
(2021) 12 BOM CK 0086

In the Bombay High Court

Case No : Comm Arbitration Petition (L) No. 11890 Of 2021

Kalpataru Ltd

APPELLANT

Vs

Middle Class Friends Coop HSG Society Ltd

RESPONDENT

Date of Decision : 16-12-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9
Indian Contract Act, 1872 — Section 10

Citation : (2021) 12 BOM CK 0086

Hon'ble Judges : G.S.Patel, J

Bench : Single Bench

Advocate : SH Jagtiani, Gulnar Mistry, DK Sinha, Suneet Tyagi, Aditi Chavan, H Vaswani, Shrey, Dr BB Saraf, Aseem Naphade, Ameet Naik, Madhu, Gadodia, Naik, Shah, Subit Chakrabarti, Vidhii Partners

Final Decision : Dismissed

Judgement

G.S.Patel, J

1. The Petitioner ("Kalpataru") is a real estate development company. The sole Respondent ("the Society") is a cooperative society of apartment owners.

2. Kalpataru's application is under Section 9 of the Arbitration & Conciliation Act, 1996. It seeks interim relief pending arbitration. The primary relief is to restrain the Society from acting on its termination letter dated 18th May 2021. By this, the Society claims it terminated a Letter of Intent or LoI dated 18th May 2019 for the re-development of the Society's at the Juhu Vile Parle Development Scheme or JVPDS.

3. The issue on which the parties are at loggerheads is as narrow as it is not easy. Indeed, some weeks after I first reserved judgment, I placed the matter again for further hearing on specific questions that I put to both sides (in writing). They took a little time to consider these and then addressed me briefly. They also put in written submissions. Oddly enough, at the hearing both sides

relied on one particular authority but with diametrically opposite interpretations, only adding to the difficulty.

4. Given the manner in which the case unfolded before me, I believe it is both appropriate and necessary to approach the matter slightly differently from other cases. I begin this judgment, therefore, with a statement of what it is, in my understanding, that I am asked to decide. I have attempted to make this as concise as possible. I then proceed to set out, very broadly, the principles that I think must guide in cases like this. I follow this with a brief summary of my conclusions. After that, I turn to the facts, which are largely undisputed, the relevant documents and clauses of the LoI, the termination letter and some other documents, and to a consideration of the rival submissions and reasons for my conclusions.

5. The question is in this general background. There is a LoI between the parties. Kalpataru is to redevelop the Society's property. The LoI specifically says there is to be a further agreement, and it says what that further agreement is to contain. The LoI is, however, itself detailed and complex. Kalpataru maintains that even if the further agreement is not finalized - the parties have not reached a consensus on it - the LoI itself is sufficiently detailed as to the rights of the parties. It is, on its own, capable of specific performance. While that is certainly for the arbitral tribunal to consider, the fact that the LoI contemplates a further agreement does not ipso facto render the LoI incapable of specific performance. In other words, according to Kalpataru, every agreement that requires a further agreement is not unenforceable only for that reason. The LoI is a 'concluded contract'. The later agreement is a non-essential term of the bargain the parties struck.

6. In opposition, the Society argues that without the further agreement, there is no concluded contract between the parties at all. The LoI is an agreement to enter into an agreement, one that is for that reason incapable of specific performance. But even if it is not (i.e., not an agreement to enter into an agreement), without the later agreement, the LoI is not enforceable: the respective rights and liabilities of the parties are not decided or agreed. What Kalpataru must build, how, when and to what specifications are all matters yet undecided. If, therefore, Kalpataru can be shown to have been in breach of time-lines and obligations, the Society is within its rights to terminate the LoI.

7. I must, I believe, bear three things in mind while addressing a case like this.

(1.1 The first is about the relative position of the parties. The Society is evidently of extremely modest means. It does not have the wherewithal to do the development or re-development itself. Kalpataru is, by its own telling of it, a reputed developer with considerable resources.

(1.2 The second aspect is about the property itself. This is indubitably the Society's. Kalpataru does not own any of it. Under the LoI, the recompense to Kalpataru in consideration of it redeveloping the Society's property is the right to sell additional built space - the so-called 'free-sale' component - in the open

market. This is where Kalpataru stands to make its gains; and these are likely to be considerable. It is the Society that is vested with all rights in the property, including the fullness of its development potential. Even the additional Floor Space Index ("FSI") or buildability beyond that required to reaccommodate the occupants belongs to the Society. The right to this additional FSI is ceded by the Society to its chosen developer as consideration for the developer, at its cost, providing the Society with rebuilt apartments for its members. Had it been possessed of sufficient means, the Society could as well have appointed a contractor on payment, and the Society would then have retained to itself all rights over the free-sale additional FSI portion. Consequently, the primary or supervening right in property is the Society's.

(1.3 These two aspects coalesce in the third, which speaks to the consequence of accepting the contentions of one side over the other. We know this as the balance of convenience test, and it is one of the three essential ingredients to the grant of any form of interim relief. Accepting Kalpataru's case means, necessarily, foisting a developer on an unwilling property owner (I use the word 'owner' in its broadest sense here, only for convenience). Kalpataru will get to decide what is built and how, and there is a good deal of controversy about this on record. The Society is left with virtually no recourse or remedy in law, but, in contrast, accepting the Society's case against Kalpataru does not totally denude Kalpataru of legal remedies. On the other hand, accepting the Society's case means that Kalpataru's efforts and expenditure until now count for nothing. Kalpataru specifically contends that the entire termination is at the instigation of rival builder or developer, which seeks to piggy-back on Kalpataru's work so far: incurring none of the expenses or costs Kalpataru already has, and yet getting an entitlement to the massive profits from the free-sale component and additional buildability. This is inevitable, Kalpataru says, for admittedly the Society is in no position to 'self-redevelop', i.e., take up the work itself and appoint its own Project Management Consultant or PMC, contractor, architects and so on. This conflict in the balance of convenience question is precisely what makes this a very difficult case.

2. These three aspects are over and above the central question of whether the further agreement is an essential term of the contract.

3. On considering the rival cases, I have not been persuaded to grant Kalpataru the interim relief it seeks. My reasons follow.

4. In July 1966, the Society took a 99-year lease of the property in question from the Maharashtra Housing & Area Development Authority ("MHADA"). The plot is about 1928.92 sq mts at JVPDS. Some time in 1970, the Society put up four buildings, collectively called "My Little Home". Each is ground and three floors. There are 32 apartments or flats in all. These are the only constructions on the Society's plot.

5. By 2019, the Society's buildings were about half a century old, and needed re-

development. In February 2019, the Society issued a public notice in local newspapers inviting offers for re-development of its property. The Society's PMC made available tender or Bid Documents, including a Technical Bid and a Financial Bid. Copies of these are annexed.

6. The proposal was for re-development of the land and buildings. It contemplated use of the existing FSI and "Fungible Compensatory FSI" permissible under the applicable Development Control Regulations. The successful bidder was to deliver to the Society new flats in newly built buildings for its members. The remaining newly built flats were meant for the developer to sell to recover costs. New purchasers (of the free-sale component) would have to apply for membership of the Society. This is set out in Clause 5.1.1.

7. Clause 7.22 of the General Conditions defined the Contract to mean-

"the Registered Agreement papers, details of the Company/Firm, all of the proformas, BID document list of amenities and facilities together with the Letter of Intent and any other documents specifically indicated herein and the formal agreement executed between the Developer and the Society. All these documents taken together shall be termed as the contract."

8. Clause 9.4(d) of the Special Conditions of Contract (at pages 191-192 of the Petition) specifically required the execution of 'a regular contract agreement'. It also said that a failure to do so would be a breach.

9. There is no doubt that clause 9.38 had an arbitration clause.

10. Clause 8.3 specifically said that all rights continued to vest in the Society-

"Except sale proceeds of the saleable component of the Developer as provided herein."

11. Kalpataru put in its bid. It made the shortlist. It was invited to improve its commercial bid. After meeting the Society's Managing Committee, it submitted a revised commercial offer with tentative plans. It made a final commercial offer on 23rd May 2019. A month later, the Society's General Body voted on Kalpataru's offer - an authorised officer from the office of the Cooperative Societies Registrar was present - and unanimously approved Kalpataru's appointment as a developer. The Society informed Kalpataru of its appointment on 25th July 2019.

12. Kalpataru insists this is 'the concluded contract': the communication by the Society of its acceptance of Kalpataru's offer. As we shall presently see, this is a vast over-simplification.

13. On 18th October 2019, the Society issued Kalpataru a Letter of Intent. Clause 2 of the LoI says this:

a) It is hereby agreed that Kalpataru shall proceed to have drafted and the Society and Kalpataru shall thereafter mutually approve and settle within a

period of 180 (one hundred and eighty) days from the date hereof, the Proposed Development Documents (defined hereinafter) that is: (i) the formal Agreement that shall be entered into and executed by the Society and Kalpataru recording the full and complete terms, conditions and provisions in respect of the grant of the aforesaid rights and entitlements to Kalpataru in respect of the Property, based upon/incorporating the principle terms and conditions of the Final Offer ("Proposed Agreement"), (ii) the Power of Attorney to be executed by the Society in favour of Kalpataru containing necessary powers, discretions and authorities to undertake and complete the redevelopment of the Property ("Proposed POA"), (iii) the Writings to be executed by each of the Members of the Society and Kalpataru under which they shall each, inter alia, confirm that they shall observe, perform and comply with all the terms and conditions of the Proposed Agreement and fully co-operate with the redevelopment of the Property in terms thereof, and also containing various representations, declarations and undertakings regarding their respective titles to their respective shares and flats ("Proposed Members' Writings"), (iv) the format of the writing to be executed by the Society, each of the Members respectively and Kalpataru in respect of the Member's proposed new flats in the redeveloped property ("Proposed New Flat Writing") and (v) a Declaration made by the Society as to its title to the Property and related matters ("Declaration"). The Proposed Agreement, the Proposed POA, the Proposed Members' Writings, the Proposed New Flat Writing and the Declaration are hereinafter collectively referred to as the ("Proposed Development Documents").

(b) In the event of the parties hereto failing to execute the Proposed Development Documents within 180 (one hundred and eighty) days then both the parties herein shall discuss amongst themselves and mutually extend in writing the period for execution of Proposed Development Documents.

14. Clause 16 of the LoI says:

16. The parties agree that this LoI records the basic understanding between the Parties in respect of the re-development of the Property and the detailed understanding on the basis thereof would form part of the Proposed Development Documents.

15. In paragraph 22 of the Petition, Kalpataru reads this to mean that- the fundamental terms of the transaction were agreed between the parties and set out therein, on the basis of which the formal Proposed Development Documents as described hereunder would be executed.

16. As we shall also see, this distinction between a 'basic understanding' and 'fundamental terms' will prove determinative.

17. I do not think a microscopic examination of the correspondence until December 2019 is necessary or even permissible. I am not to hold a trial of any kind here. For instance, Kalpataru alleges delay by the Society in approving the draft Irrevocable Consents required from members. This, and similar matters,

are best left for another day and another proceeding.

18. I come immediately to 3rd December 2019, when Kalpataru sent the Society a draft of the 'formal' Development Agreement ("DA"). Nothing came from the Society on this (or even the proposed Irrevocable Consents) for several weeks until about late January or early February 2020. The Society responded with its comments on the draft DA. Kalpataru replied and sought a meeting in February 2020. A reminder from Kalpataru followed in early-March 2020.

19. On 7th March 2020, the Society replied to Kalpataru's reminders. It said that it had edited the draft DA in accordance with what it called "agreed terms and conditions". It went on to insist that its terms be incorporated, and until that was done, refused to enter into any further discussions or even to provide the Irrevocable Consents. This back-and-forth went on until 14th July 2020, when the Society responded to Kalpataru's revised DA draft with more updates. On 28th August 2020, the Society provided Kalpataru with Irrevocable Consents of 18 of its 32 members. On 18th August 2020, the two sides' representatives met. On 5th and 19th October 2020, Kalpataru sent the Society a further revision of the draft DA with an annexure of suggested amenities, and a synopsis of the points discussed at the August meeting.

20. Then Kalpataru forwarded typical floor plans in mid-October 2020.

21. On 5th December 2020, the Society sent back to Kalpataru its further revisions to the latest draft DA. More discussions followed. Much of this seems to have been about the parking options. On 20th January 2021, Kalpataru emailed the Society, saying that the Society had now made changes even to clauses previously agreed in August 2020. That notwithstanding, the parties' representatives met on 10th February 2021. Kalpataru asked for the Society's revisions to the draft DA. On 25th/26th February 2021, the Society sent Kalpataru a revised draft. Between March and May 2021, Kalpataru gave the Society another parking option.

22. Kalpataru says that it was being led down the garden path. For, even while documents were being exchanged (and I have largely concentrated on the draft DA; there were many other documents), and meeting were being held, the Society had opened negotiations with one of Kalpataru's rivals, Dhyan Projects Pvt Ltd ("DPPL") for the same project.

23. On 18th May 2021, the Society issued its Notice of Termination. A copy is at Exhibit "MMM" at page 349. Kalpataru replied on 23rd May 2021, disputing the termination.

24. Here is the Termination Clause 7.72 in full:

7.72 TERMINATION OF CONTRACT BY THE SOCIETY

If the developer commits a breach of any terms of this contract or any Act of Insolvency or shall be adjudged as Insolvent or shall make an assignment or

composition of the greater part in number or amount of this creditors or (being an Incorporated Company) shall have an order made against him or pass an effective resolution for winding up either compulsorily or subject to the supervision of the Court or voluntarily or if the official assignee of the developer shall repudiate the contract/or if the official assignee or liquidator in such acts of insolvency or winding up shall be unable, within seven days after notice to him requiring him to do so, to show to the reasonable satisfaction of the Society/Consultant, that he is able to carry out and fulfil the contract and if required by the Society to give security thereof, if the Engineer shall certify in writing to the Society that, in his opinion, the developer-

a) Has abandoned the contract,

Or

b) Has failed to commence the works, or has without any lawful and reasonable excuse under these conditions suspended the progress of the works for 30 days after receiving from the Consultant/PMC written notice to proceed;

Or

c) Has failed to remove materials from the site or to pull down and replace the work within seven days after receiving from the Consultant/PMC written notice that the said materials or work were condemned and rejected by the Consultant/PMC under these conditions;

Or

d) Has neglected or failed persistently to observe and perform the acts, matters or things as per the terms and conditions of the contract by written notice to perform and act;

Or

e) Has to the detriment of good workmanship or in defiance of the PMC instruction to the contract sub-let any part of the contract,

Then in any of the said cases the society with the written consent of the Consultant may notwithstanding any previous waiver, after giving seven days' notice in writing to the developer, determine the contract, but without hereby affecting the powers of the Consultant or the obligations of the developer the whole of which shall continue in force as fully as if the contract had not been so determined and as if the works subsequently executed had been executed by or on behalf of the developer.

25. The less said about this appalling drafting the better. Mr Seervai's submission for Kalpataru on this clause is that the Society's termination does not conform to a single one of these conditions. Except for 'abandonment', every single one of the grounds for termination requires a notice and a cure period or option. Termination without cause by the Society is not contemplated. The termination

also requires there to be a Consultant or a PMC to have formed an opinion, given a notice, etc.

26. In its termination letter of 18th May 2021, the Society's grievance seems to have been the delay in finalizing the DA. Specifically, it contended that Kalpataru was obdurate in not accepting the Society's changes and revisions. On any reading of the LoI, the Society said, the DA was to be finalized within 180 days, i.e., by 17th April 2020. That time had not been extended "by mutual agreement". Kalpataru had refused to accept the Society's changes regarding the circumstances for termination, insisting that the Society could not terminate for any reason at all - and, on the contrary, insisted that if Kalpataru delayed or defaulted, the Society would take over and complete all of Kalpataru's obligations, including building new flats and hand them over to Kalpataru. Further, Kalpataru insisted now on extended the project completion period from 24 months with a grace period of 12 months, a total of 36 months, to a total of 42 months; and that too before a single brick had been laid. More surprisingly, the Society said, Kalpataru refused to incorporate the terms of the tender documents in the DA but insisted that the DA would over-ride and supersede all tender document terms. The Society also said that Kalpataru had delayed sharing floor plans for a year and, in any case, had refused to share the AutoCAD versions for the Society's architects to examine. Kalpataru refused to accept the Society's suggestions and requirements for changes to these plans. Among other things, it refused to provide basement parking with an access ramp. Instead, it had proposed mechanized systems for car parking, too expensive to maintain. Though the Society refused, Kalpataru was adamant. The Society maintained that it had not extended time for executing the DA; the LoI had, therefore, expired by passage of time on 16th April 2020. Therefore, at its meeting on 14th May 2020, the General Body of the Society, at which 30 of the 32 members attended, resolved to terminate the LoI. Hence the termination. The Society returned the Rs.7.5 lakhs deposited as earnest, demanded a return of all documents and a confirmation of the resignations of the architect and licensed surveyor.

27. Mr Seervai's submission is that the formal DA is not a necessity. Its absence does not detract from the completeness of what he calls 'the contract'. He maintains that the 'contract' - which consists of all writings except the DA; the bid documents, the LoI and all correspondence - is sufficiently specific and complete. All the requirements of a contract under Section 10 of the Contract Act are met by the tender notice, the bid of offer (both technical and financial), the resolution of the Society appointing Kalpataru, the actual letter of appointment of 25th July 2019, the LoI and all later correspondence. The execution of the DA is not, he says, an essential term of the contract.

28. Mr Seervai frames his propositions like this:

(1.1 Executing a DA is not an essential term of 'the contract'. An agreement to execute a later document does not preclude the existence of a valid contract

unless the contract says that without the later agreement and until it is executed, there is no valid contract at all.

(1.2 The 'formal' document in this case is only to incorporate the terms of the tender. It is, literally, a formality; and therefore is dispensable.

(1.3 The terms of the draft DA are secondary. They do not alter the bid documents and their acceptance.

(1.4 The definition of 'contract' (set out above, in clause 7.22 of the General Conditions of Contract) lists everything, including nebulous documents and also documents that are not contractual.

(1.5 The draft DA includes clauses that the Society terms 'unilateral deviations'. But these are subject to discussions and do not dilute the binding nature of 'the contract'. These drafts of the DA do not meet or concern the question of whether or not there is a binding contract.

2. Kalpataru is, he submits, on this formulation entitled to limited injunctive relief. A word on that at this stage: nothing in the Petition or its prayers suggests that Kalpataru seeks only a 'limited' injunction. Prayer (a) is for a full-spectrum injunction against the Society from acting on its termination letter or giving effect to it. There is no way to limit this. In translation, it means that Kalpataru must be allowed to continue as if there is no termination; and, read with Mr Seervai's submissions, means that it is absolved of the need to enter into a DA at all, or, alternatively, that the Society must accept Kalpataru's draft DA and find a way to be happy with it. For, self-evidently, there can be no interim order directing the parties to agree on the draft DA.

3. Mr Seervai goes on to argue that the time-limit in the LoI of 18 months was extended by conduct of parties, for drafts of the DA were still being exchanged until 13th May 2021. Meanwhile, he says, the Society was in total breach of the terms of the LoI that mandated confidentiality and forbade the Society from trucking with another developer, actively engaging DPPL in May 2021.

4. Cutting through some of the surrounding clutter in correspondence, the questions for determination are only these. Is the requirement of a DA an essential term of the contract or is it an idle formality? Without the DA, can the project proceed? If Mr Seervai is right, and the DA is not essential, then he must get relief. But if the DA is an essential term of the contract and, without it, the project cannot possibly proceed, then no injunction can follow.

5. Before I turn to the authorities Mr Seervai cites, I note again the definition of 'contract' in clause 7.22 (extracted earlier). It specifically says the contract includes 'the formal agreement', i.e., the DA.

6. Section 10 of the Contract Act says:

10. What agreements are contracts.

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

29. Mr Seervai first cites the Supreme Court decisions in *Kollipara Sriramulu v T Aswatha Narayana*. (1968) 3 SCR 387 : AIR 1968 SC 1028. We have used the SCC version. The principle question there was about specific performance of an oral agreement between the partners of a firm for sale of their shares. The second question that the Supreme Court addressed was 'whether the oral agreement was ineffective because the parties contemplated the execution of a formal document or because the mode of a payment of the purchase money was not actually agreed upon.' The appellant contended that 'there was no contract because the sale was conditional upon a regular agreement being executed and there was no such agreement'. The Supreme Court rejected this argument. It held as well-established that- a mere reference to a future formal contract will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract.

(Emphasis added)

What matters, the Supreme Court said, is the intention of the parties, and this depends on the facts of each case. There mere fact that the persons desire to have a formal agreement drawn up does not establish the proposition that, invariably, they cannot be bound by a previous agreement. The Supreme Court cited with approval the principle enunciated in *Von Hatzfeldt-Wildenburg v Alexander*, (1912) 1 CH 284, 288 that whether or not the formal agreement is an essential term of the contract is always a question of construction. If it is a condition or term of the bargain, then without the formal agreement there is no enforceable contract because the execution of the formal agreement is a condition; unfulfilled, there is no contract at all. If, on the other hand, it is merely an expression of the parties' desire, there is a binding contract and the 'reference to a more formal document may be ignored'. That is precisely what Mr Seervai would have me do today.

30. In paragraph 4 of *Kollipara*, the Supreme Court referred to the decision in *Rossiter v Miller*, [1878] 3 AC 1124 (HL). Mr Seervai's next port of call. The *Kollipara* decision cites this portion of Lord Cairns' decision in *Rossiter* for the House of Lords:

"If you find not an unqualified acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise then you cannot find a concluded contract."

31. I must reproduce parts of Rossiter, since both Mr Seervai and Mr Dwarkadas relied on these.

"I pause there for the purpose of pointing out to your Lordships that in these conditions there are to be found the terms - and the detailed terms - of a contract, such as might reasonably be expected to be proposed with regard to sales of plots of land of this description. There is no doubt a stipulation that the purchaser would be required to sign a contract embodying these conditions. That is an obvious and natural term, because the contemplation is that persons will come in and will make offers of the price which is required for the plots, and at that point the persons so offering will not be bound by anything; it will be necessary to bind them, and therefore they are told, beforehand, that at the time when their offer is accepted, or along with the acceptance of it, the matter will not be allowed to rest in dubio, or without legal obligation, but that they will be required to sign something which will bind them. But they are also told what they will be required to sign; it will not be a contract at the arbitrium of the vendors, not a contract the terms of which they do not know, not a contract the provisions of which they will see for the first time when it is offered to them to sign, but a contract as to which the vendors are content, beforehand, to bind and oblige themselves that it will assume the shape of these stipulations, and no other shape. That is what is stated to the purchasers by this printed form of conditions.

... It is not in any way a suspending of the making of a contract until an agreement is determined upon and is arranged. It is a letter recording the conclusion of a contract so far as the vendors are concerned, ...

My Lords, I have only to say that - but that I have found the learned Judges in the Court of Appeal, for whose opinion I have the greatest respect, taking a different view

- I should have said that a clearer and simpler case of an offer made and accepted by a correspondence consisting of no more than three letters I have seldom seen. Every term is made clear, by reference to an elaborate scheme of conditions under which the sales were to be made. The offer is recognised in terms by the person who had made it, under his hand, and it is accepted without the possibility of doubt or cavil by the persons to whom the offer was made.

My Lords, the reference to the agreement in the first letter is, I think, exactly what you might have expected to find. I have pointed out that at that time the purchaser was in no way bound, and therefore it was right in the vendors to call upon him for the signature of the agreement which he was bound to sign. But, as regards any legal consequence, the moment he himself had written a letter in which he had referred to the contract as a contract under the terms and conditions of the articles of 1871, the vendors might, if they had so desired it, have required the agreement to be prepared and signed as a matter of form, but as a matter of law it was to my mind perfectly indifferent whether they did so or not. If they did so, if an agreement had to be prepared and signed, it must be an

agreement exactly to the effect of the terms and conditions of the paper of 1871, and no other terms and conditions could have been introduced. If other terms and conditions had been introduced, either party would have had a perfect right not only to refuse to accept those other terms, but to insist upon an agreement in the original terms of the paper of 1871.

My Lords, I therefore come to the conclusion that there is here clearly and distinctly a concluded contract with the terms expressed in this letter, subject to the observation I have yet to make upon what I call the second part of the case in reference to the use of the word "authorized."

(Emphasis added)

32. Mr Seervai then took me through various parts of the record in an attempt to establish that the contract was 'concluded' - nothing remained to be decided. It was so concluded, he said, with the appointment of Kalpataru and the issue of the LoI.

33. It is with this formulation that Mr Dwarkadas takes issue. The arbitration agreement may survive any termination. Like Mr Seervai, Mr Dwarkadas too relied on Note 3 below the financial bid (at page 223). This says that the terms in the technical and financial bid documents-

'are only broad guidelines which can be amended by the society and the final terms and conditions will be agreed upon by all the concerned parties before execution of the Development Agreement.'

(Emphasis added)

34. This is also repeated in a note below the Financial Bid.

35. Clause 5.9.2 of the tender document says that after the bid is accepted, the Society will enter into a Development Agreement with the selected bidder and-

'shall enter into a further agreement after the bidder has completed all formalities and terms and conditions for entering into further agreement for carrying out construction work for the said Project.'

36. There is also the stipulation in Clause 16 of the LoI that the LoI is only the broad understanding and a detailed understanding based on the LoI was necessary.

37. All this must be read with clause 9.4(d) of the Special Conditions of Contract, which requires the execution of a 'regular contract agreement'.

38. Clause 8.1 at page 185 also has a provision that it is the Society that must approve overall layouts. It alone has the right to select a layout from options to be offered.

39. Then Mr Dwarkadas highlights Clause 2(a) of the LoI, extracted above. This, he submits, sets a 180-day time-line for execution of the DA. If that is not done,

the project is abandoned. Kalpataru specifically agreed to this in paragraph 8 of its offer submission letter of 10th April 2019, when it said that if the contract documents were not executed and work not commenced within the prescribed period after the bid was accepted, the Society would be entitled to treat the contract as abandoned. Any extension must be by mutual agreement. Clause 16 of the LoI says this is only the 'basic' understanding.

40. In paragraph 91 of the Petition, Kalpataru says that the 'contract' includes later correspondence. In paragraph 100, it says it will execute the formal DA 'in accordance with the true terms of the contract' and that it is also agreeable to executing the formal DA on such terms as this Court or an arbitral tribunal suggests to bring these conditions 'in line with the documents comprising the contract'. Mr Dwarkadas submits that this is nothing but an admission that there is only an inchoate contract and not a concluded contract.

41. To the Affidavit in Rejoinder from page 432 is annexed a long document. This is the draft DA with the revisions of each side shown in mark-up. It is difficult to see how this document can, on any rational basis, be said to be 'part of the contract', as Kalpataru suggests: it is clearly a document yet to be finalized. Indeed, the Society's affidavit says its members have not seen it. But on the face of it, at least two proposed sections stand out. About the parking method, there is clearly no understanding at all. The Society has refused to accept mechanized parking; Kalpataru insists on it. But more egregious is Kalpataru's proposal of the termination clause. This is in draft clause 19 and, from any perspective, it is entirely unconscionable. As the Society says, Kalpataru insisted that even if there was a default on its part, and the Society terminated for cause, the Society should be bound hand and foot to complete the construction and to deliver the free-sale flats to Kalpataru. This is simply unimaginable and I do not know how or on what basis Kalpataru could even have proposed it. As it stands, it amounts to Kalpataru being rewarded - fully - even if it is in default and even if the contract is validly terminated on account of Kalpataru's default. This is the point the Society makes in paragraph 3(e) of its termination letter.

42. Kalpataru's answer to the termination letter is of 23rd May 2021. A copy is at Exhibit "A" to the Affidavit in Rejoinder from page 421. In response to paragraph 3(e) of the termination letter (the Society's complaint about the slanted termination clause 19 in the draft DA), Kalpataru does not say this is a mistake. It defends its position in paragraph 4(c) at page 424. It claims this is a 'general practice', i.e., to have the Society 'step in'. It goes on to say that the Society was free to include a provision for liquidated damages.

43. Leaving aside the question of the suggestion itself being unconscionable, what the draft DA unquestionably shows is that while the parties may have generally agreed on the re-development, they were a very great distance from a consensus on the actual details of the project. Basic things like parking, layouts, termination and compensation were not agreed.

44. Mr Dwarkadas is also, in my view, correct in his submission that Kollipara is not in favour of the proposition Mr Seervai advances, but actually against it. What Kollipara says, in my understanding of it, is this: there is no universal or immutable rule that every future agreement is an idle formality, or the earlier contract is complete. This is case- and fact-dependent. It is a matter of construction of the contract. Was the later contract only a formality? The word 'formal' is not determinative. The test is to see what is left to be agreed. It is not a test of form. It is a test of substance. If the parties agree that important and crucial aspects are yet to be agreed and will be incorporated in a later agreement, the earlier agreement is not enforceable. If, on the other hand, they have agreed on everything but only desire that a later agreement embody - for the sake of good form (and perhaps in more obscure legalese) - what they have already agreed upon and nothing more of substance, then the earlier contract is a concluded, enforceable contract.

45. Projects like these always have two components. The first is the rebuilding of the Society's homes. This is the members' component. They must get their newly constructed flats. These must be to the members' (and their Society's) specifications and liking. The rationale is that the property is, after all, that of the Society. The chosen developer does not get to dictate to members what their flats should be like, how they should live or what kind of parking they must accept. That choice is, and is only, that of the members and the Society. The present contract, as we have seen, envisages precisely this when it says that Kalpataru is to give members a range of options from which to choose. The second component is the free-sale component, Kalpataru's (or any developer's) incentive and profit-centre. Here, the Society may have next to no say. The second component is consideration from the Society for the first. Viewed in reverse, the developer's rights to the second component of free-sale component is the consideration for it providing to members and the Society, free of charge, the first component of members' housing designed to the members' specifications and liking. Consequently, if there is no agreement on the first component - the layout, the floor plans, the flat dimensioning and layouts, the amenities, the parking - the project cannot and does not proceed. This is the essence of the DA. In the contract documents other than the DA, this has not been specified. It remained to be done, and this is the reason drafts of the DA were being constantly exchanged and revised.

46. The legal consequence must, therefore, logically be that the DA is an essential requirement. It is not an idle formality. The project cannot proceed without it - there is simply no agreement on what is to be built for the members' component. If this be so, Kalpataru's case must fail entirely. Add to this the fact that in its petition Kalpataru expresses its willingness to complete the DA on such terms as this Court or the arbitral tribunal may decide and it is clear that the DA is no idle nice-to-have document but is of the very essence. That suggestion, incidentally, is preposterous for it is not for any court or tribunal to step into the agreement-making arena.

47. Most fundamentally, what this tells us is that there is no consensus ad idem on an essential requirement of the contract: the form, nature and precise configuration of the members' component. Kalpataru cannot brush this aside.

48. I put this to the test a short while after I first reserved judgment. I placed the matter back on board and handed down a list of queries based on the draft DA, asking if Kalpataru could construct without these details being agreed. Almost predictably, I got a wordy response from Kalpataru's legal team where a simple yes, no or maybe might have served better. The rest is a decidedly mixed bag. There is a table annexed to the response. It extracts portions of the Tender and Bid documents and claims these are sufficient. In some portions, that might be true. But that is not enough. An excellent example is the portion in the draft DA about compensation to the members (clause 5A). Kalpataru claims this is covered by Clause 8.1 at page 186. Clearly, it is not. Clause 8.1 has no specifics of the kind sought in Clause 5A of the draft. This is straining the boundaries of what is possible.

49. In the context of a contract like this, what exactly does 'enforceable' mean? In the legal world, it connotes getting an order to perform the contract. But, in practice, this means compelling one side to actually do some specific work. Now this is an odd case. It is not the Society that wants Kalpataru to do anything at all. It is Kalpataru that makes the demand. And the demand is that the Society should sign documents and make way for Kalpataru to construct as Kalpataru wishes, no matter what the Society may want or even need. 'Enforceability' at the Society's instance would mean compelling Kalpataru to execute that which was agreed. In the present case, Kalpataru's demand for 'enforceability' is to be allowed to do as it almost as it pleases absent an agreement on critical aspects of the all-important members' component. That can never be permitted.

50. Mr Seervai's next submission seems to me very like reverse engineering. It goes like this. If the Society claims there is no concluded contract - and it must so claim to succeed, according to Mr Seervai - then there is no arbitration agreement either. But Mr Dwarkadas accepts there is an arbitration agreement. Therefore there must be concluded contract without the DA. Therefore the DA is not an essential term of the contract. This syllogism is fundamentally flawed. An arbitration agreement is an agreement within an agreement. Certainly the LoI can be said to be an agreement, one with an arbitration clause. But that would not necessarily make it enforceable. The reliance on Section 10 of the Contract Act in this context is an over-simplification. Every contract is an agreement. But every agreement is not necessarily an enforceable - that is to say, concluded - contract.

51. That is the substance of Mr Dwarkadas' case. Without the DA in place, Kalpataru cannot enforce the contract; and to be clear, the 'contract', no matter how often the word is repeated, is one thing and one thing only: to build the Society new homes, deliver possession and, in consideration for that, to have the right to the free-sale component. To do the first leg of it, the DA is inescapable.

If only some terms were agreed and others not, the 'contract' is not enforceable. That is all there is to it.

52. By a logical extension, what this means is that without the DA, the very contract that Mr Seervai speaks of is presently enforceable only by the Society. But had the DA been agreed on and the Society had refused or failed to execute it, what then? Undoubtedly Kalpataru could then have sought enforcement. But this only reinforces Mr Dwarkadas' argument that without the DA the contract is not enforceable by Kalpataru. Therefore, when Mr Seervai says the contract is presently enforceable without the DA, what this really means is that the options contractually available to, and only to the Society - to choose a layout from among several options, to decide for itself its preferred floor plans and amenities, and so on - must all be stripped from the contract. Kalpataru can then build as it likes and leave the Society with no choice.

53. It is in this context that Mr Dwarkadas' reliance on the decision of a Division Bench of this Court in *Kalpataru Properties Pvt Ltd v Majithia Nagar CHSL* 2014 SCC OnLine Bom 984 is most apposite. Kalpataru (the same as the present petitioner, or perhaps a sister concern or a predecessor-in-title) was in appeal against an order of a learned single Judge of this Court refusing interim relief in Kalpataru's specific performance suit. The same question arose there: whether there was a concluded contract. *Kollipara* was cited. The Division Bench held there was no concluded contract, though there was a tender. The difference perhaps was that tender said a concluded contract would come into existence only upon the execution of a formal agreement, squarely within the *Kollipara* and *Rossiter* frame. For my purposes, what is important is paragraph 24, where the Court looked at the relative position of the parties and explicitly held that the society in question was entitled to insist on its demands being met and encoded in a formal Development Agreement. In *Heritage Lifestyle & Developers Ltd v Cool Breeze CHSL* [2014 (3) Mh LJ 376], RD Dhanuka J said that a very similar contract was one of which specific performance could not be granted because an initial Memorandum of Understanding left undecided many additional factors.

54. In a very early case from 1955, *Subodh Chandra Nandy & Ors v Himanshu Bala Bose & Ors*, 1955 SCC OnLine Cal 257 : (1955-56) CWN 423. a Division Bench of the Calcutta High Court was asked to decide whether or not there was a concluded contract. This came up from a preliminary decree in a partition suit and the subsequent auction sale. The Division Bench held that if the record showed that only some of the terms were agreed but that others were to be negotiated, or were only broadly stated, the conclusion was irresistible that there was no concluded contract. Evidence of subsequent negotiations showing that parties had not reached an agreement on those additional terms was enough to hold there was no complete and concluded contract.

55. In the course of arguments, there were twice what I can only now describe as diversions. The first was Kalpataru's outrage at the Society's reproduction in its Affidavit in Reply of some portions of the contract: the Society's office-bearer

used the word 'registered' instead of 'formal'. Mr Dwarkadas explained that, on affidavit. I have let it pass. As I noted, the word 'formal' is not determinative, and the 'formal' DA would have to be registered in any case.

56. The second was when Kalpataru contended that the Society had taken 'mutually destructive stands', first by contending that there was no concluded contract, and then by saying that there was a contract but it was not enforceable, or that there were two contracts, the later controlling the enforceability of the first. Mr Seervai was of a mind to place much law before me on this. I do not think it makes a whit of a difference. I have declined to address it for a simple reason. I see no conflict. Mr Dwarkadas was always at liberty to take an alternative plea or even an inconsistent one. That would not have made the DA any the less necessary or a non-essential term of the contract. That is not to be determined by the pleadings. Kalpataru cannot succeed on the basis of what the Society's lawyers choose to argue or plead.

57. Far surer guides are (1) clauses in the contract; and (2) what the parties actually did. As we have seen, at least at four places the LoI and the tender documents all speak of these being only a 'basic understanding' and of the need for a 'formal agreement', 'detailed understanding', and 'regular contract agreement' yet to follow. What Kalpataru wants now is to write out these requirements altogether - nothing but a wholesale rewriting of the LoI and the tender document. But that is contrary to Kalpataru's own conduct. It has never said in correspondence that the formal agreement - whatever its name - was unnecessary. It went on wrangling the detailed terms of the draft DA with the Society. The draft DA and its inconclusive quality, plus the fact that it evidently has to contain material not yet decided, is the more telling circumstance by far. Even at the simplest level, the fact that drafts of the DA were being exchanged tells us that the parties had not agreed to bypass it. Neither side saw it as dispensable.

58. But Kalpataru now says "it makes no difference what the tender document said. It makes no difference that by bidding on that document, we accepted its terms. It makes no difference what the LoI said. The requirement for a formal agreement, a detailed understanding and a regular contract agreement are all unnecessary, are idle formalities and are altogether dispensable."

59. And then it effectively goes further and says that Kalpataru alone will decide the terms of the agreement. Or - worse yet - that Kalpataru will accept not what the Society says but what this Court or an arbitral tribunal says. The Society can have no say even on the construction details of the members' component of the project. On its own, that is a breach of a fundamental term of the contract. It is a ground for Kalpataru's ejectment.

60. The DA is not an idle formality. The fullness of the terms of the construction were not agreed. They were to be part of the DA. Even the final terms of 'termination by the Society' are inchoate, and Kalpataru's draft suggestion on

that in clause 19 of the draft DA is utterly preposterous, untethered to any rational concept of law and wholly unmoored from every concept of justice or of contracting parties being on an equal footing. The DA is not just required. It is an essential condition of the contract. Indeed, it is a fundamental term of the contract.

61. Once this conclusion is reached, Kalpataru's contention that the LoI, tender documents, bid documents and correspondence all resulted in a concluded contract fails. Without the DA there is no concluded contract. No question of enforcing the LoI arises. Kalpataru has no such right. More brutally, and for the reasons I have already discussed: unless Kalpataru reaches an understanding with the Society about the construction and development of the members' component, Kalpataru has no enforceable contractual rights at all. For this reason too, Kalpataru's submissions about the so-called 'conflict in arguments' or 'want of pleadings' are all futile.

62. Notably, nowhere does Kalpataru say that terms of the DA required were in fact settled and agreed, nor that despite such an agreement, the Society refuses to execute the agreed DA. Instead, it accepts that there is no agreement on the terms of the draft DA. And Kalpataru itself proves that there is no agreement on the terms of the draft DA.

63. Indeed, this is why up to this stage, it is only the Society that can terminate. Kalpataru's right to seek enforcement or specific performance arises only after the DA is executed. Before that, or without it, arguably only the Society could have insisted on performance by Kalpataru, but I am not asked to decide any such case. I am certain, however, that without the DA, and on account of a failure to have its terms agreed and to have it executed within the time specified, the Society was within its rights to terminate the LoI.

64. I do not see a prima facie case by Kalpataru.

65. On the other two determinants, I am clear that the balance of convenience is not in favour Kalpataru at all, for the reasons I have twice discussed earlier. Far greater prejudice will be caused to the Society if relief is granted than to Kalpataru if relief is denied. A fourth factor: relief under Section 9 is discretionary and equitable. I do not see equities falling in favour of Kalpataru, or, more accurately, I see very great inequities falling to the Society if I were to accept Kalpataru's case.

66. The Petition is dismissed.

67. This is a matter in the Commercial Division and the statutory requirement there is that costs must follow the event. If costs are not awarded, a court must record reasons. In the facts of the case, however, I leave it to parties to bear their costs. I do so because the complexity of the transactional documents - not aided by the needless obscurity of their wording - did not make the task easier for either side or for me, and also because Kalpataru has undoubtedly done some

preparatory work on site.

68. The Society is, of course, now at liberty to avail of the discount said to be presently available until 31st December 2021 from the MCGM in regard to certain FSI or development-related premiums. This is on a without prejudice basis.

69. At Mr Seervai's request, and since there has been a statement in operation since 23rd June 2021, when the Society said it would not act on a MHADA-issued NOC or appoint another developer until further orders, I will let that status continue until 10th January 2022. There are two reasons for that: first, the intervening court holidays and my reluctance to impose on my colleagues sitting in the vacation. Second, the very recent development of the unavailability of the regularly rostered commercial appellate division bench presided over by Mr Justice SJ Kathawalla. That roster has been presently assigned to the Division Bench over which I myself now preside, and evidently therefore any appeal that Kalpataru files against this order will have to go to yet another Bench, an alternate to the one on which I serve. Hence this limited continuance.

70. I end this judgment with a suggestion, one I cannot fashion into an order. It seems to me in the interest of both sides if they adopt a practical and rational approach. Kalpataru is on site. It has done some preparatory work. Fundamentally, two things alone need to be addressed: the lopsided and indefensible termination clause proposed in the draft DA, on which Kalpataru is irredeemably wrong; and allowing the Society primacy in decision-making for the members' component of the project. That is all there is to it. If the two sides can see their way around this, a very great deal of time, effort and money will be saved.

71. My thanks to Mr Seervai, Mr Dwarkadas and their juniors for their assistance.