
(2012) 11 BOM CK 0123

In the Bombay High Court

Case No : Notice of Motion No. 1438 of 2011 in Suit No. 1037 of 2011

Mana Builders and Developers Pvt. Ltd. and Others	APPELLANT
Vs	
Firdous Park Co-operative Hsg. Soc. Ltd. and Others	RESPONDENT

Date of Decision : 06-11-2012

Acts Referred:

Mumbai Municipal Corporation Act, 1888 — Section 354

Citation : (2013) 1 ABR 350 : (2012) 6 ALLMR 912 : (2013) 1 MhLj 423

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

Bench : Single Bench

Advocate : Deepak Chitnis, instructed by M/s. Deepak Chitnis-Chiparikar and Co, for the Appellant; P.K. Samdani , Along with Mr. Nikhil Karnawat and Ms. Gogre, instructed by Mr. Nivit Srivastava, for Defendant No. 1 and Ms. Rebecca Dias Dias, instructed by M/s. AKS Legal for Defendant No. 10, for the Respondent

Judgement

S.J. Kathawalla, J.—The above suit is filed by the Plaintiffs inter alia for an order and decree against the Defendants to specifically perform the Memorandum of Understanding ("MoU") dated 10th March 2008 (Exhibit-H to the Plaint), Development Agreement dated 24th March 2008 (Exhibit-J to the Plaint) and also to execute all necessary documents/writings so as to effectually sell, transfer and convey the right, title and interest of the Defendants property bearing Survey No. 20, Hissa No. 4, corresponding C.T.S. Nos. 112, 112/1 to 112/7 admeasuring 5335.35 sq. meters situate at Village Bandivali, Tal. Andheri, Mumbai Suburban District ("the suit property") to the name of the Plaintiffs. The Plaintiffs have taken out the above Notice of Motion in the suit seeking interim reliefs i.e. appointment of a Court Receiver in respect of the suit property and an injunction restraining the Defendants from in any manner dealing with, and/or disposing off and/or creating any third party rights in respect of the suit property and from permitting any person other than Plaintiffs from carrying out the work of redevelopment of the suit property.

2. The Defendant No. 1 Society is the owner of the suit property which was

originally developed by M/s. Jogani Enterprises-builder and developer. There are in all 138 members in the Defendant No. 1 Society who have purchased flats and/or shops/offices.

3. According to the Plaintiffs, since the buildings of the Defendant No. 1 were in a dilapidated condition, Defendant No. 1 society floated a tender, and in pursuance thereof the offer submitted by the Plaintiffs vide their letter dated 8th October 2007 for carrying out the redevelopment of Defendant No. 1 Society's property was held to be the most beneficial to Defendant No. 1 Society. At that time the suit property was not owned by Defendant No. 1 Society, since the said M/s. Jogani Enterprises had not conveyed the suit property in favour of Defendant No. 1 Society. At the request of Defendant No. 1 Society, the Plaintiffs negotiated with the said Jogani Enterprises who agreed to accept a sum of Rs. 10,00,000/- in full and final settlement of its claim, and for sale, transfer and conveyance of the suit property along with the building standing thereon in favour of the Defendant No. 1 Society.

4. The Plaintiffs thereafter vide their letter dated 6th November 2007, gave a detailed offer to the first Defendant Society. The Plaintiffs by their said letter have inter alia set out the exact area that will be provided to the members of the Society after carrying out the redevelopment of the suit property. The Plaintiffs also agreed to provide various other commercial benefits such as payment of advance rent to the members of Defendant No. 1 Society for enabling them to make their own transit accommodation arrangements, deposit of Rs. 2.5 crores as and by way of corpus fund with the Defendant No. 1 Society and compensation at the rate of Rs. 12,000/- to every shopkeeper to enable them to acquire temporary alternate accommodation during the construction period.

5. In the Annual General Body meeting of the first Defendant Society held on 11th November 2007, attended by 49 out of 138 members, it was decided to get the plan and elevation features from the Plaintiffs and give the work to the Plaintiffs "upon satisfaction of the members of the Society". A copy of the minutes of the meeting held on 11th November 2007 was forwarded to the Plaintiffs by the first Defendant Society vide its letter dated 26th November 2007. According to the Plaintiffs, a tentative plan along with the elevation drawings of the new building were submitted by the Plaintiff to the Defendant No. 1 Society. The said tentative plan and the elevation drawings were considered and accepted by the Managing Committee Members of the first Defendant Society who approved and discussed the said plan by showing the same to the members of Defendant No. 1. Society.

6. In the Annual General Meeting of the first Defendant Society held on 20th February 2008, Defendant No. 1 Society discussed the various proposals received from different builders and developers. In the said meeting the plan and invitation received from the Plaintiff was discussed in detail by the first Defendant Society. In the meantime, the Plaintiffs paid an amount of Rs. 10 lakhs and also got a Deed of Conveyance executed by Jogani Enterprises in

favour of Defendant No. 1 Society.

7. On 10th March 2008, the Plaintiff and Defendant No. 1 executed a MoU incorporating the terms and conditions agreed between the Plaintiffs and Defendant No. 1 Society pertaining to redevelopment of the property of the Society. After execution of the MoU, a Development Agreement was entered into by and between the Plaintiff and Defendant No. 1 Society on 24th March 2008. The Society vide its letter dated 23rd April, 2008 also acceded to the request of the Plaintiffs dated 19th April 2008 to put up a sign Board of the Plaintiffs in the Society building.

8. In the Annual General Meeting of the first Defendant Society held on 9th November 2000 which was attended to by 63 out of 138 members, the members inter alia confirmed the Agreement as well as the MoU entered into by and between the Plaintiff and the Society. On 19th January 2009 the Society executed an Irrevocable Power of Attorney in favour of the Plaintiffs to enable the Plaintiffs to carry out the development of the said property as agreed between the Plaintiffs and the Defendant No. 1 Society under the Development Agreement. By the said Power of Attorney, the Defendant No. 1 Society authorised the Plaintiffs to carry out the development of the suit property in accordance with and as contemplated by the Development Agreement and also in accordance with the lay out plan sanctioned by the Bombay Municipal Corporation or any other Municipal/local Corporation/body of Mumbai, and as per the requirements as laid down by the development control authorities or other relevant authorities for successful development of the suit property. The Plaintiffs were also empowered to demolish and construct buildings and other structures on the suit property, consuming the entire potential Floor Space Index ("FSI"), including FSI by way of Transfer of Development Rights ("TDR").

9. In the year 2008, about 10 members of the Society filed a dispute before the IVth Co-operative Court, Mumbai being Dispute No. 309 of 2008 challenging the said redevelopment of the suit property. In the said dispute, the Society filed its affidavit dated 19th November 2008 (Exhibit-Q to the Plea) opposing the said dispute and supporting redevelopment of the property of the Society by the Plaintiffs. The Hon. Secretary of the Society by his letter dated 28th January 2008 informed the Plaintiffs that the Managing Committee of the first Defendant Society has approved, discussed and also shown to the members of the Society the plans, and thus authorised the Plaintiffs to go-ahead with the development and other formalities. By an undated letter, the Plaintiffs were also handed over peaceful possession of the suit property.

10. The Plaintiff by its letter dated 1st August 2009 addressed to the Secretary of Defendant No. 1 Society inter alia recorded that the Society has failed to get the Agreements for providing alternate accommodation to the Members of the Society executed from each and every member and that the Society should get the agreement for permanent alternate accommodation executed from the remaining members of the Society immediately on receipt of the said letter. By

the said letter, the Plaintiffs also informed the first Defendant Society that in view of the prevailing market situation, the Plaintiffs will have to consider reducing the corpus fund amount and the monthly rentals given to each member and that they will provide extra area of not more than 25 per cent to the residential owners and 10 to 15 per cent to the shop owners. The first Defendant Society was also informed by the Plaintiffs that the Plaintiffs will not be providing a Bank Guarantee as initially offered to be provided by them.

11. The Defendant No. 1 Society did not respond to the said letter dated 1st August 2009 received from the Plaintiffs. On 16th September 2010, the Assistant Engineer (B & F), K/W of the Municipal Corporation of Greater Mumbai issued a notice u/s 354 of the Mumbai Municipal Corporation Act to the Chairman of the Society, setting out therein that the buildings on the suit property are in a ruinous condition, likely to fall and therefore dangerous to any person occupying, or passing by the same. The Chairman of the Society was therefore called upon to forthwith carry out the work set out in the said notice. The buildings standing on the suit premises were inspected by the Municipal Corporation of Greater Mumbai. The Corporation by its report dated 30th September 2010 recommended that if the said buildings are not taken for reconstruction or structural repairs at the earliest, it may deteriorate further and may collapse endangering the lives of the occupants/inmates of the said buildings. It is also recorded by the Corporation that despite several notices having been issued by the Municipal Corporation of Greater Mumbai to the Society and the occupants, no steps are taken either for structural repairs or reconstruction. The A.E. (Bldg.) was requested to issue a notice to vacate the said buildings to avoid any mishap and/or take necessary steps for the same.

12. The Secretary of the Defendant No. 1 Society under cover of his letter dated 4th October 2010 forwarded the said notices received from the Municipal Corporation to the Plaintiffs and requested them to expedite the redevelopment process as per the MoU dated 10th March 2008. According to the Plaintiffs, they received a show cause notice from the Defendant No. 1 Society dated 29th October, 2010 calling upon them to show cause within a period of thirty days from the date of receipt of the said notice as to why the Development Agreement dated 24th March 2008 should not be terminated on the ground that the Plaintiffs are unable to carry out the development of the property of the first Defendant.

13. The Advocate for the Plaintiff addressed a letter dated 24th December 2010 to the Registrar of Co-operative Societies, "K" Ward, wherein it is inter alia alleged that the Society had agreed to provide to the Plaintiffs Agreements duly signed by each and every individual member of the Defendant No. 1 Society agreeing and confirming the execution of the MoU as well as the Development Agreement executed by and between the first Defendant Society and the Plaintiffs and that the Plaintiffs have repeatedly also requested the members of the Society to individually sign and execute the Agreement for providing

permanent alternate accommodation to them. However, out of 139 members, only 53 members have signed and executed the Agreement for providing permanent alternate accommodation in the redeveloped building. It is recorded in the said letter that the Plaintiffs hope that the Defendant No. 1 Society will not compel the Plaintiffs to inform and bring to the notice of the Registrar of Co-operative Society the conduct of the Managing Committee members of not fulfilling their commitments and instead indulging in dishonest, illegal and fraudulent conduct. Interestingly, though the letter is addressed to the Registrar of Co-operative Societies, "K" Ward, the letter is entirely addressed to the Society.

14. The Plaintiff addressed a letter dated 15th January 2011 to the Chairman/Secretary/Treasurer of the Society inter alia requesting them to pursue their members and request them to immediately sign and execute individual Agreements with the Plaintiffs. In the said letter the Plaintiffs have recorded that in their earlier letter dated 1st August, 2009, they had informed the Society that if the above project is delayed for a considerable period, the Plaintiffs may have to reduce the corpus fund, rental and area agreed to be provided by the Plaintiffs to the members of the Society. Under these circumstances they had requested the Society to get the said Agreement for providing alternate accommodation executed from the remaining members of the Society immediately. It is further recorded that the Plaintiffs have kept the aforesaid payment ready and are awaiting a prompt reply from the Society and if the said Agreements for providing alternate accommodation are signed and executed from the remaining members of the Society within a short duration, the Plaintiffs will not change any of the terms and conditions as mentioned in the Development Agreement.

15. On 17th January, 2011, the Plaintiffs issued a public notice in the Times of India setting out the Agreements entered into by and between the Plaintiffs and the Defendant No. 1 Society and thereby put the public to notice that in view of the execution of the said documents, the Society has no right to enter into any transaction with any other developer/builder. It was further cautioned that if the Society is illegally and unlawfully dealing with some other developer for developing the said property, the transaction will not be binding on the Plaintiffs and they will challenge the said transaction in a Court of Law, thereby preventing any such developer from entering and disturbing the Plaintiffs' possession of the suit property.

16. The Plaintiffs thereafter filed the present suit on 26th April 2011. Since Defendant No. 1 Society had invited tenders for re-development of the suit property on 13th December, 2010 and pursuant thereto had entered into a Development Agreement and Power of Attorney with Defendant No. 10 on 2nd July 2011, the Plaintiffs amended the plaint on 17th June 2011 and joined the new Developer as Defendant No. 10 to the present suit. The Plaintiffs also made an application for urgent ad-interim reliefs which was rejected by a detailed order of this Court (Coram: S.J. Vazifdar, J.) dated 23rd June 2011.

17. The Plaintiffs preferred an appeal rejecting the grant of ad-interim reliefs before the Division Bench of this Court. The Division Bench, whilst requesting the single Judge taking Notices of Motion to try and dispose of the Notice of Motion at an early date, clarified that the third party rights created in favour of Defendant No. 10 would be subject to the result of the final order of the learned single Judge on the Notice of Motion.

18. The Learned Advocate appearing for the Plaintiffs has submitted that the Plaintiffs have complied with all the obligations required to be fulfilled by them under the MoU dated 10th March 2008 and the Development Agreement dated 24th March 2008. It is submitted that however the Defendant No. 1 Society has not complied with clause 3 (b) of the Agreement under which the Defendant No. 1 is obliged to obtain Agreements for alternate accommodation from each and every member of the Society. It is submitted that though the Plaintiff had in its letter dated 1st August 2009, stated that the Plaintiffs will have to reconsider its offer made to the members of the Society and will not be in a position to furnish a Bank Guarantee, the Plaintiffs have subsequently by their letter dated 15th January, 2010, informed the office-bearers of the Society that if they are ready to co-operate with the Plaintiffs and get the necessary Agreements executed from each and every member of the Society pertaining to the alternate accommodation to be provided by the Plaintiffs to the members of the Society, the Plaintiffs will not change any of the terms agreed upon by the Plaintiffs in the MoU/Development Agreement. It is submitted on behalf of the Plaintiffs that the first Defendant therefore cannot contend that the Plaintiffs by their letter dated 9th January 2009 have backed out from the offer made by the Plaintiff to the Society and its members. The Plaintiffs have also relied on the decision of the Division Bench of this Court in Chheda Housing Development Corporation Vs. Bibijan Shaikh Farid and Others, wherein it is held that an agreement for use of TDR can be specifically enforced unless it is established that compensation in money would be an adequate relief. It is submitted on behalf of the Plaintiffs that the Plaintiffs have paid an amount of Rs. 45 lakhs to the Defendant No. 1 Society and has also incurred other expenses. The amounts spent by the Plaintiffs are approximately to the tune of Rs. 93 lakhs. It is therefore submitted that the balance of convenience is also in favour of the Plaintiff and against the Defendant No. 1 Society and that the Plaintiffs be granted reliefs as sought.

19. The Learned Senior Advocate appearing on behalf of the first Defendant No. 1 denied and disputed the submissions advanced on behalf of the Plaintiffs. It is submitted that the Defendant No. 1 has no privity of contract with the Plaintiffs. The suit has been filed by Plaintiff No. 1, which is a Private Limited Company, incorporated on 10th August 2008 and not by Mana Constructions, whereas the MoU, Development Agreement and the Deed of Confirmation have been executed by Defendant No. 1 in favour of M/s. Mana Constructions. The certificate of registration of M/s. Mana Constructions shows that the name of Mana Constructions has been changed to M/s. Mana Builders and Developers Pvt. Ltd. with effect from 1st April, 2008. However, the suit has been filed on the basis of

a Power of Attorney dated 23rd October 2007 executed by the partners of M/s. Mana Constructions in favour of Saleem Motorwala which Power of Attorney is annexed at the end of the Plaint i.e. after page 280. Therefore there is no valid authorisation by Plaintiff No. 1 for challenging the suit. It is submitted that it is thus clear that the Plaintiff No. 1 does not have any privity of contract with Defendant No. 1.

20. The Learned Senior Advocate appearing for Defendant No. 1 has next contended that Defendant No. 1 has complied with all its obligations under the Agreements and it is the Plaintiff No. 1/Mana Constructions who have failed to perform the terms and conditions incorporated in the Agreements. It is submitted that as per recital (F) of the Development Agreement dated 24th March, 2008 it was the representation of M/s. Mana Constructions that they have entered into Agreements with all the members of Defendant No. 1. Clause 3 (b) of the Development Agreement contemplates that at the time of handing over quiet, vacant and peaceful possession of the respective flats/units/shops etc., Defendant No. 1 shall make best endeavours to ensure that all the members cooperate and execute/implement their respective Agreements. The said endeavour is distinct and different from obtaining Agreements or possession from the members. It is submitted that thus there is no obligation upon Defendant No. 1 for obtaining Agreements/possession from its members. Despite this, the Plaintiffs in paragraph 54 of the Plaint have wrongly pleaded such obligation on part of Defendant No. 1. It is submitted that paragraph 54 of the Plaint records that 51 members of the Defendant No. 1 Society out of 138 members had signed and executed Agreements with the Plaintiffs which is contrary to the representation made by the Plaintiffs in the Development Agreement at Recital (F). It is therefore submitted that it is the Plaintiffs who have failed to perform their part of the Agreement and are wrongly alleging that the failure is attributable to Defendant No. 1.

21. The learned Senior Advocate appearing for Defendant No. 1 next contended that the Plaintiffs even at the time of filing of the Plaint were not ready and willing to perform its part of the contract. Clause 3 (d) of the Development Agreement contemplates furnishing a Bank Guarantee of Rs. 2.5 crores by M/s. Mana Constructions to Defendant No. 1. However, the Plaintiffs in paragraph 62 at page 33 of the Plaint have stated that they have reduced the corpus fund and monthly rental amount to be provided to the members of Defendant No. 1 and will not be able to provide Bank Guarantee as agreed by them. It is submitted that in paragraph 48 of the Plaint, the Plaintiffs have admitted that there was no relief granted against Defendant No. 1 in Co-operative Court No. IV. Thus, nothing prevented the Plaintiffs to proceed under the Development Agreement dated 24th March 2008. It is also submitted that the Plaintiffs have stated in paragraph 55 of the Plaint that the plans were approved by Defendant No. 1 on 28th January 2008. However, no steps were taken by M/s. Mana Constructions till the termination of the Development Agreement for obtaining sanction of the building plans. It is therefore submitted on behalf of Defendant No. 1 that the

Plaintiffs were never ready and willing to perform their part of the Contract and are therefore not entitled to specific performance of any Agreements as sought or otherwise.

22. The Learned Advocate appearing for Defendant No. 1 has submitted that the reliefs claimed by the Plaintiffs are not contemplated by the Agreement. By prayer clause (a), the Plaintiffs seek specific performance of MoU and Development Agreement which cannot be granted. Further by prayer clause (b), the Plaintiffs are seeking a decree for execution of all necessary documents/writings so as to effectually sell, transfer, convey the right title and interest of Defendant No. 1 in the suit property. Under the Development Agreement, the only right which the Developer i.e. M/s. Mana Constructions could claim is to carry on re-development of the suit property as per the terms and conditions of the Agreement. Therefore, the reliefs claimed are not contemplated by the agreed terms and hence cannot be granted. In support of this contention, the learned Senior Advocate appearing for the Defendant No. 1 has relied on the decision of the Division Bench of the Delhi High Court in *Raj Rani Bhasin and Others Vs. S. Kartar Singh Mehta*, . The Learned Senior Advocate appearing for Defendant No. 1 has also submitted that the purported show cause notice dated 29th October 2010 issued to the Plaintiff, is annexed as Exhibit-1 to the affidavit filed on behalf of Defendant No. 1 dated 21st June 2011. He has submitted that in the Plaint the Plaintiffs have suppressed, and later admitted in the affidavit-in-rejoinder in paragraph 18 at page 53 that they had a meeting with the members of the Managing Committee of Defendant No. 1 and Defendant No. 10 where they were offered return of Rs. 45 lakhs. It is therefore submitted on behalf of the Defendant No. 1 that the conduct of the Plaintiffs smacks of mala fides and disentitles the Plaintiffs from grant of any discretionary reliefs.

23. The Learned Senior Advocate appearing for Defendant No. 1 has lastly submitted that the Plaintiffs cannot claim any equities in their favour. It induced Defendant No. 1 to enter into the Development Agreement on representation that it had already entered into Agreements with members of Defendant No. 1. The members of Defendant No. 1 have passed resolutions to terminate the Development Agreement dated 24th March 2008 in favour of the Plaintiffs and have appointed Defendant No. 10 as the new developer. All the notices for the Special General Meeting of the Defendant No. 1 held on 17th October 2010, 5th February 2010 and 17th April, 2011 were duly served upon M/s. N.S.S.R. Group, a sister concern of M/s. Mana Constructions, being a member of the Defendant No. 1, who purchased shops in Defendant No. 1 as admitted by the Plaintiffs in paragraph 75 of the Plaint. It is submitted that the subject matter of the suit concerns re-development of a Co-operative Society. The buildings need urgent redevelopment. They are admittedly in a dilapidated condition. The Plaintiffs do not have support of individual members, in whose benefit the redevelopment is to take place. The balance of convenience is thus in favour of Defendants and against the Plaintiffs. The Plaintiffs even otherwise do not have a prima facie case. The Notice of Motion therefore deserves to be dismissed.

24. I have considered the submissions advanced on behalf of the parties. The suit is filed by one Mana Builders and Developers Pvt. Ltd. However, in paragraph 1 of the Plaint it is stated that "the Plaintiff Nos. 2 to 7 are the Partners of the Plaintiff No. 1 and they are represented by their Constituted Attorney Mr. Saleem Motorwala. The Plaintiff Nos. 2 to 7 have authorised Mr. Saleem Motorwala to represent them in the matter of redevelopment of the property belonging to the Defendant No. 1 Society". The Plaintiffs have along with the plaint filed a General Power of Attorney executed by the Partners of M/s. Mana Constructions on 23rd October, 2007 in favour of one of its Partners Mr. Saleem Motorwala. In the verification clause Mr. Saleem Motorwala as a Director/Constituted Attorney of the Plaintiffs declared that what is stated in para 1 of the plaint was true to his own knowledge. This Court therefore pointed out on 3rd October 2012 to the learned Advocate appearing for the Plaintiff that since Plaintiff No. 1 is admittedly a Company, Plaintiff Nos. 2 to 7 cannot be partners of Plaintiff No. 1 Company and cannot be represented by their Constituted Attorney Mr. Saleem Motorwala on the basis of the Power of Attorney executed on 23rd October 2007, when admittedly Plaintiff No. 1 Company was not even incorporated. This Court also pointed out to the Advocate for the Plaintiffs that the submission therefore made on behalf of the first Defendant that there is no valid authorisation by Plaintiff No. 1 in favour of Saleem Motorwala to file the above suit appears to be correct. The learned Advocate appearing for the Plaintiffs sought a day's time to seek a clarification of this issue. On the next day, the Advocate for the Plaintiffs filed a chronology of dates and events and also a compilation of documents running into 54 pages explaining that the Partnership Firm was formed by Plaintiff Nos. 1 to 7 in the name and style of M/s. Mana Constructions under a Deed of Partnership dated 1st June 2006. By a Supplemental Deed of Partnership dated 15th March 2008, the Partners of M/s. Mana Constructions had agreed to change its name to Mana Builders and Developers with effect from 1st April 2008. By a Resolution dated 8th April, 2008, the Partners of M/s. Mana Builders and Developers unanimously resolved to convert the Partnership business of M/s. Mana Builders and Developers to M/s. Mana Builders and Developers Pvt. Ltd. i.e. the first Plaintiff which was incorporated on 18th August 2008. Even today, the learned Advocate appearing for the Plaintiffs is unable to explain as to how in paragraph 1 of the Plaint it can be stated that Plaintiff Nos. 2 to 7 are the Partners of Plaintiff No. 1 and how the Plaint is signed by Shri Saleem Motorwala on the basis of a Power of Attorney executed by the Partnership Firm of Mana Constructions on 23rd October 2007. Despite the Advocate for the Plaintiffs having taken time to clarify this issue, he did not apply to this Court to carry out any amendments to the Plaint. In view thereof I am satisfied that there is no valid authorisation by Plaintiff No. 1 for filing the suit and the Plaintiffs are not entitled to any reliefs on this ground alone.

25. Recital (F) of the Development Agreement dated 24th March 2008, reads as under:

F. The Developer has entered into separate Agreements with each member of the

said Society whereby, inter alia, each such member has granted consent to the said Re-Development Project and the Developer has allotted a flat/increased area in the new building/s to be constructed by the Developer on the said Land, on the terms and conditions therein contained. Relevant details of the agreement executed between the Society and each member are provided in the Annexure "A" hereto.

From the aforesaid recital it is clear beyond any doubt that at the time of entering into the Development Agreement dated 24th March 2008 the Plaintiffs (Developer) have represented to the Defendant No. 1 Society that the Plaintiff No. 1 has entered into separate Agreements with each member of the Society whereby each such member has inter alia granted consent to the said redevelopment project and the Developer has allotted a flat having increased area in the redeveloped buildings to be constructed by the Developer on the suit land, on the terms and conditions contained in the said separate Agreements "with each member of the Society". The relevant details of the Agreements executed between the Society and each member which are provided in Annexure-A to the Development Agreement pertains to the original Agreements executed by and between the Society and the Member at the time when the member originally purchased the flat/shop in his possession. The same cannot be mistaken as the details of the Agreements allegedly entered into by and between the Developer and each member of the Society as represented by the Developer to the Society and recorded in Recital (F). Clause (1) of the said Development Agreement clearly states that the recitals to the Development Agreement shall form an integral part of the Agreement and are deemed to form a part of the operative part of the understanding recorded in the Agreement. Despite the aforesaid representation made by the Developer to the Society in the Development Agreement which, as stated hereinabove, forms part of the Agreement, the Plaintiff No. 1 has repeatedly taken a stand that it is the responsibility of Defendant No. 1 Society to get the Agreements executed by each and every member of the Society pertaining to providing alternate accommodation by the Plaintiffs to the members of the Society. In support of this contention, the Plaintiffs have relied on clause 3 (b) of the Development Agreement which pertains to consideration. The said clause 3 (b) is reproduced hereunder:

(b) On the execution of all the Agreements to be executed between the Developer and the individual members of the Society with respect to the Re-development Project and the individual members handing over to the Developer quiet, vacant and peaceful possession of all their respective flats/units/shops etc. the Developer shall pay the residue amount out of the total corpus fund of Rs. 2,50,00,000/- (Rupees Two crores fifty lakhs only). The Society shall make best endeavours to ensure that all the members co-operate and execute their respective Agreements.

From the aforesaid clause, it is clear that clause 3 (b) of the Development

Agreement contemplates, that at the time of handing over quiet, vacant and peaceful possession of the respective shops/units/flats etc., the Defendant No. 1 shall make best endeavours to ensure that all the members co-operate and execute their respective Agreements. As correctly submitted by the learned Senior Advocate appearing for the Defendant No. 1, this endeavour is distinct and different from getting Agreement executed by the individual members of the Society, or possession from the Members of the Society. I am therefore of the view that there is thus no obligation upon Defendant No. 1 for obtaining Agreements/possession from its members as the Developer has represented in recital (F) of the Development Agreement that he has entered into separate Agreements with each member of the said Society wherein each member has granted consent to the said redevelopment project and the Developer has allotted flats/increased area on the terms and conditions mentioned in such separate Agreements. In paragraph 54 of the Plaint, the Plaintiff records that 51 members of the Defendant No. 1 Society out of 138 members have signed and executed Agreements with the Plaintiffs which is contrary to the representation made in the Development Agreement at recital (f). I am therefore of the view that the Plaintiffs are incorrect in their submission that the Defendant No. 1 has failed to comply with its obligations under the Development Agreement to obtain agreement/possession from its members and in fact it is the Plaintiffs who have made an incorrect representation in the Development Agreement that they have already entered into separate Agreements with each member of the Society and have thereafter tried to shift the burden qua execution of the said Agreements with the members of Defendant No. 1 on the Society, which cannot be allowed and disentitles the Plaintiffs from any discretionary/equitable reliefs.

26. Clause 3 of the Development Agreement contains an agreement between the Plaintiffs and the Defendant No. 1 Society as regards "consideration". Under sub-clause (d) of the said clause 3, the Plaintiffs/Developers have agreed as follows:

(d) As and by way of security for the performance of the terms of this Agreement, the Developer shall furnish a bank guarantee for an amount of Rs. 2,50,00,000/- (Rupees Two crore fifty lakhs only) refundable in favour of the Society or alternatively provide/grant transferable development rights to the Society to the extent of Rs. 3,50,00,000/- (Rupees Three Crore and Fifty lakhs only).

The Plaintiffs initially by their letter dated 1st August 2009 inter alia requested Defendant No. 1 society to get the Agreements for providing alternate accommodation to the members of the first Defendant Society executed from each and every member and in paragraph 12 of the said letter recorded as under:

12. In view of the present market situation we will have to consider to reduce the corpus fund amount and the monthly rentals to be given to each member. We will provide extra area of not more than 25% to the residential owner's and 10% to 15% to the shop owner's. As offered initially. We will also not provide Bank Guarantee.

From the aforesaid it is clear that Plaintiff No. 1 has not contended that the contents of the said paragraph 12 would be applicable only if the Defendant No. 1 Society fails to get the Agreements for providing alternate accommodation executed by its members. The said paragraph 12 is clearly independent of the request made by the Plaintiffs to the Defendant No. 1 Society to get the said Agreements executed. In fact, as regards the Bank Guarantee required to be provided by the Plaintiffs to Defendant No. 1 Society, the Plaintiffs have categorically stated "We will also not provide Bank Guarantee" and it is not stated that the Plaintiffs would be considering not providing of a Bank Guarantee. The contents of the said paragraph of the said letter therefore clearly establishes that on 1st August 2009 the Plaintiffs were not ready and willing to perform their part of the contract and wanted to reconsider reduction in corpus fund and the monthly rentals to be given to each member and had taken a decision not to provide the Bank Guarantee. The Plaintiffs having realised later that in view of the said paragraph 12 of the letter dated 1st August, 2009 they are not entitled to claim specific performance of the Agreements, after receiving the purported show cause notice according to the Plaintiffs, and the termination letter, according to Defendant No. 1 on 15th January, 2010, tried to clarify/make up by recording in paragraphs 21 and 22 of the said letter as follows:

21. We draw your attention to our letter dated 1st August 2009 informing you the present market scenario whereby we had informed you that if the above project is delayed for a considerable period, we may have to reduce the corpus fund, rental and area agreed to be provided by us to your members. Under these circumstances, we have requested you to get the said agreement for providing alternate accommodation executed from the remaining members of your society immediately.

22. We have kept the aforesaid payment ready and we are awaiting your prompt reply. If you get the said Agreement for providing alternate accommodation signed and executed from the remaining members of your society within a short duration, we will not change any of the terms and conditions as mentioned in our Development Agreement.

The interpretation sought to be given in paragraph 21 of the letter dated 15th January 2010 certainly cannot be given to paragraph 12 of the letter dated 1st August, 2009. Again even in the letter dated 15th January, 2010, the Plaintiffs have not agreed to provide a Bank Guarantee which it had categorically refused to provide by the letter dated 1st August 2009. In fact, even in paragraph 62 of the Complaint, the Plaintiffs state " The Plaintiffs state that due to changes in market situation the Plaintiffs will have to consider to reduce the corpus fund amount and monthly rentals to be given to the members of the Defendant No. 1 Society". Even if I treat the contents of paragraph 62 of the complaint, as an attempt on the part of the Plaintiff to set out the contents of the letter dated 1st August 2009, in incorrect English, in the facts and circumstances set out hereinabove I am satisfied that there did exist a stage before filing of the present suit when the

Plaintiffs were not ready and willing to perform their obligations as agreed under the Development Agreement dated 24th March, 2008. The Plaintiffs are therefore disentitled from seeking specific performance of the said Development Agreement and any interim reliefs in their favour.

27. Though there is a dispute qua the letter dated 29th October 2010 written by Defendant No. 1 to the Plaintiffs and the Plaintiffs having stated in the plaint that they have replied to the said show cause notice dated 29th October, 2010 addressed by Defendant No. 1 to the Plaintiffs, again a doubt arises as to the case of the Plaintiffs in that regard since Exhibit-AA annexed to the Plaint is a reply dated 24th December, 2010 to the Registrar of Co-operative Societies, "K" Ward and not to the Defendant No. 1 Society. A copy of the said reply is also not marked to the Society.

28. Again though the Society has always cooperated with the Plaintiffs as regards displaying their Board on the property of the Society, approving plans on 28th January 2008 itself, executing Power of Attorney as agreed under the Agreement, handing over possession of the suit property to the Plaintiffs, the Defendants have not taken any steps in getting plans sanctioned from the Municipal Corporation and obtaining IOD in respect of redevelopment of the buildings on the suit property despite more than two years having elapsed.

29. As can be seen from the narration of facts, the buildings are in a dilapidated condition and the Municipal Corporation has already given notices to the Society to have the buildings vacated on the ground that they are likely to collapse causing harm to the life and property of its occupants. In view thereof, the balance of convenience is also in favour of Defendant No. 1 and not the Plaintiffs in having the redevelopment of the project completed as early as possible from a developer of the choice of the members of the Defendant No. 1 Society. In the circumstances, the Notice of Motion is dismissed. However, the Defendant No. 1 is directed to deposit an amount of Rs. 45 lakhs received by them from the Plaintiffs on or before 19th November, 2012 with the Prothonotary and Senior Master of this Court. The Plaintiffs shall be at liberty to withdraw the said amount without prejudice to their rights and contentions in the suit. In the event of the Plaintiffs not being interested in withdrawing the said amount, the Prothonotary and Senior Master shall invest the same in a fixed deposit of a Nationalised Bank initially for a period of one year and thereafter renew the same from time to time.