

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMM. ARBITRATION PETITION (L) NO.81 OF 2016**

Homai Mahal Premises Co-op. Soc. Ltd. ... Petitioner
and
M/s. Icon Builders and Developers and Anr. ... Respondents

Mr. Vikhil Dhoka with Mr. Mukesh Gupta i/by M/s. Solicis Lex, for Petitioner.

Mr. Amarendra Mishra with Mr. Sayed Zia, for Respondent No.1.

Mr. Sirsikar, for Respondent No.2.

Mr. Ramakant Paranjape with Mr. Prashant Magru, Mr. S. Jaydeo for M/s. Techno Infracom Pvt. Ltd.

Mr. Sachin Kelkar, Partner of Respondent No.1 and Mr. Shiva Pasare, General Manager of Respondent No.1, present.

Mr. Kunal Sodhi, present.

CORAM: S.J. KATHAWALLA, J.
DATE: 22nd AUGUST, 2016

P.C.:

1. Almost every alternate matter called out before this Court either as Notice of Motion in a Suit or an Arbitration Petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("the Act") pertains to disputes concerning redevelopment of properties. The grievance in almost all these

matters is against the builders/developers who have undertaken the responsibility of redevelopment. In a majority of cases, it is observed that the builders/developers who have no funds of their own enter into redevelopment agreements with the tenants/members of residential buildings/societies, promising them a flat/s of larger area/s than currently under their occupation, free of charge, on ownership basis within a period of 24 to 36 months from the date of receipt of possession of their existing flats and in the meantime also promising them monthly payment to seek temporary alternate accommodation. In return, the developer secures from the society/its members a right to construct additional flats on the plot/property belonging to the society/members, by utilizing the available FSI and loading of TDR, and thereafter sells the free-sale flats to the members of the public at the prevailing market price/value. Based on such promises, the tenants/members hand over their existing premises to the builders/developers and shift with their families by taking accommodation for a temporary period on leave and license

basis. The builders/developers immediately start raising funds by issuing allotment letters/executing agreements qua the free-sale flats, and thereby collect crores of rupees from the prospective purchasers/investors/financial institutions. The builders/developers thereafter put up a shell structure, and on one pretext or the other do not complete construction of the new flats, stop paying compensation to the members/tenants towards temporary accommodation, because of which such members/tenants alongwith their families almost come on the streets. The redevelopment project either progresses at a snail's pace or is almost abandoned leaving the tenants/members not only roofless, but with several liabilities in respect of their properties like non-payment of property taxes and third-party rights created in respect of free-sale flats to be constructed on the property of the society. By the time the tenants/members of the society and the free sale purchasers approach the court seeking protective orders, the builders/developers are all set to inform the court that they have no assets to offer, but are infact neck-deep in debts.

However it is observed that despite allegedly being neck-deep in debt, these very same builders /developers still continue to move around in branded vehicles like Mercedes/BMW/Audi. The standard answer given to the court by such builder/developers in respect of the same is that all their branded vehicles are hypothecated to financial institutions and that they have already defaulted in payments of the installments for such vehicles. In such cases, which are rising at an alarming rate, though the Court very closely witnesses the pain and anguish of the tenants/members/free-sale flat purchasers, the court, in the absence of the existence of any unencumbered asset/s in the name of such builder/ developer finds itself absolutely helpless as far as passing of protective orders in favour of such tenants/free-sale flat purchasers, is concerned.

2. The present case, is a case which has exceeded all limits. In this case, the Members of the Petitioner Society were promised flats between the first to the sixth floors of the new structure, within 24 months of them handing over possession of their existing flats to the Respondent No. 1. However,

despite vacating their flats prior to November 2010 and handing over the same to the Respondent No. 1, Developer, as far back as January 2011, the Members have yet to receive not only their new flats of larger area as promised, but also the compensation promised to them in lieu of temporary alternate accommodation. The Respondent No. 1 Developer has till date not obtained Commencement Certificate beyond the third floor, though it has carried out unauthorized construction upto the seventh floor and has sold flats in the free-sale category upto the eighth floor (which floor is till date not even in existence). Two bogus and fabricated Commencement Certificates bearing forged signatures of the BMC officials are found annexed to the Agreement for Sale dated 19th August, 2013, executed by and between the developer - Shri Sachin Kelkar and his General/Project Manager Shri Pasare, and the Agreement for Sale dated 14th May, 2015 executed by and between Shri Sachin Kelkar and Shri Sodhi. The Respondent No. 1 Developer also failed and neglected to pay property taxes to the Respondent No. 2 Corporation, because of which the property

of the Society is likely to be put up for sale by public auction.

3. It is submitted by the Petitioner Society that the circumstances in which the above Petition is filed under Section 9 of the Act are as under:

3.1 The Petitioner is a Co-operative Society of 23 Members occupying shops, garages, hospital and residential premises. The Respondent No. 1 is a Partnership Firm and Respondent No. 2 is the Municipal Corporation of Greater Mumbai.

3.2 The Petitioner Society has entered into an Agreement dated 9th December, 2009 with Respondent No. 1 to redevelop the property of the Petitioner Society bearing CTS No. 273/A, Survey No. 42, Hissa No. 15/B, Mumbai Municipal Corporation 'N'-1767 Vile Parle (East), Shahaji Raje Marg, Mumbai 400 057 ('Suit Property'). Under the Development Agreement, the Developer has agreed to pay monthly compensation to the Members in lieu of temporary alternate accommodation until they are put in occupation of the permanent alternate accommodation and it is also agreed that the construction work would be completed within a period of

twenty-four months from the date of all the Members vacating their respective premises and the Society handing over vacant possession of the property to the Developers for the purpose of redevelopment of the said property.

3.3 All the Members of the Society vacated their respective flats prior to November, 2010 and in January, 2011 handed over possession of the same to Respondent No.1 for the demolition of the said building and reconstruction of the new building as agreed.

3.4 In mid 2013, Respondent No. 1 failed to renew the Bank Guarantee which was furnished in favour of the Petitioner Society for a sum of Rs. 50 lakhs covering the cost of construction

3.5 Due to change in Development Control Regulations by introduction of fungible FSI in January, 2012, the Respondent No. 1 through its Architect submitted amended plans for construction of the residential cum commercial building having two wings, comprising of basement plus ground floor and seven upper floors. Respondent No. 2 issued IOD dated

30th November, 2012 and 1st December, 2012 to Respondent No. 1 for construction of residential cum commercial building having two wings comprising of basement plus ground floor and seven upper floors.

3.6 Some time in March, 2014, the construction of the new building stopped beyond the first floor. When the Petitioner Society enquired with the Respondent No. 1 the reasons for the same, the Respondent No. 1 informed the Petitioner Society that the Respondent No. 2 had not approved the utilisation of the FSI for a portion of the plot admeasuring 34.16 sq. mtrs. towards the north side of the plot which was used as an access to the adjoining Shiv Mandir, and as a result of which it will not be viable for the Respondent No. 1 to provide the Members of the Petitioner the permanent alternate accommodation in the new building as promised under the Agreements executed with the Petitioner/its Members.

3.7 On this ground in June, 2014, the Respondent No. 1 also stopped making payment of compensation to the Members towards temporary alternate accommodation.

3.8 On or about 26th August, 2014, the Respondent No. 1 addressed a letter to the Petitioner Society setting out the statement of the new lesser area of permanent alternate accommodation. The Petitioner out of sheer frustration and desperation accepted the reduction of the area in their permanent alternate accommodation in December, 2014.

3.9 In February, 2015, the Respondent No. 1 began payment of compensation for the temporary alternate accommodation to the respective Members of the Petitioner, and commenced the construction of the new building. The Respondent No. 1 completed the construction of the new building till the 7th floor but on or about August, 2015, not only the construction work was again stopped, but from September 2015, the Respondent No. 1 also once again stopped payment of compensation towards temporary alternate accommodation to the Members of the Petitioner Society.

3.10 Upon rigorous follow up with the Respondent No. 1, the Petitioner Society was informed by Respondent No. 1 in a Meeting with the Petitioner Society that Respondent No. 2 had

issued a Stop- Work Notice due to a proposed road to be constructed upon the said plot under the proposed new development plan, and expressed their inability to pay the compensation for temporary alternate accommodation on the ground that the Developer was facing a financial crunch but was expecting funds through foreign direct investment. Respondent No. 1 promised to commence the work and start payment of compensation for temporary alternate accommodation from 16th January, 2016. The same is recorded by the Petitioner vide their letter dated 1st December, 2015.

3.11 Respondent No. 1 failed to commence the construction and also failed to pay the compensation towards temporary alternate accommodation as promised. In view thereof the Petitioner by their letter dated 11th January, 2016 called upon the Respondent No. 1 to furnish copies of all the taxes paid by it since the time of the Petitioner handing over vacant possession of the said property to Respondent No.1.

3.12 Since Respondent No. 1 failed to respond to the query

raised by the Petitioner, the Petitioner initiated inquiry with the Office of Respondent No. 2 and filed an Application under the Right to Information Act. Upon receipt of the documents from Respondent No.2, the Petitioner was shocked and surprised to note that the Commencement Certificates being Exhibits G-1 and G-2 to the Petition were issued for construction of the new building upto only the 3rd floor and the Respondent No. 1 did not get the same revalidated beyond the third floor and had unauthorisedly continued to construct the new building upto the 7th floor, because of which Respondent No. 2 issued a Stop-Work Notice dated 14th August, 2015 under Section 354A of the Mumbai Municipal Corporation Act, 1888, and sought demolition of the unauthorized work. Upon receiving such Notice, the Respondent No. 1 through its Architect submitted a proposal for regularization to the Respondent No. 2, and also filed Suit No. 2353 of 2015 before the City Civil Court at Dindoshi, against Respondent No. 2, wherein by an Order dated 28th August, 2015, the parties were directed to maintain status quo.

3.13 That the stoppage of work in March, 2014, as well as in August, 2015 was due to the unauthorised work carried out by the Respondent No. 1 as set out in paragraph 15 of the Petition, and the reasons given to the Petitioner for stoppage of work were false and incorrect to the knowledge of Respondent No.1. The Petitioner now realised that by making misrepresentations, Respondent No. 1 made the Petitioner agree to accept premises of a lesser area as their permanent alternate accommodation.

3.14 The Petitioner through a search conducted in the Office of the Sub-Registrar learnt that in spite of there being no approval for the construction of the new building beyond the three floors, the Respondent No. 1 had illegally entered into an Agreement for Sale dated 19th August, 2013, with its General Manager/Project Manager Mr. Shiva Pasare for Flat No. 104, in the new building and an Agreement for Sale dated 14th May, 2015 with Mr. Kunal Sodhi, HUF for sale in respect of flat No. 704 on the 7th floor of the new building. In fact, Respondent No. 1 had forged/fabricated a Commencement Certificate,

wherein it was wrongly recorded that approval was purportedly granted by Respondent No. 2 Corporation upto the 7th floor. One more forged/fabricated Commencement Certificate has also surfaced, as set out in the Affidavit filed on behalf of the Respondent No. 2 Corporation dated 18th August, 2016. The said fabricated Commencement Certificate/s is/are annexed to the registered Agreements executed by and between the Respondent No. 1 and Shri Sodhi and the Respondent No. 1 and its General/Project Manager Shri Shiva Pasare.

3.15 That Shri Shiva Pasare on the strength of the said Agreement dated 19th August, 2013, executed by and between him and his Employers (i.e. Respondent No. 1), applied for and obtained a loan of about Rs. 74,00,000/- from GIC Housing Finance Ltd. by mortgaging the Flat No. 104 in the new building, and it appears that GIC Housing Finance Ltd. sanctioned the loan on Respondent No. 1 submitting to them the Resolution dated 18th July, 2015, purported to be passed by the Petitioner, stating that the office and fitness centre which was to be provided to the Society and shown in the

approved plan shall no longer be provided to the Society and instead the Developers were planning to construct residential/commercial premises in its place, which is accepted by all the Members of the Society.

3.16 The Petitioner by their letter dated 25th April, 2016 lodged a complaint against the Respondent No. 1 before the Senior Inspector of Vile Parle Police Station and also informed GIC Housing Finance Ltd. by their letter dated 11th July, 2016, that the transaction between Respondent No. 1 and its General Manager Mr. Shiva Pasare is ab initio bad in law and void.

3.17 The Petitioner in their Special General Body Meeting held on 27th February, 2015, resolved to terminate the Agreement with Respondent No.1 and issued a notice to him through their Advocate's letter dated 13th April, 2016. Respondent No. 1 through its Advocate's letter dated 21st June, 2016 (posted on 27th June, 2016) stated that no breach has been committed by the Respondent No. 1 and the said notice dated 13th April, 2016 is false, bogus and ought to be

rejected.

3.18 The Petitioner by their Advocate's letter dated 25th July, 2016, invoked Clause 52 of the Agreement and nominated their Arbitrator to which the Respondent No. 1 did not respond.

3.19 The Petitioner therefore on 8th August, 2016 filed the above Petition seeking the following reliefs:

"(a) Pending the Constitution of the Arbitral Tribunal and final disposal of the arbitral proceedings this Hon'ble Court be pleased to direct the Respondent No.1, their partner, representative, servants, agents and all other persons claiming through them directly and/or indirectly from dealing with and/or transferring and/or assigning and/or creating third party rights of any nature whatsoever in respect of the land admeasuring 653 sq.mtr. i.e. 7029 sq.ft. together with the building/s and/or structure/s standing thereon situated, lying and being at Vile Parle (East), Shahaji Raje Marg, Mumbai-400 057, bearing C.T.S. No. 273/A. Survey No. 42, Hissa No. 15/B, Mumbai Municipal Corporation "N"-1767 East and structure stand thereon.

(b) Pending the constitution of the Arbitral

Tribunal and final disposal of the arbitral proceedings the Respondent No.1, their partner, servants, agents and all other persons claiming through nor under the Respondent No. 1 or otherwise be restrained by an order and decree of this Hon'ble Court from claiming and/or deriving any benefits from the Agreement for Development dated 9th December, 2009 being Exhibit "A" hereto entered into between the Petitioner and the Respondent No. 1 and Power of Attorney dated 9th December, 2009 for redevelopment of the land admeasuring 653 sq.mtr. i.e. 7029 sq.ft. together with the building/s and/or structure/s standing thereon situated, lying and being at Vile Parle (East), Shahji Raje Marg, Mumbai-400 057, bearing C.T.S. No. 273/A, Survey No. 42, Hissa No. 15/B, Mumbai Municipal Corporation "N" -1767 East and structure stand thereon in the Registration Sub-District of Borivli, Mumbai Suburban District.

(c) Pending the constitution of the Arbitral Tribunal and final disposal of the arbitral proceedings this Hon'ble Court be pleased to direct the Respondent No.1, their partner, representative, servants, agents and all other

persons claiming through them to pay forthwith Respondent No.2 and/or any other statutory Government and/or Semi Government body their dues in respect of land admeasuring 653 sq.mtr. i.e. 7029 sq.ft. together with the building/s and/or structure/s standing thereon situated, lying and being at Vile Parle (East), Shahaji Raje Marg, Mumbai-400 057, bearing C.T.S. No. 273/A. Survey No. 42, Hissa No. 15/B, Mumbai Municipal Corporation "N" -1767 East and structure stand thereon and submit the No Due Certificate from the respective body to the Petitioner.

(d) Pending the constitution of the Arbitral Tribunal and final disposal of the arbitral proceedings, the Respondent No.2, its officers, servants and agents be restrained by temporary norder and injunction of this Hon'ble Court from accepting and/or sanctioning any application for the IOD, Commencement Certificate or any other application for such nother approval/permission made by the Respondent No. 1 or their officers, servnats and agents in respect of redevelopment of the land admeasuring 653 sq. mtr. i.e. 7029 sq.ft. together with the building/s an d/or structure/s standing thereon situated, lying and

being at Vile Parle (East), Shahaji Raje Marg, Mumbai-400 057, bearing C.T.S. No. 273/A, Survey No. 42, Hissa No. 15/B, Mumbai Municipal Corporation "N" -1767 East and structure standing thereon.

(e) pending the constitution of the Arbitral Tribunal and final disposal of the arbitral proceedings the Respondent No. 1 , their partner, servants, agents and all other persons claiming through or under them be directed to disclose on affidavit all the movables and immovable assets owned and possessed by the Respondent No. 1 and further restrain them by a temporary order and injunction of this Hon'ble Court from dealing with and/or selling and/or parting possession and/or creating third party right in the movable and immovable assets owned and possessed by the Respondent No. 1 in any manner.

OR

(f) Pending the constitution of the Arbitral Tribunal and final disposal of the arbitral proceedings, the Respondent No. 1 their directors, servants, agents and all other persons claiming through nor under them be further ordered and directed by this Hon'ble Court to forthwith deposit a sum of Rs.

7,00,00,000/- (Rupees Seven cores only) or any other sum as this Hon 'ble Court may deem fit that would satisfy the Petitioners claim on succeeding the present petition;

(g) For ad-interim reliefs in terms of prayer (a) to (e) or (f) above"

4. On 12th August, 2016, the Petitioner Society moved an application before this Court for ad-interim reliefs. On that day, the learned Advocate appearing for Respondent No. 2, Corporation, confirmed that the Commencement Certificates purportedly issued by EEBP (WS) K Ward of the Corporation showing that the CC is extended upto the 7th floor is fabricated. It was also pointed out by the Advocate for the Corporation that the endorsement at page Nos. 254 and 255 of Exhibit-G2 to the Petition that, " 8) this cc is now valid and further extended for entire work i.e. ground + 3 upper floor as per approved plan dated 27.11.2012" is also not made by the Building Proposal Department of MCGM. It was submitted on behalf of the Corporation that no CC beyond the third floor was granted by the Building Proposal Department of MCGM qua

the subject Project. This Court, therefore, enquired as to whether the Partner of Respondent No. 1, in charge of the Project was present in Court. Mr. Shiva Pasare, General/Project Manager came forward and informed the Court that he is the Project Manager of the Respondent No.1 and informed the Court that Mr. Sachin Kelkar, Partner of Respondent No. 1, is in charge of the subject Project. The Court enquired as to why Mr. Sachin Kelkar is not present in Court in a matter of such serious nature, where fabricated Commencement Certificates are annexed to the Agreements for Sale executed by and between Sachin Kelkar as Partner of Respondent No. 1 and the flat-purchasers i.e. Mr. Sodhi in one of the Agreements and Mr. Pasare in the other. This Court also inquired as to when Mr. Kelkar would appear in Court. However the response of Mr. Pasare was evasive. When this Court enquired from Mr. Pasare the source of the Commencement Certificate/s annexed to the Agreement for Sale of a flat purportedly purchased by him from his Employer, Shri Sachin Kelkar, he informed the Court that he is not aware of the same. Thereupon this Court

explained to Mr. Pasare that since the Court is at the outset giving him an opportunity to speak the truth, he should reveal the true facts, since, if at a later stage, upon investigation it is found that he was aware of the same, he would be in serious trouble. However, Mr. Pasare insisted that he was not aware as to how the fabricated Commencement Certificates came to be annexed to the Agreement executed and registered by and between Shri Sachin Kelkar (Partner of Respondent No. 1) and himself i.e. Shri Pasare. On 12th August, 2016, it was also pointed out on behalf of the Petitioner to this Court that under the sanctioned plan the office of the Society and fitness centre are shown on the 1st floor. However, Shri Kelkar has fabricated the document at Exhibit-P to the Petition and informed the Corporation that the Members of the Society have given up their right to the said Society office and the fitness centre, and have allowed the Respondent No. 1 to construct residential/commercial premises using the said area on the 1st floor, which area was sold by Shri Kelkar to his General/Project Manager, Shri Pasare under the said Agreement dated 19th

August, 2013. It was further submitted that a complaint in this regard is filed with the Vile Parle Police Station. In view thereof, this Court after setting out some of the facts, passed the following Order:

(i) The Respondent No.1 is restrained by an order and injunction from in any manner acting upon the Development Agreement dated 09-12-2009 executed by and between the Petitioner and Respondent No.1 and which is terminated by the Society on 13-04-2016.

(ii) The Respondent No.1 and its partners shall not deal with the Suit property/property of the Society in any manner whatsoever.

(iii) Mr. Sachin Kelkar, partner of the Respondent No.1 is directed to remain present before this Court on 19th August, 2016 at 11.00 a.m., failing which the Court shall be constrained to issue a warrant of arrest against him.

(iv) The Senior Inspector of Police, Vile Parle (E) Police Station shall submit his report to this Court on 19th August, 2016 setting out the progress made by the authorities pertaining the complaint letter dated 25th April, 2016 filed by the Petitioner Society against Mr. Sachin Kelkar.

(v) Mr. Sachin Kelkar shall also file an Affidavit on or before 19th August, 2016 setting out all the assets and liabilities of the Respondent No.1 firm as well as his personal assets. He shall also in his Affidavit set out the rights purportedly created by him in respect of the property of the Society, including the proposed saleable area, which the partnership firm proposed to construct on the property of the society.

Stand over to 19th August, 2016."

5. On 19th August, 2016, Mr. Sachin Kelkar appeared before the Court. Mr. Kelkar as well as Mr. Pasare admitted that the two Commencement Certificates were bogus and fabricated, but they were not aware how the said Certificates came to be annexed to the Agreements. Since such documents were also annexed to the Agreement executed by and between Shri Kelkar and Shri Kunal J. Sodhi, this Court directed Shri Kunal J. Sodhi to remain present before the Court. In the Order dated 19th August, 2016, this Court, inter alia, recorded as under:

"2. Today, Mr. Sachin Kelkar is present before this Court along with his Advocate. Mr. Shiva Pasare, working as General Manager in the organization of Mr. Sachin Kelkar is also present. Both Mr. Kelkar and Mr. Shiva Pasare admit that Exhibit-G-2 to the Petition, which is a Commencement Certificate purportedly issued by the Corporation along with another Commencement Certificate showing that Commencement Certificate has been issued upto the 7th floor are bogus documents. It is pointed out to Mr. Kelkar and Mr. Shiva Pasare that the fabricated Commencement Certificate/s is/are annexed to a registered Agreement executed not only to an Agreement executed by Mr. Pasare on behalf of Mr. Kelkar in favour of one Mr. Sodhi but the same is/are also annexed to an agreement executed by Mr. Kelkar in favour of Mr. Pasare. Since Mr. Kelkar and Mr. Shiva Pasare who have no answer/explanation to offer, they have informed the Court that they are not aware as to how the fabricated commencement certificate/s forms part of the registered Agreements which are admittedly executed by them.

3. The learned Advocate for the Society has once

again reiterated that Exhibit-P to the Petition is a copy of the purported resolution passed by the Society. However, the same is fabricated by Shri Kelkar and based on the said resolution, his General Manager Shri Pasare has taken a loan of Rs. 75,00,000/- from GIC Housing Finance Limited. Mr. Kelkar and Mr. Pasare in response to a query raised by the Court initially submitted that all the instalments due to GIC Housing Finance Limited have been paid. Mr. Pasare admitted that the loan is paid by Mr. Kelkar. Mr. Kelkar was quick to add that he is paying the loan by deducting necessary amount from the salary of Mr. Pasare. When Mr. Kelkar was asked as to whether he is regularly making payments to his staff, he informed the Court that he has not paid his staff since the last four months. This Court therefore enquired as to how he made a statement that all the instalments payable to GIC Housing Finance Ltd. by Mr. Pasare have been paid till date, once again Mr. Kelkar had no answer. From the demeanour of Mr. Kelkar and the answers given by him in Court, I am more than prima facie satisfied that Mr. Kelkar is making false statements in Court knowing the same to be false.

4. *However, before passing any order, Mr. Kunal J.*

Sodhi, residing at A/1104, Jayram Heights, Link Road, Kanderpada, Dahisar (West), Mumbai - 400068 in whose favour a registered Agreement has been executed by Mr. Kelkar through his Power of Attorney Holder Mr. Pasare and one of the annexures thereto i.e. the Commencement Certificate purportedly issued by the Municipal Corporation is admittedly bogus/fabricated, Mr. Sodhi is directed to remain present before this Court on 22nd August, 2016 at 03.00 p.m.

5. The report filed by the Senior Police Inspector, Vile Parle Police Station, Mumbai, stating that the investigations qua the fabricated resolution of the Society are in progress, is taken on record.

6. A copy of this order shall be served on Mr. Sodhi by hand delivery.

7. Stand over to 22nd August, 2016 at 03.00 p.m. "

6. On 22nd August, 2016, i.e. today, when the matter is called out, Mr. Sodhi is present before the Court. Mr. Sodhi has informed the Court that he is in the business of selling TDR. He has also allotted TDR to Mr. Sachin Kelkar/ M/s. Icon Builders and Developers through Mr. Shiva Pasare for the subject Project. He has also invested in the Project of Mr. Sachin

Kelkar by booking flats. Since he trusted Mr. Kelkar and Mr. Shiva Pasare in view of his earlier dealings with them, he has signed the registered Agreement pertaining to Flat No. 704, A Wing, on the basis of the representation made to him by Mr. Kelkar and Mr. Pasare. Since Mr. Kelkar has in his Affidavit dated 19th August, 2016, made an attempt to blame the Secretary of the Society by saying that he was responsible for the registrations and he was paid Rs. 5,000/- for each registration, this Court enquired from Mr. Sodhi as to who had prepared the said Agreement with its annexures and who was present at the time of registration. Mr. Sodhi informs the Court that the Agreement with its annexures was prepared by Mr. Pasare including the Commencement Certificate issued by the Bombay Municipal Corporation, which now appears to be a fabricated document, and he and Mr. Pasare were present for registration. What was most astonishing, was the fact that Mr. Sodhi produced a Letter of Allotment whereby Mr. Kelkar has agreed to sell Flat No. 804 on the 8th floor of the building to be constructed on the property of the Petitioner Society to Mr.

Sodhi. Mr. Sodhi also produced photo copies of the cheques/demand drafts which showed that Mr. Kelkar has received the entire consideration amount in respect of the said Flat No. 804. The receipts issued in regard thereto by the Respondent No. 1 in favour of Mr. Sodhi are also produced in Court. What came as a further shock was when an Advocate appeared for M/s Techno Infrastructure Pvt. Ltd., the Contractor of Mr. Kelkar, and produced Allotment Letters issued in favour of M/s Techno Infrastructure Pvt. Ltd., in respect of Flat Nos. 801, 802, 803 & 804 on the 8th floor of the building to be constructed on the Property of the Society. Interestingly, Flat No. 804 which is promised to be sold to Mr. Sodhi, and in respect of which the Respondent has received the entire consideration from Mr. Sodhi is already allotted to the said Contractor by an Allotment Letter dated 7th February, 2013.

7. The most distressing fact which has come to light is that Mr. Kelkar has made false and dishonest statements on oath in his Affidavit of Disclosure dated 19th August, 2016, filed pursuant to the order and direction of this Court dated

12th August, 2016. In paragraph 4 of the said Affidavit he has stated on oath that the Respondent No. 1 has sold the saleable area available with it to the flat purchasers, details whereof are more particularly mentioned in Ex. 'B' to the said Affidavit. In this list Shri Kelkar has not mentioned the flat sold to Mr. Sodhi on the 8th floor for which he has received full consideration from Mr. Sodhi, or any of the flats sold to M/s. Techno Infrastructure Pvt. Ltd (the Contractor). It is pertinent to note that each of the Allotment Letters are signed by Shri Sachin Kelkar himself. It is therefore established that Shri Kelkar has suppressed facts and made statements on oath which are false and incorrect to his knowledge. Again, when this Court asked pointed questions to the Advocate of Mr. Kelkar qua the figures given in his Affidavit concerning his assets and liabilities, Mr. Kelkar stated that he has no income and he is surviving on the help given to him by his friends and family members. Since the Advocate for the Petitioner informed the Court that Mr. Kelkar travels only by Audi or Mercedes cars, this Court enquired whether the said statement is true. Mr. Kelkar admitted that he

has an Audi as well as a Mercedes car and that he has come to the Court on that day in his Audi car. This Court realised that Mr. Kelkar had no respect for the law and towards the Court, and was leaving no stone unturned in trying to mislead the Court with the intention of preventing the Court from ascertaining the correct state of affairs qua the Suit Property and the assets of Mr. Kelkar and his family members, and thereafter passing appropriate interim measures of protection qua the Petitioner Society, its Members and their Property. This Court also enquired whether Mr. Kelkar had recently travelled abroad. As expected, the answer was in the affirmative. So much for the man who claims he has no funds and survives on the help given to him by his friends.

8. An attempt has been made by the Advocate for Mr. Kelkar and Mr. Pasare to suggest that the present Petition is a Petition under Section 9 of the Act and the Court is supposed/required to only pass protective orders and send the matter to an Arbitrator. Section 9 of the Act is reproduced hereunder:

"9. Interim measures etc by Court.- (1) A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure or protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or

evidence;

(d) *interim injunction or the appointment of a receiver;*

(e) ***such other interim measure of protection as may appear to the Court to be just and convenient,***

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

(2) *Where, before the commencement of the arbitral proceedings, a court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.*

(3) *Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious."*

9. The protective orders sought by the Petitioner in the Petition are already set out hereinabove. Over and above the same, Section 9 of the Act empowers the Court to pass "**such**

other interim measure of protection as may appear to the Court to be just and convenient". It will also not be out of place to mention here that it is now settled law that a person who is not a party to the arbitration agreement can be joined as a respondent to a petition u/s 9 of the Act and appropriate reliefs can be claimed and obtained against such party, if the circumstances so require.

10. From the above facts it is clear that though the Respondent No. 1 is a Partnership Firm the same is entirely managed by Sachin Kelkar who is admittedly also in charge of the entire Suit Project. It is further clear that the Members of the Petitioner Society have vacated their existing flats in November 2010, and have handed over the same to the Developer in January 2011, after which their existing flats were demolished by the Developer. These Members have not only, not been handed over their newly constructed flats between the 1st and the 6th floors of the newly constructed building, which were promised to be allotted to them by mid 2014, but the Developer has till date not even obtained a legitimate

Commencement Certificate beyond the third floor. To make matters worse, the Developer has also stopped paying monthly compensation towards temporary alternate accommodation to these Members leaving them completely helpless. Instead the Developer has constructed an unauthorized structure of seven floors, has created third party rights in respect of free-sale flats and has thereby collected crores of rupees from innocent and unsuspecting purchasers. In two of the Agreements for Sale executed by the Developer/Sachin Kelkar, one with his own Employee, Mr. Pasare, and the other with Mr. Sodhi, fabricated Commencement Certificates are annexed purportedly showing the Corporation having granted permission to carry out construction upto the seventh floor. The Society has also pointed out that the Respondent No. 1 has fabricated certain documents and has thereby attempted to usurp the office area and the area for a fitness centre agreed to be handed over to the Society, for which a complaint has been filed with the Vile Parle Police Station. Property-taxes have also not been paid by the Respondent No. 1/Sachin Kelkar, because of which the

Corporation may put up the Property of the Society for sale. Therefore the Members of the Society have at this point of time not only lost their roofs since the last six years, but have been deprived of compensation for temporary accommodation, and are instead saddled with huge liabilities in the form of taxes and third-party rights created by the Developer in respect of flats to be constructed on the Property owned by the Society. To ascertain the nature of protective reliefs required to be granted in such circumstances and to ensure that the Petitioner Society is ultimately able to recover from the Respondent No. 1/Sachin Kelkar the fruits of the award passed by the arbitral tribunal, this Court is required to seek disclosures from Mr. Kelkar inter alia pertaining to the amounts received by him from the flat purchasers and whether such amounts are siphoned away by him to his other Companies/family members. This Court is also required to prima facie assess the damage caused by Respondent No. 1 to the Society and its Members. This Court is entitled to at least prima facie ascertain the correctness of the

material/documents placed before the Court, and thereafter, pass adequate protective orders in the matter. This has become all the more necessary in view of the fact that Mr. Kelkar and Mr. Pasare, as stated hereinabove, have not been cooperating with the Court, but instead Mr. Kelkar has breached the Order dated 12th August, 2016, and has tried to mislead the Court by not disclosing any facts pertaining to the sale of the flats on the eighth floor, including receipt of full consideration from Mr. Sodhi in respect of Flat No. 804. The Court also cannot shut its eyes when fabricated documents constituting an offence under the Indian Penal Code are brought before the Court qua documents concerning the subject matter before the Court, especially when no parties are willing to come forward and accept liability for the commission of such offences. In view thereof, at this ad-interim stage, I am constrained to pass the following Order:

- (i) Office to forward the copies of the Commencement Certificates, which according to all the parties before the Court, including Bombay Municipal Corporation,

are fabricated documents, to the Joint Commissioner of Police, EOW, who shall form a special team of officers to investigate the matter and submit his report to this Court on the adjourned date.

- (ii) The directions given in the Orders dated 12th August, 2016 and 19th August, 2016 to Respondent No. 1/Sachin Kelkar/ Shiva Pasare shall continue.
- (iii) Mr. Kelkar and Mr. Pasare shall deposit their Passports with this Court on or before 23rd August, 2016 and shall be at liberty to move the Court for the same as and when they want to leave the country.
- (iv) Mr. Kelkar shall produce the annual returns of the last five years of all the Companies in which he and his immediate family members are Directors/Shareholders.
- (v) Mr. Kelkar shall not dispose of or create any third party rights in respect of his Audi/Mercedes car.
Stand over to 29th August, 2016.

(S.J.KATHAWALLA, J.)