says that a plaintiff instituting a suit for specific performance of a contract may pray in the alternative that. If the contract cannot be specifically performed, it may be rescinded and delivered up to be cancelled, but the converse was not provided in the Specific Relief Act. It was further pointed out that the omission in the Act was deliberate and the intention of the Act was that no such alternative prayer was open to the plaintiff. It was also pointed out that it was well settled that in a suit for specific performance the plaintiff should aver that he is ready and willing to perform his part of the contract and there was no such averment in that suit and reference was made to AIR 1928 PC 208. **As regards the plaintiff's argument that in any event the High Court should have given the plaintiff an option to elect either of the two reliefs. It was pointed out that the question of giving on option did not arise because no cause had been made out for the relief of specific performance.**

> 27. **For the reasons discussed above, I must hold that the plaintiffs have disentitled themselves for the relief of the specific performance by having purported to terminate the agreement and specifically stating that the rest of the agreement was not to be performed**. I have therefore answered Issue No. 18 accordingly.
>
> (*emphasis added*)

58) Thus, law appears to be fairly well settled that once Plaintiff terminates the contract and seeks damages, he cannot turn around and seek specific performance of such terminated contract. The law appears to be equally well settled that once Plaintiff exhibits conduct of acting in variance with the contract by treating himself as having been discharged, he cannot be permitted to even plead readiness and willingness in the Plaint in support of claim for specific performance. It also appears to be fairly well settled principle of law that if contract is broken by the Defendant, Plaintiff has to make an election in view of availability of twin remedies of (i) claim for damages and (ii) specific performance of contract and in the alternative, compensation under Section 21 of the Specific Relief Act. Once Plaintiff elects to exercise former remedy of terminating the contract and treats himself as having been discharged, he can neither sue for specific performance nor claim damages/compensation in the alternative. The alternate remedy of compensation/damages under Section 21 of the Specific Relief Act can be granted only in validly maintainable suit for specific performance. Such relief for damages/compensation under Section 21 is an alternate relief to specific performance. However, in a case where suit for specific performance itself cannot be filed, Plaintiff cannot claim that since specific performance is being denied, claim for damages in the alternative be entertained.

59) Therefore, Plaintiff needs to make a conscious choice once he notices that the contract is broken. Once Plaintiff terminates the contract, he cannot turn around and sue for specific performance of such terminated

contract nor can claim damages as alternative to specific performance. In such a case, the only remedy for Plaintiff is to sue for damages for breach of the contract. On the other hand, if Plaintiff elects to treat the contract as subsisting, he can seek equitable relief of specific performance and can claim compensation / damages in the alternative under Section 21 of the Specific Relief Act. Merely because principles under Section 73 of the Contract Act are made applicable while determining quantum of the compensation under Section 21 of the Specific Relief Act, it does not mean that compensation can be sought under Section 21 in a suit for specific performance, which is not maintainable on account of Plaintiff's own act of termination of contract.

WHETHER PRINCIPLE OF IMPERMISSIBILITY TO SUE FOR SPECIFIC PERFORMANCE AFTER TERMINATION OF CONTRACT CAN BE ATTRACTED IN PRESENT CASE ?

60) Having discussed the legal principles on the issue of impermissibility to maintain the Suit for specific performance after termination of the contract, now I proceed to consider whether the said principles can be attracted in the present case for the purpose of ousting the Respondent-Society's claim of specific performance, which is allowed by the Arbitral Tribunal.

61) In the present case, since the Petitioner-Developer failed to act in terms of the development agreement and *inter alia* failed to secure occupation certificate in respect of 'A' wing building for a considerable period of time, the Respondent-Society terminated the Agreement by letter dated 15 October 2015. Paragraphs 8, 9, 16 and 17 of the termination notice dated 15 October 2015 reads thus:-

> 8. We have time and again demanded copies of the sanctioned plans and documents however, you have failed and neglected to furnish the same,

although you were duty bound to provide us the same as per clause no.26 & 27 of the said Agreement. Therefore, we made an application under RTI, whereupon we were surprised to note that by virtue of the second approved plan dated 21/05/2009 you had made changes to the first approved plan dated 17/09/2008, wherein you had reduced our MBUA (Municipal Built Up Area) from 3855.36 Sq.Mtrs. to 3583.48 Sq.Mtrs. The difference of 271.88 Sq.Mtrs. was derived by creating massive Open to Sky ducts in the living rooms of all the 4 flats + smaller Open to Sky ducts in the bedrooms of all these flats. Please note that the first approved plan did not have Open to Sky ducts in the Living Rooms of flat nos. 1 & 3, but the second approved plan had massive Open to Sky ducts in the Living Rooms of flat nos. 1 & 3 too. This difference of 271.88 Sq.Mtrs. was obviously added to the Commercial B Wing, in stark violation of clause no.26 & 27 of the said Development Agreement. This amounts to a Major Breach of Agreement as defined in clause no.27 of the said Agreement.

9. We were also surprised to note that despite the fact that construction of both the Residential A wing & the Commercial B wing were completed simultaneously you had made an application for obtaining part Occupation Certificate for commercial B wing only without applying for the Occupation Certificate for the residential A wing. This clearty establishes your fraudulent and malafide intention. We received a copy of the application of your Architect dated 09th May, 2014 to MCGM seeking amendment of Plans of A wing and requesting regularizations of work beyond approval and seeking issuance of amended plan for 2.00 Floor Space Index (FSI) plus fungible FSI. You submitted amended plans to MCGM inter-alia proposing to demolish portion of Society's Building and retaining commercial building as it is. This Act of yours seeking amendment to the Plans clearly reflect your fraudulent and malafide intention. No prior approval as provided in Clause 27 and 28 of the said agreement was sought from us for any such amendment of the Plan. It was further shocking to note that you proposed to falsely show certain areas of passage outside flats as part of the flat as also existing ducts adjoining the said case as part of Kitchen in certain flats and existing L.V. duct adjoining W.R. duct in staircase as part of certain flats and demolish flower beds, dry yards, pocket terraces etc., and we were equally shocked by the Orders passed by Hon'ble Municipal Commissioner in July 2014 sanctioning the demolishing of virtually all the Flowerbeds in Residential A wing, whereas not a single inch of Flowerbeds from the Commercial B wing were proposed to be demolished. These acts on your part clearly demonstrate your fraudulent and malafide intention.

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16. Under the abovementioned circumstances, under clause 64 of the said Agreement, on your following breaches details whereof are enumerated above:

i. Non compliance of terms of reconstruction;
ii. Non compliance to sanctioned plans;
iii. Abandonment of work for more than 6 months; and

> iv. Abandonment of work for a period of continuous six months or not completing within a period of 36 months and the remaining work being such that will take more than 6 months i.e. 42 months
>
> We through our Advocate had served to you termination notice. You have not rectified the breaches. Hence we hereby terminate the Development Agreement and all other documents signed or purported to be signed by us including Power of Attorney dated 3rd May, 2008 with immediate effect.
>
> 17. Without prejudice to the termination, in addition to the breaches stated in our letter dated 16th May, 2014, you have also committed fraud. You have committed repudiatory breaches. Hence the Agreement stands terminated on account of fraud by you and we are not under an obligation to give you any further notice. Hence, we terminate the said Agreement with immediate effect and request you to remove all your men and material from site and hand over peaceful possession of the premises to the Society.
>
> (*emphasis added*)

62) After termination of the Agreement, Respondent-Society filed Arbitration Petition (L) No.1969 of 2015 in this Court under Section 9 of the Arbitration Act seeking following reliefs:

> (a) The respondent by itself, its servants, agents, directors and/or all other persons claiming through the respondent, be restrained by an order of injunction of this Hon'ble Court from in any manner submitting or prosecuting further any application for regularization made by the Respondent to the Municipal Corporation of Greater Mumbai for obtaining Occupancy Certificate for "B" wing without first obtaining Occupancy Certificate for "A" wing, and/or acting in furtherance of such application and/or otherwise demolishing or removing any part of the flats in Wing "A" or of Wing "A" of the building;
>
> (b) the Respondent by itself, its servants, agents, directors and/or all other persons claiming through the respondent, be restrained by an order of injunction of this Hon'ble Court from in any manner selling, transferring, alienating, encumbering or creating any third party rights of any nature whatsoever or handing over possession of any of the commercial premises in Wing "B" or any part or portion thereof in any manner whatsoever;
>
> (c) the Respondent be directed to furnish Bank Guarantee/ Security in the sum of Rs. 25,00,00,000/- being the amount owed by the Respondent to the petitioner and its members, or such other amount as this Hon'ble Court may deem fit and appropriate;

(d) For ad-interim reliefs in terms of prayer clauses (a) to (c) above.

(f) For costs of this petition.

(g) For any other and/or further reliefs as this Hon'ble Court in the nature and circumstances of the petition may deem fit and proper.

63) When Arbitration Petition (L) No.1969 of 2015 came up for hearing before this Court, Petitioner-Developer made a statement that it would take further steps in obtaining occupation certificate in respect of the entire building expeditiously in consultation with the Respondent-Society. The statement made on behalf of the Petitioner-Developer was accepted by the Court and parties were relegated to arbitral proceedings by constitution of the Arbitral Tribunal. It would be apposite to reproduce order dated 20 October 2015 passed by this Court in Arbitration Petition (L) No.1969 of 2015, which reads thus:-

. The matter is placed on board today for 'Ad-interim Relief.' By consent of parties, the matter is heard finally.

2. By this petition filed under Section 9 of the Arbitration and Conciliation Act 1996, the petitioner seeks an injunction against the respondent restraining them from submitting or prosecuting further any application for regularization made by the respondent to the Municipal Corporation of Greater Mumbai for obtaining Occupancy Certificate for 'B' wing and/or acting in furtherance of such application and/or otherwise demolishing or removing any part of the flats in wing 'A' or of wing 'A' of the building.

3. It is the case of the petitioner that under various provisions of the Development Agreement entered into between the parties, the respondent cannot be allowed to hand over possession of the sale components area to any party unless a valid possession of the rehabilitation components is given to the members of the petitioner Society in terms of the Development Agreement. In support of this submission, reliance is placed on clauses 19 and 21 of the Development Agreement. It is the case of the petitioner that the members of the petitioner were handed over possession of their premises by the respondent some time in the month of January 2014 without any occupancy certificate, however, the same was only for the fit out purposes and since then respondent stopped paying compensation to the members of the petitioner.

4. Mr.Kamdar, learned senior counsel appearing for the petitioner submits that there are large scale violation on the part of the respondent while carrying out the construction. The respondent thus cannot be permitted to hand over possession of the commercial premises to any third party till occupancy certificate is obtained by the respondent in respect of the entire building.

5. Mr.Samdhani, learned senior counsel appearing for the respondent, on the other hand, submits that the parties have entered into the correspondence since last three years raising the dispute. He submits that the members of the petitioner-Society have carried out various alterations in the flats given to them for fit out purposes. It is submitted by the learned senior counsel that the respondent has already entered into an agreement for sale in respect of the entire sale components area except in respect of the eight tenements. He submits that the respondent has entered into registered agreements in respect of remaining tenements and possession thereof has been handed over to the third party purchasers for fit out purposes. It is submitted that in so far as the remaining eight tenements for which the allotment letters are issued by the respondent are concerned, substantial payments are paid by those allottees to the respondent. It is submitted by the learned senior counsel that no interim measures can be granted to the petitioner by this Court at this stage.

6. **Learned senior counsel for the respondent, on instructions, submits that the respondent would take further steps in obtaining occupation certificate in respect of the entire building expeditiously in consultation with the petitioner. Statement is accepted.** Parties have exchanged correspondence for quite some time. The respondent has already taken various steps in handing over possession to the purchasers for fit out purposes. Be that as it may, there is no dispute that no occupation certificate in respect of any part of the building has been granted by the Corporation.

7. It is made clear that the possession which is already handed over by the respondent to all the purchasers in respect of which the agreement is already registered for fit out purposes in the commercial wings would be at the risks and costs of the respondent. Even if the respondent hands over the possession to the allottees for such fit out purposes only without obtaining the occupancy certificate thereof, the same would also be at the risks and costs of the respondent. The respondent shall inform all the purchasers and the allottees in the commercial wings about the pendency of the present litigation filed by the petitioner and shall make it clear that the possession handed over to those purchasers and/or allottees would be at the risks and costs of the respondent and would be subject to the final outcome of the arbitral proceedings. The respondent shall also make it clear that if any action is initiated by the Municipal Corporation for handing over the possession to the purchasers and allottees of the commercial wings, the same would be at the risks and costs of the respondent. In my view, the rival contentions of the parties can be considered by the learned arbitrator.

8. **By consent of the parties, Mr. Shailesh Shah, Senior Advocate is appointed as a sole arbitrator**. Both the parties are permitted to file their claims and/or counter claims before the learned arbitrator. All the issues

> raised in this petition are kept open and are to be agitated before the learned arbitrator. Both the parties would be at liberty to apply for interim measures before the learned arbitrator under Section 17 of the Arbitration and Conciliation Act, 1996.
>
> 9. Mr. Samdhani, learned senior counsel tenders a copy of the list of the purchasers and allottees in the commercial wings. The same is taken on record and marked 'X' for identification. Mr. Kamdar, learned senior counsel for the petitioner does not accept the correctness of the sale or allotment of flats reflected in the said list.
>
> 10. The respondent is directed to furnish inspection of all such agreements alleged to have been entered into by and between the respondent with such parties including the payment details in respect of all the commercial areas to the petitioner and shall also furnish copies of such agreements and/or allotment letters and payment details on payment of photocopying charges to the petitioner.
>
> 11. The arbitration petition is disposed of in aforesaid terms. No order as to costs.
>
> (*emphasis added*)

64) Petitioner thus made a solemn statement before this Court that it would procure the occupation certificate in respect of the building. This statement was made after noticing that the development agreement was terminated by the society. After passing of order dated 20 October 2015 by this Court, parties entered into correspondence with each other. The Petitioner-Developer wrote to Respondent-Society's Advocate on 18 February 2016 stating as under:-

> Pursuant to the directions in the above matter, our clients record that the inspection of the documents has been offered to your clients on 5th December, 2015 and thereafter copies of the remaining documents were also forwarded to you on behalf of your clients.
>
> **In order to ascertain the work to be carried out before the submission of application for Occupation Certificate our clients seek your clients' co-operation to fix up an appointment for inspection of the rehab building as per the convenience of your clients.** Your clients are expected to extend co-operation in letter and spirit of the **Order dated 20th October, 2015** passed in the above matter.
>
> *(emphasis and underlining added)*

65) Thus, Petitioner-Developer, acting in pursuance of statement made before this Court, offered inspection of documents to the

Respondent-Society and sought Respondent's cooperation for inspection of 'A' wing building. Petitioner also sought society's cooperation for complying with the order dated 20 October 2025. The Respondent-Society responded by letter dated 29 February 2016 stating as under:-

> Our clients deny complete inspection was given by your clients on 5th December, 2015 or that copies of the remaining documents was forwarded by you as alleged.
>
> Our clients reiterate what is recorded in our letter dated 28th December, 2015 bearing Ref. No. HS/SM/995 /2015 inter alia to the effect that during the inspection, your client furnished only the list of amount received from the purchasers for the commercial premises without providing payment details. Furthermore your client had not given inspection of the Agreement for Sale with respect to Unit Nos. 705 to 707.
>
> Our clients are shocked and surprised to receive your clients request calling upon your clients' cooperation to fix an appointment for inspection of our clients' building as the construction was carried by your clients themselves and all the details are already available with them. Furthermore, since the order was passed way back on 20th October, 2015, and the request for extending cooperation is being received after almost 4 months, therefore the request for inspection does not seem to be genuine.
>
> Without prejudice to their rights and contentions of our clients and before our clients consider your clients' request, your clients are called upon to furnish copies of all the correspondence entered with the MCGM are called upon to furnish copies of all the correspondence entered with the MCGM along with the copies of IOD, CC and all the plans of both rehab building as well as commercial building as well as furnish all the details along with the supporting documents regarding efforts made by your clients for obtaining occupation certificate of rehab building in terms of Development Agreement dated 3rd May, 2008.
>
> Your clients are also called upon to clarify in detail with timeframe and proposed plan of action, how they propose to obtain occupation certificate.
>
> Upon receipt of the aforesaid information, our clients will consider your clients' request.
>
> Our clients have instructed us to place on record that, if all your clients had acted in letter and spirit of Development Agreement dated 3rd May, 2008, this situation would not have arisen.

Thus, parties exchanged correspondence wherein they decided to take requisite steps for obtaining occupation certificate in respect of 'A' wing building.

66) After constitution of Arbitral Tribunal by order dated 20 October 2015, the Respondent-Society filed its Statement of Claim. I have already reproduced paragraphs 18 and 19 of the Statement of Claim in the preceding paragraphs. So far as Petitioner-Developer's willingness to secure occupation certificate expressed before this Court is concerned, the Respondent-Society averred in the Statement of Claim as under:-

> 24. The Hon'ble High Court after hearing parties at length by its Order dated 20th October, 2015 recorded that the possession which is already handed over by the Respondent to all the purchasers in respect of which the agreement is already registered for fit out purposes in the Wing B would be at the risk and costs of the Respondent. Even if the Respondent hands over the possession of the commercial premises in Wing B to the allottees for such fit-out purposes only, without obtaining the occupancy certificate thereof, the same would also be at the risk and cost of the Respondent. It was agreed by the Respondent that it would take further steps to obtain the Occupation Certificate of Wing A (Rehab building) in consultation with the Claimant. The Respondent was further directed to furnish inspection of all such agreements alleged to have been entered into by and between the Respondent with such third parties including payment details in respect of all commercial areas and also to furnish copies of such agreement and/or allotment letters and payment details. The Claimant craves leave to rely upon the Order dated 20th October 2015 at the time of hearing. The Hon'ble Court, by consent of party's inter-alia constituted the present arbitral tribunal. The Respondent by their Advocate's letter dated 18th February 2016, addressed to the Advocates for the Claimant, purportedly sought cooperation from the Claimant for inspection of the Wing A for purportedly ascertaining the work to be carried out before submission of application for Occupation Certificate. The Claimant craves leave to rely upon the letter dated 18th February 2016 at the time of hearing. The Claimants by their Advocate's letter dated 29th February, 2016, inter alia called upon the Respondents to furnish copies of the IOD, CC, plans for both rehab and sale building and of all the correspondence with the MCGM. The Respondent was also called upon to clarify in detail the time frame within which and proposed plan of action of how the Respondent proposed to obtain the Occupation Certificate. The Claimant craves leave to rely upon the letter dated 29th February 2016. The Respondent has deliberately failed and neglected to comply with the request or reply to the said letter. **The Respondent has also deliberately failed and neglected to take steps to obtain Occupation Certificate of the Wing A as promised/undertaken as recorded in the**

Order dated 28th October, 2015. The Respondent is in contempt/breach of the said Order dated 28th October 2015.

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27. The Claimant submits that the Respondent had given a solemn assurance and made a statement before the Honorable Bombay High Court that it will obtain the Occupation Certificate at the earliest. It is respectfully submitted that the Respondent is even otherwise bound and required to bring a valid Occupation Certificate from MCGM, in respect of wing A in accordance with the floor plans shown to the Claimant before the execution of the said Agreement and annexed to the individual agreements for permanent alternate accommodation with the members of the Claimant and to do all things as maybe necessary for that purpose including but not limited to demolishing the Wing B or part thereof or loading mere TDR, if permissible under the proposed TDR policy dated 16th November, 2016. The total area of the tenements to which the members of the Claimants are entitled is 45,215 sq. ft. (carpet area). It is submitted that the Respondent be ordered and directed to bring the Occupation Certificate in respect of Wing A of the said land, in accordance with the floor plans having aggregate area of not less than 45, 215sq. ft. within 6 months from the date of the Award or within such other time as this Honorable Tribunal may grant, and under the supervision and concurrence of the claimant and/or the architect appointed/nominated by the claimant and do and perform all such acts, deeds, matters and things as are required to be done and perform for obtaining such Occupation Certificate from MCGM, including demolition of such area in Wing "B" on the said land, as may be required, to bring Occupation Certificate in respect of the entire area of 45, 215 sq. ft. in Wing A.

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30. It is submitted that the Claimant and/or its members are laymen and do not possess the necessary technical skill, expertise, knowledge or documents to approach the MCGM and other concerned authorities for applying for regularization. It was for this reason that the Claimant Society in the first place, appointed the Respondent as a developer. Notwithstanding the aforesaid, even otherwise, it is the developer and the professionals appointed by him viz. Architect, Structural Consultant, RCC Consultant, Licensed Plumbers etc., who have the complete knowledge and details pertaining to the applications made to MCGM and approvals obtained from them as well as various representations made to them for obtaining building permission. Without this information, it is impossible for the Claimant herein to approach the MCGM with any meaningful application for regularization and/or Occupation Certificate. It is therefore, submitted that the Respondent ought to be directed to furnish all particulars pertaining to the redevelopment of the Claimant's building, including, but not limited to all applications, representations made and all permission obtained from the MCGM as well as all communications between the Respondent and all authorities. It is also for this reason that the Claimant despite the termination, is today, compelled to seek regularization through the Respondent as per the statement made

> **by it before the Hon'ble Bombay High Court despite the continuing breaches by the Respondent.** The aforesaid contentions of the Claimant therefore, should not be in any manner, construed as a concession by the Claimant of any of its contentions against the Respondent.
>
> (*emphasis added*)

67) The Petitioner-Developer filed Statement of Defence and pleaded in paragraph 33 thereof as under:-

> 33. **With reference to paragraphs 27 and 28, the Respondent submits that it is ready and willing to act in accordance with the statement made by it before the Hon'ble High Court of Bombay** and has called upon the Claimant vide its letter dated 18th February, 2016 to co-operate with the Respondent, and is taking and will continue to lake all such steps to comply therewith, but requires the co-operation of the Claimant therein. The Respondent submits that, in terms of the Development Agreement, the additional usable area was to comprised inter alia of ducts as well and therefore the injunctive relief sought in paragraph 28 is contrary to the express provisions of the Development Agreement and cannot and ought not to be granted. The Respondent further submits that it has provided the premises to the Claimant's members as envisaged under the Development Agreement, and therefore the Claimant's contention/prayer in this regard is false and misconceived.
>
> *(emphasis added)*

68) Thus, this is not an ordinary case involving Respondent-Society raising claim for specific performance after termination of the Development Agreement. No doubt, the Respondent-Society terminated the Development Agreement by notice dated 15 October 2015. However, extraordinary circumstances got created thereafter on account of conduct of the Petitioner-Developer, who solemnly undertook before this Court that it would secure occupation certificate for 'A' wing building. The Arbitral Tribunal was constituted by this Court after noting Petitioner-Developer's readiness and willingness to secure the occupation certificate. The Petitioner-Developer thereafter remained consistent with its undertaking to secure occupation certificate for 'A' wing building and sent letter dated 18 February 2016 to the Society seeking its cooperation. The Respondent-Society also responded on 29 February 2016 seeking timeframe from the

Petitioner for procuring the occupation certificate. The matter did not end here. After the Respondent-Society filed its Statement of Claim seeking specific performance of the Development Agreement, the Petitioner-Developer once again expressed readiness and willingness to perform the same by raising specific pleadings in the Statement of Defence.

69) In the light of the above factual position, whether the settled law of impermissibility to seek specific performance of terminated contract can be applied to the facts of the present case? The answer, to my mind, appears to be in negative. In the present case, specific undertaking is given by the Petitioner-Developer before this Court for procuring the occupation certificate. This Court accepted the said undertaking. In such circumstances, the usual principle of impermissibility to seek specific performance of terminated contract cannot be attracted. This Court is mindful of the fact that the Respondent is a cooperative housing society formed by the residents of the old building. Construction of 'A' wing building of the society was complete and in addition to construction of some of the amenity spaces, the Petitioner-Developer was expected to procure the occupation certificate of 'A' wing building. The Petitioner-Developer solemnly undertook to secure the same, which undertaking/statement is recorded by this Court in order dated 20 October 2015. After having solemnly undertaken to procure the occupation certificate in respect of 'A' wing building, it was but natural for members of the Respondent-Society to expect that the Petitioner-Developer would remain abide by the statement made before this Court. By making the statement before this Court to act in accordance with the contract, Petitioner made the Respondent-Society believe that the contract was still subsisting. Again, by exchange of correspondence, parties treated the contract as subsisting. In such circumstances, the principle of

impermissibility to seek specific performance of terminated contract cannot be attracted in the present case.

70) Also of relevance is the fact that the constitution of the Arbitral Tribunal by order dated 20 October 2015 was after recording statement of the Petitioner-Developer for procurement of occupation certificate. Constitution of the Arbitral Tribunal was not either by agreement between parties or by an order passed on society's application under Section 11 of the Arbitration Act. In those situations, Respondent-Society would be bound by the election made by it by serving termination notice dated 15 October 2015. In fact by filing application under Section 9 of the Arbitration Act, the society acted in consonance with the election it made. It is Petitioner who made the society believe that the contract was still subsisting and that it would procure the occupation certificate. The constitution of the Arbitral Tribunal was thus after recording a statement of the Petitioner-Developer that it would procure the occupation certificate. In such circumstances, can it be contended that the Arbitral Tribunal was constituted for the purpose of deciding the issue of validity of termination of contract and/or Respondent's claim for damages for breach? The answer would obviously be in the negative. Once the contract was treated to be subsisting by Petitioner by making solemn statement before this Court and the parties were driven to arbitration by constitution of the tribunal, it would have been ludicrous for society to file claim for damages alone by treating the contract as at end. Once the statement made by the Petitioner-Developer for securing occupation certificate was recorded while constituting the Arbitral Tribunal, the remit of enquiry before the Tribunal was essentially in the direction of specific performance of contractual obligations under the Development Agreement. Even if Petitioner was to secure occupation certificate in accordance with the undertaking it gave, the society still had claims towards construction of amenities, etc. Thus

when the Tribunal was constituted, both the parties clearly envisaged claims and counterclaims before tribunal in the direction of specific performance. On the other hand, if both parties and Section 9 Court were to envisage resolution of disputes only relating to validity of termination notice and society's claim for damages, it would not have recorded Petitioner's statement for performance of contractual obligations. Having driven the Respondent-Society in the direction of performance of contract by giving undertaking to this Court on 20 October 2015, the Petitioner-Developer cannot now turn around and contend that the Respondent-Society could not seek the relief of specific performance.

71) The doctrine akin to that of election would apply equally to the Petitioner in the facts of the present case. After society terminated the contract and filed Section 9 application, Petitioner also had two choices. It could have accepted the termination and defended the action for damages. Second choice for Petitioner was to ignore the termination and proceed to perform the contract. Petitioner chose to elect the second course of action. It ignored the termination and proceeded to perform the contract. It gave an undertaking to this Court that it would perform the contract by procuring the occupancy certificate. By doing so, it treated the contact as valid and subsisting. Parties thereafter exhibited conduct towards performance of contract. Even after filing of statement of claim, Petitioner specifically pleaded in the defence statement that it would perform the contract. In the light of the above peculiar facts of the present case, the usual settled principle of impermissibility to seek specific performance of terminated contract cannot be attracted.

72) In my view therefore, the principle of impermissibility to seek specific performance of terminated contract is subject to exception of intervening event of revival of contract. The principle would apply only to a case where the contract is treated as at end by Plaintiff as on the date of

filing of the suit. In a case where the contract is terminated, but subsequently parties act in performance of contract, Plaintiff would not be debarred forever from seeking specific performance merely because at one point of time, he elected to put an end to the contract. The issue is whether the contract was treated by the parties as at an end on the date of filing of claim. In the present case, not just Petitioner but even the society did not treat the contract as at an end at the time of filing of its claim.

73) Normally revival of terminated contract cannot occur by unilateral conduct of a party to the same. However in exceptional cases like the present one, where undertaking is given before the Court by the party alleged to have broken the contract that it would perform the same, and parties are then driven to arbitration by recording such undertaking, the opposite party cannot be married forever to the election it once made of termination of contract. The supervening event of undertaking given to this Court would make the usual principle of impermissibility to seek specific performance of terminated contract inapplicable in the present case.

74) In my view therefore, the intervening event of Petitioner's solemn statement before this Court, recorded in order dated 20 October 2015 changes the entire scenario and makes the usual legal principles discussed in the preceding paragraphs inapplicable to the facts and circumstances of the present case. Therefore, though the Respondent-Society made an election of terminating the contract by serving notice dated 15 October 2015, the intervening event of the Petitioner-Developer undertaking to fulfil contractual obligations of securing occupation certificate necessarily resulted in negation of such election made by the Respondent-Society. By making the statement before this Court on 20 October 2015 that it would procure occupation certificate, the Petitioner-Developer virtually admitted that it did not act in accordance with the Development Agreement and showed willingness to fulfil the unperformed

contractual obligations. Once the Petitioner-Developer made this conscious choice, it cannot now turn around and claim that the Respondent-Society's claim for specific performance was not maintainable in the light of serving of termination notice dated 15 October 2015. The Petitioner-Developer is seeking to approbate and reprobate by blowing hot and cold at the same time. It has failed to remain consistent in respect of its own stand. If the Petitioner-Developer was to remain consistent with the position that it has not committed breach of any contractual obligations and if it was to defend Section 9 Application by raising such defence, what Mr. Dwarkadas contends could have been correct. If Section 9 Court was to simply relegate the parties to arbitration after noticing Petitioner's defence of non-commission of breach of any contractual obligations, the Respondent-Society could not have sought relief of specific performance and would be bound by the election it made while terminating the contract. However, the Petitioner-Developer chose not to raise such defence and virtually admitted before Section 9 Court that it will perform the part of the contract by procuring the occupation certificate. Once this election is made by the Petitioner-Developer, it cannot contend that breach of undertaking given to this Court by it should be ignored by applying the principle of impermissibility to sue for specific performance of terminated contract. Thus, Petitioner-Developer cannot be permitted to walk back on the election it made by giving undertaking to this Court for the purpose of frustrating Respondent-Society's lawful claim of securing occupation certificate in respect of the building. Therefore, in the unique facts and circumstances of the present case, though the Respondent-Society initially had the right to elect and though it elected to terminate the contract, the contract still survived on account of undertaking given by the Petitioner before this Court on 20 October 2015.

75) Also there appears to be no allergy in law to withdraw the termination of contract, especially by mutual consent. A terminated contract of service can always be revived by the employer by withdrawing the termination notice. If the employee is willing to work and consents for withdrawal of termination, there is nothing in law which puts an embargo on the appointing authority from withdrawing the termination notice. It is only where the opposite party acts on termination and refuses to accept the withdrawal that unilateral withdrawal of termination of contract would be impermissible. However with the consent of both the parties, a terminated contract can be revived. In the present case, both parties exhibited conduct towards revival and subsistence of the contract. The initiative for revival/subsistence of contract was taken by the Petitioner itself. The society accepted the assurance of Petitioner acting as per development agreement and Section 9 Petition was disposed of and parties exchanged correspondence for procurement of occupation certificate.

76) It would otherwise be unjust to accept a principle that a party taking initiative towards revival/subsistence of terminated contract and undertakes to perform the same, is permitted to raise the issue of impermissibility to specifically perform that contract on the ground that the same was terminated at one point of time. By doing so, the party undertaking to perform the contract would be permitted to wriggle out of the undertaking it gave to perform the contract. It is like taking chances. When Plaintiff terminates the contract and is about to sue for damages, the Defendant gives an undertaking in collateral proceedings before Court that it would perform the contract and thereby prevents an action for breach. When Plaintiff acts on Defendant's undertaking and parties walk further in the direction of performance of contract, but Defendant once again defaults and refuses to perform the contract. In such case Defendant cannot be permitted to contend that the Plaintiff must remain married forever with

the election of termination it initially made and must sue only for damages and not for specific performance.

77) In this connection, reliance by Mr. Kadam on judgment of learned Single Judge of Delhi High Court in ***Sanjay Agrawal*** (supra) appears to be apposite. In case before the Delhi High Court, Respondent No.3 therein had terminated the contract of the Petitioner alleging breach. A representation was made by the Petitioner therein against such termination. In the meeting held under the chairmanship of the Director General in the Ministry, it was recorded that the termination was unjustified and that the State Public Works Department should get the work done from the Petitioner by granting extension of time. In the counter-affidavit filed on behalf of the Ministry, opinion of Department of Legal Affairs was relied upon, in which it was opined that there was no stipulation in the contract for revival thereof after termination. The opinion also sought to state the position of law that once a contract is terminated, the only legal consequence is to sue for damages and that a terminated contract cannot be revived. The learned Single Judge of the Delhi High Court found the said opinion of Department of Legal Affairs to be flawed and held that there is nothing in the Contract Act, which prohibits the party to a contract to reconsider its decision to terminate the contract on a representation made by other party. It would be apposite to reproduce paragraphs 6 to 8 of the judgment in ***Sanjay Agrawal*** (supra), which reads thus:-

> 6. The respondent no. 1 has filed its counter affidavit *inter alia* contending therein that pursuant to the Minutes of Meeting dated 13.06.2019, an advise was sought from the Department of legal affairs, the Ministry of Law, on whether the termination of the contract can be revoked without any legal complication as per the contract. The Department of Legal Affairs rendered an opinion on 02.08.2019 *inter alia* opining as under:
>
> > "*It is noted that there is no stipulation, either expressly or impliedly, under the said contract agreement to the effects that contract which has once ceased to exist by virtue of the*

> *termination order issued by the Government can be revived or reinstated. Further, it is settled position of law that once a contract has been terminated, either on the breach of terms of contract by one party and subsequent repudiation by the other or by frustration of the contract due to circumstances beyond the control of either of the parties, the contract legally comes to an end between the parties. What follow is only the legal consequences which may have been contemplated in the terms of the contract e.g. liquidated damages, etc. Since the contract has been terminated under article 23.1.1(C) of Contract, in absence of any stipulation under the contract for its revival after the termination, the terminated contract cannot be revived."*
>
> 7. The learned counsel for the respondents further submits that based on the above opinion, the respondents decided not to revive the contract of the petition.
>
> 8. **In my opinion, the opinion of the Ministry of Law is totally flawed. There is nothing in the contract or the Indian Contract Act, 1872 that prohibits a party to a contract to reconsider its decision to terminate the contract on a representation made by the other.**
>
> *(emphasis added)*

78) I am in agreement with statement of law in ***Sanjay Agarwal*** (supra) that termination of contract can be withdrawn upon making representation by another party. Thus a terminated contract can be revived by the parties by their conduct. These principles particularly apply to the facts of the present case where the Respondent is a cooperative housing society of flat owners, whose building is without occupation certificate. After waiting for considerable period of time, where Petitioner had failed to secure occupation certificate and has breached the contractual stipulations, the society initially thought of terminating the contract. It could have then appointed another developer/consultant and secured occupation certificate by recovering damages from the Petitioner. The Petitioner-Developer however prevented the Respondent-Society from doing so and gave a solemn undertaking before this Court that it would secure the occupation certificate. By doing so, Petitioner-Developer prevented the Respondent-Society from appointing another developer/consultant for securing occupation certificate. By giving undertaking to this Court that it would

perform part of its contractual obligation of securing occupation certificate, the Petitioner-Developer essentially revived the terminated contract by having itself treated the contract as subsisting. Parties thereafter proceeded in the direction of procuring the occupation certificate by entering into correspondence. There was substantial gap of more than one and half year between the date of passing of order dated 20 October 2015 and date of filing of Statement of Claim on 1 March 2017. This means that Petitioner-Developer had ample time of one and half years for securing the occupation certificate. However, it failed and neglected to secure the same. After noticing that the Petitioner-Developer once again committed breach of not just the contractual obligation, but also of undertaking given to the Court, the Respondent-Society had one more opportunity to elect one out of the two available remedies viz. (i) to treat the contract as at an end and claim damages against the Petitioner-Developer or (ii) to seek specific performance of the contractual obligation to secure occupation certificate as undertaken before this Court. This time the Respondent-Society chose to elect the latter remedy of specific performance of the contractual obligations.

79) Thus, in the peculiar facts and circumstances of the present case, there were two opportunities of election were available to the Respondent-Society. The first election opportunity was on 15 October 2015 when the Society elected to terminate the contract. However, contractual obligation to obtain occupation certificate got revived on account of conduct and solemn undertaking by the Petitioner-Developer. However, when the Respondent-Society noticed breach of contractual obligation and undertaking given to this Court, another opportunity to elect remedies became available to the Respondent-Society. The election of remedy of seeking specific performance in such facts and circumstances is legal and

valid and it cannot be held that the Respondent-Society was not entitled in law to seek specific performance of contractual obligations.

80) Petitioner cannot escape the consequences of undertaking given before this Court. The undertaking was not given out of charity and was given to prevent any restraint order in respect of sale component building. The undertaking given before this court for performance of contractual obligations can also be the foundation of right of the society to seek specific performance. In this regard reliance by Mr. Kadam on judgment of the Apex Court in ***Nagindas Ramdas V/s. Dalpatram Ichharam***[14] is apposite. While dealing with the issue of distinction between the judicial and evidentiary admissions, the Apex Court has held that judicial admission not just binds the party making it and constitutes waiver of proof, but it also becomes foundation of rights of all the parties. It is held by the Apex Court in paragraph 27 of the judgment as under:-

> 27[26]. … Admissions if true and clear, are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. **They by themselves can be made the foundation of the rights of the parties.** On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.
>
> *(emphasis added)*

81) In ***Sangramsinh P. Gaekwad*** (supra) the Apex Court has referred to the judgment in ***Nagindas Ramdas*** (supra) and has held that judicial admissions, by themselves, can be made the foundation of rights of the parties and held in paragraphs 215 and 218 as under:-

[14] (1974) 1 SCC 242

> 215. Admissions made by Respondent 1 were admissible against her proprio vigore.
>
> xxx
>
> **218. Judicial admissions by themselves can be made the foundations of the rights of the parties.**
>
> *(emphasis added)*

82) In the present case, Petitioner gave undertaking before this Court to procure occupation certificate in respect of 'A' wing building and thereby impliedly admitted that he had failed to perform its part of contract in procuring occupation certificate and was ready and willing to perform the same. In addition to undertaking given to this Court, Petitioner made another judicial admission in paragraph 32 of the Statement of Defence that it was ready and willing to act in accordance with statement made by it before this Court. These judicial admissions given by the Petitioner can also be made the foundation of right to seek specific performance in favour of the Respondent-Society. This is on the principle that an admission given before the Court is not inconsequential and would bind the party making it and the party in whose favour the same is made can sue based on such admission. What the Petitioner wants this court to believe is that the undertaking given before this Court be treated as inconsequential or ineffective and the position before giving that undertaking must form the basis for exercise of remedy by the Respondent. This cannot be countenanced in law. The undertaking given by the Petitioner before this Court would also form the foundation/basis of launching the judicial proceedings.

83) Therefore, it is difficult to uphold Petitioner's contention that the Respondent-Society is debarred from seeking specific performance of the Development Agreement, because the same was terminated at one point of time.

TRIBUNAL'S FINDINGS IN PARA 69 WHETHER SUFFICIENT FOR SETTING ASIDE THE AWARD ?

84) Having broadly rejected the Petitioner-Developer's contention of impermissibility to seek specific performance of the terminated agreement, it is also necessary to deal with certain findings recorded by the Arbitral Tribunal, which are sought to be projected as inconsistent by the Petitioner-Developer. In paragraph 69 of the Arbitral Award, the Tribunal has recorded following findings:-

> 69. The above Issue has partly been discussed while deciding Issue No. (v) in para 48 above. In support of his contention that the Claimant having terminated the Development Agreement was not entitled to specific performance thereof, Mr. Jumani, the learned Counsel for the Respondent has relied upon Judgment reported in (1968) 3 SCR 648 in the matter of Pt. Prem Raj vs. D.L.F. Housing. In that case, Plaintiff had sued for a declaration that a contract was void and in the alternative prayed for specific performance. Apex Court citing Section 37 of Specific Relief Act, 1877, observed that one may ask for specific performance and in the alternative for rescission, but not the converse, which was what was sought in the case before the Apex Court. The facts in the present case are different. Here, the Claimant has not sued for declaration that the Development Agreement dated 3rd May 2008 is void. In effect, the Claimant is seeking compliance in terms of the statement made by Respondent's learned Counsel on 20th October 2015 before the Hon'ble Bombay High Court and in the alternative for damages. The ration of the said Judgment is therefore not applicable to the facts of this case and reliance thereon is misconceived. It is however not possible to accept Mr. Raheja's submission that because the Respondent in its Statement of Defence has termed the termination as wrongful, it can not contend that the Claimant is not entitled to specific performance. **As a matter of fact, Claimant has not sought specific performance in the Statement of Claim**. **Just because the Respondent denies validity of termination in Statement of Defence does not mean that the Development Agreement which is terminated by Claimant automatically revives**. The answer to this Issue however for the reason stated in the earlier part of the para, is in yes.
>
> (*emphasis added*)

85) Much capital is sought to be made by the Petitioner-Developer out of the following three findings:

(i) In effect, the Claimant is seeking compliance in terms of the statement made by Respondent's learned Counsel on 20th October 2015 before the Hon'ble Bombay High Court.

(ii) As a matter of fact, Claimant has not sought specific performance in the Statement of Claim.

(iii) Just because the Respondent denies validity of termination in Statement of Defence does not mean that the Development Agreement which is terminated by Claimant automatically revives

86) The first finding is about the Respondent seeking compliance in terms of the statement made by the Petitioner on 20 October 2015. This finding cannot be plucked out of context. The finding is recorded while distinguishing the judgment of the Apex Court in ***PT. Prem Raj*** (supra). In case before the Apex Court in ***P.T. Prem Raj***, Plaintiff therein had sued for a declaration that contract was void and in the alternative, relief of specific performance of that very contract was also sought. For distinguishing judgment in ***P.T. Prem Raj***, the learned Arbitrator has held that the society had not sued for a declaration that the Development Agreement was void, but was seeking compliance in terms of the statement made by the Petitioner-Developer before this Court. From this finding, it cannot be inferred that the Arbitral Tribunal has granted specific performance in respect of only the statement made by the Petitioner-Developer before this Court. The Tribunal has merely observed throughout the award that the Petitioner was bound to comply with the statement made before this Court and procure the occupation certificate.

87) So far as the next finding relating to the Respondent not seeking specific performance in the Statement of Claim is concerned, the same is recorded while rejecting submission made on behalf of the Respondent-Society that since Petitioner did not plead in the Statement of Defence that termination was wrongful, it cannot contend that the

Respondent is not entitled to specific performance. What the learned Arbitrator has done is not to grant specific performance only on account of Petitioner-Developer treating termination as wrongful. It was sought to be suggested on behalf of the Respondent before the learned Arbitrator that since it was Petitioner's own case that the termination was wrongful, it was bound to perform the contract. Instead of allowing the claim for specific performance only on account of Petitioner's description of termination as wrongful, the learned Arbitrator conducted independent enquiry into the aspect of the Respondent-Society's claim of specific performance and has awarded the same. Therefore the finding in the award about society not seeking specific performance in the statement of claim cannot be read out of the context.

88) So far as their finding of non-revival of terminated Development Agreement is concerned, the same again is recorded for limited purpose of rejecting Respondent's argument that Petitioner's treatment of termination as wrongful automatically entitled the society for specific performance. The Tribunal has refused to believe that the agreement revived only because Petitioner denied validity of termination. The finding cannot be read out of context to infer that the Arbitrator has altogether rejected the theory of revival of contract.

89) This would the correct way of understanding the above three findings recorded by the Arbitral Tribunal. The said findings cannot be read in isolation for the purpose of inferring different meaning than the one sought to be given by the learned Arbitrator in the context of other findings in the award. Here it would be apposite to refer to the following observations of the Arbitral Tribunal in paragraph 46 of the Award:-

> 46. ...Thus possession was taken under economic duress. As regards Respondent's contention that Claimant having terminated the Development Agreement was not entitled to seek specific performance of Clause 5 and 10 of the

> Development Agreement, Mr. Raheja contended that, having made a statement on 20th October 2015 that Respondent would take further steps to obtain Occupation Certificate expeditiously, it was not open for Mr. Jumani to contend so.

Though in the context if issue of payment of rent, the Tribunal has appreciated the stand of the society that after making statement before this Court, it was not open for the Petitioner to contend that society was not entitled to seek specific performance after termination thereof.

90) In ***OPG Power Generation Private Limited*** (supra) the Apex Court has held that where reasons appear to be insufficient or inadequate but on careful reading of the entire Award and the documents, the underlying reason forming basis of the Award is discernible /intelligible and if the same does noy exhibit any perversity, the court need not set aside the Award but rather it would explain the existence of the underlying reason while dealing with the challenge laid to the Award. The Apex Court held in paragraph 168 of the said judgment as under:-

> 168. We have given due consideration to the above submission. In our view, a distinction would have to be drawn between an arbitral award where reasons are either lacking/unintelligible or perverse and an arbitral award where reasons are there but appear inadequate or insufficient [See paras 79 to 83 of this judgment]. **In a case where reasons appear insufficient or inadequate, if, on a careful reading of the entire award, coupled with documents recited/ relied therein, the underlying reason, factual or legal, that forms the basis of the award, is discernible/ intelligible, and the same exhibits no perversity, the Court need not set aside the award while exercising powers under Section 34 or Section 37 of the 1996 Act, rather it may explain the existence of that underlying reason while dealing with a challenge laid to the award. In doing so, the Court does not supplant the reasons of the arbitral tribunal but only explains it for a better and clearer understanding of the award.**
>
> *(emphasis added)*

91) The Arbitral Tribunal has decided Issue No. (viii) relating to society's entitlement to seek relief of procurement of occupation certificate

after termination of contract. The Tribunal has upheld the entitlement of the society for occupation certificate. The Tribunal has apparently approached the issue from a slightly different angle. It appears that the specific issue of impermissibility to seek specific performance in the light of termination of contract was not framed. What was framed as Issue No. (viii), which was slightly different, as it was about society's entitlement to secure occupation certificate after termination of contract. The Tribunal has relied on Petitioner's undertaking given to the Court for procuring the occupation certificate and this is how the society's entitlement for prayer (a) is upheld. This Court is ultimately satisfied with the final conclusion arrived at by the Tribunal. It is not known whether the point of impermissibility to seek specific performance of terminated contract was argued in the same manner as is urged before me. Therefore even if the Tribunal may have answered issue No. (viii) by adopting a different approach, this Court is agreeable with the ultimate conclusion that Petitioner cannot run away from the responsibility of procuring occupancy certificate in respect of the building it has constructed.

92) Therefore, even if the reasons recorded by the Arbitral Tribunal in paragraph 69 of the Award while answering Issue No. (viii) are found to be insufficient or inadequate, this Court is able to discern the underlying reason forming basis of the Award and I have explained that underlying reason in the present judgment, which I am entitled to do in the light of the ratio laid down by the Apex Court in ***OPG Power Generation Private Limited*** (supra). The Arbitral Award need not be set aside only because this Court comes to a conclusion that the Tribunal could have recorded better reasons. The Arbitral Tribunal has come to overall conclusion that termination of the contract did not stand in the way of the Respondent-Society in seeking occupation certificate for its building. This underlying reason is clearly discernible and intelligible and therefore setting

aside the Arbitral Award would not be the right course of action to be adopted in the present case, where this Court is in a position to explain the underlying reason for making the Award.

93) Therefore, stray observations in paragraph 69 of the Award about non-revival of the terminated Development Agreement while dealing with an altogether different argument cannot be inferred to mean that the Development Agreement remained terminated and it was impossible to seek its specific performance. The Arbitral Tribunal has ultimately answered issue No. (viii) in favour of the Respondent holding that it was entitled to seek relief in terms of prayer clause (a) even though it had terminated Development Agreement dated 3 May 2008. I am in agreement with this final conclusion reached by the Arbitral Tribunal and the same does not warrant any interference merely because some other view may also be possible or better reasons could have been recorded for reaching the said conclusion. This Court is not exercising appellate jurisdiction over the Arbitral Tribunal. It is well settled principle that mere erroneous application of law or wrong appreciation of evidence is not a ground to set aside the Award. The approach of the Court ought to be to respect the finality of the Arbitral Award rather than interfering with the same on the ground of non-recording of adequate or sufficient reasons or possibility of alternate view. In ***OPG Power Generation Private Limited*** (supra) the Apex Court has held in paragraphs 71, 74 and 75 as under:-

> 71. In ***Ssangyong*** (supra), which dealt with the legal position post 2015 amendment in Section 34 of the 1996 Act, it was observed that a decision which is perverse, while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. It was pointed out that an award based on no evidence, or which ignores vital evidence, would be perverse and thus patently illegal. It was also observed that a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence in as much as such decision is not based on evidence led by the parties, and therefore, would also have to be characterized as perverse.

> xxx
>
> 74. **The aforesaid judicial precedents make it clear that while exercising power under Section 34 of the 1996 Act the Court does not sit in appeal over the arbitral award.** Interference with an arbitral award is only on limited grounds as set out in Section 34 of the 1996 Act. **A possible view by the arbitrator on facts is to be respected as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon.** It is only when an arbitral award could be categorized as perverse, that on an error of fact an arbitral award may be set aside. **Further, a mere erroneous application of the law or wrong appreciation of evidence by itself is not a ground to set aside an award as is clear from the provisions of sub- section (2-A) of Section 34 of the 1996 Act.**
>
> 75. In ***Dyna Technologies*** (supra), a three-Judge Bench of this Court held that Courts need to be cognizant of the fact that arbitral awards are not to be interfered with in a casual and cavalier manner, unless the court concludes that the perversity of the award goes to the root of the matter and there is no possibility of an alternative interpretation that may sustain the arbitral award. It was observed that jurisdiction under Section 34 cannot be equated with the normal appellate jurisdiction. **Rather, the approach ought to be to respect the finality of the arbitral award as well as party's autonomy to get their dispute adjudicated by an alternative forum as provided under the law.**
>
> (*emphasis added)*

94) Therefore, the findings recorded by the Tribunal in para 69 of the Award cannot be the ground for setting aside the same.

NEED FOR RESTITUTION OF POWER OF ATTORNEY

95) It is strenuously sought to be contended by Mr. Dwarkadas that direction of the Arbitral Tribunal for procurement of occupation certificate is invalid and incapable of being executed in absence of reinstatement of Power of Attorney, which stood terminated by letter dated 15 October 2015. I am not impressed by the submission. The Petitioner-Developer itself never treated termination notice dated 15 October 2015 as end of contract. It defended Section 9 Application filed by the Respondent-Society by assuming that the Development Agreement continued to subsist and remained valid. This is why it made the statement before this Court

about procuring the occupation certificate. By doing so, it did not treat the Respondent-Society as having ended the contract. When tall claim of procurement of occupation certificate was made 10 years back on 20 October 2015, Petitioner-Developer never qualified the said undertaking with requirement for reinstatement of Power of Attorney. Again, when it made correspondence with the Respondent-Society vide letter dated 18 February 2016, it did not express that termination of Power of Attorney by notice dated 15 October 2015 would come in the way of the Petitioner-Developer applying for occupation certificate before the MCGM. To make the things worst for the Petitioner-Developer, it did not contend in the Statement of Defence that Power of Attorney needs to be reinstated for enabling the Petitioner to act on the statement made before this Court. Both, in letter dated 18 February 2016 and paragraph 33 of the Statement of Defence, the Petitioner-Developer merely sought cooperation from the Respondent-Society. The Petitioner-Developer never raised any demand with the Respondent-Society for reinstatement of Power of Attorney as a condition precedent to filing proposal for occupation certificate. Therefore, the Petitioner-Developer cannot now be permitted to raise the pretext of non-revival of Power of Attorney for its blatant failure to procure the occupation certificate for 'A' wing building. The contention is accordingly repelled.

96) The first objection of the Petitioner to the impugned award is accordingly rejected and it is held that the Arbitral Tribunal has rightly entertained and decided in Respondent's favour the issue of specific performance. The direction to the Petitioner-developer to procure occupancy certificate or to get the 'open to sky ducts' in the modified plans regularised does not warrant any interference in exercise of powers under Section 34 of the Arbitration Act.

RESPONDENT'S CLAIM FOR DAMAGES

97) Once Respondent's right to file a claim for specific performance is upheld, the alternate claim for compensation / damages under Section 21 of the Specific Relief Act must necessarily be recognised. I am therefore of the view that the Respondent-Society rightly claimed damages as alternate relief to specific performance. This is also clear from sequencing of the prayer clauses in the Statement of Claim. The substantive prayers (a) to (j) in the Statement of Claim read thus:-

> 49. The Claimant therefore prays that:-
> a. The Respondent be ordered and directed to;
>
> (i) Amend the existing plans of wings A and B and/or obtain approval on fresh plans of Wings A and B, so as to ensure that the Occupation Certificate is granted for the entire area of flats allotted to the members of the Claimant in Wing A is as per representation made to the Claimant under the said Agreement dated 3rd May 2008 and the Plans sanctioned in 2008;
>
> (ii) After such sanction/amendments to plans, obtain Occupation Certificate from MCGM in respect of Wing A within 6 months from the date of the Award or within such other time as this Honourable Tribunal may grant, and do and perform all such acts, deeds, matters and things a are required to be done and perform for obtaining such Occupation Certificate from MCGM, including demolition of such area in Wing B on the said land, as may be required, to bring Occupation Certificate for the Wing A under the supervision of the Claimant and/or the architect nominated or appointed by the Claimant;
>
> b. The Respondent be restrained by a permanent order an injunction from in any manner submitting any plans to MCGM contrary to the building plans sanctioned in year 2008 for the purpose of obtaining Occupation Certificate of Wing A or otherwise howsoever;
>
> c. This Honorable Tribunal be pleased to declare that the plan submitted by the Respondent to the MCGM on 9th May, 2009 and 25th March 2011 are null, void and not binding upon the Claimant and/or the said property and the Respondent is not entitled to act upon or claim any benefit under the same;
>
> d. This Honorable Tribunal be pleased to order and direct the Respondent to hand over to the Claimant all the original / certified copies of the IQD, commencement certificate, plans.submitted to and correspondence with the MCGM from time to time in respect of both

the wings and also disclose on oath the FSI consumed in both the wings of the said land and the actual constructed area in both wings;

e. Without prejudice to the above and only if for any reason Occupation Certificate cannot be granted for the entire are of flats allotted to the members of the Claimant in Wing A is as per representations made to the Claimant under the said Agreement dated 3rd May, 2008;

   i. If the entire wing A is liable to be demolished for - complying with features in the Claimant's members flats under plans dated 9th May, 2009 and 25th March 2011, then in the case this Hon'ble Tribunal be please to pass an award in favour of the Claimant for a sum of Rs.158,25,25,000/- (Rupees One Hundred Fifty Eight Crores Twenty Five Lacs and Twenty Five Thousand only) as per the particulars of claim annexed hereto as Exhibit 'A2'.

   ii. In alternative to e (i) above, if the features in the plans dated 9th May, 2009 and 25th March 2011 can be constructed without completely demolishing the entire wing A, then in that case, this Honorable Tribunal be pleased to pass an award in favour of the Claimant and against the Respondent, and the Respondent be ordered and directed to forthwith pay to the Claimant a sum of Rs.35,000/- (Rupees Thirty Five Thousand only) per square feet of the shortfall, if any, in the area for which the MCGM may issue Occupation Certificate, as damages, together with interest thereon at the rate of 18% per annum from the date of the Statement of Claim till payment and/or realization, as par the Particulars of Claim at Exhibit "A4" hereto;

f. This Honorable Tribunal be pleased to pass an award in favour of the Claimant and against the Respondent, and the Respondent be ordered and directed to forthwith pay to the Claimant.

g. This Honorable Tribunal be pleased to pass an award in favour of the Claimant and against the Respondent, and the Respondent be ordered and directed to pay to the Claimant;

   i. A sum of at the rate of Rs.83,29,841/- (Rupees eighty Three Lakh Twenty Nine Thousand Eight Hundred and Forty One Only) for the period from February 2014 till February 2017, towards the rent payable by the Respondent to the members of Claimant and further amount from the date of the statement of Claim till Occupation Certificate alongwith further interest at the rate 18% from the date of filing of the Statement of Claim till Occupation Certificate as more particularly described in the Particulars of claim annexed at Exhibit 'A' hereto.

   ii. a sum of Rs.65,37,00,000/- towards the damages for delay in handing over possession of tenements in wing A with valid Occupation Certificate to the Claimant, together with interest thereon at the rate of 18% per annum from the date

of the Statement of Claim till payment and/or realization, as per the Particulars of Claim at Exhibit "A4" hereto;

iii a sum of Rs.125,28,00,000/- towards the damages for delay in handing over possession of tenements in wing A with valid Occupation Certificate to the members of the Claimant, together with interest thereon at the rate of 18% per annum from the date of the Statement of Claim till payment and/or realization, as per the Particulars of Claim at Exhibit "A5" hereto;

iv. a sum Rs. 68,25,000/- (Rupees Sixty Eight Lakh Twenty Five Thousand only) towards the damages for shortfalls and deficiencies in area, together with interest thereon at the rate of 18% per annum from the date of such failure till payment and/or realization, as par the Particulars of Claim at Exhibit A4? Hereto;

v. a sum of Rs. 1,13,02,889/- (Rupees One Crore Thirteen Lakh Two Thousand and Eight Hundred and Eighty Nine Only) towards property taxes till 16th September 2016, and such further taxes from the filing of the statement of claim till the occupation certificate, together with interest thereon at the rate of 18% per annum from the date of the Statement of Claim till payment and/or realization, and such further taxes as par the Particulars of Claim at Exhibit A'8' hereto;

vi. such sum, as may be disclosed by the Respondent as consideration received for the premises in which it has permitted operation bar and restaurant as per the particulars of claim annexed at Exhibit 'A1'.

vii. a sum of Rs. 2.05 Crores being 10% of the total Bank Guarantee towards the failure to comply with clause 16 of the said Agreement.

viii. compensation amounting to Rs.3,87,000/- for failure to install the Mahanagar Gas Pipe Line Connection alongwith further interest at the rate 18% from the date of filing of the Statement of Claim till Occupation Certificate, as more particularly described in the Particulars of Claim annexed at Exhibit ‘A8’.

ix A sum of Rs.18,70,000/- alongwith interest at the rate of 18% per annum from filing of the Statement of Claim till Occupation Certificate towards sub standard quality of construction of wing A as more particularly described in the particulars of claim annexed at Exhibit 'A9'.

h. This Honorable Tribunal be pleased to declare that the alleged Rectification Deed is illegal, void, bad in law and not binding upon the Claimant or its members;

> i. This Honorable Tribunal be also pleased to order and direct the Respondent to deliver up the alleged Rectification Deed to this Honorable Tribunal, and upon such delivery the same be cancelled;.
>
> j. The Respondent be restrained by an order and permanent injunction of this Hon'ble Court from in any manner handing over possession of the commercial premises in Wing B to any of the purchasers, without the Respondent obtaining and furnishing to the Claimant Occupation Certificate in respect of Wing A on the said land;

98) The Respondent-Society thus sought the relief of grant of occupation certificate as per contractual obligations as well as prayed for compliance of the statement made before this Court. In the event of non-issuance of occupation certificate and in the event of the building becoming liable for demolition, the Respondent-Society sought damages in the sum of Rs.158,25,25,000/-. In the event of non-demolition of the wing 'A' building, the Respondent-Society prayed for sum of Rs.35,000/- per sq.ft. for shortfall area. The Respondent also sought various other damages. In my view therefore, the claim for damages raised in the Statement of Claim were in alternative to the main relief of making the Petitioner liable for issuance of occupation certificate. The learned Arbitrator has also awarded claim of the Respondent in similar sequence. The main direction to the Petitioner is to secure occupation certificate. If the occupation certificate is not issued by the MCGM, the Petitioner is directed to have the 'open to sky ducts' regularised (possibly by securing outside FSI at its own cost). It is only in the last eventuality of non-issuance of occupation certificate and non-regularisation of the building, alternate relief of damages in the sum of Rs.128.98 crores is awarded. In my view therefore, the Tribunal has rightly granted the alternate relief of damages in favour of the Respondent-Society in the event of non-grant of occupation certificate and non-regularisation of the building.

99) It is seen that Petitioner-Developer's challenge to the award of damages by the Arbitral Tribunal is premised on its contention that since the Respondent-Society is not entitled to seek specific performance, it is also not entitled to alternate relief of damages/compensation under Section 21 of the Specific Relief Act. Once the objection to prayer for specific performance is rejected, the Respondent's right to seek alternate relief of damages / compensation must necessarily be upheld.

QUANTUM OF DAMAGES AWARDED

100) The Arbitral Tribunal has awarded a sum of Rs. 128,98,00,000/- in favour of the Respondent-Society in paragraph 87(g) of the Award. As observed above, this direction for payment of damages is only the third consequence made applicable to the Petitioner-Developer. Petitioner can easily avoid the payment of even a single farthing towards damages to the Respondent-Society by implementing the first direction for securing the occupation certificate. If the Petitioner-Developer was to procure the occupation certificate within the period of six months as stipulated in the Award, the direction for payment of awarded sum of Rs.128.98 crores would have been rendered meaningless. However, if for some reason the Petitioner's application for occupation certificate was to be rejected by the MCGM, the Petitioner has one more option to opt for regularization of 'open to sky ducts' by procuring outside FSI/shortfall FSI. If MCGM was to regularise the irregularities committed by the Petitioner, again Petitioner would not be liable to pay even a farthing to the Respondent-Society towards damages. It is only if the first direction to secure occupation certificate and alternate direction for regularization of 'A' wing building fail that the Petitioner-Developer becomes liable to pay damages of Rs.128.98 crores to the Respondent-Society.

101) Accordingly, the Petitioner-Developer's challenge to the quantum of damages of Rs.128.98 crores is required to be appreciated keeping in mind the above context. It is Petitioner-Developer's objection that the amount of damages of Rs.128.98 crores is determined by the Arbitral Tribunal by taking into consideration the cost of the land and building. It is submitted that if the building is required to be demolished on account of non-grant of occupation certificate and non-regularisation by MCGM, the Respondent-Society ought to have claimed the cost of demolition and cost of reconstruction of the building. However, it is contended that the Respondent-Society placed on record Valuer's report based on comparative sale instances in the vicinity, meaning thereby that the market price of the 58 flats is awarded by the Arbitral Tribunal as damages for breach of contractual stipulations of securing occupation certificate. It would be apposite to reproduce the findings recorded by the Arbitral Tribunal in paragraph 76 of the Award, which reads thus:

> 76. Mr. Jumani's contention that the probability of having to demolish buildings is next to zero, can not be accepted. Admittedly there is no occupation Certificate issued by MCGM, The Respondent itself had submitted plans for regularization of Claimant's building after notices were issued by MCGM, which application was rejected. CW-3, i.e the expert has in para:15 onwards in his affidavit of evidence stated that, open to sky ducts would have to be provided at the time of construction itself and cannot be created subsequently. CW3 has further deposed that the ducts were proposed to be constructed in the living room and the bed room and that the living room will become unviable to be used and it will affect the usability of the entire Flat itself. In view of the opinion expressed by CW-3, it is difficult to comprehend as to how ducts could be constructed without demolishing the entire building. The apprehensions of the Claimant are therefore justified. **As set out in Exh.A-2 to the Statement of Claim, Claimants have claimed Rs.158,25,25,000/- as damages in this respect, if the entire building i.e. A Wing is required to be demolished. However, the Valuation Report dated 11th November 2021 [Exh. C-7/2 to 15] produced by Claimant through CW-4 i.e. Mr. H.G. Samant, an Architect and a Valuation Expert, puts the market value of the present building at Rs. 128,98,00,000/-.** In its Written Submissions dated 16th October 2023 at para 71, Claimants have said that they are ready to adopt the rate provided by CW-4. **The reading of the said Report dated 11th November 2021 shows that it is based on comparative sale instances of flats in the vicinity.** It has relied upon the said Sale Agreements which have been tendered and marked as Exhibits. The Report is a well

> reasoned Report and there is no reason to disbelieve it. No dent in the evidence of CW-4 has been made in his cross examination by the Respondent. **Also, Respondent have neither produced any evidence to contradict the said Report nor examined any Expert.** Claimant have thus shown that the damages which they would suffer if the building is to be demolished would be Rs.128,98,00,000/-. Claimant is therefore entitled to reliefs in terms or prayer e(i) with figure of Rs. 158,25,25,000/- being replaced by figure of Rs.128,98,00,000/- for the reasons set out above.
>
> *(emphasis added)*

102) Perusal of the above findings would indicate that amount of Rs.128.98 crores is awarded towards damages, which the Respondent-Society would suffer if the building is to be demolished. Ordinarily, if 'A' wing building is to be demolished and reconstructed by ensuring 52% additional area to each member, the Respondent- Society would incur following cost:-

(i) cost of demolition of existing 'A' wing building
(ii) cost of purchasing shortfall FSI for ensuring 52% additional area to each member.
(iii) cost of reconstruction of new building.
(iv) fees of consultants, architects, etc.
(v) displacement charges/ rent during the period of demolition of building and its reconstruction in respect of each of the member.
(vi) shifting charges, brokerage, etc.
(vii) damages towards mental agony for vacating flats and to make alternate arrangement during reconstruction of the building.

103) It appears that the Respondent -Society had produced report of the valuer named Right Project Management Consultant Private Limited, which indicated cost of reconstruction of new building as Rs.169.11 crores. In the particulars of claim, the Respondent-Society had claimed an amount of Rs.158,25, 25,000/- as damages with the description 'damages equivalent to the value of the entire building'. The Respondent-Society led evidence of Mr. Nitin Naik of M/s. Right Projects Consultant Ltd., who stated in paragraph 35 of affidavit of evidence as under:-

> 35. In my professional belief and opinion the flats and overall the entire residential wing provided by the Developer are not constructed as per the Development Agreement and there exists no OC in respect of the residential wing till date. In any event, if the members were to be provided with flats in the present vicinity and as per the Development Agreement, the cost of purchasing the same would be approximately at the rate of Rs. 35,000/- per square feet. The total area of all flats to be provided as per the Annexure 7 is 45215 square feet. Thus, bringing the total cost to 45215 square feet carpet area x Rs. 35,000 per square feet = Rs.158,25,25,000/- Rupees One Hundred Fifty Eight Crores Twenty Five Lacs and Twenty Five Thousand Only). **In the alternative to the same, if the residential wing was to be demolished and reconstructed as per the Development Agreement and an approximate cost of the same alongwith cost of extra FSI to be consumed according to me would be approximately Rs. 169 Crores.** I produce a report on the financial viability of such demolition and reconstruction at Serial No.51 of the Further Compilation of Documents No.6.
>
> *(emphasis added)*

104) The Valuer apparently adopted two methods of determining the damages. The first method was to multiply the total area of 58 flats of 45,215 sq.ft. by prevailing market rate of Rs.35,000/- per sq.ft. This how figure of Rs.158,25,25,000/- was arrived at. The second method was to determine the cost of demolition and reconstruction of 'A' wing building alongwith cost of extra FSI and the same was arrived at Rs.169.11 crores. Thus, according to the valuer examined by the Respondent-Society, the cost of demolition and reconstruction of 'A' wing building in addition to cost of extra FSI was 169.11 crores. I have gone through the said report of the Valuer. In that report, the Valuer took into consideration the parameters of construction cost of building, construction cost of podium, cost of purchase of premium FSI, cost of purchase of TDR, cost of purchase of fungible FSI, cost of puzzle parking, cost of car lifts, rent for alternate accommodation for 58 flat owners, transportation charges, architect fees, RCC consultant fees, project management consultant fees, legal charges, etc. This is how the total cost of Rs.169.11 crores was arrived at by the said consultant.

105) However, it appears that the Respondent examined CW4 (Hiranyakant G. Samant) proprietor of H.G. Samant and Associates, who produced a report indicating market value of the building at Rs.128.98 crores based on comparative sale instances i.e. by the first method adopted by Right Project Management Consultant Private Limited.

106) The Arbitral Tribunal thus had three amounts as per three valuations as under:-

(i) value of the building comprising of 58 flats @ Rs.35,000/- per sq.ft. of Rs.158,25,25,000/-
(ii) cost of demolition and reconstruction of the building of Rs.169.11 crores.
(iii) value of the building with 58 flats @ Rs.23,500/- per sq.ft. of Rs.128,98,00,000/-.

The Arbitral Tribunal has picked up the lowest of three figures of Rs.128,98,00,000/-

107) Mr. Dwarkadas is not entirely wrong in contending that market value of all the 58 flats in the building could not have been awarded as damages suffered by the Respondent-Society. Under Section 73 of the Contract Act, if the contract is broken, injured party is entitled to receive compensation for any loss or damage caused to him which naturally arose in the usual course of things from such breach. Section 73 provides thus:

> **73.Compensation for loss or damage caused by breach of contract.—**
>
> When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> **Compensation for failure to discharge obligation resembling those created by contract**.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.
>
> Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Thus, the principle is that of restitution i.e. to put back injured party in the same position, who would have been if the contract was not broken.

108) In the present case, if the Planning Authority refuses to grant occupation certificate and also refuses to regularise 'A' wing, the same will have to be demolished. The Society, being the land owner, would be entitled to reconstruct the building either by itself or by appointing another developer. Petitioner has already exploited all the FSI flowing out of the plot. In fact there is shortfall FSI for regularising 'A' wing building or for securing occupation certificate for it. Therefore this is not a case where the substituted developer would reconstruct the building free of cost. The society will have to bear not just the cost of demolition and reconstruction, it will have to purchase FSI/TDR from the market to ensure that the members receive same sized flats, which are in the current building.

109) In such circumstances, the Respondent-society will have to incur cost of demolition of the existing building, cost of procurement of shortfall FSI, cost of reconstruction of new building, cost of rent during the intervening period, shifting charges, etc. Therefore while quantifying the damages suffered by the Respondent-Society in the event of non-grant of occupation certificate and non-regularisation of 'A' wing building, the market value of 58 flats may not be the correct parameter/yardstick.

However, as observed above, the Respondent's Valuer indicated the total cost of reconstruction of new building at Rs.169.11 crores. The Petitioner-Developer did not plead any evidence to the contrary suggesting that lesser sum would be required for construction of the new building. The Arbitral Tribunal could have awarded sum of Rs.169.11 crores as cost of demolition of existing 'A' wing and for its reconstruction. However, the Arbitral Tribunal has chosen to award lesser sum of Rs.128.98 crores.

110) One must also not lose sight of the fact that the members of the Respondent-society have been suffering since long on account of actions of the Petitioner-developer. Their building is without occupation certificate for a considerable period of time. Petitioner has stopped paying rent to the members after January 2014. If it is made to pay the rent on account of non-procurement of occupation certificate, the amount of rent during last 12 long years would be enormous. While determining the cost of demolition and reconstruction of the building, the mental agony that the members have already suffered and will suffer if the building is to be demolished also needs to be factored in. Therefore the issue of damages cannot be trivialised by contending that the cost of construction is hardly Rs. 3000 per sq. ft. The members of society are living in their houses under threat of being evicted on account of absence of occupation certificate. Petitioner is solely responsible for such situation. What about the mental agony suffered by members on that count? Also if building goes for demolition, there would be unimaginable miseries for the members, who will have to relocate themselves till the building is reconstructed.

111) Petitioner appears to be an incalcitrant developer, who has scant regard to the development control regulations. It has failed to procure occupation certificate not just for society's building but there is no occupation certificate even for the sale component building. It has committed an act of deceit. It has deceived the society members by stealing

their sanctioned built-up area and sold it to outsiders in 'B' wing building. Such errant developer needs to be penalised by making him liable to pay the damages for sufferance by the society members. Therefore in my view, Petitioner's contention of restricting the damages to only generalised cost of construction in Mumbai city cannot be accepted.

112) Respondent-society led some evidence to demonstrate that the cost of demolition and reconstruction of the building would be to the tune of Rs. 169.11 crores. As observed above, Petitioner, being a developer, could have led evidence to the contrary by quantifying the exact costs involved for reconstruction of the building. It failed to do so. Even before me, no valuation is presented by the Petitioner to demonstrate that the cost of demolition, reconstruction, procurement of shortfall FSI, transit rent, etc would be less than Rs. 128 crores. Also, no attempt is made before me to demonstrate as to how the cost of reconstruction indicated in society's valuer's report of 169.11 crores is wrong. Instead Petitioner chose to adopt a stand before the Tribunal that the chances of demolition of the building are near zero. Petitioner may be right in contending so as there is possibility of regularising the construction of 'A' Wing building. However the Arbitrator was required to adjudicate the alternate prayer for damages also and therefore Petitioner ought to have led some evidence to counter the valuations relied on by the society. Even before me, the exact cost involved for reconstruction of the building is not presented by the Petitioner. Having failed to do so, it cannot seek to annul the award by contending that the methodology adopted by the leaned arbitrator for assessing the damages is erroneous.

113) In the light of the above position, the issue that arises for consideration is whether interference by this Court in the impugned Award is warranted especially in respect of direction for payment of damages,

which is essentially in the nature of a consequence of non-procurement of occupation certificate, because yardstick applied for determination that amount may not be entirely right? The answer to the question does not appear to be in the affirmative.

114) As observed above, the eventuality of the Petitioner-Developer paying any damages to the Respondent-Society would arise only if it is unable to secure occupation certificate and also fails in getting 'open to sky duct' regularised by procuring outside FSI. In fact, during the course of his submissions, Mr. Dwarkadas has repeatedly highlighted the position that the DCPR permits procurement of FSI under the 'pick and choose' policy and it is easily possible to secure occupation certificate by feeding 'A' wing building with deficit quantity of FSI. If this is the position, it is not really understood as to why the Petitioner-Developer has unnecessarily indulged in the present litigation. Instead of wasting time in challenging the Award, Petitioner ought to have procured occupation certificate from the MCGM. This could have been done even during pendency of the present Petition to demonstrate its bonafides. The moment Petitioner secures occupation certificate or gets 'A' wing building regularised, as the case may be, the direction for payment of damages of Rs.128.98 to the Respondent-Society would become redundant. I must keep in mind this vital aspect while deciding whether the impugned Award requires interference merely because the yardstick applied by the Arbitral Tribunal in determining the amount of compensation/damages may not be entirely right. Application of an erroneous yardstick in assessing the damages does not amount to patent illegality in the award. This is particularly true where the ultimate sum awarded as damages can be justified by application of correct yardstick.

115) As observed above, in absence of any contrary evidence, the Arbitral Tribunal is entitled to rely on evidence produced by the Respondent that cost of demolition and reconstruction of existing building is Rs.169.11 crores. Instead of awarding that figure, the Arbitral Tribunal has awarded lesser amount of Rs. 128.98 crores. Even if it is held that the yardstick of market value of all flats is not right, the valuation under that erroneous yardstick (Rs. 128.98) crores is still less than the valuation of reconstruction of the building (Rs. 169.11 crores). So application of so called erroneous valuation has not resulted in award of any undue or excessive sum in favour of the society. Therefore even though the yardstick applied by the Tribunal may not be entirely correct, it has still awarded lesser amount than the one indicated in valuer's report of cost of reconstruction. It therefore cannot be contended that the approach of the Arbitral Tribunal is so unreasonable, arbitrary or capricious that no fair minded person would ever adopt the same. Merely because another yardstick is also available for determining the quantum of damages, Section 34 court would not interfere in the Award so long it is satisfied that (i) the occasion for actual payment of damages is unlikely to arrive and (ii) the ultimate amount awarded by the Tribunal is not unduly excessive.

116) Also, even if this Court was to arrive at a conclusion that there is any error in the awarded sum towards damages by the Arbitral Tribunal, this Court can also exercise power under Section 34(4) of Arbitration Act and direct resumption of arbitral proceedings for taking action for elimination of grounds for setting aside the arbitral award. By exercising that power, this Court could have directed redetermination of the quantum of damages by letting parties to lead evidence on that aspect. In ***Gayatri Balasamy Vs. ISG Novasoft Technologies Ltd.***[15] the majority view of the Constitution Bench is as under:

[15] (2025) 7 SCC 1

VI. To modify or to remit? Addressing the Court's quandary

56. As elucidated above, if a fog of uncertainty obscures the exercise of modification powers, the courts must not modify the award. Instead, they should avail their remedial power and remand the award to the Tribunal under Section 34(4). Under the sub-section, either party—whether the one challenging the award under Section 34 or the one defending against such a challenge—may request the Court to adjourn the proceedings for a specified period. If the court deems it appropriate, it may grant such an adjournment, allowing the Arbitral Tribunal to resume proceedings or take necessary corrective measures to eliminate the grounds for setting aside the award. Thus, Section 34(4) provides a second opportunity for a party to seek recourse through arbitral channel.

57. However, the power of remand permits the Court only to send the award to the Tribunal for reconsideration of specific aspects. It is not an open-ended process; rather, it is a limited power, confined to limited circumstances and issues identified by the Court. **Upon remand, the Arbitral Tribunal may proceed in a manner warranted by the situation — including recording additional evidence, affording a party an opportunity to present its case if previously denied, or taking any other corrective measures necessary to cure the defect.** In contrast, the exercise of modification powers does not allow for such flexibility. Courts must act with certainty when modifying an award — like a sculptor working with a chisel, needing precision and exactitude. Therefore, the argument that remand powers make modification unnecessary is misconceived. They are distinct powers and are to be exercised differently.

59. While it is not appropriate to establish rigid parameters or a straitjacket formula for the exercise of this power, it is clear that Section 34(4) does not authorise the Arbitral Tribunal to rewrite the award on merits or to set it aside. Rather, it serves as a curative mechanism available to the Tribunal when permitted by the Court. **The primary objective is to preserve the award if the identified defect can be cured, thereby avoiding the need to set aside the award.** Accordingly, a court may not grant a remand when the defect in the award is inherently irreparable. A key consideration is the proportionality between the harm caused by the defect and the means available to remedy it.

(emphasis added)

117) Therefore if the award is otherwise sustainable and the liability of injuring party to pay damages to the injured party can be upheld, if an error is traced in quantifying the damages on account of application of erroneous yardstick, rather than setting aside the entire award, the same can be preserved by weeding out the ground of challenge to the quantification by having recourse to provisions of Section 34(4) of the Arbitration Act. In the present case, the award relating to rest of the

directions has appealed to this Court. Petitioner is attempting to take disadvantage of a possible error on the part of the Tribunal in applying the yardstick of market value of building and flats for quantifying the damages. Since the rest of the directions in award are sustainable, the same needs to be preserved rather than setting aside the whole of the award due to Petitioner's objection of application of erroneous yardstick. Once the Award is to be preserved, the next issue is whether recourse to provisions of Section 34(4) of the Arbitration Act is warranted in the present case? In my view it is not. This is because of above discussed twin factors of (i) remote possibility of Petitioner becoming liable to pay any damages and (ii) the quantification of damages being supported by evidence on record, which is uncontroverted. As held above, the quantification of damages by applying correct yardstick of cost of reconstruction of building is higher (Rs. 169.11 cr) than the cost of market value of building and flats (Rs. 128.98 cr). Since the Arbitral Tribunal has awarded lesser of the two figures, it is not necessary to remand the proceedings for resumption under Section 34(4) of the Arbitration Act. Rather the whole of the Award can be preserved.

118) Also, the direction for payment of damages of Rs. 128.98 cr is essentially *in terrorem*. It kicks in only if the Petitioner, who has already defaulted, commits further defaults and fails to procure the occupation certificate for the building. This drastic consequence is also necessary considering the past conduct of Petitioner, who has violated the undertaking given to this Court with impunity. If Petitioner continues with the same attitude, the Respondent-society would recover the amount of damages from it and take necessary steps for ensuring that the society members have flats conforming to the DCPR.

119) Considering the peculiar facts and circumstances of the case where directions for payment of damages is merely in the nature of security

to the Respondent-Society with easy possibility for the Petitioner to avoid payment of the same by obtaining of occupation certificate and/or getting 'A' wing building regularised, I am not inclined to interfere in the quantification of damages and would rather preserve the whole of the Award.

120) Petitioner's objection to quantification of damages of Rs. 128.98 crores is accordingly rejected.

DIRECTION FOR PAYMENT OF RENT

121) The Arbitral Tribunal has directed payment of monthly compensation @ Rs.80 per sq.ft. per month per member for the period from February-2014 to October-2015. The Arbitral Tribunal has thus not awarded monthly compensation/rent after termination of Agreement vide notice dated 15 October 2015. The objection of the Petitioner-Developer is to the rate applied by the Arbitral Tribunal of Rs.80 per sq.ft. per month as it contends that the rent could not exceed maximum limit of Rs 52 per sq. ft. as per the Development Agreement. The Arbitral Tribunal has recorded following reasons while awarding the sum claimed:-

> **77. Re: Prayer (g)(i) Monthly Compensation:-**
> While deciding Issue Nos. (ii) and (x), the Tribunal has for reasons recorded in paras 48 and 49 above, has held that there is a breach on Respondent's part in having failed to pay monthly compensation to the members of Claimant. It is an admitted position [Respondent's Written Submissions, R-3, pg. 150, para VIII(i) and pg. 161 para (vi)(ii)] that Respondent have paid monthly compensation to each member of Claimant till January 2014 @Rs.80/- per square feet, per month. In Exh.A/ pg. 55 of the Statement of Claim, Claimant have claimed Rs.83,29,841/- on this basis for the period February 2014 to February 2017. However, for reasons stated in para 48 above, it is not possible to grant any relief in respect of the monthly compensation to the Claimant beyond 15th October 2015 i.e. the date of termination. Respondent shall therefore pay monthly compensation @ Rs.80/- per square feet, per month to each member for the period February 2014 to October 2015. Though the Claimant have claimed interest @ 18% on the arrears of monthly compensation from the filing of the Statement of Claim i.e. 1st

> March 2017, it would be reasonable to grant interest on the above amounts@8% per annum from the date of the filing of the Statement of Claim, till the date of passing of Award. The arrears so calculated with interest, as on the date of the passing of the Award, shall be paid within a period of 3 (three) months from the date of the passing of the Award, failing which it shall carry interest@12% per annum from the expiry of 3 months from date of the receipt of this Award till payment.

122) The Arbitral Tribunal has recorded a finding of fact based on Petitioner's written submissions that it has paid monthly compensation to each member of the Respondent-Society till January-2014 @Rs.80 per sq.ft. per month per member. In its written submissions the Petitioner-Developer stated on page 150 Paragraph VIII(i)(b) as *"… it is stated that from 2011 till January 2014 the Respondent paid to the Claimant members monthly compensation @ Rs.80 per sq.ft. per month".* Again, it is stated that "… *Accordingly for the aforesaid period when the Claimants members received monthly compensation of Rs.80 per sq.ft. per month, the Respondent submits that they were more than sufficiently compensated.*" Thus, the Petitioner-Developer itself admitted before the Arbitral Tribunal that till January-2014, it was paying monthly compensation/rent @ Rs.80 per sq.ft. p.m. per member. It is incomprehensible that though rent @ Rs. 80 per sq.ft. was being actually paid till January 2014, reduced contractual rent @ Rs. 52 per sq. ft. would be payable from February 2014 onwards. The rent agreed in the development agreement was obviously not to be applied in respect of indefinite period. Therefore the Tribunal has rightly directed payment of rent at the same rate at which the same was being paid till January 2014. Petitioner should consider himself lucky that it is saved of liability to pay rent after October 2015, considering that the building is still without occupation certificate. I therefore do not find any element of perversity in awarding rent @ Rs.80 per sq.ft. per month per member in direction No.87(i)(i) of the Arbitral Award.

PAYMENT FOR SHORTFALL AREA

123) It appears that direction to pay amount towards shortfall area is to be found in paragraph 87(e) and 87(j)(i) of the impugned Award. The claim is awarded by the Tribunal in respect of area per member, which would be below aggregate 52% additional area promised under the Development Agreement even after covering of 'open to sky ducts' in living rooms and bedrooms. In direction No.87(e), the Arbitral Tribunal has directed that if any shortfall area is noticed, compensation of Rs. 23,500/- per sq.ft. shall be paid to the Respondent-Society for such shortfall area. That area is identified as 195 sq.ft. in paragraph 79 of the Award, which reads thus:-

> 79. It was submitted by Mr. Raheja that even if all the areas provided to members as open to sky ducts were regularised, still there would be shortfall of 195 square feet carpet, as stated by CW3 in para 37 of his AoE. CW3 has also given its break up in his answer to Q. 56. There is no dent made in the oral evidence of CW3 on this. Claimant are therefore entitled to be compensated for this loss. However, it would not be @ Rs.35,000/- per square feet, but @ Rs.23,500/- per square feet, as stated by CW4 in his answer to Q. 67. This will work out to Rs.45,82,500/- which amount will also be paid by Respondent within 3 (three) months from the date of the receipt of this Award, failing which, it will carry interest @ 8% per annum from the expiry of 3 months from the date of receipt of this Award.

124) For shortfall area of 195 sq.ft. compensation @Rs.23,500 per sq.ft. totalling Rs.45,82,500/- is awarded under paragraph 87(j)(i) of the Arbitral Award. In my view, the directions in paragraphs 87(e) and 87(j)(i) appear to be similar. It is not that after payment of Rs.45,82,500/-, the Petitioner-Developer would be liable to pay any additional amount towards shortfall area under paragraph 87(e) of the Award. I therefore do not find any reason to interfere in the said directions.

CONCLUSIONS:

125) Considering the overall conspectus of the case, I am of the view that the Respondent-Society rightly sought compliance with contractual obligations of securing occupation certificate for 'A' wing building, which was also undertaken to be performed by the Petitioner-Developer by making the statement before this Court in Arbitration Petition (L) No.1969 of 2015. Even though the Respondent-Society had terminated the Development Agreement by notice dated 15 October 2015, the Petitioner-Developer drove the Society in the direction of the specific performance by making the solemn statement before this Court that it would procure occupation certificate in respect of 'A' wing building. The Arbitral Tribunal has rightly directed the Petitioner-Developer to act in compliance with the said statement. Even otherwise, having constructed the building and having sold flats in the sale component building, the Petitioner-Developer cannot be permitted to walk away out of the project without securing the occupation certificate. The Petitioner-Developer has acted in a blatantly deceitful manner by stealing FSI/BUA meant for 'A' wing building and has sold the same to outsiders by loading it in sale component building. It has shown 'open to sky ducts' in the living rooms and bedrooms of members of the Respondent-Society. The members of the Society together own the land, which was permitted to be redeveloped by the Petitioner-Developer. The acts of the Petitioner-Developer have resulted in a situation that the society members have received flats constructed in violation of sanctioned development plan. Considering these circumstances, the Arbitral Tribunal has rightly directed the Petitioner-Developer to take every step to ensure that the occupation certificate is granted in respect of the 'A' wing building. The approach of the Arbitral

Tribunal is judicious and not something which no fair-minded person would ever adopt.

126) For the reasons indicated above, this Court is not impressed by the submissions canvassed on behalf of the Petitioner-Developer that the Respondent-Society is not entitled to seek specific performance of the terminated contract. The said submission is raised before me in total ignorance of the Petitioner-Developer's own conduct in virtually reviving the terminated contract by submitting a solemn undertaking before this Court that it would secure occupation certificate in respect of 'A' wing building. This Court is also unable to notice any patent illegality in the Arbitral Tribunal awarding damages in the sum of Rs.128.98 crores, which is a direction *in terrorem* for ensuring that the Petitioner-Developer secures occupation certificate in respect of Society's 'A' wing building. If no consequences are imposed on the Petitioner-Developer, it would conveniently not secure occupation certificate in respect of the building which is also the conduct exhibited by it for the last 14 long years. The impugned Arbitral Award is in accordance with the public policy of India as it seeks to ensure that the society's building constructed by developer has occupation certificate. Direction by Arbitral Tribunal for procurement of occupation certificate in respect of a building cannot be treated as in conflict with fundamental policy of Indian law or with most basic notions of justice. The findings recorded therein are not so perverse that the entire award is required to be annulled. The Award also does not suffer from any patent illegality. The approach adopted by the Arbitral Tribunal is such that every fair minded person would adopt the same considering the unique facts and circumstances of the case. Considering the narrow scope of interference in the Arbitral Award under Section 34 of the Arbitration Act, I am not inclined to invalidate the Award. Consequentially, no relief

deserves to be granted in favour of the Petitioner in the Arbitration Petition and the Award deserves to be confirmed.

MODIFICATIONS IN TIMELINES

127) The Arbitral Tribunal has granted time limit of six months to the Petitioner for procurement of occupation certificate in respect of 'A' wing building, failing which direction has been issued to get the 'open to sky ducts' regularised within three months. Both the periods have expired. Since the Petitioner has challenged the Award, it has not complied with the directions for procurement of occupation certificate/regularisation of 'A' wing building.

128) The interest of members of the Respondent-Society is in having occupation certificate for the building rather than recovering any monies from the Petitioner-Developer. It would therefore be appropriate to grant one opportunity to the Petitioner-Developer to secure the occupation certificate/regularisation of the building by extending the time limits stipulated by the Arbitral Tribunal. To avoid any confusion, it needs to be clarified that the termination notice dated 15 October 2015 would not come in the way of Petitioner applying to MCGM for occupation certificate/regularisation. Since this Court is fixing new timelines for procurement of occupation certificate by the Petitioner, it is also expected that MCGM also shows the necessary alacrity in processing and deciding the application(s) for regularisation and for grant of occupation certificate as overshooting the timelines would invite the drastic consequences of payment of damages.

129) Accordingly, I deem it appropriate to extend the period specified in paragraph 87(a)(ii) of the impugned Award by six more months

and which would also have the effect of extension of time in paragraph 87(e) of the impugned Award. It would be open for the Petitioner to directly go for regularisation and obtain occupation certificate for 'A' wing building within overall time limit of 9 months. The timelines are being extended in the interest of both the parties. If timelines are not extended, only the direction for payment of damages and other sums can now be executed and the main purpose of litigation would remain frustrated. Petitioner would also have an opportunity of avoiding payment of damages by getting the occupancy certificate for the building. However, the extension timeline would not impact the liability to pay interest on various sums awarded by the Arbitral Tribunal. Therefore in the event Petitioner fails to get the occupation certificate even during extended timeline fixed by this Court, the original direction for payment of interest on awarded damages of Rs.128.98 crores on expiry of 9 months from the date of the Award would continue to operate.

ORDER

130) I accordingly proceed to pass the following order:

(i) The impugned Award dated 16 August 2024 is upheld, except to the limited extent as indicated below.

(ii) The time limit specified in paragraph 87(a)(ii) of the Award shall stand extended by a period of six months from today with corresponding further extension of time of three months stipulated in paragraph 87(e) of the Award. It would be open for the Petitioner to directly opt for regularization of 'A' wing building and to procure occupation certificate in respect of the regularized building within aggregate period of 9 months.

(iii) It is however, made clear that if the Petitioner-Developer fails to secure the occupation certificate for 'A' wing building within the extended time limit, the direction in paragraph 87(h) of the impugned Award for payment of interest @ 8% shall continue to operate from the date of expiry of 9 months from the date of the Arbitral Award.

131) With the above directions, the Arbitration Petition is **disposed of** without granting any relief in favour of the Petitioner-Developer. Considering the peculiar facts and circumstances of the case, I am not inclined to award any further costs against the Petitioner.

132) In view of disposal of the Petition, nothing survives in the Interim Application and the same stands disposed of.

[SANDEEP V. MARNE, J.].