

**PLR PLRonline****2022 PLRonline 0399 (Bom.)**

Bombay High Court

Before : Justice G. S. Kulkarni

NEHRU NAGAR RATNADEEP CO.OP. HSG. SOC. LTD. – Petitioner,  
versus

S.D. BHALERAO CONSTRUCTIONS – Respondent.

Commercial Arbitration Petition No. 621 of 2021

**Arbitration and Conciliation Act, 1996, Section 9 – Developer failed to complete construction of the demolished society – Application by members of a co-operative housing society against the respondent-developer whose building was demolished in January 2015 and who are suffering from the year 2011 since they vacated their respective tenements – There was no real intention on the part of the developer to undertake the project – Though the Agreement is of the year 2010, the respondent could achieve construction of only 20% of the plinth- Respondent failed to pay the transit rent to the members of the society – In 2021 the society passed a resolution to terminate the development agreement entered with the respondent, and to remove the respondent as the developer – Intention is that the society needs now to proceed with the redevelopment project, by appointing a new developer – It cannot be, that merely because the respondent happened to be a developer of the society, whose agreement stands terminated can take a position at the peril, suffering, harassment and disadvantage of the members that too belonging to low income group and who are without a house since the year 2011, can create any hurdles for the petitioner to undertake redevelopment, by appointing a new developer – At the most respondent can interalia claim the damages from the society – a strong *prima-facie* case has been made out by the society for grant of interim measures as prayed for. The balance of convenience is also in favour of the society – If the reliefs as prayed for are not granted, it will add to the suffering of the members of the society – Receiver appointed , in case of default – Arbitration and Conciliation Act (1996), Ss.9, 17 – Civil Procedure Code, 1908, O.40 R.1 – Interim prayer granted as under:**

*“(a) pending the hearing and final disposal of the arbitration proceedings, this Hon’ble Court restrain the Respondent, or its agents, servants or any person claiming through or under it from holding itself out as the developer of the subject property or from purporting to transfer, sell, encumber or create any third party rights or interests of any nature whatsoever or in any manner in the subject property;*

*“(b) pending the hearing and final disposal of the arbitration proceedings, this Hon’ble Court direct the Respondent, or its agents, servants or any person claiming through or under it to remove all its men, materials, and construction, including any signage or fencing/ barricades, and materials at site if any from the subject property and restrain the Respondent or its agents, servants or any person claiming through or under it from entering upon or interfering with the possession of the Petitioner or its development manager or*

*their respective agents or in any manner from obstructing the Petitioner from developing the said property, in any manner what so ever;*

*(d) pending the hearing and final disposal of the arbitration proceedings, this Hon'ble Court direct the Respondent, or its agents, servants or any person claiming through or under it from obstructing or interfering with the redevelopment of the property by the Petitioner or any person appointed by it in any any manner whatsoever;*

*(e) pending the hearing and final disposal of the Petitioner and Award, the Respondent be directed to hand over all the Original documents, title, permission and all deeds and documents, receipts as regard to the said redevelopment project to the Petitioner and also direct the Respondent to provide NOC' and or no objection for appointment of another Architect, engineer, professional etc. To ensure undisturbed continuous development of the said Property;*

*Petitioner Counsel: Mr. Aakash Rebello, Ms. Sunitha Perumal, Mr. Sachin Masurkar.*

*Respondent Counsel: Mr. Vaibhav Krishna, Mr. Tahir Prande, Juris Consillis, Mr. Sanjay Bhalerao*

#### **JUDGEMENT**

*(07.07.2022) - The present proceeding is another case of a co-operative housing society having 40 members who are literally on the street. Their building being demolished in January 2015, who are at the mercy of the respondent-developer and who are suffering from the year 2011 that is since the time 39 members vacated their respective tenements.*

*2. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") whereby the petitioner/a co-operative society (for short, "the society") is before the court praying for the following interim measures pending the arbitral proceedings.:-*

*(a) pending the hearing and final disposal of the arbitration proceedings, this Hon'ble Court restrain the Respondent, or its agents, servants or any person claiming through or under it from holding itself out as the developer of the subject property or from purporting to transfer, sell, encumber or create any third party rights or interests of any nature whatsoever or in any manner in the subject property;*

*(b) pending the hearing and final disposal of the arbitration proceedings, this Hon'ble Court direct the Respondent, or its agents, servants or any person claiming through or under it to remove all its men, materials, and construction, including any signage or fencing/ barricades, and materials at site if any from the subject property and restrain the Respondent or its agents, servants or any person claiming through or under it from entering upon or interfering with the possession of the Petitioner or its development manager or their respective agents or in any manner from obstructing the Petitioner from developing the said property, in any manner what so ever;*

*(c) pending the hearing and final disposal of the arbitration proceedings, this Hon'ble Court appoint the Court Receiver with such powers under Order 40 Rule 1 of the Code of Civil Procedure, 1908 as may be necessary to remove the Respondent and all its men, materials, and construction, including any signage or fencing / barricades, from the subject property;*

*(d) pending the hearing and final disposal of the arbitration proceedings, this Hon'ble*

*Court direct the Respondent, or its agents, servants or any person claiming through or under it from obstructing or interfering with the redevelopment of the property by the Petitioner or any person appointed by it in any any manner whatsoever;*

*(e) pending the hearing and final disposal of the Petitioner and Award, the Respondent be directed to hand over all the Original documents, title, permission and all deeds and documents, receipts as regard to the said redevelopment project to the Petitioner and also direct the Respondent to provide 'NOC' and or no objection for appointment of another Architect, engineer, professional etc. To ensure undisturbed continuous development of the said Property;*

*(f) pending the hearing and final disposal of the arbitration proceedings, this Hon'ble Court direct the Respondent to pay the Petitioner and in the alternative, to deposit in this Hon'ble Court, the unpaid amounts owed and payable to the Petitioner amounting to Rs. 5,10,00,000/- as set out in Exhibit F&U.*

*(g) ad-interim reliefs in terms of prayers (a) to (e) above."*

3. The relevant facts are required to be noted:- The society is a lessee of a plot admeasuring 671.97 sq. mtrs. being Survey No. 229 and 267, CTS No.12 (pt) situated at Nehru Nagar Layout, Kurla, Mumbai. The 40 members of the society belong to the low income group and were beneficiaries of a welfare scheme of the Maharashtra Housing and Area Development Authority (MHADA) in relation to allotment of tenements in building no.60, which came to be constructed by MHADA.

4. In the year 1967, the building in question was constructed by MHADA. As the years passed by, it became old and dilapidated. The society decided that there was no alternative but to redevelop the building which is by demolishing the existing building and constructing a new building and for which a developer would be required to be appointed.

5. In or around 2009, the society decided to go for redevelopment of the property through a competent developer. It appears that at the relevant time, the respondent had undertaken redevelopment projects, in the same locality and who had ambitious plans to redevelop various buildings in the Nehru Nagar Layout, approached the society with two offer letters dated 11 July, 2010 and 26 July, 2010.

6. Eventually on 20 December, 2010 a Development Agreement came to be entered between the society and the respondent whereby the society granted development rights to the respondent to carry out development by demolishing the existing building and in its place constructing a multi storied building on the terms and conditions as set out therein. A Power of Attorney was also executed in favour of the respondent for obtaining permissions and approval under the development agreement. The respondent agreed that within 28 months of the Commencement Certificate being issued, redevelopment work would be completed and the members of the society can be re-housed in the developed premises. The development agreement also came to be registered with the Sub-Registrar of Assurances. It is significant that another development agreement of the same date i.e. 20 December, 2010 came to be executed, which is a notarized agreement, to include a clause of payment of transit rent to the members of the society.

7. By 01 May, 2011, 39 members of the society vacated their tenements and only one member i.e. Mr. Rajesh Thakur resisted to vacate his tenement. It however appears to be

an admitted position that no independent proceedings were initiated by the respondent against Mr. Rajesh Thakur and it was the society who had ultimately taken steps. Mr. Krishna, learned Counsel for the respondent would also not dispute that a remedy was available to the respondent to initiate proceedings against the only member Mr. Rajesh Thakur, who was obstructing the redevelopment, however, the respondent had not taken any steps on that regard.

8. It appears that on 30 December, 2014 an IOD was obtained. There were some disputes between the respondent and the society as the respondent expressed its inability to provide flats area of 484 sq. ft. on the ground that there was change in MHADA policy and had insisted the members to accept a lesser area of total 444 sq. ft. carpet as and by way of permanent alternate accommodation. The society even agreed for such lesser area, on the respondent giving an assurance that it will hand over possession within two years with full OC and also to pay regular rent. On such backdrop, a supplementary agreement came to be executed on 01 July, 2014 between the society and the respondent, which is also a notarized document and which was not registered.

9. It is the case of the society that the respondent paid transit rent till September 2014 and since October, 2014, the respondent had defaulted in making regular payment of the monthly transit rent for the temporary alternate accommodation to the members of the society. From October 2014 to January 2016 the respondent did not pay any rent. Thereafter from February 2016 to May 2016 (four months only) the respondent paid rent at the rate of Rs.17,000/- per month keeping arrears pending. Thereafter the respondent kept defaulting in payment of the transit rent. The total arrears of transit rent due and payable to the members of the society is to the tune of Rs.4,70,00,000/- and an amount of Rs.40 Lakhs towards corpus funds. Thus the total outstanding amount on account of transit rent as on March 2021 payable by the respondent to the members of the society aggregates to Rs.5.10 Crores.

10. It appears that it was never the clear intention on the part of the respondent to earnestly undertake the project and/or as per the terms and conditions of the development agreement, complete the project. The respondent adopted all tactics to delay the work on the project. In January 2015, the building was demolished. This was after 39 members had vacated by 01 May, 2011. Almost a year and half after the demolition of the building i.e. on 25 April, 2016, a Commencement Certificate is stated to have been obtained. By June, 2016, a farce of some construction namely a small portion of plinth was put up and admittedly since then no construction whatsoever has taken place.

11. It is the case of the petitioner that by September 2016, not only the respondent failed to progress any further with the construction work but also failed to pay the rent amounts and in fact abandoned the site. It is contended by the petitioner that not only the project in question but also some other projects of the respondent in Nehru Nagar also had come to an absolute standstill. It is also the society's case that criminal complaints and proceedings as also FIRs came to be registered against the respondent in which the respondent was arrested and thereafter released on bail.

12. On 16 November, 2019, MHADA, who is the owner of the land in question, issued an offer letter for utilizing the FSI on the adjacent plot on which no action whatsoever was

taken by the respondent. Thus the case of the society is that the respondent was not only in continuous default to make payment of the transit rent to the members but also there was no real intention on the part of the respondent to undertake the project. The society contends that the respondent was not financially incapable to complete the construction. In these circumstances, the petitioner earlier approached this Court by filing a petition under Section 9 of the Act being Commercial Arbitration Petition (L.) No. 194 of 2019 (Commercial Arbitration Petition No.405 of 2019). In such arbitration petition, on 13 August, 2019 this Court had passed the following ad-interim order:-

*“Reply affidavit be filed within two weeks from today, and a copy of the same be served on the petitioner well in advance. Rejoinder, if any, be placed on record within one week thereafter. Stand over to 3rd September, 2019.*

*2. In the meantime, learned counsel for the respondent makes statement that his clients will not create any third party rights in regard to the tenements which are stated to be allotted to the members of the petitioner, as also shall not create third party right in respect of any other premises subject matter of the project.*

*3. It is informed that though the Agreement is of the year 2010, the respondent could achieve construction of only 20% of the plinth. It is informed by learned counsel for the respondent that in one of the FIR, respondent no.2 is granted bail and in respect of other FIR, proceedings are pending.”*

13. A further order was passed by this Court (S. J. Kathawalla as his Lordship then was) on the said petition on 27 September, 2019, whereby by consent of the parties, the said proceedings were disposed of recording that the parties had agreed for appointment of a sole arbitrator to adjudicate the disputes and differences between the parties, as arisen under the development agreement dated 20 December, 2010 and the supplementary agreement dated 01 July, 2014. The order records that the Section 9 petition be considered as a Section 17 application to be adjudicated by the arbitral tribunal. The parties accordingly appeared before the arbitral tribunal which passed an interim order dated 12 December, 2020 recording its reasons in issuing the following directions:-

*“17. As such the Tribunal issues the following directions:*

*(a) That the Respondent company pay an amount of Rs. 50,000/- per member as balance arrears of rent out of the agreed figure of Rs. 5,00,000/- as lump sum figure payable till 31st March 2020. This payment be made on or before 5th January 2021 along with interest at the rate 9% p.a. till realization, which interest will begin to accrue only in the event that the amount is not being deposited on the stipulated date.*

*(b) That the Respondent company be liable to pay regular rent of Rs. 20,000/- per month per member from January 2021 till the hearing and final disposition of the hearing under Section 17 Application.”*

14. It appears that the said order passed by the learned sole arbitrator was not complied by the respondent and the respondent failed to pay the transit rent to the members of the society. Also the redevelopment/construction had not progressed an inch and was absolutely at a standstill.

15. Confronted with such situation, the members of the society having lost a roof over their heads and who were awaiting redevelopment from the year 2010, that is, when the

redevelopment agreement was entered into with the respondent, a Special General Body Meeting of the society was convened on 15 January, 2021 in which the society passed a resolution to terminate the development agreement entered with the respondent, and to remove the respondent as the developer. In a subsequent special general meeting held on 24 March, 2021, the society confirmed the action of termination to be adopted against the respondent. Accordingly, the society by its letter dated 03 April, 2021 issued to the respondent terminated the development agreement. On 29 April, 2021, again an intimation of termination was issued to the respondent by a letter of the society.

16. The society has contended that the respondent neither responded nor challenged the termination notice and in fact, has accepted the termination.

17. Eventually, in view of the development agreement itself being terminated, the arbitral proceedings, which were initiated by the society on the backdrop of the development agreement and supplementary agreement subsisting, were sought to be withdrawn by the society. Such withdrawal applications appear to be resisted by the respondent on untenable grounds. The learned sole arbitrator passed a detailed order on the withdrawal application of the society on 02 June, 2021, ultimately terminating the arbitral proceedings by such order. Some of the relevant paragraphs of the said order are required to be noted which read thus:-

*"3. Under the Development Agreement, the Respondent developer has been appointed by the Claimant for redevelopment of their Property under the Development Control Regulations (DCR) 33 (5) MHADA Policy. Admittedly the Respondent is in default of various payments that are due under the said Development Agreement for arrears of payments for temporary alternate accommodation. The Claimant has stated that they are facing a financial crunch which has been exacerbated by the defaults in payment by the Respondent.4. During the pendency of these proceedings, the Claimant had adopted a conciliatory towards the arrears of rent due from the respondent, in view of the fact that the Respondent had stated that it is in financial distress itself, and the execution of the project which is the larger goal of both parties before this Tribunal, would be prejudiced if it is enforced to comply with its contractual obligations as agreed upon by way of the said Agreements.*

*5. During the pendency of the present proceedings, the claimant had pressed for relief under Section 17 of the Arbitration Act for payment of arrears of temporary alternate accommodation, which, relief had been granted by the Tribunal by way of its Order dated 27.12.2020 granting an amount of Rs. 50.000/- per member i.e. 20 lakhs in total. However, even those directions issued by the Tribunal, which were largely arrived at after mediating a middle ground between the parties so as to balance equities, were not complied with by the Respondent by paying the amount directed. It appears that at this point, the Claimant Society had lost faith in the financial capacity of the Developer to execute the Project.*

*6. Pursuant to a direction in this regard by way of its Order dated 27.12.2020, the Claimant society held an Annual General Body meeting (AGM) dated 15.01.2021, where in it was decided that the Claimant Society will terminate the respondent under the said Development Agreements. The Claimant had by way of its Notice of Termination dated 03.04.2021 finally did in fact, terminate the Respondent developer. The said Notice of*

Termination dated 03.04.2021 is hereby taken on record of this Tribunal.

...  
10. The Respondent has argued that it is their case that the Claimants have in fact, breached the said development agreement and that the Claimant ought not to repudiate the mandate of this Tribunal prior to and adjudications on merits of the present dispute. This, argument is flawed since, the Respondent has failed to file any counter-claim for any reliefs before this tribunal even though the present proceedings have been heard at length on various occasions. In fact, even during hearing of the present withdrawal application, the Counsel on behalf of the Respondent stated that he wishes to file a counterclaim but even on the present day, no such counterclaim has been forthcoming on behalf of the Respondent. The withdrawal of the claims by the Claimant and the consequential termination of the mandate of this Tribunal, would only come in the way of the Claimant proving its own case vis-a-vis the breach of the obligations contained in the Development Agreements by the Respondent and evidence led in that regard, since, the Tribunal is only seized of that particular case. In view of the above, the Tribunal is constrained to consider that the only case before it is the one filed by Claimant.

11. The main relief sought by the claimant was performance of obligations and not one of either damages or of declaring that their termination was validly issued. The fact that now a termination has occurred, the complexion of this dispute has been substantially altered and the substratum of the dispute has been taken away. Without there being a counterclaim, the tribunal cannot direct the claimant to proceed before it when none of the relief as originally claimed by it can be granted by this tribunal in light of such termination and withdrawal of the reliefs sought by the Claimant." (emphasis supplied)

18. It is in these circumstances, the society has approached this Court for the reliefs as prayed in the present proceedings which are noted above. The intention is that the society needs now to proceed with the redevelopment project, by appointing a new developer, so that the development can be undertaken at the earliest and members of the society are rehoused in their respective redeveloped tenements.

19. The present proceedings are opposed by the respondent and in so doing, reply affidavit of Mr. Sanjay Bhalerao, Director of the respondent is filed. The affidavit of the respondent is primarily setting out the facts. The respondent has contended that there was willingness on the part of the respondent to undertake and complete the project, but one of the members of the society Mr. Rajesh Thakur was not vacating his premises. However, as noted above no proceedings were initiated by the respondent against Mr. Rajesh Thakur. The affidavit next refers to the documents as executed for development and thereafter refers to the details of permissions and approvals for the project as obtained, preparatory activities for development, some averments in regard to expenses incurred for the project and some proposals which were made by the respondent for settlement of the disputes. In paragraph 9 of the reply affidavit, it is contended that the respondent is opposing the termination of the respondent on certain issues, however, admittedly, no independent proceedings are filed so far to challenge the termination. Thus, the contention is that the respondent is ready to resolve the disputes and is willing to undertake the petitioner's project.

20. The contentions as urged on behalf of the respondent in reply affidavit are denied by the petitioner by filing a rejoinder affidavit of Mr. Chandrakant Pandurang Satam dated 30 March, 2022. In the rejoinder affidavit, the society has reiterated that the respondent failed in performing the development agreement and what has been stated by the respondent in the reply affidavit is false. It is contended that the respondent never had the intention to complete the project as per the terms of the development agreement. It is contended that the entire conduct of the respondent was writ large in as much as what could be achieved by the respondent was construction of the part plinth when the building itself was demolished on 01 May, 2014. It is contended that the respondent's submission that they have constructed the plinth is also false, for the reason that if the site is to be verified, it cannot be said that it is a plinth which is constructed. It is contended that also there are arrears of municipal taxes to be paid by the respondent. The same has been calculated to be an amount of Rs. 1 Crore. The contents of the rejoinder affidavit in so far as the conduct of the respondent are required to be noted which read thus:-

*..... However, from the site situation it could very well be seen that no such work is done. Only some small pit with a sort of piling can be seen. Annexed hereto and marked as Exhibit "A" is the recent photograph showing site situation. It is further pertinent to note that this has also gone to mislead the members that some work is going on, which is evident from the fact that this nominal construction was carried out in 2016 and from September 2016 there has been no construction at all. It is further pertinent to note that as per the offer given to the Petitioners the Respondents had agreed to construct the building within 28 months, however, until 31st March 2021 the Respondent could not even pay the premium towards the portion of the plot. The Respondents' acts and conduct clearly indicate that they were playing hide and seek and fooling around the members in the name of finalising etc. of the consent terms while the members were struggling without any moneys and the project is also at stand still since long. It is pertinent to note that the Respondents have been facing several financial issues apart from the fact that their Directors are facing criminal proceedings for allegation of misappropriation, fraud, dishonour of cheques, etc. It is further pertinent to note that one M/s. Thime Infra has also filed a criminal case u/s.138 of Negotiable Act against the Respondents. Annexed hereto and marked as Exhibit "B" is the case status of the said Criminal Case. The Respondents have undertaken other projects in the locality which are also lying incomplete. There are court proceedings in which the Respondents were directed not to interfere in the redevelopment and their Development Agreements have been terminated. The Respondents' acts and conduct clearly indicate that not only they are incapable to develop the Petitioners' property but they are totally dishonest from their acts and conduct. They are involved in mischievous acts and tactics and not interested in practical construction and completion of the development work. .... ....*

### **Submissions**

21. Mr. Rebello, learned counsel for the petitioner has made extensive submissions. He would submit that it is clear from the record that the respondent had no intention as also a financial capacity to complete the project in question. He would submit that in fact, the respondent had undertaken other projects which could not be completed by the

respondent. To support his contention, Mr. Rebello has drawn the Court's attention to an order passed by a co-ordinate bench of this Court in the proceedings filed by Nehru Nagar Satyam CHSL against the respondent being Arbitration Petition No.618 of 2017 wherein by a detailed order passed by this Court (S. J. Kathawalla, as his Lordship then was) the petitioner was granted reliefs, similar to the reliefs as prayed in the present petition. It is submitted that as far as the conduct of the respondent is concerned, which is similar in the facts of the present case, the same is subject matter of a detailed discussion in such order in the court granting reliefs on the section 9 petition, which were in the following terms:-

*"50. Accordingly, the following order is passed:*

*Pending the hearing and final disposal of the arbitration proceedings or at any time after the making of the arbitral award till it is enforced.*

*(a) The Respondents, their agents, servants, employees or any third parties claiming through them are restrained by an order of temporary injunction of this Court from entering upon, encumbering, selling, developing and /or creating any third party rights in and/ or interfering in any manner whatsoever in respect of the said property or any premises therein or any part thereof or to obstructed the development of the property by the Petitioner or by any agent of the Petitioner or Developer appointed by the Petitioner;*

*(b) The Petitioner is at liberty to act upon the termination and take such steps as it considers appropriate for development on the property including by appointing a new developer;*

*(c) As monetary claims of the Petitioner may be made in the arbitration;*

*(d) Liberty to the Petitioner to apply in case of difficulty."*

22. From the above order, it is pointed out by Mr. Rebello that the modus operandi of the respondent is to accept redevelopment projects without having any financial capacity and resources and attempt to generate funds from the very project at the prejudice and harassment to the members of the society. It is submitted that it was never the approach of the respondent to be a bonafide developer and to complete the project. It is submitted that the respondent also illegally dealt with some third parties and tried to create third party rights by receiving monies from them with which the society has no privity. It is submitted that the respondent has siphoned off huge sums money from other societies. The submission of Mr. Rebello is that the respondent appears to have indulged in mal practices by undertaking development projects in Nehru Nagar area and in other projects, also there are proceedings against the respondent including criminal proceedings in which Director of the respondent was arrested. Mr. Rebello would submit that development agreements now having stood terminated on 03 April, 2021, it is almost a period of more than one year, which has lapsed after the termination. It is his submission that it is impossible for the society to wait any longer and not take further steps to proceed with the project at the earliest and when such an attempt is sought to be made, it is being resisted by the respondent. It is submitted that the respondent in no manner whatsoever in the circumstances of the present case stall any such action being lawfully taken by the society. It is hence his submission that the reliefs as prayed for in the petitioner be granted, failing which an irreparable injury, prejudice and loss would be suffered by the petitioner.

23. On the other hand, Mr. Krishna, learned counsel for the respondent has also made

extensive submissions. The entire tenor of his submissions is to the effect that, another opportunity ought to be given to the respondent by the society so that the work can be resumed by the respondent and the project can be completed, which was the submission even on the prior occasion. It needs to be noted that on 05 July, 2022 considering such case of the respondent, this Court had passed an order directing the respondent to place on record an affidavit to support its contention that the respondent has sufficient funds to undertake the project, as also to clear the liability of the outstanding rent payable to the members of the society. It was directed that the respondent shall also state as to within what time the respondent would complete the project and in what manner. The respondent was also directed to make a disclosure of all its assets.

24. In pursuance of such order, the respondent has placed on record an additional affidavit of Mr. Sanjay Bhalerao in purported compliance of the orders passed by this Court. As Mr. Krishna's submissions revolve on such affidavit, the contents of the said affidavit are required to be noted. The affidavit states as to how the respondent would make an effort to retrieve the situation and the manner in which the project can be revived. Accordingly, the affidavit has incorporated a heading setting out such scheme namely "Amalgamation of Welfare Centre Plot" for the purpose of construction of basement/pit parking/tower parking plus stilt/ground plus 17 upper residential floors. It states that the construction upto 12th floor shall accommodate 40 tenements to be allotted to the members of the society and the construction of 12 floors can be completed within 30 months from the date of revised Commencement Certificate and possession shall be handed over to the 40 tenements with part Occupation Certificate. The revised area of the tenement upto 12th floor would be offered as per RERA to the members of the society. There is a separate heading in the affidavit of "Permissions and approvals", which are stated to be granted to the respondent. In regard to the payment of arrears of rent, there are some assurances which are based on the proposed sale of the commercial area in the project and not by finance. Apart from other headings, referring to the arrangement of the funds, the total cost of project is stated to be 58 Crores. It is stated that the money which can be generated by the project is about 67.54 Crores. It is stated that the initial payment required for the project i.e. Rs. 4.50 Crores would be self-funded by the respondent and that too by arranging some funds in respect of which it is stated that the respondent has entered into a Memorandum of Understanding dated 01 June, 2022 with one Mitali Enterprises, a reputed entity engaged in financing and broking business, and the first tranche of payment is stated, would be disbursed on 15 July, 2022. It is stated that Rs. 4.50 Crores would be utilized for mobilization of work at site etc. It is stated in paragraph (K) as to how the project would be completed.

25. Mr. Krishna submits that the respondent is ready and willing to proceed with the project in the manner as set out in the reply affidavit as also in the additional affidavit. It is his contention that although immediately no finances are available with the respondent, however, all arrangements can be made as set out in the additional affidavit. Mr. Krishna has fairly conceded that termination of the development agreement was not assailed by his client and no proceedings whatsoever are initiated in that regard. It is submitted that considering the pleas in the reply affidavit, additional affidavit, no reliefs be granted to the petitioner and on the contrary, the respondent be permitted to proceed with the project.

## Analysis & Conclusion

26. I have heard learned counsel for the parties at length and with their assistance, I have gone through the documents on record as noted above.

27. In my opinion, the present case appears to be a gross case where the respondent has totally failed to comply with its obligations under the development agreement dated 20 December, 2010. It is immensely disheartening that the building which was constructed in the year 1967 and which was vacated on 1 May 2011 by 39 members and subsequently demolished in January 2015, dis-housing 40 members of the society, belonging to low income group, is yet to see even laying of a plinth. The members of the society are being made to suffer for no fault of theirs. Admittedly, as per the development agreement, Commencement Certificate was required to be obtained at the earliest and steps for demolition were required to be taken for which it appears that 39 members, except one member, had vacated their tenements as on 1 May 2011 that is about 11 years back. Nothing has been pointed out on behalf of the respondent that at any point the members created any hurdle in vacating the premises and obstructed the redevelopment in any manner whatsoever. It appears that the respondent was too ambitious and had undertaken several projects in the locality and could not do justice to any of the projects, as clear from the order passed by this Court in case of another society i.e. Nehru Nagar Satyam CHSL [Arbitration Petition No.618 of 2017 (supra)].

28. Admittedly, after the society's building was demolished in the year 2015, what has been undertaken by the respondent is a farce of part construction of a plinth. In my opinion, this is a clear case that the respondent has taken things for granted and in fact has taken the society to a ride having miserably failed to comply with its obligations under the Development Agreement. It also appears that the respondent has no financial capacity to undertake the project and *prima facie* it appears that despite several opportunities being made available by the society to the respondent, the respondent could not improve its position under the [contract](#), leading to the ultimate termination of the contract on 03 April, 2021. Such a termination has also been accepted by the respondent and not assailed by the respondent. It cannot be, that merely because the respondent happened to be a developer of the society, whose agreement stands terminated can take a position at the peril, suffering, harassment and disadvantage of 40 members that too belonging to low income group and who are without a house since the year 2011, can create any hurdles for the petitioner to undertake redevelopment, by appointing a new developer. At the most, the effect of the termination, if at all can be that, the respondent can inter alia claim the damages from the society, which shall be subject to all contentions of the society on the breach of the terms and conditions of the development agreement and the sufferings which were meted out to the members of the society on several counts including on non-payment of the transit rent. Such contentions are although not the scope of the present proceedings and may be in the context of any claim for damages which may be put up by the respondent if so aggrieved by the termination.

29. The present case is akin to the case of *Borivali Rajesh Co-op. Hsg. Soc. Ltd. v. Kamla Homes & Lifestyles Pvt. Ltd. & Ors.* 2022 SCC OnLine Bom 940 which had fell for consideration of this Court where similar was the plight of 64 members of the society who

were without roof over their heads and who were anxiously awaiting redevelopment of their building since the year 2010, and in a similar situation wherein nothing had moved for the redevelopment to commence. In such context, the Court had observed that it is not an easy situation for the member of the society to remain homeless and that too in a city like Mumbai, in which it is extremely difficult to find out even the temporary alternate accommodation, except at a huge cost, inconvenience and human suffering. It was observed that the members of the society do not suffer alone. They suffer along with their family members which may comprise of ailing persons, women and children. It was observed that for the developer it is purely a commercial interest and business propositions, however, on the other hand, there are human elements involved and the fundamental interest of the members of the society namely for a shelter being the very livelihood of the members of the society. It would be apposite to refer to the following observations of this Court:-

*“16. Considering the facts and circumstances of the present case, the Court cannot be unmindful of the interest of 64 members of the society who are without roof over their heads and who are anxiously awaiting redevelopment of their building since the year 2010. Miserably, for almost 12 years nothing has moved for the petitioners for the redevelopment to commence. It is not at all an easy situation for the members of a society to remain homeless and that too in a city like Mumbai, in which it is extremely difficult to find out even the temporary alternate premises, except at a huge cost, inconvenience and human suffering. The members of the society do not suffer alone. They suffer along with their family members which may comprise of senior citizens, ailing persons, women and children. In my opinion, this is a classic case where respondent Nos.1 to 4 appear to be concerned only of their commercial interest and their business propositions. On the other hand, there are fundamental interest of the members of the society namely for a shelter, which is the very livelihood of the members of the society. In a recent decision of a Division Bench of this Court in High Court on its own motion (in the matter of Jilani Building at Bhiwandi) Versus Bhiwandi Nizampur Municipal Corporation & Ors. reported in 2022 SCC OnLine Bom 386, the Division Bench has held that the right to live in a safe building is a part of the fundamental right of the citizens under Article 21 of the Constitution. Respondent No.1 at the inception could have had a strong commercial interest, however, respondent No.1 could have never been oblivious of the helpless condition of the members of the petitioner society and their urgent requirement to have their legitimate entitlement to the redeveloped premises. In a contract where such basic human needs and requirements are concerned and that too of such large number of persons, the commercial interest of the developer is saddled with an onerous obligation to recognize that what is paramount to such contract is dependency of the society on the developer to satisfy the housing requirement for its members. Thus a human sensitivity in handling these projects with utmost expediency and to rise to such human needs and expectations by maintaining an impeccable transparency and fairness in executing such contracts, is the need. In contracts of such nature any breach on the part of the developer would be fatal to the collective interest of the members of the society. This would not however mean that the members of the society or the society itself ought not to cooperate. Both these wheels on which the*

*contract is founded, are required to work in tandem and by adopting all norms of fairness in such commercial venture so as to create a win-win situation, for all the stake holders. The developer would ever be remembered for his good work. There cannot be a better satisfaction to him."*

30. In the above circumstances, in so far as the present proceedings are concerned, a strong *prima-facie* case has been made out by the society for grant of interim measures as prayed for. The balance of convenience is also in favour of the society. If the reliefs as prayed for are not granted, it will add to the suffering of the members of the society. For such reasons, I am inclined to grant reliefs to the petitioner in terms of prayer clauses (a), (b), (d) and (e).

31. In the event the directions of the Court in terms of prayer clause (b) are not complied by the respondent within a period of two weeks from the date a copy of the order is available to the parties, the Court Receiver, High Court, Bombay shall stand appointed with all powers under Order 40 Rule 1 of the Code of Civil Procedure, 1908 to take action for the compliance of the reliefs as granted in terms of prayer clause (b). In case of such requirement, the petitioner to deposit with the Office of the Court Receiver an amount of Rs.50,000/- as and by way of his fees, charges etc. For such purpose, the Court Receiver is permitted to seek police help from the appropriate police station. Ordered accordingly.

32. The petition is accordingly disposed of. No costs.
33. The parties to act on an authenticated copy of this order.
34. At this stage, Mr. Krishna, learned counsel for the respondent prays for stay of this order. In the facts of the present case, the request is rejected.