
(2012) 02 BOM CK 0103

In the Bombay High Court

Case No : Public Interest Litigation No. 131 of 2008

Kamlakar Motiram Satve and Another

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 22-02-2012

Acts Referred:

Arbitration Act, 1940 — Section 34

Urban Land (Ceiling and Regulation) Act, 1976 — Section 20, 6, 8, 9

Citation : (2012) 3 ALLMR 104 : (2012) 5 BomCR 460 : (2012) 114 BOMLR 901

Hon'ble Judges : Mohit S. Shah, C.J;Roshan Dalvi, J

Bench : Division Bench

Advocate : S.G. Deshmukh in PIL No. 131/2008 Ms. Sumedha Rao in PIL No. 91/2008 Mr. Kiran Bhalerao in PIL No. 21/2010, for the Appellant; S.G. Aney with Mr. D.D. Madon with Mr. Pradip Sancheti with Mr. Suryakant Jadhav, Advocate for Respondents 9 and 10 Mr. K.K. Singhvi for BMC Ms. Kiran Bagalia, Advocate for MMRDA Mr. Ravi Kadam, Advocate General with Mr. D.A. Nalavade, GP for Respondent State, for the Respondent

Judgement

Roshan Dalvi, J

1. The aforesaid three PILs are largely similar arising out of the same set of facts. The petitioners have challenged the construction put up on 230 acres of Villages Powai and Tirandaz by respondents 9 and 10 (the developers). The conditions of grant for development of the said lands are contained in a tripartite agreement dated 19 November 1986 executed by and between the State of Maharashtra, Mumbai Metropolitan Regional Development Authority (MMRDA) and the developer on behalf of the initial landholders as their constituted attorney. The said grant was made for planning the development of the said two villages by MMRDA as the Planning Authority. Six agreements of lease also dated 19 November 1986 have been executed between MMRDA and the developers as the Constituted Attorney of the landholders. An order of exemption u/s 20 of the Urban Land (Ceiling and Regulations) Act (ULC Act) was made on 12 February 1987. The petitioners claim that the conditions mentioned in the

tripartite agreement have been grossly breached and violated by the developer. The petitioners claim that consequently the exemption order under the ULC Act is required to be cancelled and the land is required to be resumed by MMRDA.

2. The petitioners have accordingly applied for a writ of mandamus directing inquiry in respect of the tripartite agreement and to restrain the developer from carrying on any further construction in contravention of the tripartite agreement and the conditions imposed in the exemption order granted under U.L.C Act. The petitioners have also prayed for appropriate civil and criminal action against the officers and employees of MMRDA upon the case of collusion with the developer.

3. The transactions between the parties are admitted. The nature of the transactions must be first understood. Respondents 5 to 8 were the initial landholders. Their land came to be acquired by MMRDA for development of affordable housing. The MMRDA in turn granted six separate leases to the landholders, including respondents 5 to 8, for 80 years upon the premium of Re.1/-per hectare i.e., Rs. 15/-in all. The leases were executed on 18 November 1986 for development to be carried on in accordance with the relevant permissions under sanctioned plans of Mumbai Municipal Corporation (MMC) in accordance with the provisions of the Bombay Municipal Corporation Act (BMC Act) and the Maharashtra Regional Town Planning Act 1966 (MRTP Act). The leases were signed on behalf of the landholders by the developer as their constituted attorney.

4. Contemporaneously with the said agreements to lease the developer, the MMRDA as the Planning Authority and the State entered into a tripartite agreement setting out the terms and conditions for the development of the entire area under a scheme called the Powai Area Development Scheme (Powai ADS).

5. The relevant and important provisions of the tripartite agreement which have been stated to be breached and violated are essentially under clauses 6, 7(iii), 8(i), 8(ii)(iii), 9(b), 12 & 13, the relevant portions of which run thus:

Clause 6 : The Authority shall immediately after the execution of these presents in accordance with and in exercise of the powers contained under the Urban Land (Ceiling and Regulations) Act, 1976 (Act No. 33 of 1976), (hereinafter referred to as "the said U.L.C.R. Act" exempt or cause to be exempted the lands agreed to be demised from the provisions of Chapter III of the said U.L.C.R. Act in the hands of the land-holders to enable the land-holders to hold the lands agreed to be demised and more particularly described in the Third Schedule hereunder written in excess of the Ceiling Limit on leasehold basis and to develop the same on the terms and conditions herein contained.

Clause 7(iii): The land-holders further agree and undertake that in respect of flats, apartments, tenements, units, premises, houses, bungalows, buildings, by whatever name called and entitled to be erected by them, each of 50% of such units shall not exceed 40 sq. mtrs as measured in terms of Floor Space Index and each of the remaining 50% of such Units shall not exceed 80 sq. meters in

terms of the F.S.I. The expression "F.S.I" means Floor Space Index as defined from time to time in the Development Control Rules framed by the Municipal Corporation of Greater Bombay under the provisions of the Maharashtra Regional Town Planning Act, 1966 (Mah. Act No. XXXVII of 1966).

Clause 8(i): The landholders shall, during the period of 10 (ten) years from the date of possession of the said lands described in the First Schedule hereunder written at their own costs and expenses provide in and over the said lands described in the First Schedule hereunder written being the subject matter of the said Powai Area Development Scheme of the Authority for the time being the whole net work of infrastructure by providing laying or installing water mains, sewers, storm water drains, street lights, roads, leaving open spaces for schools, parks, service industry, hospital, as more particularly delineated on the plan 3 annexed hereto (hereinafter referred to collectively as "the whole infrastructure") and in accordance with the norms and standards laid down by the Municipal Corporation of Greater Bombay. The landholders shall so provide the whole infrastructure within the period of 10 years to the satisfaction of the Authority and such whole infrastructure so completed shall vest in the Authority free of any encumbrances and free of any costs to be handed over to the Municipal Corporation of Greater Bombay. It is hereby agreed and declared that in respect of roads provided in the said lands hereby agreed to be demised unto the landholders and abutting the said lands agreed to be demised and more particularly described in the Third Schedule hereto annexed and shown on the plan annexed hereto and handed over to the Municipal Corporation of Greater Bombay by the Landholders, the landholders shall be entitled prorata inter se in proportion to their holdings of the said land more particularly described in the Third Schedule hereunder written, the F.S.I., which will become available in respect of the area falling under the said roads and other amenities under the Development Control Rules of the Municipal Corporation of Greater Bombay. The landholders further agree that they will have no right, title and interest, claim or demand in such whole infrastructure or any part thereof save and except to the benefit of the Floor Space Index as mentioned earlier. The question whether the whole infrastructure is so provided wholly hereunder shall be determined by the Metropolitan Commissioner for the time being of the Authority whose decision shall be final and binding upon the landholders. The Authority shall grant or cause to be granted to the landholders a license or permission to enter upon the said lands described in the First Schedule written hereunder by themselves or through their agents, contractors and servants for the purpose of providing the whole infrastructure and only thereupon the landholders shall commence and complete the work of providing whole infrastructure as contained herein. The landholders shall provide such whole infrastructure on, over, on in land or lands in respect of which they have been so granted the license or permission. The landholders hereby agree to indemnify and save the Authority of and from any loss or damage that may be caused to the Authority or any other person in the course of the whole infrastructure being provided by the landholders and further

from and of any claim or demand that may be made or any suit or proceedings that may be instituted in respect of such loss or damage and the costs and charges of defending or contesting such claims, demands, suits or proceedings. The landholders agree and declare that the Authority shall be entitled to issue reasonable directions and instructions in respect of provisions of infrastructure in the said scheme.

Clause 8(ii): The landholders shall sell to the Authority/State Government out of flats, apartments, tenements, houses or units to be erected by them on the land agreed to be demised to them and described in the Third Schedule hereunder written flats, apartments, tenements, houses or units equivalent to 15% of the Floor Space Index consumed by the Landholders in the erection or construction of the buildings of such flats, apartments, tenements, units, premises or houses. The landholders shall so sell the flats, apartments, tenements, units, premises or houses at a price calculated at the rate of Rs. 135/-(Rupees one hundred Thirty Five only) per sq. ft. The expression FSI shall have meaning assigned to it in the foregoing para 7 hereof.

Clause 8(iii): The landholders agree and declare that all the lands described in the Third Schedule hereunder written and agreed to be demised by the Authority into them as aforesaid, the lands, more particularly described in the Fourth Schedule hereunder written, were notified by the Central Government for compulsory acquisition for diverse public purposes. The landholders agree with and undertake to the Authority that they will offer to the Central Government to grant a sub-lease or sub-leases of the lands described in the Fourth Schedule hereunder written at the premium or premiums to be determined by the Director of Town Planning, Government of Maharashtra, provided that the lease agreed to be granted by the Authority to them of the lands agreed to be demised and described in the Third Schedule hereunder written contains a condition enabling or permitting them to grant such sub-lease or sub-leases and provided further that if the Central Government shall not signify unqualified acceptance of such offer agreed to be made as stated hereunder within three months from the date of offer, the offer made by them shall lapse irrevocably and thereupon the landholders shall stand absolved of their liability under this clause and shall be entitled to use such lands in the same manner and to the extent to which other adjacent lands are permitted under the terms and conditions of the lease to be granted by the Authority.

Clause 9(b): Power in case the landholders shall fail to complete the works and infrastructure within the time specified in clause 8(1) and in accordance with stipulations hereinbefore contained (time in this respect being the essence of the contract) or shall not proceed with the infrastructure works with due diligence or shall fail to observe any of the stipulations on their part herein contained to re-enter through the Metropolitan Commissioner upon and resume possession of the said lands described in the First Schedule hereunder written and everything thereon and thereupon this agreement shall cease and determine and all

erections and materials plant and things upon the said lands shall notwithstanding any enactment for the time being in force to the contrary belong to the Authority without making any compensation or allowance to the landholders for the same.

Clause 12: Subject to provisions of Clause 9 hereof, if either the Authority or Landholders shall commit breach of any condition/obligation or stipulations contained herein to be observed and performed by the Authority or the landholders, respectively, the party suffering any loss or damage in consequences of such breach shall be entitled to be paid compensation by the party committing the breach. It is hereby agreed that such compensation shall be at Rs. 100/- (Rupees One Hundred only) for every day of delay involved in the breach.

Clause 13: Any dispute or difference which may arise between the parties hereto in respect of performance, non-performance or terms of performance or breach or cancellation or abutment of this agreement including validity, subsistence, termination or interpretation of this Agreement or any of the terms or part thereof shall be referred to arbitration of the Arbitrators one of whom will be nominated by the Authority and the other by Landholders and such Arbitrators shall appoint an Umpire before entering upon the reference and any award given by the said Arbitrators and Umpire to be appointed by them shall be final binding and conclusive upon the parties hereto. The arbitration shall be governed by the provisions of Arbitration Act, 1940, and amendments thereto from time to time.

6. It is clear that under the aforesaid clause 6, the land to be developed was to be exempted under Chapter III of the ULC Act on the terms and conditions contained in the order of exemption. The exemption order dated 12 February 1987 sets out that in view of the location of the land and the purpose for which it was to be used the exemption order was to be granted. The location of the land at the time of the order in 1987 was far from the habited city of Bombay and the purpose of the use of the land was its development for affordable housing. It is argued on behalf of the petitioners that the lands were unacceptable, open, and barren and would not have been attractive for habitation. The land holders were, therefore, given back the acquired land for a pittance to develop it. In view thereof the excess land held by them came to be exempted from the rigors of ULC Act. Hence the exemption was granted on specified conditions as set out in the tripartite agreement. Any breach of the conditions would result in withdrawal of the order under clause 4 thereof. When the exemption is rescinded Chapter III of ULC Act was to apply as if the land had not been exempted. Consequently, under clause 6 the exemption was to be granted as per the terms and conditions contained in the exemption order. Under clause 4 of the exemption order the terms and conditions mentioned in the agreement were to apply upon breach or failure of which the exemption order would be rescinded. Hence the terms and conditions of the agreement were mandatory and sacrosanct requiring strict compliance.

7. The main term and condition is set out in clause 7(iii). Clause 7(iii) sets out

the maximum area of construction of the flats, units, premises etc. 50% of the units were not to exceed 40 sq. mtrs of FSI and the other 50% were not to exceed 80 sq. mtr of FSI as defined from time to time in the Development Control Rules (D.C. Rules) of the MMC and the MRTP Act. It is the case of the petitioners that this was the main condition for affordable housing to the public in the city of Mumbai. It is their case that the developer has blatantly, grossly and outrageously ignored the said specific condition and constructed large palatial units so as to bring them wholly out of the reach of the middle class people for whom they were meant as affordable housing. The developer has not denied this condition though he admits to have set up units far larger than the maximum allowed under the tripartite agreement.

8. The developer has claimed that members of the family of several flat purchasers booked and registered agreements for more than one units and claimed to amalgamate them. These were one too many. They incidentally booked adjacent units. They claimed to demolish the wall separating the units. They claimed to have larger units. These were members of one family. These were generally husband and wife, father and son or father and daughter. From time to time the developer has made requests to the MMRDA for allowing the amalgamation. The amalgamation appears to be endemic. The developer appears to have had clients and customers who largely needed only large flats. The very purpose of the tripartite agreement was to construct smaller flats for affordable housing. The developer as well as the flat purchasers appear to have thrown to the winds this essential requirement. The developer has, even before us, sought permission for even future construction (if it is at all allowable) to amalgamate when required. The grievance of the petitioners is largely concerned with such amalgamation. The orders in the writ petition would be largely required to be passed upon the request for such amalgamation, past and future.

9. The developer sought to construct and has constructed flats and units far in excess of the maximum area of each of such flats and units permitted. The desire not to construct is matched by the inability to construct. The petitioners have shown various brochures and pamphlets of the developer showcasing the exquisite and elitist construction sought to be put up by the developer. Whilst we appreciate the elegance of the construction and the intent at creating an architecture marvel for the city of Mumbai, we see the specific intent of wholly ignoring the most vital, and perhaps the only, condition in tripartite agreement. The pamphlets only show, as the petitioners have rightly described, palatial buildings of the art-deco architecture. There is no mention of small units of 40 sq. mtrs or even 80 sq. mtrs offered to public as affordable housing. Consequently, the land which was leased upon a pittance of Rs. 1/-per hectare came to be developed as a goldmine realising from such investment millions of rupees worth of real estate. This, the petitioners contend, has been wholly pocketed by the developer. Though the developer claims that his cost of construction has matched the final product, it remains to have been on a free land which otherwise the developer would not have been able to obtain or

develop given the rigors of ULC Act and the location of the land itself at the time he entered into the tripartite agreement, it being both inaccessible from the city of Bombay as it then was and barren.

10. Pursuant to the decision in the executive meeting of the MMRDA a notice came to be issued upon the developer on 31 October 2007 showing the agreement between the parties as also the no-objection granted by the MMRDA on 18 August 1989 to permit the joint user of two units subject to condition stated therein that there shall not be any further violation of the construction with regard to the size. Since constructions ranging from 180 sq. mtrs to 457 sq. mtrs were put up as per the pamphlets, advertisements etc. of the builders, the MMRDA alleged gross violation of condition 7(iii) and the offence of the criminal breach of trust. Consequently, the then Metropolitan Commissioner issued show-cause notice upon the developer why the exemption under the ULC Act be not rescinded and annulled and why the licenses granted under the agreement to lease to develop the properties be not cancelled. The developer was given a hearing on 17 December 2007. He submitted his explanation by way of a reply dated 17 December 2007. He did not deny the complaint or the facts of the case. He did not tender the explanation sought. He only stated that he had not violated the conditions.

11. By its report dated 14 February 2008 the Metropolitan Commissioner set out the provisions of the tripartite agreement, the complaint of one Shivdasani alleging construction of flats of various measurements between 180 sq. mtrs and 457 sq. mtrs. , the fact that the plans were not submitted to the MMC for sanction, the fact that an explanation was sought from the developer and the MMC and the fact that an oral hearing was granted to him on 17 December 2007. The report further shows that the developer did not deny the statements in the complaint or the facts that had transpired, but only stated that the amalgamation will not be in excess of 10% to 15% of the total development and would be as per the terms and conditions of the no-objection given by the MMRDA under its letter dated 18 August 1989. The report sets out that the Powai ADS was made mainly with a view to make available affordable tenements and that the terms and conditions of the tripartite agreement were framed for that purpose. It concludes that the developer had violated condition 7(iii) and, therefore, exemption order and the agreement for lease be cancelled and the possession of the land be recovered. The report has been made to the Additional Chief Secretary, the Chief Secretary, the Chief Minister and the Chairman, MMRDA. Necessary directions and orders in that behalf are sought from the State Government.

12. It is contended on behalf of the petitioners that the State Government and its officers in collusion with the developer failed to act on the report. It would have to be seen by the Court whether the case is made out for acting upon that report. If the violation of tripartite agreement is shown the exemption order issued, pursuant to and in accordance with the tripartite agreement, would come

up for scrutiny and challenge. The exemption order would be required to be cancelled. The excess land under the ULC Act would, therefore, revert to the State. The agreement for lease would also stand cancelled and possession of the land would require to be taken by the State.

13. It appears that the State sought to make amends on behalf of the developer and, in the words of the petitioners, sought to shield the developer. By its order dated 31 March 2008 the State Government informed the Metropolitan Commissioner that the premium should be charged as per the Government policy for the TDR used by the developer as per the prevailing market price available in the ready-reckoner at 100% considering third party interest created. The State Government directed recovery of Rs. 3 crores as penalty and the undertaking that he would strictly observe the conditions of the tripartite agreement and not violate them for "ongoing construction works". The petitioners contend that this anticlimax shows the collusion as much as the corruptibility of the State Government and its officers. Consequent upon the State Government's direction the developer deposited Rs. 3 crores on 5 May 2008. The petitioners claim that the developer's construction would be worth more than Rs. 200 crores, so the pittance was directed to be deposited and was in fact deposited.

14. The MMRDA through its Metropolitan Commissioner by its notice dated 14 May 2008 sought details of the amalgamated flats from the developer and called upon him to execute an undertaking. Whereas an undertaking is executed and forwarded under the developer's letter dated 8 September 2008 upon denying the averments of the notice, the details of the amalgamated flats are not shown to be supplied.

15. The undertaking of the developer is undated made on a stamp paper of 5908. The essence of the undertaking in clause 3 runs thus:

(3) I will ensure that no [any] terms & conditions of the said Tripartite Agreement and the Agreement to Lease referred to above will be violated in the present and future development being/to be carried out by me on the land referred in the said Tripartite Agreement and the Agreement to Lease referred as above.

16. The petition has been filed on 6 October 2008. Hence immediately prior to the petition the developer undertook to ensure that no terms and conditions of the tripartite agreement and the agreement of lease would be violated and the future development would be in accordance thereto.

17. The developer has been allowed to carry out construction which would be subject to the final order in the petition without being entitled to any equity. The developer is expected to carry out construction of only flats and/or units of 40 sq. mtr and 80 sq. mtr.

18. Even before us it is requested on behalf of the developer that large flats within the permitted area be accepted and that even in future construction of

flats be allowed to be amalgamated. We do not understand how the developer has so sensed the real estate market that he expects various parties to request amalgamation of flats. Indeed when flats are required to be sold they are to be sold to a single member of one family. Two flats, much less two adjoining flats, cannot be sold to a husband and wife, father and son, father and daughter etc. What cannot be done directly can never be allowed to be done indirectly. Not only the tripartite agreement, but the developer's undertaking requires clause 7(iii) to be complied and not violated. The very request shows the intent to violate. In fact it is not even argued that clause 7(iii) is merely directory or was meant to be breached. It is upon this ambit that the entire case of the developer is put before the Court.

19. The record shows that by letter dated 8 June 1989 the developer put on record clause 7(iii) of the tripartite agreement requiring the ceiling limit of the area of construction of the flats and units to maintain the ratio. However he stated that his prospective purchasers, either individuals or companies, requested him to merge two adjoining flats or one flat above the other. While executing that work, the merging exceeded the prescribed limit of 80 sq. mtrs of the tenements which was objected by the MMC. The MMC contended that not more than one flat could be sold to one family. A family unit would consist of husband, wife and children. The flats were booked in the names of more than one member of the family. Permission was sought to increase the area of the flats by merging two flats into one such that the majority of the cases would not exceed 100 to 125 sq. mtrs and in extreme cases it would not exceed 160 sq. mtRs. The developer further contended that whilst granting the exemption/permission u/s 20 of the ULC Act the State Government, as a policy, allowed 20% of the flats to be up to 100 sq. mtrs so that the limit of 80 sq. mtrs was not sacrosanct. He specified that the merging of flats would not increase beyond 10% to 15% of the over all development and applied for no-objection for constructing larger flats from the MMRDA.

20. Whereas his application shows the correct stand of the MMC in not allowing flat sizes to be more than the specified limit and not allowing more than two members of the family to purchase two adjacent flats, his own application was to make an extension for few flats only, being not more than 15% of his overall development. The developer has not been able to show the policy of the State Government to allow 20% of the flats up to 100 sq. mtRs. Though the letter shows a copy of the permission attached, no copy is shown to be attached in the Court record. The developer has not shown in which extreme cases flats exceeding 160 sq. mtRs. were constructed. He has also not shown how many flats exceeded 125 sq. mtRs. Such flats may only be upon merging one flat of 40 sq. mtr with another flat of 80 sq. mtr. In any event the merged flats would be few and far between after the developers own contention in para 4 of the letter that the merging of the flats would not increase beyond 10 to 15% of over all development.

21. The MMRDA replied to the said request on 18 August 1989. It also set out the prime condition of the tripartite agreement in clause 7(iii). However it granted permission for joint usage of two units of flats upon six conditions. The main condition being condition No. (vi) which runs thus:

(vi) That in all future planning the ratio of the tenements and their sizes are strictly maintained as per the Tripartite Agreement while seeking the GBMC's sanction of the plans.

This was a one-time permission. It constituted a novatio between the parties. It had a self-imposed limit of 10% -15% of the construction to be used for merger. This ceiling could not be exceeded. Hence at least in all future constructions the ratio of the tenements and sizes was to be strictly 40 sq. mtrs for 50% of the units and flats and 80 sq. mtrs for remaining 50% of the units and flats.

22. The developer has not shown which was the precise construction up to 8 August 1989 and which buildings have come up thereafter. He has also not shown how many tenements, if at all, were constructed in terms of the aforesaid condition, his undertaking and the specific orderS. The Petitioners have instead shown massive, large scale construction all larger than the prescribed ceiling limit.

23. It appears that even the later construction by the developer went on unabated ignoring the size limit. There have been several meetings of the MMRDA officers setting out the history and considering the aftermath of the acts of the developer. There have been several complaints more specially by one Mr. Shivdasani setting out the blatant and flagrant breach of the agreement upon such vast construction.

24. Under clause 9(b) the developer was to complete the construction work and provide the whole network of infrastructure leaving open spaces for schools, parks, service industry and hospitals by utilising the FSI of the plot agreed to be leased to the landholders in accordance with the norms and the standards of the MMC within the time limit stated in clause 8(i) of the tripartite agreement failing which the MMRDA was to resume possession of the lands allowed to be developed by and agreed to be leased to the landholders without any further compensation. Similarly if the exemption u/s 20 of the ULC Act was breached the permission was to be withdrawn and the exemption would stand rescinded.

25. Whereas the Petitioners would have clause 9(b) strictly enforced and claim that the ULC permission granted u/s 20 of the ULC Act be rescinded and the land be reverted to the State Government as it would be the owner of the land acquired for MMRDA to put up affordable housing as a public purpose which is not achieved by the breaches of the developer, the developer would contend that the order u/s 20 of the ULC Act is bad because the landholders had not filed any declarations u/s 6, 8 or 9 of the ULC Act and were not issued notices in that behalf.

26. These petitioners do not challenge the procedure adopted under the ULC Act. All the parties, being the landholders, the developer acting on behalf of the landholders as their constituted attorney, MMRDA, as also the State Government acted in agreement. The landholders allowed the land to be acquired in or before 1986 in consideration of which the State Government granted permission to them to develop the land under a lease at Re1/-per hectare and which they, through their constituted attorney, the developer, agreed to have developed. Such development could not have taken place during the period the ULC Act was in force but for the exemption/permission granted thereunder. The permission has enured for the benefit of all including the developer. None can challenge the permission under which he has acted and derived benefits. In fact the developer has relied upon the provisions of the ULC Act to claim that the State Government allowed 20% the flats to be of 100 sq. mtRs. in the permission granted u/s 20 of the ULC Act (though that permission is not produced before us).

27. The permission is conditional. Hence the conditions under the permission would have to be complied. The conditions were to complete the construction over the entire lands under the Powai ADS within 10 years as specified in clause 8(1) of the tripartite agreement and as per the stipulations in the said agreement, i.e, of 40 & 80 sq. ft., of equal number flats upon failure of which the MMRDA was entitled to re-enter upon the land and resume possession of it.

28. The mere fact that the ULC Act is later repealed would make no difference to the contracts already entered into and which were already breached before the repeal. However, the disputed lands may not vest in the State Government as possession of the land was not taken by the State Government (See in the case of Voltas Ltd.Vs. Addl. Collector & Competent Authority 2008 5 BCR 746) 28. In any event the breach of clause 7(iii) by itself would be sufficient to visit the developer with the consequences of such breach under the law of contracts.

29. Under clause 8(ii) the developer was to sell to the MMRDA/State Government 15% of the FSI consumed by the developer in the construction of the flats and units @ of Rs. 135/-per sq. ft of area. That has not been complied at all. If complied, it would have been to the extent of 96,470 sq. metr., of construction having 1800 flats.

Under clause 8(iii) the developer was to offer the Central Government a sub-lease of the land described in schedule IV of the agreement being a part of the land to be developed and if the Central Government did not signify its unqualified acceptance within 3 months of the offer, the offer was to lapse irrevocably and the developer was to be absolved from such liability.

30. It is seen that these clauses they are mutually exclusive. They show two distinct obligations cast upon the developer.

31. It is argued on behalf of the developer that the land was offered to Central Government as required, but was not unconditionally accepted by it as required within the time specified and hence the developer has been absolved of his

liability. Clause 8(ii) relates to the sale of land to the State Government of 15% of the flats and clause 8(iii) refers to the offer of land to the Central Government. It is claimed by the developer that neither of the clauses remain for compliance because the land has not been accepted by the Central Government and hence the flats thereon would not be constructed. The MMRDA has by its letter dated 22 February 1990 absolved the owner of the condition for giving the lands earmarked in schedule IV of the tripartite agreement to the Central Government as except the MTNL no other Central Government agency offered to take the sublease of the land. The letter states that the developer is, therefore, absolved of his liability under clause 8(iii) of the tripartite agreement and would be entitled to use the lease in the same manner and to the same extent to which the other leases were permitted to be used by the developer under the terms and conditions of the lease except the land of 18 hectares claimed by MTNL out of 34 hectares offered to Central Government. Such land leased to the landholders was to be developed by the developer under the tripartite agreement and was available to the developer to be developed in the same manner as the remainder of the land.

32. However this does not in any manner affect the obligation of the developer to sell 15% of the FSI consumed on the land to the State Government @ Rs. 135/- per sq. ft., of area under clause 8(ii) of the tripartite agreement. Neither is this liability refuted, nor are the flats sold at such rate or even offered to the State Government in compliance with clause 8(ii) by the developer.

33. The State Government had required a part of the land to be used for its employees to provide housing stock within affordable means of the poor by its Resolution dated 22 August 1986, relied upon by the petitioner in PIL No. 21 of 2010. The State Government has been wholly deprived of the land which was to be given in consideration for getting the entire land exempted from the mischief of the ULC Act.

34. The agreement for lease executed contemporaneously with the tripartite agreement only gives permission to the landholders as the licensees of MMRDA to enter upon and develop the land by erecting buildings for the purpose permitted under the agreement and no other purpose until the grant of the lease. The actual lease of the land is not yet shown. The purpose of the tripartite agreement is to make available affordable housing to the people of Mumbai. Hence the development of the entire land including the land offered to the Central Government and not accepted by the Central Government which reverted to the developer would also necessarily be the development as contemplated in the tripartite agreement to meet with the same avowed purpose. Consequently, for such 15% of the land also the development has to be strictly in consonance with clause 7(iii) requiring flats and units to be constructed not exceeding 40 sq. mtrs and 80 sq. mtrs equally for 50% each of the tenements constructed.

35. We are surprised to note that all the parties - the Government, the MMRDA and the developer - have strictly construed and complied with the clause 8(iii);

They have totally ignored clause 8(ii). The petitioners require the developer to comply with clause 7(iii) equally strictly and fully which has neither been done by the developer, nor insisted upon by the MMRDA and this is reflected in the aforesaid correspondence by and between the developer of the MMRDA contained in their respective letters dated 8 June 1989 and 18 August 1989 requesting the permission to amalgamate the flats and granting such permission respectively.

36. In the writ petition filed about a decade thereafter the grievance is that almost all the tenements go against the specific mandate contained in clause 7(iii) of the tripartite agreement which aspect has not been denied by the developer. Smaller tenements have not been shown by him. The no-objection certificate itself has been breached.

37. It is contended on behalf of the petitioners that the permission of the MMRDA dated 18 August 1989 itself has the effect of nullifying condition 7(iii). The petitioners contend that the permission itself was granted in collusion with the developer. In fact they make a charge of corruptibility alleging criminal offences under the Indian Penal Code and the Prevention of Corruption Act against the officers granting sanction which was in vague terms without specifying which of the already constructed flats and units were accepted under the permission granted so that it could be seen which was to be the future construction which was to maintain the strict requirement as to the size and the ratio of the tenements.

38. It is contended on behalf of MMRDA that the outrageous breach of the tripartite agreement has resulted in enormous amount of compensation payable by the developer to the MMRDA which is a part of Arbitration proceedings adopted by the parties and which would be agitated in the competent forum being this Court in a petition filed u/s 34 of the Arbitration Act challenging an award dismissing their claim of compensation entirely.

39. It is contended on behalf of the developer that the Arbitration Award having been made, this Court cannot go into even the bonafides or legality of the construction.

40. The Arbitration Award is not the final judgment even on the issue of compensation; these writ petitions challenge the legality of the acts of the developer which is outside the preview of Arbitration.

41. It is also contended on behalf of the developers that the writ petition is filed too late in the day and would be barred by laches. That may at best apply for the construction already put up. The breach of provisions of law or contract between the parties cannot be allowed to continue once it is made known to Court. That itself is the spirit of the interim order of the Division Bench of this Court presided over by the then Chief Justice Swatanter Kumar and Justice Bobde dated 4 December 2008 which injects further sale of amalgamated flats and makes the already put up construction subject to the final orders in the writ petition without the developer being allowed to claim any equity for the work

done during the pendency of the petition. Still further construction remains to be carried out after the aforesaid interim orders of injunction were passed in the first of the petitions being PIL No. 131/2008 on 4 December 2008 and extended by the further order dated 21 April 2010.

42. It is clear that clause 7(iii) and 8(i) of the tripartite agreement have been wholly breached. The required flats have not been constructed and consequently the network of infrastructure has not been provided within the 10 year period during which the construction was to be completed. The open spaces for schools, parks, service industry, hospital etc. have not been left. The land has, therefore, vested in MMRDA free from all encumbrances under clause 8(1) of the tripartite agreement even if it is not liable to be resumed by the State Government under clause 9(b) of the agreement.

43. Massive construction has been put up pending the petitions. 70 buildings are constructed in the Powai ADS. Various applications for contempt upon breach of the order of injunction seeking punitive reliefs are also filed.

Certain commercial premises are also constructed. Though the tripartite agreement makes no mention, the developer has contended that 15% of the construction must be allowed to be for commercial purpose. Any commercial construction must be in accordance with the D.C Rules even if permitted.

44. The developer contends that he has brought in Transfer of Development Rights (TDR) purchased by him to be loaded on the buildings to be constructed as a part of the Powai ADS. He claims that that construction must be kept out of the purview of the specific restrictions under the tripartite agreement. Of course any developer would be entitled to put up additional construction upon the TDR purchased by him. That also must be in accordance with the DC rules, if permitted. The petitioners contend that no further construction be allowed. The construction already put up is completely violative of term 7(iii). We may mention that two flats of the 40 sq. mtRs. , if amalgamated may be taken for and calculated to be within the 50% FSI of the entire plot under the Powai ADS which would be 80 sq. mtRs. However the flats which are in excess of 80 sq. mtrs of area could be permitted only to the extent of the specific permission asked for by the developer in his letter dated 8 June 1989 and the permission granted by MMRDA under its letter dated 18 August 1989 so that even the amalgamated flats exceeding 80 sq. mtrs should not be in excess of 15% of the over all development and in any event flats constructed after August 1989 cannot be allowed to be of more than 40/80 sq. mtRs.

45. The permissible FSI is 1. Hence the total permissible FSI on the plot of land under the Powai ADS to be developed is 738609.29 sq. mtRs. After the legitimate deductions for set back area, proposed DP road, other reservations as also for recreational grounds the net area of the plot available for construction for the purpose stated in the tripartite agreement is 4,04,838 sq. mtRs.

46. The developer is, at best, allowed consolidation or amalgamation of 15% of

the total area by order dated 18 August 1989 based upon his request dated 8 June 1989. Such construction would be approximately to the extent of 60730 sq. mtrs being 15% of the total area of 4,04,838 sq. mtRs. thus excepted from the obligation under clause 7(iii) of the tripartite agreement. That would leave approximate 3,44,110 sq. mtRs. of construction required to be constructed of the specified dimensions as affordable housing.

47. The land which was to be offered to Central Government under clause 8(iii) was 50 hectares. Only 8 hectares have been accepted. That would be 80000 sq. mtrs of area to be deducted from the area available for construction, the remainder which is liable to be used in the same manner as the remaining plot for development. Deducting this area the land available for development would, therefore, be approximately 2,64,110 sq. mtRs.

48. This would permit construction of 2200 flats of 40 sq. mtrs and 2200 flats of 80 sq. mtRs. Instead, only 689 flats of 40 sq. mtRs. & 607 flats of 80 sq. mtRs. are accepted to have been constructed consuming FSI of 76120 sq. mtRs. In fact no advertisement or brochures in that respect has been issued. No attempt for any such further construction is also shown to have been made. 1511 flats of 40 sq. mtRs. and 1593 flats of 80 sq. mtRs. would, therefore, necessarily have to be constructed first as per clause 7(iii) of the tripartite agreement without any excuses, exceptions, allowances or reservations before any further construction of whatsoever nature, residential or commercial, is put up. 15% of the 1511 and 1593 flats so constructed shall have to be sold to the State Government @ Rs. 135/-per sq. ft., of area as per clause 8(ii) of the tripartite agreement. Any order short of that must be scorned as shorn of the main requirement of the tripartite agreement which brought in the developer in the Powai ADS in the first place.

49. The developer claims TDR available on the land of 103000 sq. mtRs. He claims to have purchased slum TDR of 135000 sq. mtRs. He has produced certain Development Right Certificates (DRCs) aggregating to 80547 sq. mtRs. approximately. That can be adjusted against the construction already put up all of which is contrary to the terms and conditions of the tripartite agreement in relation to the size of the flats or units.

50. It is contended on behalf of the petitioners that these flats must be sold at the specified prices. The tripartite agreement makes no mention of the price ceiling except for flats of 15% of the FSI to be sold to the State Government @ Rs. 135/-per sq. ft., as contained in clause 8(ii). The developer has put up impeccable construction and brought up the value of not only the plot under Powai ADS, but also the surrounding area. He could justifiably be proud that it may be amongst the best locality in suburban Mumbai. This could be achieved only because the price was not capped. The affordable housing which was meant to be created by the MMRDA included housing of superior quality albeit of a small sizes for such of the middle middle class people or higher middle class people as would be able to afford it. What the MMRDA contemplated was, therefore, only the ceiling on the sizes, but not on the prices. All housing is not expected to be

only for lower income groups. All housing is also not expected to be of a derelict variety requiring to be redeveloped and reconstructed within 3 or 4 decades. The city deserves and requires construction of a superior variety to be purchased by persons of easier means such was the Powai ADS contemplated under the tripartite agreement. We cannot rewrite the contract. We cannot impose any further conditions or restrictions. We must only honour the contract and its intentions within its scope. We must require all parties including the Government to strictly comply with as also enforce the terms and conditions of the tripartite agreement failing which we must direct the implications arising out of noncompliance in accordance with law.

51. The developer also contends that 15% the total construction can be of commercial premises as per the Development Control Rules (DC Rules) of the MMC. We do not find any provision in the tripartite agreement with regard to the commercial user though we accept commercial use of the land to be both inevitable and allowable under the D.C. Rules. In fact under clause 8(i) the developer has been allowed to put up the infrastructure "leaving open spaces" inter alia for schools, parks, service industry, hospital etc. This would show commercial construction at least of the aforesaid nature excepted from the purview of the agreement allowing the developer to construct. We are shown from the photographs produced by the petitioners and not refuted by the developer that conference centres, malls, hospitals, colleges etc have also been constructed. These are commercial premises by their very nature; they are not residential premises. A glance at such construction easily shows that it is more than required 15% of the total FSI. We do not require to make accurate arithmetical calculations. Though such construction is wholly disallowed under the agreement, at best, such construction may be allowed to be later adjusted against the 15% area of the total land under construction allowable as commercial construction. Even allowing such 15% for commercial construction from the net area of the plot available for construction being 404838.255 sq. mtRs. , at best an area of 60730 sq. mtRs. may be used as legitimate commercial construction on the disputed lands from out of the construction of commercial nature already put up. We are concerned with the total area of the plot available for construction after the legitimate deductions to be for residential housing of the two specifications shown in the agreement. Given that 70 buildings have been already constructed having flats/units or larger specifications, we do not see how anything other than flats of 40 and 80 sq. mtrs to take up the entire available FSI potential can be allowed in the Powai ADS before any other type of construction can be put up or allowed to be adjusted.

52. Though we do find a lot of substance in the Petitioners contention that the State Government officers in collusion with the developer have turned a Nelson's eye to the gross violations of the tripartite agreement by the developer, which has resulted in the aggrandisement of the developer alone which smacks of acts of corruption in not heeding the report of the Metropolitan Commissioner of the MMRDA dated 14 February 2008, and instead calling upon the developer to

deposit a paltry sum of Rs. 3 crores for the massive construction put up by him in violation of the terms of the tripartite agreement, we would rather direct corrective action for the public who would be entitled to take up such affordable housing of the specified size being 40 and 80 sq. mtrs of flats rather than punitive action in these writ petitions upon collusion with the Government officers, leaving the petitioners free to take up the issue of corruption in a criminal prosecution against any errant public officers and the developer.

53. Hence, following order.

(a) The petitioners and the developer as also the Metropolitan Commissioner of the MMRDA shall prepare a statement of all the buildings and structures put up by the developer in the Powai ADS alongside their names and description and the numbers and area of the units/flats therein within 4 weeks from today.

(b) The petitioners, the developer and the Metropolitan Commissioner of the MMRDA shall prepare a plan showing the vacant areas of the plot under the Powai ADS, where further buildings may be constructed, within 4 weeks from today.

(c) If the parties are unable to work jointly they would be entitled to work individually in terms of (a) and (b) above.

(d) The developer shall not put up any further construction of whatsoever nature on the remainder of the plot under the Powai ADS before specifying the vacant lands and the buildings that can be constructed thereupon as per the statement and plan mentioned in clauses (a) and (b) above and shown to Court.

(e) The developer shall be entitled to commence any further construction only after obtaining the specific permission of this Court in that behalf and subject to the sanctioned plans of the MMC.

(f) Such construction shall be only of 1511 flats of 40 sq. mtrs 1593 flats of 80 sq. mtrs without any amalgamation, exception, or further allowance.

(g) No two flats shall be sold to the same person or any member of her/his family, being her/his spouse and children.

(h) The developer shall sell to the State Government from such construction such of the flats or units as would represent 15% of the total FSI of the total plot consumed under the development @ Rs. 135/- per sq. ft. and the State Government shall offer those flats to be purchased by the employees of the State Government at the aforesaid rate in a transparent manner.

(i) After constructing and showing the Court the total number of units or flats constructed for residential purpose as initially required under the Powai ADS and after offering to sell the flats as directed in clause (h) above, the developer shall submit a report of such construction and sale to Court with a copy to the Petitioners in all the above Petitions, the MMRDA, the State Government and the MMC.

(j) The Developer shall thereafter be entitled to put up any further construction as per law.

(k) The compensation for the breaches of the tripartite agreement claimed by the MMRDA shall be determined in the appropriate forum.

(l) The petitioners may file any private criminal complaint for any offence committed by the developer or any of the public officers of MMRDA or the State Government in the appropriate Court.

(m) All the writ petitions shall stand over to 29th March 2012 for placing on record the statement and plan as directed in clauses (a) and (b).