
(2013) 06 BOM CK 0063

In the Bombay High Court

Case No : Notice of Motion No. 1393 of 2012 in Suit No. 762 of 2012

Gopi Gorwani

APPELLANT

Vs

Ideal Co-operative Housing Society Limited and Others

RESPONDENT

Date of Decision : 10-06-2013

Acts Referred:

Citation : (2013) 4 ABR 845 : AIR 2013 Bom 133 : (2014) 1 ALLMR 27

Hon'ble Judges : S.J. Kathawalla, J

Bench : Single Bench

Advocate : Pradeep Sancheti, along with Mr. R. Shah and Ms. Rita Yadav, instructed by M/s. Raval Shah and Co, for the Appellant; Sanjay Jain along with Mr. Tushar Goradia, Deepesh Mani and Ms. Sejal Shah, instructed by M/s. JJ Associates, for Defendant No. 1 and Mr. P.G. Lad, AGP, for Defendant Nos. 3 and 4, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Kathawalla, J.—By the above suit, the Plaintiff has sought a declaration that there is a subsisting lawful and binding contract between the Plaintiff and Defendant No. 1 for redevelopment of the building situated at Juhu Circle, Gulmohar Road, Juhu Scheme, Mumbai ("the suit property"), under the management of the Defendant No. 1 and that the Plaintiff is entitled to specific performance of the said contract based on the Expression of Interest, being Exhibit-C annexed to the Plaint. The Plaintiff has also sought an order and direction against Defendant No. 1 through their Office-bearers to execute a Development Agreement and pass appropriate Resolutions approving the revised plan (being Exhibit-P to the Plaint) submitted by the Plaintiff to Defendant No. 1 on 20th December 2010. In the alternative, the Plaintiff has sought damages in the sum of Rs. 15 crores as per particulars of claim, being Exhibit-U to the Plaint. The Plaintiff has also taken out the above Notice of Motion for appointment of a Court Receiver in respect of the suit property and for an injunction against the Defendants from initiating or continuing any fresh tender process to invite bids from other developers/builders, or grant any approval/permissions or sanctions

for the same.

2. The Plaintiff is an individual carrying on business as a builder and developer in the name of his sole proprietary concern M/s. Gorwani Builders. Defendant No. 1 is a Society formed under the Maharashtra Co-operative Societies Act, 1960, Defendant No. 2 is the Municipal Corporation of Greater Mumbai, Defendant No. 3 is the Maharashtra Housing and Area Development Authority ("MHADA") and Defendant No. 4 is the Deputy Registrar of Cooperative Housing Societies.

3. Defendant No. 1 Society was interested in redevelopment of the suit property. The process for selection of the builder for redevelopment adopted by Defendant No. 1 consisted of issuance of a document titled "Expression of Interest" ("EOI"). In the said EOI, Defendant No. 1 had set out its objectives, information and quotations solicited from builders. The said document was provided to Builders willing to bid. The Plaintiff submitted the EOI on 26th June 2009. Defendant No. 1 had clarified on page 42 of the EOI that the EOI contained only some of the "basic conditions" and the Society was willing to negotiate with the shortlisted developer regarding "Expressions by Developer" and the "expectations of the Society". Thus it was made clear that the Society was inviting interested persons to express what they can offer against the tentative expectations set out by the Society in the EOI, and thereafter the Society would negotiate with the shortlisted developer to carry the matter further. Clauses 37, 38 and 39 of the EOI clarify the procedure contemplated, viz. that the Developers shall be shortlisted first, after which negotiations would take place with the shortlisted developers and thereafter a Memorandum of Understanding (MoU) would be executed with the selected Developer. The Development Agreement with the Developer was contemplated at a later stage.

4. In the General Body Meeting of the Defendant No. 1 Society held on 7th March 2010, the members gave their consent for selection and appointment of the Plaintiff. In the minutes, though it is recorded that the contract was awarded to the Plaintiff, it does not appear that the terms and conditions of the EOI, either as expected by the Society or as expressed by the Plaintiff, were in any manner approved or disapproved by the General Body. After the decision of selecting the Plaintiff and awarding the contract to the Plaintiff was taken, there was a series of correspondence between the parties on several issues pertaining to the redevelopment work on the suit property including the plans required to be sanctioned by Defendant Nos. 2 and 3. However neither the MoU nor the Development Agreement came to be executed between the parties, which resulted in the aforesaid Suit being filed by the Plaintiff for the reliefs set out in paragraph 1 hereinabove.

5. Though the Plaintiff was selected as a Developer and it was agreed to award the contract to him, the first and the most relevant issue raised by Defendant No. 1 is that no agreement was arrived at and executed between the Plaintiff and Defendant No. 1.

6. As against this, the Plaintiff has contended that there exists an established and concluded contract between the Plaintiff and Defendant No. 1 whereunder the Defendant No. 1 has agreed to get the redevelopment work of the suit property done through the Plaintiff. In support of this contention, it is submitted on behalf of the Plaintiff that on 7th March, 2010, a Special General Body Meeting (SGBM) was held by Defendant No. 1 in the presence of 22 members, a Special Duty Officer from the Office of the Deputy Registrar of Cooperative Housing Societies (Defendant No. 4) and two invitees along with the Architect. In the said meeting, 20 members were found eligible to vote and all 20 members have voted in favour of the Plaintiff, thereby selecting the Plaintiff and awarding the contract to him for redevelopment of the suit property. It is submitted that, in fact, on 18th March 2010, Defendant No. 4 has recorded that the meeting was held on 7th March, 2010. As per the circular issued by the State (Page 58 of the Affidavit-in-reply), a Resolution was passed on the offer made by the Plaintiff. Thereafter, the Plaintiff has deposited a sum of Rs. 50 lakh with the Defendant No. 1 vide letter dated 20th April, 2010, with a request that the Pay Order be encashed by the Society upon its approval, and the same has been encashed by Defendant No. 1. It is submitted that Defendant No. 1, vide its letter dated 6th May, 2010, acknowledged the payment of Rs. 50 lakh and also stated "We hereby request you to go ahead with the redevelopment work of our society building". It is submitted on behalf of the Plaintiff that only the formal execution of the Development Agreement was to be completed between the parties and therefore the Plaintiff's contention that there is no agreement between the Plaintiff and Defendant No. 1 qua the redevelopment of the suit property, is untenable, baseless and needs to be rejected.

7. With the assistance of the learned Advocates appearing for the parties, I have gone through the Minutes of the General Body Meeting of the Defendant No. 1 Society, held on 7th March, 2010, and the entire correspondence exchanged between the parties thereafter. As submitted by the Plaintiff and also as recorded hereinabove, though the said Minutes of the General Body meeting dated 7th March, 2010, records that the Plaintiff is selected and the contract of redevelopment is awarded to him, the Resolution passed at the said Meeting does not, in any manner, approve or disapprove of the terms and conditions of the EOI, either as expected by the Society or as expressed by the Plaintiff. Again, on the very same day i.e. 7th March, 2010, the Plaintiff has given a declaration (Page 106 of the Complaint) inter alia, stating as under:

We will execute a separate agreement with Society and with individual members at our cost which is to be approved by the Society's Solicitors and on the basis of Society's EOI condition, our financial commitments, our offers given in separate letters and the offers stated in our presentation dated 7-3-2010 in the Special General Body Meeting.

All these things will be part and parcel of Agreements to be signed between the Society and the Developer.

Therefore, admittedly even according to the Plaintiff, the terms and conditions of the contract were not only to be on the basis of the EOI conditions (of which specific performance is sought in the present Suit) but were also to be based on financial commitments, the offers purportedly given by the Plaintiff in separate letters and the offers stated in its presentation on 7th March, 2010, i.e. much after its offer was given to Defendant No. 1 in the EOI document.

8. According to the Plaintiff, separate Agreements would be executed with the Society and individual members and the same were subject to approval by the Solicitors of Defendant No. 1. In any event, there is no averment in the plaint that any such separate agreement was approved by the Solicitors of the Society. In fact, though the Plaintiff has, by a letter dated 9th March, 2010 (Page 145 of the Plaint), stated that it shall shortly forward a draft of the Development Agreement, no such draft has been attached by the Plaintiff in the proceedings. Again, by a letter dated 20th April, 2010, the Plaintiff has recorded that there was a further Agreement as narrated therein, and sought approval and confirmation by the General Body of the Defendant No. 1 Society. However, no such approval/confirmation of the first Defendant Society to the said further agreement is on record. In fact, it is submitted on behalf of the Plaintiff that the so-called "agreed terms" were never confirmed by the Society. The Society by its letter dated 6th May, 2010, has confirmed that in the Special General Body Meeting held on 7th March, 2010, the Plaintiff has been selected and appointed as Developer for redevelopment of the Society's building at JVPD Scheme, Mumbai-49. The Society has confirmed having received Rs. 50 lakh from the Plaintiff and has requested him to go ahead with the redevelopment work of the Society building and has stated that the points mentioned in the letter of the Plaintiff dated 20th April, 2010, will be discussed in the Special General Body meeting. Though a Special General Body Meeting of the first Defendant was held on 23rd June, 2010, there was no discussion on the issue of "further Agreement" and the only discussion pertained to the sharing of additional FSI and revision of the draft Agreement for the purpose of incorporating the issue pertaining to sharing of the additional FSI.

9. The Plaintiff, by his letter dated 12th July, 2010, inter alia recorded that it was the responsibility of the Society to ensure that all its members sign the Development Agreement which, as the first Defendant has correctly pointed out, was never a term earlier agreed upon between the parties.

10. As can be seen from the letter dated 22nd July, 2010 (Page 109-Z of the Plaint), addressed by the Plaintiff to the Defendant No. 1 Society, the Plaintiff forwarded plans for an entire residential building. It was a stringent condition in the EOI that there would be only 24 residential premises for the 24 tenants and no more residential premises, which the Plaintiff had accepted. However, since the Development Agreement, containing the final terms and conditions, was yet to be finalised, it appears that the Plaintiff kept on making offers, counter offers and suggestions to the Defendant No. 1 Society, though these offers/suggestions

were contrary to the express agreement in the EOI that the redeveloped building shall contain only 24 residential premises. Defendant No. 1, by its letter dated 11th August, 2010, inter alia, recorded that the plans submitted by the Plaintiff for approval of the Society were not according to the plans explained by the Plaintiff earlier. Defendant No. 1 therefore suggested that the Plaintiff should stick to the earlier plan and proceed with the reconstruction by submitting the same to the BMC authorities for their approval. Defendant No. 1 also recorded that it expected the Plaintiff to take necessary steps towards finalising the contract and commencement of work as early as possible. It is pertinent to note that there is no letter from the Plaintiff, in response to the said letter dated 11th August, 2010, from the Defendant No. 1 Society, agreeing to finalise the contract.

11. The Plaintiff, by his letter dated 13th August, 2010, again purported to make suggestions about 2.5 FSI, despite being categorically told to stick to the earlier plan. The Plaintiff again offered to construct a purely residential building. The Plaintiff also proposed to change the manner of providing and calculating the 900 sq. ft. (carpet area) of each flat to be provided to each member of the Society. The Plaintiff, by his letter dated 4th September, 2010, now stated that one of the prerequisites for development was a clear title for all the flats and therefore the dispute qua Flat No. 3 should be resolved before execution of the Development Agreement.

12. Since the Plaintiff failed to finalise and crystalised the terms and conditions which could be placed before the General Body of the Society, the Defendant No. 1 Society by its letter dated 7th October, 2010 (Page 112 to the Plaint), addressed to the Plaintiff, pointed out that the offers and suggestions made by the Plaintiff were not acceptable to the Society. The Defendant No. 1 Society also pointed out that the Plaintiff was repeatedly making fresh and inconsistent offers, and that the Society had selected the Plaintiff and reposed its faith and trust in the Plaintiff, however the Plaintiff had committed breach of such faith and trust. The Defendant No. 1 Society noted in the letter dated 7th October, 2010, that the Plaintiff paid the security deposit after much delay, the process of finalising the Draft Agreement had been delayed, that any change in any EOI expectation of the Society was not acceptable to the Society and that the Plaintiff had even deleted certain facilities offered in the EOI; therefore, the Society and its members had lost faith in the Plaintiff. The Plaintiff, by his letter dated 15th October, 2010, contended that the Society was racking up nonexistent issues which were creating unnecessary obstructions in the process and "it is only now in your letter dated 7th October, 2010 that you have clearly stated that the Society would not like to accommodate any additional residential units beyond the existing members residential flats". The Plaintiff has however, failed to explain that admittedly, despite one of the basic conditions/expectations in the EOI being that no residential units beyond the existing members residential flats would be constructed in the residential building, the Plaintiff kept insisting on suggestions to the contrary, thereby delaying the entire process. In fact, the Plaintiff, by his letter dated 25th October, 2010 (Page 114-F of the Plaint), again

suggested (according to Defendant No. 1, with a view to scare the members of the Society) that FSI may not be available from MHADA and that the same was likely to get exhausted early, on the basis of the demand for the incentive FSI. The Plaintiff proposed that the parties keep their options open and try "testing waters" i.e. take a chance by submitting plans for 2.5 FSI. The Plaintiff suggested that the parties meet, discuss and negotiate. The Plaintiff, again, by his letter dated 30th October, 2010, reiterated the urgency and recorded that failure to do so would be detrimental to the interest of both the parties, regarding benefits of the incentive FSI. When the time came for submission of the plans ("testing the waters"), viz. when the proposal was being placed before the General Body of the Society to be held on 9th January, 2011, the Plaintiff, by his letter dated 6th January, 2011 (at page 124-A of the Complaint), stated that the "Memorandum of Agreed Terms" (MOAT) should be executed before proceeding further. The Defendant, vide its letter dated 7th January, 2011 (Page 124-B of the Complaint), pointed out that this was never discussed, to which the Plaintiff vide his letter dated 15th January, 2011 (Page 125-P of the Complaint), stated that the Plaintiff was not willing to proceed further without any agreement in place. According to the Defendant No. 1, even the MOAT contained conditions which were never agreed to by the parties. The subsequent correspondence rested with the letter dated 4th March, 2011 (Page 126 of the Complaint) of the Society, whereby the Plaintiff again insisted upon entering into an Agreement before anything further was done. Thereafter, there was no correspondence between the parties and the discussions, negotiations and consultations were put on hold. It is only when the Plaintiff learnt that the Defendant No. 1 Society was contemplating starting the process afresh for inviting offers, did the Plaintiff address a letter to Defendant No. 1 dated 28th September, 2011 (Page 130-A of the Complaint). The Society, by its letter dated 17th October, 2011 (Page 133 of the Complaint), immediately pointed out that the parties had not entered into any other Agreement or any other legally binding contract and in case the Plaintiff was insistent on the existence of such an Agreement, the Plaintiff was requested to provide a copy of the same. The Plaintiff did not respond to the said letter nor did he provide any such Agreement.

13. From the aforesaid facts it is clear beyond any doubt that though Defendant No. 1 has, in its minutes dated 7th March, 2010, selected the Plaintiff as the Developer and stated that the contract of redevelopment has been awarded to the Plaintiff and in a subsequent letter, asked the Plaintiff to proceed with the redevelopment work, the terms and conditions between the parties were never finalised. In the absence of such terms and conditions, a mere statement that a contract is awarded to the Plaintiff or that the Plaintiff should proceed with the redevelopment work does not entitle the Plaintiff to contend that there is an established and concluded contract between the parties. For a contract to be in existence, it is mandatory that the terms and conditions on which the contract is based are finalised between the parties. In the absence of any terms and conditions, the Defendant No. 1 is correct in its submission that there exists no

valid and binding agreement between the parties. If there existed a valid and binding agreement between the parties based on or in the form of EOI, the Plaintiff would not have repeatedly made fresh suggestions which would defeat some of the basic conditions spelt out in the EOI, like changing the entire plan to suggest a purely residential building despite a categorical condition in the EOI that the new building will have only 24 residential flats for 24 members and no more. Again, if the EOI contained the agreed final terms and conditions approved by the first Defendant Society, the Plaintiff would have surely pointed out this fact and objected to the statement of the Defendant No. 1 in its letter dated 11th August, 2010, that it expected the Plaintiff to take necessary steps towards finalising the contract and commence work as early as possible, which the Plaintiff did not do. Therefore, I am prima facie satisfied that there is no established and concluded contract between the Plaintiff and Defendant No. 1, based on the EOI, being Exhibit "C" to the Plaintiff.

14. Though the Plaintiff has, in the suit, sought specific performance based on the EOI (Exhibit "C" to the Plaintiff), the Plaintiff, has in his declaration dated 7th March, 2010, clearly declared as follows:

We will execute a separate agreement with Society and with individual members at our cost which is to be approved by the Society's Solicitors and on the basis of Society's EOI conditions, our financial commitments, our offers given in separate letters and the offers stated in our presentation dated 7/03/2010 in the special general body meeting.

Not only was there no Agreement executed with or without the Solicitors' approval but also, the declaration provides that the Agreement is to be prepared not only based on the EOI but also on the basis of financial commitments, offers given in separate letters and the offers stated in their presentation dated 7th March, 2010, in the Special General Body Meeting. The Plaintiff has in the suit, not sought specific performance based on financial commitments or on offers given in separate letters or on the offers stated in his presentation dated 7th March, 2010, in the Special General Body Meeting, and therefore on this ground alone, the Plaintiff is not entitled to any relief/s.

15. It is next submitted on behalf of Defendant No. 1 that assuming without admitting that the EOI constituted the basis of an alleged agreement, the Plaintiff has, by failing to abide by the same and insisting on new conditions, deviated from and in fact violated the same, thereby dis-entitling himself from seeking specific performance of such alleged agreement, since he was not ready and willing to abide by such an alleged agreement at all times. The Defendant No. 1 has also submitted a chart showing such deviations from the terms, insistence on additional terms and violation of the terms and conditions by the Plaintiff.

16. It is submitted on behalf of the Plaintiff that the comparison by the Defendants in their written submissions between the EOI documents and the offers made by the Plaintiff in response to the said EOI, is completely

misconceived.

17. It is true that Defendant No. 1 has repeatedly mentioned in the EOI that there will be only 24 residential members i.e. the existing members and therefore there shall not be more than 24 residential tenements. The relevant clauses from the EOI are reproduced hereunder:

"The Society do not want any new Residential member/members. There will be only 24 residential members (i.e. existing 24 members)". (Page 41 of the Complaint)

"No additional residential members will be allowed"

(Page 45 of the Complaint)

"No additional residential member will be allowed. There shall be only 24 residential tenements i.e. to re-accommodate existing members". (Page 80 of the Complaint).

In response to the above expectation of the Society, the Plaintiff responded as follows:

It is confirmed that no additional residential member will be allowed

In fact, in the EOI (Page 83 of the Complaint), the expectation of the Society is set out as follows:

The Developer is expected to know all rules and regulations governing the development of our plot and building.... The Developer is supposed to be confident enough to start and complete the project within 18 months (18 months from the time of vacating existing building)

In response, the Plaintiff has responded as follows:

The project will be completed within the time frame of 18 months

Though the Plaintiff was aware at the very outset that the first Defendant was very clear on its requirement of only 24 residential tenements, to which the Plaintiff has expressly consented and the Plaintiff despite having agreed that he has knowledge of all the Rules and Regulations governing the development of the suit property and building, vide his letter dated 22nd July, 2010 (Page 109-Z of the Complaint), proposed a new conceptual plan that the entire construction should be purely residential, as under:

As stated below in new conceptual plan in 2 FSI, we shall propose ground floor showroom, basement commercial, 1st floor parking podium, 2nd floor E-level parking and upper floors residential i.e. from 3rd floor to 10th floor for existing members. The top most floor i.e. 11th floor is for free sale area of developers for residential purposes.

18. Defendant No. 1 immediately, vide its letter dated 11th August, 2010, addressed to the Plaintiff, recorded that the plans now submitted by the Plaintiff

for approval of the Society are not according to the plans explained by the Plaintiff earlier. By the said letter, Defendant No. 1 suggested to the Plaintiff that it is necessary that they stick to the earlier plan and proceed with the reconstruction by submitting the plans of the same to the BMC authorities for their approval. Defendant No. 1 further recorded that the Plaintiff will act accordingly and take necessary steps towards finalization of the contract and commencement of work as early as possible, preferably before the ensuing Dussehra festival.

19. Despite the letter dated 11th August, 2010, written by the first Defendant to the Plaintiff, the Plaintiff, by his letter dated 13th August, 2010, once again recorded that the following was inter alia, discussed:

Our new conceptual plan for 2.5 FSI would be as follows:

The entire building planned and constructed as purely residential only ground floor stilt parking, podium level car parking, 2nd floor to 9th floors members flats, 10th floor society's free sale share of 0.5 additional FSI (40 %) and 10th to 14th floors for developers free sale flats.

The Plaintiff also pointed out that the purely residential plan has various advantages, besides higher valuations.

20. The Plaintiff, by his letter dated 4th September, 2010 (Page 111-C of the Plaint), addressed to the first Defendant recorded inter alia:

Further to our option for entire residential building due to various factors as stated in our letter dated 13th Aug. 2010, and we are still awaiting the final decision of the Society in the said matter.

21. The first Defendant, by its letter dated 7th October, 2010, addressed to the Plaintiff recorded inter alia, that by keeping faith and trust in the representations made by the Plaintiff, the Society had selected the Plaintiff as the developer/builder for Society's redevelopment project. However, the Plaintiff has been deviating from the terms agreed, and recorded that the proposal of the Plaintiff for construction of only residential building instead of both commercial and residential, as mentioned in the Plaintiff's letter dated 13th August, 2010, is not acceptable to the Society, as it violates the prime condition in the EOI.

22. In response to the Society's assertion that the building cannot be constructed entirely for residential use, the Plaintiff took an incorrect stand as follows:

1. It appears that the Society is unnecessarily racking up non existent issues which are unnecessarily creating an obstruction in the smooth process of the redevelopment of the property

4..... It is only now that in your letter dated 7.10.2010 that you have clearly stated that the Society would not like to accommodate any additional residential units beyond the existing members residential flats.

6.we are proceeding strictly on the basis of EOI.

From the aforesaid facts it is clear that despite specific conditions contained in the EOI viz. that only 24 residential tenements shall be constructed in the redeveloped building, the Plaintiff who claims to know all the Rules and Regulations governing the development of the suit plot and building and having expressly agreed to the same, carried on protracted correspondence suggesting that instead of the residential tenements as agreed, Defendant No. 1 should now agree/approve an entire residential building. The Plaintiff pursued the suggestion despite Defendant No. 1, as set out hereinabove, by its letter dated 11th August, 2010, requested the Plaintiff to stick to the earlier plans and take steps towards "finalization of the contract". The conduct of the Plaintiff is a pointer to the fact that under the garb of making suggestions, the Plaintiff was not ready and willing to abide by the so-called agreed terms thereby causing delay in executing the redevelopment project.

23. In clause 4 at page 84 of the EOI, the Society has set out the requirement qua the minimum carpet area to be provided by the Plaintiff to the existing occupants of the residential tenements i.e. a minimum of 900 sq. ft. of tiled carpet area. In response, the Plaintiff has confirmed that 900 sq. ft. carpet area will be provided to each flat and it shall be purely wall to wall. Concessions, such as flower beds and ducts, shall be provided separately. In clause 33 at page 87 of the EOI, the Society has stated that the Plaintiff shall provide additional permissible facilities in addition to the 900 sq. ft. carpet area such as dry balcony, adjoining kitchen, niches, flower beds etc. In response, the Plaintiff has clarified that maximum possible attemptable concessions will be provided as per BMC Rules and Regulations. However, in the several plans proposed by the Plaintiff, the common amenities and facilities as promised, were not shown. In fact, it appears from the Plaintiff's letter dated 13th August, 2010 (Pages 110-111 of the Complaint), that the Plaintiff is counting niches in the carpet area of 900 sq. ft. though initially he had proposed to provide the same over and above 900 sq. ft. carpet area. This is a clear violation by the Plaintiff of the terms of the EOI.

24. In Clause 38 (Page 89 of the EOI), the Society has stated that the TDR should be bought and transferred by the Developer after shortlisting and selection of the Developer, by the Society. The Developer must submit proof of the same along with his plans and drawings of the expected building structure. In response, the Plaintiff has agreed by stating "will be provided". However, subsequently, the Plaintiff by his letter dated 29th July, 2009 (Page 100 of the Complaint), stated that once the plans are approved by the Society members, the TDR shall be loaded instantaneously for obtaining the sanctioned plans from the concerned authority. This is again a clear deviation violation by the Plaintiff qua bringing and transferring of TDR to the Society as per terms of the EOI.

25. Clause 39 (Page 89 of the EOI) pertains to security deposit. In that clause the Society provided as follows:

After short listing and selection, the concerned developer will have to pay Rs. 50,00,000/- (Rupees Fifty lakhs only) to the Society as "Security Deposit" (i.e. before issuing M.O.U.). This amount is to be paid in the name of "the Secretary, Ideal Apartments Co-op. Housing Society Ltd.", via DD of any nationalized or prime Bank, payable in Mumbai.

If the developer fails to submit the Security Deposit his name will not be considered for issue of M.O.U.

The Security Deposit of Rs. 50,00,000/- (Rupees Fifty lakhs only) will be returned to the developer after expiry of defects liability period of one year....

26. Clause 42 of the EOI (Page 90 of the Complaint) pertains to the Bank Guarantee to be provided by the Plaintiff to the first Defendant Society. The said clause reads as under:

The Bank Guarantee will be 10% of the total costs of the project or minimum of Rs. 3 crore (Rs. Three crore only), (whichever is more). On receipt of M.O.U. the selected Developer will have to produce the Bank Guarantee of Rs. 3 crore within 8 days...

27. In response to clause 39 pertaining to the Security Deposit, the Plaintiff recorded in the EOI as under:

Either a Security deposit or a Bank Guarantee will be provided because the Bank Guarantee covers up all risks involved which is the only market protocol.

28. In response to clause 42 of the EOI pertaining to Bank Guarantee, the Plaintiff responded as under:

Bank Guarantee will be provided covering the extent of costs of construction of member existing flats which will be ascertained with the Solicitor.

Total Bank Guarantee: Rs. 3 Cr. (in figures) Rs. Three Crores only.

With regard to the security deposit of Rs. 50 lakh agreed to be given by the Plaintiff as security deposit or by way of a Bank Guarantee vide Clause 39 of the EOI and a Bank Guarantee for a minimum amount of Rs. 3 crore vide Clause 42 of the EOI, the Plaintiff by his letter dated 30th April, 2010, alleged that it was agreed that:

Out of the Bank Guarantee of Rs. 3,00,00,000/- an amount of Rs. 50,00,000/- would be deposited by us with the Society. On obtaining Occupation Certificate of the new building you shall return 45,00,000/- without any deduction whatsoever and the balance Rs. 5,00,000/- shall be retained by you towards one year defects liability period. The balance Rs. 2,50,000/- shall be provided by us as reducing performance Bank Guarantee to the Society. Accordingly we are enclosing a Pay order for Rs. 50,00,000/- drawn on Kotak Mahindra Bank Bandra Branch to lie as deposit with the Society.

The Plaintiff further recorded that only on approval by the General Body of the

Society, would the amount of Rs. 50 lakh given towards security deposit be credited. Apart from the fact that Defendant No. 1 has contended that there was no such agreement as alleged and the EOI did not provide for depositing of Rs. 50 lakh to be made conditional, the General Body has not confirmed the purported further agreement. This is one more violation of the terms set out in the EOI under the garb of a further Agreement. The Bank Guarantee amount and the Security Deposit amount were two separate amounts which the Plaintiff has attempted to combine in the amount of Rs. 3 Crores.

29. Again, as regards the Corpus Fund, Clause 44 of the EOI provided that the Developer shall quote maximum corpus fund which he can offer when dealing with a FSI of 2. He should also quote his Corpus Fund offer for the possibility of 2.4 FSI and 2.5 FSI. In response to clause 44 of the EOI, the developer agreed that corpus fund of 2000 will be provided on 2 FSI, 2150 on 2.4 FSI and 2200 on 2.5 FSI and that 100 per cent corpus fund will be paid in advance at the time of signing the Development Agreement. In the letter dated 20th April, 2010, the developer alleged that he further agreed on 7th March, 2010, inter alia, as follows:

The Corpus amount of Rs. 3,38,40,000/- for 2 FSI is to be paid to the Society. It is agreed that out of this amount of Rs. 1,69,20,000/- being 50% corpus on execution and registration of D.A. And the balance 50% corpus shall be paid one month prior to the members handover vacant possession of their existing premises for redevelopment along with the rent compensation.

This is another violation of the terms set out in the EOI in the garb of a further Agreement.

From the aforesaid facts it is clear that the Plaintiff has repeatedly deviated from the terms of the EOI, of which the Plaintiff has sought specific performance in the present suit. The Plaintiff has alleged a further Agreement to cover up such violation, but not sought specific performance of the purported further Agreement. The conduct of the Plaintiff also shows that the Plaintiff was at all times not ready and willing to abide by the Agreement. In such a scenario, the question of granting specific performance of the purported contract based on the EOI (at Exhibit-C to the Plaint), does not arise and therefore, the question of granting any interim relief to the Plaintiff also does not arise. The first Defendant has been waiting for the last about four years for redevelopment of its property. The balance of convenience is also in favour of the first Defendant and against the Plaintiff. The work of redevelopment of a Housing Society is such that a Society must have confidence in its developers. Once the members of the Society have expressed loss of trust, faith and confidence in the developer on account of various deviations and violations done by the developer, which is clear from the correspondence on record, the Society cannot be forced to get the redevelopment work done through the Plaintiff. In view thereof, the Plaintiff is not entitled to any interim relief and the Notice of Motion is disposed of as dismissed.