

**(2012) 05 BOM CK 0037**

**In the Bombay High Court**

**Case No :** Suit No. 1574 of 1980 and Suit No. 1301 of 1981

M/s. Shanti Builders

APPELLANT

Vs

CIBA Industrial Workers" Co-op. Housing Society Ltd. and  
Another <BR> CIBA Industrial Workers" Co-op. Housing  
Society Ltd. and Another Vs M/s. Shanti Builders

RESPONDENT

---

**Date of Decision :** 11-05-2012

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 34  
Contract Act, 1872 — Section 51, 52

**Citation :** (2012) 6 BomCR 209 : (2012) 4 MhLj 614

**Hon'ble Judges :** Roshan Dalvi, J

**Bench :** Single Bench

**Advocate :** Rajesh Shah assisted with Mr. A.B. Nagvekar instructed by Solomon and Co, for the Appellant; S.B. Prabhavalkar a/w. Mr. Mohit Bhansali, for the Respondent

---

## **Judgement**

Mrs. Roshan Dalvi, J.—The Plaintiff in Suit No. 1574 of 1980 is a firm of building contractors who had to put up construction work and who put up certain construction work for defendant No.1 society. There have been various disputes by and between the parties leading the parties to enter into several agreements on 24th June, 1974, 7th August, 1975 & 13th March, 1978. These constituted novatio from time to time between parties. The last agreement of 13th March, 1978 was entered into by and between the Plaintiff and Defendant No.1 society pursuant to the resolution of defendant No.1 society dated 5th March, 1978. Both parties dispute the role of the other under the said agreement and claim breaches on behalf of the other.

2. The suit No.1574 of 1980 is filed for declaration that the agreement dated 13th March, 1978 is valid and subsisting, for specific performance of the agreement and in the alternative for certain damages in respect of the construction work carried out by defendant No.2 and ancillary reliefs.

3. Suit No.1301 of 1981 is filed by the society for termination of the agreement upon the breaches of defendant in that suit who is the Plaintiff in Suit No.1574 of 1980. The contractor claims that he carried out his part of the contract which was to put up the second slab of the building A-1 of the society but the society did not transfer to him the plot of land which was agreed to be transferred in lieu of his previous fees. The society claims that contractor failed and neglected to complete the work specified in the agreement requiring them to get electrical wiring of 80 flats in the building C-1 done by themselves at the cost of Rs.32,000/-, that the contractor failed to cast the second slab of building No. A which required them to get the said work done through another contractor upon spending Rs.44,000/- and that the contractor failed to complete work of building C-1 at the agreed amount of Rs.2,84,000/- requiring the society to get that work done at the cost of Rs.3,00,000/- The society contends that the contractor was paid Rs.44,836/- in excess of the bill certified by the Architect though the quality of work was defective and substandard. The society claims loss of Rs.2,00,000/- upon the defective work and has prayed for a decree for Rs.3,37,000/- and charged on the property. The Society also claims that the notice issued by contractor upon the society U/s.164 of the Maharashtra Co-operative Societies Act dated 7th January, 1980 before filing their suit is not valid and proper notice contemplated under the said provision and accordingly the suit of the contractor is not maintainable.

4. The execution of the agreement dated 13th March, 1978 which is the last agreement between the parties is admitted. The reciprocal promises under the said agreement and breach of reciprocal promises would have to be seen to determine the issues that arise in the suit.

5. Based upon the respective pleadings of the parties Justice S.R. Sathe, as he then was, framed several issues.

6. These issues separately show each of the contentions of the society and the reliefs of the contractor. In essence it will have to be seen who has committed breach of their reciprocal promises of the agreement and what reliefs the other party would be entitled to. Consequently the issues in both suits together are re-cast as follows:

## I S S U E S

1

Whether the suit of the contractor is validly filed pursuant of the notice dated 7th January, 1980 given U/s. 164 of the Maharashtra Co-operative Societies Act, to the society.

Affirmative

2

Whether the Plaintiff in Suit No.1574 of 1980 (contractor) has committed any

breach of its reciprocal promises under the agreement dated 13th March, 1978.

Negative

3

Whether the defendant in Suit No.1574 of 1980 being the society committed breach of its reciprocal promises under agreement dated 13th March, 1978.

Affirmative

4

What relief, if any, is the contractor entitled to?

As per final order.

5

What relief, if any, is the Society entitled to?

As per final order.

7. Both parties have examined one witness each. Essentially the admittedly executed written agreement and the correspondence between the parties which forms the chain of correspondence would determine the issues. The oral evidence would largely be excluded by the aforesaid documentary evidence. A small part of the oral evidence would require to be considered.

ISSUE NO.1

8. Suit No.1574 of 1980 is filed by contractor against society on 5th July, 1980.

9. Notice U/s. 164 of the Maharashtra Co-operative Societies Act,1960 (MCS Act) has been admittedly sent upon the society as also Registrar of Co-operative Societies through the advocate of the contractor dated 17th January, 1980 received by the Registrar of Co-operative Societies which was acknowledged on 2nd February, 1980.

10. It is contended by Mr. Prabhavalkar on behalf of the society that it does not set out verbatim the prayer in the plaint and hence it is not the legal notice u/s.164 of MCS Act which reads thus:

164. Notice necessary in suits.- No suit shall be instituted against a society, or any of its officers, in respect of any act touching the business of the society, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left.

11. Mr. Prabhavalkar took me through the lengthy and verbose notice dated 7th January, 1980. It indeed sets out the entire case of the Plaintiff complete with

the reliefs prayed for in the suit. It sets out the cause of action, the particulars of the Plaintiff and the reliefs sought from the earlier relationships between the parties and the transactions thereby. The notice is in complete compliance of Section 164 of the MCS Act. Therefore, issue No.1 answered in the affirmative.

ISSUE NOS.2 & 3.

12. The agreement dated 13th March, 1978 is the last of the five agreements between the parties. It is itself required to be read and interpreted to see there from the reciprocal promises of the parties to the agreement.

13. The recitals in the agreement show that the buildings A & C-1 are constructed by the contractors and construction of C-1 is almost completed. Building A was yet to be completed. Only the first slab was cast. The recitals show that even in C-1 building Plumbing work, electrical work, glass panes, white washing, water proofing, concrete pavement and Kaccha road near the building were to be constructed. The recitals also show that due to increase in the cost of construction additional cost was sought and additional payments were to be made. The contractors agreed to complete construction of C-1 building within two months from the date of the agreement and in consideration thereof the society agreed to pay Rs.2,84,164/- to the contractor for the completion of the construction of C-1 building. This was the balance payable by the society as on the date of the agreement.

14. The recitals, therefore, show incomplete construction as also unpaid amounts. Whereas the contractor had to complete the construction, the society had to make further payments.

15. The clause 1 of the agreement sets out that in consideration of the contractors' completing the construction of the C-1 building and also in consideration of the amount due and payable by the society on 28th April, 1964 the society shall transfer and convey land called "portion of land" out of the land owned by the society such as would consume FSI admeasuring 27315 Sq.ft. in respect of the proposed building A-1 marked in plan annexed to the agreement so that contractor can develop the said portion of land by constructing a building thereon.

16. Clause 1, therefore, requires the contractors to complete the construction of building C-1 in all respects also mentions about the consideration already due for which the society was to transfer the said land upto the aforesaid limit to allow the contractor to develop that land.

17. It is argued by Mr. Rajesh Shah on behalf of the contractor that the transfer and conveyance of the portion of the land of the society was in consideration of the amount of Rs.2,84,164/- already having been due and payable on the date of the agreement as mentioned in 1 thereof. "Clause 1 runs thus :

In consideration of the builders completing the building C-1 in all respects and obtaining jointly with the Society's Architects and with the co-operation of the

Society necessary occupation certificate but the contractors shall be liable only to the extent of the work they have carried out, and also in consideration of the amount of Rs.2,84,164/- (Rupees two lacks eighty four thousand one hundred sixty four only) due and payable by the said Society to the builders in respect of the work carried out or the carried out by the builders in the said building C-1 on the said land, the Society shall sell, transfer and convey unto the builders or their nominees so much land, hereinafter referred to as the said "portion of land" out of the said land being Survey No.132 (part) admeasuring 10,550 sq. meters or there about lying and being off Bombay Agra Road, Ghatkopar, in the registration sub-district of Bandra, District Bombay suburban as would be necessary to consume the FSI admeasuring 27315 Sq.ft. in respect of the proposed building A-1 marked in blue colour in the layout plan annexed hereto, along with the land appurtenant thereto more particularly described in Schedule II hereunder written, and in accordance with the rules and regulations of the Municipal Corporation of Greater Bombay with benefit of the plans and specification approved and sanctioned by the Bombay Municipal Corporation under No.CE/49/BSI/ANS dated 23rd March,1968 and having regard to the layout plan sanctioned under LO/N(S) 8 dated 26th August, 1968 and to the plans and specifications of the other three buildings under construction on the said land with a view to developing the said portion of land by constructing a building thereon by the builders or by their nominees.

18. The clause 1 is not happily worded. It shows the agreement to convey and transfer in consideration of the contractor completing C-1 building and also in consideration of amount due and payable. It further mentions that the contractor would be liable "only to the extent of the work they have carried out". A reading of the clause does not reflect that the contractor was enjoined to complete building C-1 in all respects after which only the society was required to transfer the extent of the land mentioned in the clause. It shows the agreement between the parties that the contractor will complete the construction of C-1 building but would be liable only to the extent of the work "they have carried out". The clause accepts that the society was in arrears of payment Rs.2,84,164/- which was then "due and payable" already. Instead of making that payment the society would give a portion of its land to the contractor for constructing a building by themselves or their nominees.

19. The further clauses would be pointer to the consideration that the parties contemplated under the agreement in clause 1.

20. Clause 2 of the agreement requires the contractors to proceed to construct the remaining work of C-1 building and complete the same to be able to obtain the occupation certificate.

21. Under clause 2A the contractor was to complete such construction within two months of the date of the agreement failing such construction of building he was to pay liquidated damages @ 200/- per day to the society.

22. The specific period of completion of the construction is, therefore, mentioned. The specific period of commencement of the construction is not mentioned. The right to claim calculated damages shows that the construction within specific period was not the essence of the contract.

23. Besides the recitals show that the C-1 building was "almost completed". Hence only the aforesaid part of the left over construction was to be completed. Building A was only completed up to the first slab. The society was to pay the contractor Rs.95,000/- in respect of the work already carried and further Rs.85,000/- forthwith upon the society's Architect issuing a certificate in respect of the work.

24. Further clauses setting out further reciprocal promises show how the construction work would begin.

25. Under clause 6 "on execution of these presents" the contractor was to cast the second slab of A building under supervision of the Architect of the society.

26. Hence the society was in arrears of payment even for A building where only first slab was cast. The society was to immediately make payment for the second slab subject, ofcourse, to the Architect issuing their certificate in respect of the work of the second slab.

27. Further under clause 8 also "upon the execution of this agreement", the society was to handover possession of the portion of land up to the extent of the FSI mentioned in clause 1 to the contractor such that the contractor would be able to dispose of or develop the said FSI. "with the land wedded to the building".

28. The handing over of possession was, therefore, an enabling provision under the agreement. It was to be done immediately upon the execution of the agreement.

29. It is contended on behalf of the society that because clause 8 followed clauses 2A & 6 it implied that the contractor had to first start and complete construction of C-1 building as also the second slab of A building after which the society would be required to handover possession of, the portion of land to the contractor. If that was so, the expression "upon execution of this agreement the society shall handover the possession of the said portion of land" would not have been made. It may be mentioned that clause 2 requiring the contractor to construct remaining portion of C-1 within two months is not followed by expression "upon execution of this agreement" and because a time period for commencing the construction is not mentioned and only the time frame for construction is mentioned, it is argued on behalf of the contractor that, it would follow the society's reciprocal promise of handing over possession of portion of its land to the contractor first and immediately upon the execution of the Agreement and the completing construction thereafter albeit within two months.

30. The society was in arrears of payment of Rs.2,84,164/- for building C-1 as also Rs.95,000/- for building -A. Hence, the society was to hand over the

possession of portion of the land immediately; the remainder of the construction could have been put up by the contractor within two months.

31. Clause 9 of the agreement also begins with the expression " on the execution of these presents". Under that the society was required to get land subdivided, for the building A-1 from its plot. This aspect, however, did not require a specific period of compliance though the society would have to commence the work of meeting the obligation for subdivision immediately upon the execution of the agreement. The society was to hand over the portion of the plot to the contractor. Hence subdivision would be necessary. The application for subdivision would have to be made immediately upon execution of the agreement.

32. The plot to be given was to be without, conditions and encumbrances. The plot was to be given to the contractor because of the arrears of the society towards payment of amount to the contractor being Rs.2,84,164/- for C-1 Rs.95,000/- for building A as on the date of the agreement itself.

33. Hence under the clause 10 of the agreement the contractor was to be entitled to sell that portion of the land with the benefit of the FSI and obtain sanction by the BMC in respect of building No. A-1 with FSI 27315 Sq.ft. as the contractor deemed fit and proper. The society was to complete the sale in favour of the contractors and even their nominees.

34. This conveyance also would, therefore, be in favour of the contractors or it would be in favour of any one else as the contractor deemed fit and proper. This clause shows the unrestricted entitlement of the contractor. That reflects the intentions of the parties. The entitlement in giving the balance sanction to the extent specified in the agreement is, therefore, complete and upon construction of such FSI the conveyance to the contractor or its nominees would be certain.

35. Clause 11 thereafter shows that society has mortgaged the land to one Maharashtra Co-operative Housing Finance Society Ltd for raising loan of Rs.16 lacs. It mentions that "in view of the aforesaid" the society shall proceed to subdivide the land together "with the land wedded thereto" and perfect the title of the contractor by clearing the encumbrances under the mortgage with the aforesaid society. This contemplates immediate action of the society with regard to the promise of giving the land free from all encumbrances to the contractors. It also sets out why it would be so - "that is to handover to the contractor to dispose of that building".

36. Further under clause 13 the Society is made liable to give the contractor access in the passage as also permanent water,electricity connection upto the end of the passage at the cost of the society.

37. This also reflects the intention of the parties to give away transfer and convey that portion of the land to the contractor absolutely.

38. Under clause 19 of the agreement the contractors are to be entitled sell that portion of the land with the FSI for constructing building A- 1 and to sell the flats

"to whomsoever in any manner they like" which would be either by themselves or through their nominees and the society would not interfere therein.

39. This also shows the intention of the parties to give to the contractor the portion of the land to be developed which was in consideration of earlier arrears of the society.

40. Under clause 20 of the agreement the contractor would be entitled to form a housing society to which the society would have no objection.

41. This would be a corollary to the right of construction and sale by the contractor.

42. Consequently for the due purpose of the aforesaid terms of the agreement in clause 25 they agreed that the contractor would become nominal member paying an admission fee of Re.1/- to the society and making the necessary application in that respect.

43. This application for nominal membership was to allow both the parties due performance of their reciprocal promises. The contractor would be a nominal member since the Society would have to transfer a portion of land to the contractor. That would be transfer to the Society's nominal member. It would, therefore, be expected that when the contractor makes an application, the society makes the contractor a nominal member. Since the society had to apply for subdivision of the plot on the completion on the execution of the agreement itself, that plot could be transferred and the society was to handover the possession of the land also on the execution of the agreement so that the plot would have been transferred. The application for nomination and its acceptance would be required to be proceeded even pending the application for subdivision by the society.

44. In short, therefore, the contractor was to apply for being nominal member. The society would make the contractor a nominal member forthwith. The society would apply for subdivision immediately. The society would handover possession of that portion of the land to the contractor immediately. This would be in consideration of the arrears of payment and not in consideration of future work to be carried out by the contractor. Upon the society performing its aforesaid promises, the contractor would proceed to cast the second slab of A building. The society would pay Rs.95,000/- for the work to be carried out subject to its Architect's certificate. Further the contractor would complete the construction of C-1 within two months thereafter. That would be the construction specified in the recitals to the agreement. As aforesaid, Building C-1 having been almost completed. The work of the contractor would, therefore, essentially follow the act of the society. The society must, therefore, perform its reciprocal promises immediately upon execution of the agreement. The contractor also must perform his reciprocal promises but not prior to the performance by the society but within the agreed time frame of 2 months.

45. It would have to be seen what the parties did pursuant to the agreement. The very next date i.e. 14th March, 1978, Advocate on behalf of the Contractor put on record that the criminal case pending against the society was disposed of for want of prosecution. He called upon society to send the original stamped agreement and the true copy of the resolution on the basis of which the agreement dated 13th March, 1978 came to be executed. He also requested payment of Rs.10,000/- as agreed. He informed the society that the period for completion of the work in respect of the C-1 building would commence from the day the requisitions mentioned in the letter were complied.

46. This requisition forms the sine qua non of the agreement. This also show the allowance of the contractor in setting at rest the criminal prosecution.

47. On 29th March, 1978 the Society wrote to the contractor asking him to become a nominal member as per the application attached to the letter. The society stated that on receipt of the application form they would admit the contractor as member after which he would be put in possession of the plot as nominal member and not otherwise. The Society also annexed copy of the resolution dated 5th March, 1978. The application annexed by the society is in the form of a letter of the contractor. It inter-alia mentions that the contractor undertakes not to part with possession of the portion of the plot without the Society's consent.

48. The aforesaid clause is a complete departure from clause 10 of the agreement dated 13th March, 1978 between the parties under which the Contractor is held entitled to sell the portion of the land with benefit of FSI as per plans and specifications sanctioned by the BMC to the extent of the FSI of 27315 Sq.ft on such the terms and conditions as the contractor deems fit and proper and would obtain complete conveyance of this land in favour of its nominees.

49. It is the case of the contractor that this departure was gross and that this constituted a complete breach of the agreement and could not be accepted. Hence he did not send the application for nominal membership to the society though he accepted that he would be a nominal member otherwise.

50. The society by its letter dated 25th April, 1978 wrote to the contractor that the society had paid the contractor Rs.10,000/- as per the clause 25 of the agreement dated 13th March, 1978 but the contractor had not become nominal member as required under the aforesaid terms. The society called upon the contractor to start the construction of C-1 building and complete the same and called upon contractor to adhere to the agreement and time schedule.

51. The contractor vide its advocate's letter dated 29th April, 1978 informed the society that unless the society had performed its part of the contract by way of requisitions mentioned in the agreement, the work of C-1 building could not be deemed to have commenced. The letter mentioned that the society failed to issue the required letter of possession and consequently the contractor was not in a position to negotiate the sale of the suit property. It specifically put on

record that the application form sent by the society with the letter dated 29th March, 1978 modified the original agreement with which the contractor was not agreeable. The contractor had already paid a nominal membership fee of Re.1/- and offered to execute the usual form for nominal membership. The contractor reiterated that the period of completion of construction of C-1 building would start only after the society's reciprocal promises were performed. It also mentions that after receipt of Rs.10,000/- the casting work (centering work wrongly stated as casting) the second slab of A building was completed and the Architect of the Society was called upon to check the work and approve the same. This was to enable the contractor to take up the casting work of the second slab. The contractor has pleaded the said fact in paragraph 18 of his plaint also.

52. The society, however, by its letter dated 4th May, 1978 contended that because application for nominal membership was not made the possession of the land would not be given and called upon the contractor to complete the construction as per his reciprocal promise under the agreement within two months time which was to expire.

53. The contractor by its letter dated 12th May, 1978 set out the various breaches of the Agreement dated 13th March, 1978 on the part of the society being failure to apply for the subdivision of the land (Cl. 9), renewal of the plan of A-1 building (Cl.9), clear the mortgage to perfect the title (Cl.11), clear the charge in favour of the society (Cl.11.), give working drawings of the A-1 building (cl.21), demarcate the boundary of the plot for construction of A-1 building (which was the portion of the land agreed to be given to the contractor) (Cl.21), fix the line for laying the foundation of A-1 building (Cl.21), give income tax clearance certificate U/s.230(A) (Cl.22) and the necessary passage rights for access (Cl.13). The most material of the failure on the part of the society is breaching the reciprocal promises of the Society under Cl.19 of the Agreement dated 13th March, 1978 being to allow the entitlement of the contractor to sell the portion of the land having FSI of 27315 Sq.ft or construct the building thereon and sell the flats therein "to whomsoever and to anyone they like". Hence the contractor in his letter dated 12th May, 1978 set out that breach as "superimposing" conditions 1 to 4 in the letter of the Society dated 4th May, 1978 calling upon the contractor to become the nominal member of the society upon new and un-agreed upon conditions "contrary to the letter and spirit of Cl.19 of the Agreement" dated 13th March, 1978. The contractor also pointed out that the building C-1 was to be vacated for the work to be carried out which was also not done by the members of the society. Consequently the work which was to be carried out in the flats of C-1 building specified in the recital to the agreement could not be carried out by the contractor. The contractor also stated about centering work done for casting second slab which was not inspected by the Architect of the Society and put on record that the nominal membership fee was paid and with the contractor was ready to become nominal member but could not sign the application with the onerous clause put in by the society.

54. Indeed, the breaches mentioned in the said letter are seem to have been committed by the society.

55. Further correspondence between the parties show reiteration of the respective cases which need not be duplicated.

56. To test who committed breach of the reciprocal promises under the agreement dated 13th March, 1978 the yardstick under Indian Contract Act with regard to performance of reciprocal promises must be applied. Sec.51 & 52 of the Indian Contract Act which deals with the performance of the reciprocal promises.

#### Performance of reciprocal promises

51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.- When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

#### Illustrations

(a) A and B contract that A shall deliver goods to B to be paid for by B on delivery. A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment. (b) A and B contract that A shall deliver goods to B at a price to be paid by installments, the first installment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first installment on delivery.

B need not pay the first installment, unless A is ready and willing to deliver the goods on payment of the first installment.

52. Order of performance of reciprocal promises. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

#### Illustrations

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house Must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock in trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

57. In this case the contract consisted of reciprocal promises to be performed by the parties. Whereas the contractor had to carry out certain construction work within two months, the society has to perform various obligations, the substantial obligations being to subdivide their plot, to transfer a portion of their plot to contractor in lieu of the amount of Rs.2,84,164/- being lieu already due and payable by the society to the contractor and to that end make an application for subdivision of its plot and to unconditionally make the contractor its nominal member. All these obligations were to be performed upon the execution of the agreement itself. The order of the reciprocal promises were, therefore, expressly fixed in the agreement dated 13th March, 1978. They had to be performed in that order or at least in the order in which the nature of the contract between the parties required which would be as aforesaid.

58. It is seen that the society made the first breach, nay breaches of the agreement dated 13th March, 1978. It failed to apply for subdivision of its plot. It failed to handover the possession of the agreed portion of its plot to the contractor. It imposed a condition upon the application for nominal membership contrary to the agreement itself. It having not carried out its reciprocal promises it could not call upon contractor to perform his part of the reciprocal promises. The fact that the society owed the builder Rs.2,84,164/- for which, instead of making payment the society had agreed to transfer a portion of its plot shows that because the amount was due and payable, the plot had to be transferred without any further act was done by the contractor. The fact that the agreement lays down specifically that the acts which were to be performed by the society were "on the execution of this presents," these acts had to be performed by the Society on the date of the agreement itself and without waiting for contractor to perform his act. The fact that the contractor was to perform his acts i.e. to complete construction within time limit specified "within two months from the date of the execution of this presents" shows that the contractors first act had not to be performed " upon the execution of the presents" itself. Since the Society did not perform its reciprocal promises, it could not call upon the contractor to perform his obligations.

59. Consequently, if the society committed breach of its reciprocal obligations in subdividing or transferring the plot of land to the contractor, the contractor need not perform his further obligation by way of the reciprocal promises of putting up further construction within the time frame mentioned in the contract. Consequently the breach by the society having been seen, no breach on the part of the contractor can be imputed.

60. Hence various breaches are seen on the part of the society but not the contractor. Consequently issue No.2 is answered in the negative and issue No.3 is answered in the affirmative.

#### ISSUE NOS.4 & 5

61. Plaintiff No.1 in Suit No.1574 of 1980 being the contractor may not be

granted relief of specific performance prayed for by it. However, it would be entitled to the amount of Rs.2,84,164/- which represents the admitted amount due and payable by the society to the contractor at the time of the execution of the agreement on 13th March, 1978 so as to transfer to him a portion of the land of the society to the extent of the FSI 27315 Sq.ft which would represent that amount at the time of the execution of the aforesaid agreement with interest thereon upon the breach of the contract by the society. The Plaintiff has not proved the construction work actually carried out by it by leading evidence to prove the bills submitted by the Plaintiff either certified or uncertified by the Architect of the Society. Hence contractor would not be entitled to the amounts claimed in its plaint under Exh."Z" thereto. However, the contractor would be entitled to the payment on the basis of quantum meruit for the work carried out by it in building A as well as C-1 after receipt of part payment of Rs.7,09,136/- as admitted in the particulars of claim at Exh."AA" to the plaint. The amount agreed to be paid by the society to the contractor for carrying out the work of the second slab of A building is Rs.95,000/- and for the work already carried out of Rs.85,000/- as specified in clause 6 of the agreement dated 13th March, 1978. The correspondence aforesaid shows the contractor having proceeded with the work of the second slab by centering work having been carried out which was to be approved by the Architect of the society but not approved though called upon. The contractor, therefore, would be entitled to the return of the aforesaid amount of Rs.95,000/- and Rs.85,000/- also with interest thereon upon the breach committed by the Society.

62. The contract between the parties was a commercial contract. The precise rate of interest payable by the Society as defined in explanation II of Section 34 of the CPC is not mentioned in the contract since default by the society was not contemplated. The contractor would, therefore, be entitled to charge reasonable commercial rate of interest chargeable by Nationalized Banks in relation to the commercial transactions as per proviso of Section 34 of the CPC at the relevant time. Rates specified by the contractor in prayer C(i) of its suit for damages by the contractor is 12% p.a. upon principal amount claimed in that prayer. That is a reasonable average commercial rate of interest which prevailed at all relevant times. Hence that contractor would not be entitled to all the amounts computed by the contractor under prayers C(i) and C(ii). The contractor would be entitled to the return of the aforesaid three amounts with interest @ 12% p.a. thereon. The reminder of the reliefs for creating charge of immoveable property of the society and to have actual sale of the immoveable property of the society is not required to be granted in view of the monetary relief. The society is not entitled to any relief prayed for by it. The issue Nos.4 & 5 are answered accordingly. Hence the following order.

#### O R D E R

1. Suit No.1574 of 1980 is decreed in a sum of Rs.2,84,164/- + Rs.95,000/- + Rs.85,000/- with interest thereon @ 12% p.a. from the date of the agreement

between the parties i.e. 13th March, 1978 until the filing of the suit and thereafter at the same rate of interest from the date of filing of the suit until payment/realization.

2. Suit No.1301 of 1981 is dismissed.