IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION (L) NO. 32740 OF 2024

Heritage Lifestyles & Developers Private Limited ...Petitioner

Versus

Madhugiri Co-operative Housing Society Ltd. ...Respondent

WITH
INTERIM APPLICATION (L) NO. 32741 OF 2024
(for stay)
IN
COMMERCIAL ARBITRATION PETITION (L) NO. 32740 OF 2024

Heritage Lifestyles & Developers Private Limited ...Applicant

In the matter of :

Heritage Lifestyles & Developers Private Limited ...Petitioner

Versus

Madhugiri Co-operative Housing Society Ltd. ...Respondent

Mr. Venkatesh Dhond, Senior Advocate *a/w. Mr. Vaibhav Sugdare, Mr. Saket Mone, Mr. Vishrant Tendulkar, Mr. Prateek Pansare & Mr. Devansh Shah i/b. Vidhii Partners, for Petitioner/Applicant.*

Mr. Mukesh Vashi, Senior Advocate *a/w. Vaishali Sanghavi, Prachi Parmar, Ameet Mehta, i/b Solicis Lex, for Respondent.*

CORAM : SOMASEKHAR SUNDARESAN, J.

Reserved on : February 7, 2025
Pronounced on : March 4, 2025

JUDGEMENT :

Context and Factual Background:

1. This Petition is an appeal filed under Section 37(2)(b) of the

Arbitration and Conciliation Act, 1996 ("***the Act***") challenging an order dated October 14, 2024 ("***Impugned Order***") passed by a Learned Arbitral Tribunal refusing grant of interlocutory relief sought by the Petitioner in an application filed under Section 17 of the Act.

2. The factual matrix relevant for purposes of this appeal may be summarised as follows:-

a) The Petitioner, Heritage Lifestyle and Developers Pvt. Ltd. ("***Heritage***") is a Developer while the Respondent, Madhugiri Co-operative Housing Society Ltd. ("***Madhugiri***") is a Housing Society located at Plot No. 408, CTS No. 1775, Shindewadi, Sion Trombay Road, Chembur, admeasuring 7,340 sq. yards, with a total of 82 members having 84 flats;

b) Heritage made a bid pursuant to a tender floated by Madhugiri, which was further revised on September 27, 2012. The proposal from Heritage was that a total carpet area of 61,538 square feet would be provided to Madhugiri's members and additional area of 2,000 square feet would be provided *pro rata.*

c) A final proposal was made on December 24, 2012 and that entailed providing Madhugiri's members 62,700 square feet with additional area 4,500 square feet to be distributed *pro rata,* with one car parking slot for every member;

d) The project was to be completed in 24 months of receipt of the Commencement Certificate to be issued by the municipal authorities. On February 17, 2013, a special resolution was passed by Madhugiri, and eventually, on March 12, 2013, a formal letter of intent was issued;

e) The parties executed and registered a Development Agreement dated March 19, 2014 ("***DA***") in connection with redevelopment of Madhugiri's two buildings – each having three floors.. The DA entailed redevelopment of Madhugiri's buildings. A key feature was that out of the total area of 1,09,220 square feet, flats for Madhugiri's members would constitute 62,700 square feet, and the balance would belong to Heritage. Entitlements of additional floor space index ("***FSI***") or transferable development rights ("***TDR***") due to any difference in actual plot area was to be divided between Madhugiri and Heritage in the ratio of 54:46;

f) Even while the DA was executed, the parties negotiated and signed on the same day i.e. on March 19, 2014, a Supplemental Development Agreement, which was not registered ("***SDA***") but was notarised and stamped, dealing with hardship compensation, transit rent, shifting expenses etc.;

g) The DA read with the SDA entailed that if there were any basic increase in the FSI / TDR because of changes in legal entitlements, that would belong solely to Madhugiri;

h) Performance under the DA did not take place for several years and the obligations under the agreed contracts have not been complied with. There is no specific evidence of the Madhugiri having violated any provisions of the DA. The parties are at loggerheads about the reasons for non-performance but that need not detain my attention at this stage of the matter, considering the nature of the controversy to be decided in this judgement. Suffice it to say, multiple approvals secured for the project including the Intimation of Disapproval lapsed without activity commencing;

i) The parties appear to have consistently had differences of opinion on the additional entitlements that would arise for the redevelopment project. Additional entitlements to the development potential arose – primarily attributable to the road width, road FSI or road setback. Heritage made an offer dated June 18, 2017 offering an additional 27% area to the members of Madhugiri, and also sought some cut backs to the other entitlements that the members would get;

j) On July 22, 2017, Madhugiri accepted the new bargain and asked Heritage to commence demolition and redevelopment. After this stage, multiple revised offers were made by Heritage and many were accepted and endorsed by Madhugiri. The parties engaged in this manner but work did not start;

k) On August 19, 2022, Madhugiri terminated the DA, the SDA and the related documentation, which was protested by Heritage. Heritage then started engaging and sending revised and updated proposals;

l) On March 17, 2023 and on ***March 24, 2023***, further revised offers were made by Heritage. On April 12, 2023, clarifications were issued. These have been summarized in a table by the Learned Arbitral Tribunal in the Impugned Order, and are found on pages 94 to 97 of the Petition. In the interest of brevity, the table is not being extracted here. Suffice it to say, the factors that were modified or clarified included the carpet area entitlement, FSI entitlements, hardship compensation, completion period and the total actual redeveloped area;

m) It is seen that there is significant difference between the actual redevelopment area initially proposed by Heritage and later offered. The actual area was made known only in the version of a draft supplemental agreement shared by Heritage on June 28, 2023, purporting to conform to the Revised Proposal dated March 24, 2023.

n) Three vital changes emerged: (i) the total area moved upwards from 1,09,220 square feet to 1,63,620 square feet; (ii) Madhugiri had been proposed to be given 62,700 square feet originally, and that moved up to 68,620 square feet; and (iii) initially, Heritage had proposed to keep 46,520 square feet for itself while later, it proposed to keep 95,000 square feet for itself.

o) Indeed, the proposal dated March 24, 2023 does not set out these revised numbers. It is from a draft of the supplemental development agreement forwarded on June 28, 2023 by Heritage (on the basis of its understanding of the proposal dated March 24, 2023), that these break-up figures of area entitlement between Madhugiri and Heritage was spelt out;

p) On March 25, 2023, the advocates for Madhugiri addressed an email stating that the draft agreement seemed alright "to go ahead". This, among other facets, is pressed into service by Heritage to indicate conclusion of contract;

q) On ***March 26, 2023***, Madhugiri held a special general body meeting to approve the offer dated March 24, 2023 and revoked its earlier decision to terminate the DA. On this date, the area break-up of the development potential was not crystallised and members approved the revocation of the earlier termination but pressed for clarity on the area and the break-up of entitlement to the developed area. The parties then engaged on what the proposal dated March 24, 2023 actually meant and Madhugiri sought clarifications from Heritage;

r) On April 2, 2023, a meeting was held between the parties. By a letter dated ***April 12, 2023***, Heritage purported to provide the clarifications sought by Madhugiri. The contents of this letter are extracted and dealt with later in this judgment;

s) On ***May 3, 2023,*** Madhugiri addressed a letter stating that the offer dated March 24, 2023 had been approved by the members on March 26, 2023. By the very same letter dated May 3, 2023, Madhugiri called upon Heritage to provide the floor plans, layout plans for individual flats, the complete building plan, elevation of the building, the proposed supplemental development agreement ("***Draft Revised SDA***"), the proposed permanent alternate accommodation agreement and the like, within a period of one month from the receipt of the letter. Madhugiri squarely stated that but for the proposal of modification sent by letter dated March 24, 2023, such revised supplemental development agreement (that would have to be received) must be read with the registered DA, the executed SDA, and the tender documents;

t) Multiple turnarounds of the Draft Revised SDA that was meant to translate the revised proposal dated March 24, 2023 into an explicit agreement, were traded between the parties. It was from a draft agreement received on June 28, 2023 that Madhugiri was put to notice that the total area had increased from 1,09,220 square feet to 1,63,620 square feet, and that of such area, Madhugiri was proposed to be given 68,620 square feet, with Heritage retaining for itself 95,000 square feet. It also appeared that additional entitlements had become available pursuant to Road Setback Area becoming available. Until this date, there was no granularity in the detail that was made known in the drafts;

u) Indeed, advocates of Madhugiri confirmed the Draft Revised SDA but subject to approval of Madhugiri. The email said *"The changes seem fine to us. You can go ahead if the clients i.e. the society approve the same*";

v) On July 4, 2023, Madhugiri called for clarification on how the entitlement of Heritage shot up to 95,000 while the entitlement of Madhugiri only marginally went up. On July 6, 2023, Heritage provided the clarifications sought. On July 4, 2023, Madhugiri wanted to know how the additional area was arrived at with particular regard to the road set back area and the break-up of the area calculation. Madhugiri asserted that if additional area due to Road Setback Area was to become available, that would have to be shared with Madhugiri. Heritage wrote to Madhugiri on the same date providing its explanations;

w) On July 24, 2023, Madhugiri wrote to Heritage asserting that the additional area emerging from the road setback ought to be shared in the 54:46 ratio. Specifically, the letter stated: "*Please send your confirmation reply within 7 days from the receipt of this letter. We Madhugiri CHS are very keen to start the redevelopment and would look forward for all the details as requested above. Based on your reply we shall for SGM to approve the final draft and go for registration.*";

x) On July 28, 2023, Madhugiri wrote to Heritage stating that the managing committee was not convinced by the

explanations. Madhugiri asserted that Heritage could either forego the additional area entitlement from the road setback and commence the long-pending redevelopment, or claim it but share it with Madhugiri in the ratio of 54:46 (the same ratio envisaged earlier for additional entitlements);

y) The dispute over entitlements continued to fester. Heritage sought interlocutory relief under Section 9 of the Act by filing a petition on September 13, 2023. On January 21, 2024, Madhugiri passed a resolution deciding to terminate the DA and SDA again. This decision was communicated to Heritage by Madhugiri's advocates on February 21, 2024. On February 27, 2024, an application under Section 11 of the Act was filed by Heritage and on March 27, 2024, the Learned Arbitral Tribunal came to be appointed converting the Section 9 Petition into an application under Section 17 to be considered by the Learned Arbitral Tribunal; and

z) On October 14, 2024, the Learned Arbitral Tribunal passed the Impugned Order rejecting the interim reliefs sought in the Section 17 Application. The Learned Arbitral Tribunal ruled that *prima facie*, the termination of the executed DA and the SDA was valid and therefore no stay could be granted on the termination.

3. The aforesaid dates and events extracted above are relevant for purposes of considering if any interference with the Impugned Order is called for.

Heritage's Contention:

4. The core contention presented by Mr. Venkatesh Dhond, Learned Senior Counsel on behalf of Heritage is that the following documents collectively constitute the instruments by which a valid amendment to the executed DA and SDA had been executed by the parties:-

   a. The revised proposal dated March 24, 2023 ("***Revised Proposal***");

   b. Madhugiri's special general body of members approving the proposal at the meeting held on March 26, 2023 ("***Members' Approval***");

   c. Heritage's clarificatory letter dated April 12, 2023 ("***Heritage Clarification***"); and

   d. Madhugiri's letter dated May 3, 2023 ("***Madhugiri Approval Communication***") communicating the Members' Approval to Heritage.

5. By such contract-forming documentation, Mr. Dhond would submit, the DA and the SDA as executed in 2014 (which, although terminated, had been revived by Madhugiri) came to be amended, and the absence of a formally executed amendment agreement was no impediment. The crux of the submission is that the Revised Proposal was meant to amend the existing DA and SDA while the Members' Approval constituted the Society's acceptance of the Proposal, which was communicated by the Madhugiri Approval Communication.

The only requirement to be met by Heritage was to clarify how it had computed the break-up of the additional area, and that had also been provided by the Heritage Clarification. Consequently, he would assert the DA and SDA stood further amended by May 3, 2023.

6. Mr. Dhond would submit that merely because Madhugiri did not execute the agreement, it would not follow that there was no amendment. There is a strong *prima facie* case he would submit, in the contention that the DA, as amended by the aforesaid four instruments, was wrongly terminated by Madhugiri on January 21, 2024.

7. Mr. Dhond would submit that Madhugiri would have no power to keep demanding more benefits and purport to terminate the concluded contract with a view to extract a greater bargain from Heritage. According to him, the demand for sharing the benefit arising from the road setback and to compare the area retained by Heritage with the area being graciously shared by Heritage with Madhugiri, has no basis in such amended contract, and therefore the termination was illegal. Learned Senior Counsel would submit that the Impugned Order has grossly erred in not appreciating this position and in denying an injunction against the termination.

Madhugiri's Contention:

8. In contrast, Mr. Mukesh Vashi, Learned Senior Counsel on behalf of Madhugiri would submit that the record would eloquently show that there was no concluded contract amending

the DA and the SDA. He would submit that the parties did not execute any amendment and the drafts of the proposed supplemental development agreement were being negotiated. In the course of negotiation, Mr. Vashi would submit, Madhugiri sought clarity from Heritage on the entitlements arising out of the road setback. The Heritage Clarification was no clarification at all, he would submit, since it only obfuscated the facts. The correspondence from the advocates of Madhugiri who were handling the drafts of proposed amendment agreement were of no consequence, and in any case, the email made it clear that the draft would be subject to approval by Madhugiri. The Draft Revised SDA was never executed.

9. Mr. Vashi would submit that any entitlement arising out of the road setback would be the Society's property. Heritage had strung Madhugiri along for nearly a decade. It had delayed in carrying on any work after signing the DA and the SDA, and only fettered the interests of Madhugiri and its members. Learned Senior Counsel would submit that Madhugiri was entitled to state that the entire road setback benefit may be given a go-by and the project may be implemented in terms of the DA and the SDA as it existed, without any amendment in 2023. In such a situation, the benefits would flow to Madhugiri in future, which it may choose to use.

10. Mr. Vashi would contend that since Heritage was not discharging its obligations under the DA read with the SDA as it existed, the termination was legitimate because Madhugiri cannot continue to be held hostage by an old DA and SDA with Heritage seeking to exploit development rights that truly

belonged to Madhugiri.

11. The most significant element in the matter according to Mr. Vashi is that at no point in time did Heritage explicitly state that benefits arising out of the road setback would be taken over by Heritage, or even that it would be disproportionately usurped by Heritage. He would submit that the agreement all along was that apart from what was stated in the DA and SDA, all further development potential was that of Madhugiri. It is only when renegotiating, ostensibly to get Madhugiri a better deal, that Heritage slipped in a reference to benefits arising out of road setback / widening and that too in an incomprehensible manner. It was comprehended only when the actual draft of the supplemental development agreement was eventually sent. Immediately upon receipt, Madhugiri started asking for explanations and from the explanations it was evident that Madhugiri was being short-changed. Therefore, the negotiations did not lead to fruition and Madhugiri decided to not treat Heritage as the Developer. The special general body meeting, by a majority vote, decided to terminate the relationship.

Analysis and Findings:

Instruments in Question

12. The key point for determination is whether the four instruments pressed into service by Mr. Dhond, namely, the Revised Proposal (dated March 24, 2023), the Members' Approval (dated March 26, 2023), the Heritage Clarification (dated April 12, 2023) and the Madhugiri Approval Communication (May 3, 2023), would, collectively constitute a binding amendment

agreement that amended the DA and SDA. According to Heritage, this sequence of events, constituted an effective amendment to the DA and SDA. Merely because Madhugiri refrained from signing the Draft Revised SDA, the aforesaid four instruments cannot be wished away. According to Madhugiri, the development potential in the project, and the manner of sharing the entitlement to such potential is an essential element of contract. That facet has always been central to the project right from the stage of the tender. It was still under negotiation even after the aforesaid four instruments came into existence. Therefore, Madhugiri argues, no binding amendment to the DA and the SDA had come about. The Members' Approval was merely an enabling approval, Madhugiri contends, asserting that unless the Managing Committee (the governing body of the Society), which took steps to ascertain the precise rights pursuant to such authorisation received satisfactory answers, no contract could be regarded as having been formed.

13. I have had the benefit of being taken through the record with the assistance of Learned Senior Counsel representing the parties. I have also had the benefit of their written submissions in the matter, as an aid to navigating the record.

14. For the reasons set out below, I am not convinced that the Learned Arbitral Tribunal was wrong in rejecting Heritage's request for injuncting the termination. In my opinion, the *prima facie* opinion expressed by the Learned Arbitral Tribunal does not call for any interference. The Impugned Order is well reasoned, articulates the actual flow of events, and the

conclusions drawn in it, do not deserve to be disturbed.

Analysis in a Nutshell

15. In a nutshell, it is evident that the DA and SDA that were executed way back in 2014, were indeed terminated on August 19, 2022. Indeed, such termination was reversed by the Members' Approval at the meeting held on March 26, 2023. The Members' Approval was an authorisation to approve Heritage as the Developer and towards that end, to reverse the previous termination of the DA and the SDA. However, the governing body i.e. the Managing Committee which had the authority to use the authorisation and the responsibility to protect the best interests of the members of the Society, asked Heritage to clarify the position on the entitlements that would flow from the Revised Proposal. The Heritage Clarification, in my opinion, did not at all clarify this in any reasonable manner that would give Madhugiri a clear picture. The Madhugiri Approval Communication indeed communicated the Members' Approval to Heritage but in the very same breath, Heritage was called upon to share the Draft Revised SDA, to achieve clarity on the core issue of precise sharing of entitlements.

16. It was only the version of the Draft Revised SDA received on June 28, 2023 that actually contained precise numerical enumeration of what component of the developed area was proposed to be given to Madhugiri and its members and what component of the area was proposed to belong to Heritage. This is the first time the actual and precise element of sharing of entitlements, with particular regard to the road setback entitlement was made clear to Madhugiri. Once that became clear, the parties still engaged to resolve their differences in

expectations, and there was no consensus on how to share the benefits, the DA and the SDA were again terminated by Madhugiri.

17. The Learned Arbitral Tribunal, which is the master of the proceedings and has examined the evidence before it, has returned an accurate *prima facie* view. Conscious of the scope of my jurisdiction under Section 37 of the Act, and that too when considering an appeal from an interlocutory order passed under Section 17 of the Act, I have sought to analyse each of the four instruments to form a view on what they contain and the implications of their contents.

Revised Proposal:

18. Before analysing the Revised Proposal, the position contained in the original DA and the SDA must be examined. The following contents of Clause 3 and Clause 5 of the DA are vital to extract:-

> ***Clause 3:***
> *The Developers are hereby granted the redevelopment rights and the Developers hereby accept the rights for redevelopment of the said property together with the buildings standing thereon, by demolishing the Existing Buildings standing thereon on the terms and conditions set out herein. The* ***Developers will be entitled to utilize the maximum FSI*** */ fungible FSI of the said Property and the maximum TDR FSI,* ***subject to the said FSI*** *and/or TDR FSI* ***being available*** *for construction* ***as per the*** *Development Control* ***Regulations now prevalent*** */ applicable in Brihan Mumbai. It is agreed between the parties hereto that* ***if there is any increase in basic FSI*** *and / or TDR-FSI* ***beyond an aggregate of 2 FSI*** */ TDR-FSI and 35% fungible FSI, due to any changes in D.C. Regulations,* ***the same shall belong to the Society only*** *and* ***the Developers shall not have any claim to the same****.*
>
> ***[Emphasis Supplied]***
>
> ***Clause 5:***
>
> *……The* ***total constructible area*** *based on the amended property card and as per the current M.C.G.M. rules* ***is 109220 sft. built up area****. Out of the 109220 sft built up area,* ***the developer shall build flats totalling to 62700 sft carpet area for the existing members of the society****.*

[Emphasis Supplied]

19. The entitlement and the break-up between the parties was set out in black and white as above. An area of 1,09,220 square feet was the total floor area that could be developed, of which 62,700 square feet carpet area was meant for the existing members of Madhugiri. The rest would go to Heritage (46,520 square feet).

20. Against this backdrop, it would be useful to see what the Revised Proposal entailed. The following extracts are noteworthy:-

> *1. Additional area for the existing Residential Building*
>
> *The Developer shall provide an extra 62% MOFA carpet area and additional 12% of existing area by way of utility area over and above the existing area as per the approved MCGM plans to the Existing Members as in the attached Exhibit No. 1 titled as Eligible area. Should there be a shortfall in the eligible area as in Exhibit 1, the member/(s) shall be compensated at the rate of Rs.45,000/- (Rupees Forty Five Thousand Only) per sq. ft. for the shortfall area. The developer confirms that the current proposal is worked out based on the plot potential as per the current Development Control & Promotion Regulations (DCPR 2034) in which as per the road width policy and zonal FSI 1 Plus Additional FSI by payment of premiums 0.5 plus admissible TDR 1 FSI = Total Permissible FSI of 2.5 Plus Fungible FSI/TDR @ 35% = 3.375 with the Road setback FSI /TDR as per prevailing policy of the MCGM over and above as per all the present provisions of the DCPR 2034. If the Government increases the FSI over and above the present DCPR 2023 norms then that increased FSI will be shared in the ratio of 46% to the Developer and 54% to the society ie (46:54) as per the Development Agreement.*
>
> *The society alone shall have the exclusive right and privilege on the extra FSI/additional FSI becomes available after obtaining Occupation Certificate in respect of the new building.*
>
> *[Emphasis Supplied]*

21. Therefore, the Revised Proposal essentially, in the portion that contains plain English, offered an additional 62% of "MOFA

carpet area"[1] to the members of Madhugiri. Should this not have been feasible, compensation in money was offered. It was made clear that the Revised Proposal was based on the current regulations governing development control. The Revised Proposal then moves on to refer to the road width policy and zonal FSI, and after that, the language used is evidently incomprehensible and would require intense deciphering skills for anyone to appreciate, leave alone members of a housing society without legal and regulatory bandwidth to decipher what was meant. Effectively, the words used indicate an FSI of 2.5 increased by 35% i.e. FSI of 3.375 with road setback FSI / TDR as per prevailing policy. The words "road setback" was used but really, the import of the same was not spelt out. Even here, apparently, any increase in FSI was to be shared between Heritage and Madhugiri in the ratio of 46:54 – meaning thereby Madhugiri would have a greater share of the enhanced entitlement, should such enhancement come about.

22. A plain reading of the Revised Proposal would show that it was formulaic and did not actually set out which party would be entitled to what area of the development potential. It is noteworthy that the Revised Proposal makes a reference to the "MOFA carpet area". Even if one were to treat this to be a 'term of art' i.e. a phrase that has a precise and specialised meaning within a particular field or discipline, it would follow that the principles invoked were those underlying the MOFA (full form in the footnote placed earlier).

[1] *Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963*

23. The first principles of MOFA is that when an agreement is entered into with a flat purchaser, the precise implications of FSI and the plot potential should be crystallised and actually spelt out in numerical terms in the agreement. The Rules made under MOFA stipulate in Form V, a draft standard agreement that a promoter of a project and the flat purchaser ought to execute, with certain non-negotiable terms stipulated in it, taking care to stipulate that any conflict with those provisions would be *void ab initio*. Clause 4, which is a stipulated standard and mandatory provision that cannot be diluted, is structured in a manner that makes it mandatory to spell out the actual area in terms of the FSI available in respect of the land. Therefore, applying this principle, it would be imperative and indeed reasonable to expect that if the Revised Proposal were to make sense in a manner that both parties understood the same thing in the same manner, then the actual area ought to have been clear. The (then) terminated DA had stipulated the development potential as 1,09,220 square feet, of which 62,700 would be Madhugiri's entitlement. The Revised Proposal did not set out any actual measure. It did set out a formula essentially to state that one could assume an FSI of 3.375 but what it meant was not spelt out. Even if one were to have the capacity to appreciate it and compute the actual area, the Revised Proposal proposed that any increase in the FSI would be shared 46:54 between Heritage and Madhugiri. This was not the actual proposal as future developments would show.

24. The Revised Proposal was a deal sweetener offered by Heritage to incentivise Madhugiri to change its mind about the termination of the DA. This is legitimate economic activity in

the market, where a contracting party is meant to put its best foot forward to make the counterparty change its hard stance on a deal. That is in the realm of negotiation and engagement, but not in the realm of having, at the least, a firm handshake on the precise contours of the deal.

25. It is because Madhugiri did not fully comprehend the full implications of the Revised Proposal, that clarifications were sought from Heritage.

Members' Approval

26. Yet, because Madhugiri's managing committee appears to have been convinced that the earlier decision to terminate required to be revisited, the special general body meeting appears to have been held in two days – on March 26, 2023. The members indeed approved the withdrawal of the termination effected earlier.

27. The minutes of that meeting would show that they record a members' queries about the total area of construction not being mentioned. A member had also sought a confirmation of the total FSI area of the plot of land of Madhugiri. Another member expressed a view that if converted into actual area, the Revised Proposal got Madhugiri nothing. Yet, the members of Madhugiri, indeed voted 41:1 in favour of accepting the Revised Proposal and revoking the earlier termination.

28. To my mind, this is an enabling authorisation by the general body. It is now trite law that development agreements are between the Society and the Developer and not between the

Developer directly with the members. This is the principle by which multiple judgments of this Court have held that individual members cannot invoke arbitration against the Developer since the actual contracting parties are the Society and the Developer. For a contract to be formed, the Society and the Developer have to come to an agreement. Even leaving out the requirement for an actual signature on a printed document purporting to be an amendment, one would need to consider if Madhugiri, the Society, and Heritage, the Developer had reached agreement. It is settled law that when the actual signature is elusive, one would need to examine if the essential features of the contract had been agreed upon by conduct of the parties and by examination of contemporaneous facts and circumstances.

29. Since the Revised Proposal did not spell out the core and essential element in a development agreement – the actual area that would emerge from the development and the size of the components to which the parties would be entitled – the Members' Approval cannot partake the character of anything more than an authorisation of the revocation of the earlier termination and an authorisation to the managing committee to accept the Revised Proposal. Therefore, in my opinion, the Members' Approval cannot be placed any higher than an in-principle approval for the Revised Proposal.

30. Based on such authorisation, the managing committee indeed engaged with Heritage and asked for precision and clarification in the area that would emerge and the manner in which it would be shared. This would bring one to the Heritage Clarification

dated April 12, 2023.

Heritage Clarification:

31. Heritage's letter dated April 12, 2023 is pressed into service to assert that it provided the clarification sought, and that concluded the contract amending the DA and the SDA, which was no longer terminated (since the Members' Approval had revoked the termination on March 26, 2023).

32. Referring to the Revised Proposal and a meeting held in Heritage's office on April 2, 2023, the Heritage Clarification sought to give assurance and clarifications under as many as fifteen issues. The Bank Guarantee was proposed to be enhanced to Rs. 7.5 crores. The transit rent was also proposed to be increased. Even if these were to be treated as non-essential elements of the contract, it would be important to see the clarification on the issue of FSI. Paragraph 5 of the Heritage Clarification reads thus:-

> *5. FSI as per DCPR 2034 (Break up with proof):*
>
> *With reference to the **FSI and TDR breakup** the **members were explained how the entire calculation was arrived**, the same is also **documented in the letter sent to society on 24th March 2023** and in **explained hereunder**.*
>
> *'The current proposal is worked out **based on the plot potential as per the current Development Control & Promotion Regulations** (DCPR 2034) in which as per the **road width policy** and zonal FSI 1 Plus Additional FSI by payment of premiums 0.5 plus admissible TDR 1 = Total Permissible FSI of 2.5 Plus Fungible FSI/TDR @ 35% = 3.375 FSI /TDR as per prevailing policy of the MCGM over and above as per all the present provisions of the DCPR 2034'.*
>
> ***[Emphasis Supplied]***

33. One would not need to sparse and explain the linage extracted

above to observe that it is hardly a clarification. The language extracted in quotes in the so-called clarification is a copy-paste of a part of the language used in the Revised Proposal. There is nothing in the Heritage Clarification that would still actually spell out the plot potential in precise numerical terms and the precise manner of distribution of such potential between Heritage and Madhugiri. In my opinion, it would not take no effort to see that the parties were still none the wiser after the Heritage Clarification on an essential element of the amendment under negotiation – namely, the area that would be retained by Madhugiri and the area that would be ceded to Heritage.

34. Therefore, I have no hesitation in holding that the Heritage Clarification would not turn the needle at all in coming to a view as to whether the parties had reached *consensus ad idem* on the essential and vital element of the DA (to be modified by a revised supplemental agreement), namely, plot potential and the manner of sharing of such potential between the parties.

Madhugiri Approval Communication:

35. Finally, the Madhugiri Approval Communication dated May 3, 2023 is pressed into service to purport conclusion of a binding amendment to the DA and the SDA. This instrument would need to be analysed.

36. The Madhugiri Approval Communication essentially records that the members of the Society had approved the Revised Proposal dated March 24, 2023 along with suggestions of some members, which had been communicated to Heritage. The

letter notes the Heritage Clarification dated April 12, 2023. The letter calls on Heritage to share within a month, the layout plans of individual flats, floor plans, complete building plan, elevation of the building, the permanent alternative accommodation agreement, and the final draft of the supplemental development agreement. The letter also makes it clear that the final draft of the supplemental development agreement would need to be read with the DA and the SDA already executed.

37. Whether the Madhugiri Approval Communication would constitute the clinching closure of the amendment agreement is the question to consider. That very letter seeks a final draft of the supplemental development agreement. However, the numerical figures of the development potential and the break-up of the area developed, between Heritage and Madhugiri would emerge for the first time in the Draft Revised SDA received on June 28, 2023. The total area and the break-up between the parties being an essential facet of the amendment under negotiation, and being precisely what had held up the closing of an agreement, with the crystallised figures still being available, it would be difficult to conclude that by this stage, the parties had *consensus ad idem* on all essential issues.

38. In my opinion, both before and after the Madhugiri Approval Communication, the parties have been discussing and negotiating the additional area that would emerge because of the road setback. The actual area and the break-up, after factoring in the road setback would emerge well after the date of the Madhugiri Approval Communication. Madhugiri itself requested for the Draft Revised SDA on that very date. The

subject matter of the agreement under negotiation was what the plot potential would be and how it would be split. Therefore, it would be difficult to conclude that by sending the Madhugiri Approval Communication, the deal had been sealed.

Contemporaneous Correspondence:

39. Some contemporaneous correspondence would also point to the position that the parties had not arrived at a conclusive amendment to the DA and the SDA.

40. On June 28, 2023, Heritage sent a version of the Draft Revised SDA by email. The email stated that Heritage had agreed to change two clauses as contained in the draft attached to that email. To this, lawyers of Madhugiri replied stating: "*The changes seem fine to us. You can go ahead* ***if the clients i.e. the society approve*** *the same.*"

41. There has been some debate about the implications of the email from Madhugiri's lawyers and how it could suggest completion of contract. However, that very email makes it clear that Madhugiri would need to approve it, and it was the lawyer who had stated that the draft seemed fine. Considering that even if the lawyer had expressed his opinion, he had made it clear that Madhugiri would need to approve it, not much turns on this email from Madhugiri's lawyers.

42. The parties have traded correspondence thereafter. By a letter dated July 6, 2023, Heritage defended its calculation of the area and the FSI and asserted that until the municipal approvals for the plans were received, the precise development area would

not be clear. An "approximate FSI Calculation" was provided. The letter from Heritage also recorded that the Draft Revised SDA had been provided and so had other documents also been drafted. The letter acknowledged that these drafts would need approval of the members of Madhugiri so that they could be presented to the Collector of Stamps for adjudication.

43. A letter dated July 24, 2023 from Madhugiri recorded that further meetings had been held on July 10, 2023 and July 18, 2023, and once again sought a detailed clarification on the Road Setback Area. Madhugiri reiterated its stance recorded in June. In this letter, Madhugiri wrote that it was keen to start the redevelopment and sought the details of the working of the Road Setback Area. The letter stated that based on the reply, a special general body meeting could be called to approve the final draft and go for registration.

44. An email dated July 28, 2023 from Madhugiri to Heritage provides further perspective. It stated that the Managing Committee was not convinced by the clarification. Madhugiri gave Heritage two options – one was for Heritage not to claim the Road Setback Area; and the other was for Heritage to claim it, but share it with Madhugiri in the ratio of 46:54, which was nothing but the ratio spelt out in the Revised Proposal. This is further evidence that the parties were negotiating on a vital and essential element of contract even at this stage, and Madhugiri sought to implement the very ratio spelt out in the Revised Proposal to the benefit flowing from the road setback.

45. Therefore, in my opinion, the Learned Arbitral Tribunal was

right in taking an eminently plausible view that the aforesaid evidence demonstrated that negotiations were underway and one could not reasonably infer a concluded contract. To my mind, this is writ large on the face of the record. The parties evidently considered the subject matter to be an essential element of the amendment under negotiation.

46. In my opinion, one must not lose sight of the scheme of governance and the devolution of powers in the running of a Society. Like with any body corporate, the general body and the members are the ultimate stakeholders while the Managing Committee is the decision-making body with its members having fiduciary duties to the general body to act in the best interests of the Society.

47. Even if the Revised Proposal had approval from the members, such approval, in my opinion, would only have the effect of empowering and enabling the governing body i.e. the Managing Committee to negotiate the contours of the agreement with Heritage. In my view, approval of members of a co-operative housing society is a matter of authorisation for the Managing Committee to act. If there is any grievance that Managing Committee is not obeying the diktat of the members, that would potentially present a cause of action for alleged violation of the law regulating the governance of the Society. It cannot create third party rights. As is seen in the facts of this case, the members of Madhugiri themselves viewed their approval granted on March 26, 2023 as an enabling approval, since the same general body, dissatisfied with Heritage's detailing of what the Revised Proposal dated March 24, 2023 meant, went on to

terminate the DA and SDA altogether on January 21, 2024.

48. In any collective body such as a co-operative society (or for that matter a company), there would be requirements for the governing body such as the Managing Committee (or the Board of Directors for a company) to get member or shareholder approval for certain actions. Such an approval is an authorisation, without which the Managing Committee cannot validly contract. However, the decision-making forum, with personal fiduciary duty (and attendant liability) for the decisions taken pursuant to such authorisation is the governing body i.e. the Managing Committee. That is precisely what has happened in the instant case. The Managing Committee of Madhugiri negotiated with Heritage after having terminated the DA and the SDA.

49. As stated earlier, three vital changes were evident since the DA and indeed since earlier versions of Heritage's bids to strike a deal with Madhugiri after the termination of the DA. These are: (i) the total development potential area moved upwards from 1,09,220 square feet to 1,63,620 square feet; (ii) Madhugiri, which had been proposed to be given 62,700 square feet originally, would now get up to 68,620 square feet; and (iii) initially, Heritage had proposed to keep 46,520 square feet for itself while by the time of the Revised Proposal, Heritage proposed to keep 95,000 square feet for itself.

50. With such a wide gap, it would be vital for the parties to have complete clarity of thinking on these changes. The precise computation of the aforesaid change came about only on June

28, 2023, well after the dates of all the four instruments that are relied on by Heritage making it impossible to claim a closed contract without a need to sign an amendment. The last of events claimed i.e. the Madhugiri Approval Communication was dated May 3, 2023 while the information on this material deviation and break-up emerged only on June 28, 2023. Therefore, it would be unreasonable to conclude even *prima facie* that the parties had arrived at a firm agreement to amend the DA and the SDA of 2014.

51. In view of the observations made above, I do not think it necessary to delve into the facet of whether there had been any historical delay on the part of the Petitioner in commencing the redevelopment work. Since it is apparent to me that the parties had not reached agreement on amending the DA and the SDA pursuant to the Revised Proposal, I do not think it necessary to pronounce upon past delays and the effect of any such delay. This is in the domain of the Learned Arbitral Tribunal, which may deal with it in the course of the final hearing. The Learned Arbitral Tribunal itself has shelved discussion on that subject for purposes of a decision on the Section 17 Application.

Case Law Analysed:

52. As regards the case law cited by Mr. Dhond, one judgement that was stated to be close to the facts at hand, deserves comment. In *Pittie Antariksh Grl Pvt. Ltd. Vs. Kher Nagar Sai Prasad Co-operative Housing Society Ltd.* [2] (**Pittie Antariksh**), a Learned Single Judge of this Court has ruled upon whether a Development Agreement (in the facts of that case) necessarily had to be executed to infer a concluded

[2] *2024 SCC OnLine Bom 528*

contract or whether it was merely an expression of the desire of the parties for a formal agreement to be executed. In this context, a Learned Single Judge has stated the following:

> *51. The Indian Contract Act, 1872 clearly contemplate that an agreement not enforceable by law is void and it is only an agreement which is enforceable by law and which takes shape of a contract, is binding. Before a binding contract is arrived at, the parties may enter into negotiations at pre-agreement stage and this negotiation by itself, is not an agreement but if the negotiation is in the nature of a representation that something will be done in future, as such a representation may turn into an enforceable contract, if other party to whom it is addressed, acts upon it. Such a representation may involve an existing intention to act in future in the manner represented.*
>
> *52. Freedom of negotiation is concomitant of freedom of contract. Negotiation is a well-known consensual bargaining process to reach an agreement and during its process, the parties attempt to reach agreement on a disputed or on a potentially disputed area of a transaction contemplated. Negotiations necessarily facilitates conclusion of a contract and occurs at a pre-contract period. Nonetheless proof of existence of a concluded contract is an essential, sine qua non of any legal action for obtaining a relief of specific performance of the contract and the concluded contract irrefutably presumes the existence of 'ad idem' or 'consensus'. Negotiation is initiated with a proposal which may not necessarily be an offer, but in the process of negotiation, a proposal may mature into an offer. As a result, during negotiation, cross or counter offer may mature into acceptance. In this process, the parties involved engage themselves in the freedom of making proposals after proposing, making counter proposal, after counter proposal and these may be 'without prejudice'. Indication that throughout the process, either parties and obligations remain unaffected as they do not intend to be bound by the offer made or the counter offer.*
>
> *53. For a contract to come into existence, there has to be acceptance of the offer on the same terms of the offer and such acceptance must be unequivocal, unconditional and absolute.*

An acceptance is a final and unqualified assent to the terms of the offer.

54. In other words, nothing is left to be done for the future. It is trite position of law that a contract has three essentials viz. an offer, followed by an acceptance of the same for a consideration. Negotiations may take place either on those essentials or on all of them, depending upon the circumstances involved. Freedom of negotiations is always exercised without prejudice to the existing mutual rights and obligations of the parties involved and engaged in negotiation. In many situations, during the course of negotiations, which may begin with a proposal, it may end with a concluded contract.

55. When parties negotiate, with a view to enter into a contract, multiple preliminary communications may pass between them, before a definite offer is made. One party may simply ask or respond to request, for information, or he may invite the other to make an offer. Between this may lie a preliminary inquiry, a statement as to price, an invitation to treat and invitation to apply, a request for bid offer or cross or counter offer.

56. When parties carry on lengthy negotiations, it may be difficult to say exactly, when an offer has been made and accepted. As negotiations progress, each party may make concessions or new demand and the parties may, at the end disagree as to whether they had ever agreed at all.

57. As per Chitty's on Contract, Vol I (General Principles), in such a scenario, the Court shall look at the whole correspondence and decide whether, on its true construction, the parties had agreed to the same terms. If so, there is a contract even though both the parties or one of them had reservations not expressed in the correspondence. The Court will be particularly anxious to ascertain, whether continuing the negotiations, have resulted in a contract where the performance, which was the subject matter of the negotiations has actually been rendered. Reference is made to G. Percy Trentham Ltd. v. Archital Luxfer Ltd., (1993) 1 Lloyd's Rep 25, where a building sub-contract was held to have come into

existence, (even though agreement had not yet reached when the contractor began work) as during its progress outstanding matters were resolved by further negotiations.

58. In various business transactions, it is very difficult to precisely state as to when the parties have reached agreement as they may continue to negotiate after they appear to have agreed to the same terms and it becomes necessary to look at the entire negotiations to decide whether an apparently unqualified acceptance did in fact, conclude the agreement and if it did, the fact that the parties continued negotiations after this point, does not affect the existence of the contract between them, unless the continued correspondence be construed as having an agreement to resign the contract. The binding force of oral contract or the exchange of communications is not affected or altered merely by the fact that, after its conclusion, one party sends to other a document, containing terms significantly differing from those which had been agreed upon them mutually.

59. The Contracts, therefore, are often the product of lengthy communications, over the range of issues such as scope of work, price, time for completion, specification and performance criteria. While scanning the negotiations, which may be in form of communications or oral commitments, it becomes necessary to ascertain the intention of the parties, continuing upto the date of the supposed contract, to bring into a Contract and on the date of the supposed contract, to find out whether the parties had been of one mind on all the terms, which they regarded to be its essential terms and upon expressing a consensus over the same, it decided that the contract shall come into existence and shall bind the parties.

60. In Pagnan S.P.A. v. Feed Products Ltd., (1987) 2 Lloyd's Rep. 601, the Queens Bench Division (1987 W.L. 493430), Lord Justice Lloyd, evolved the principles for determining the existence of a concluded contract, which often arose as a perennial question and the parameters in determining so to summarized the following effect:—

(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first

look to the correspondence as a whole.
(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case.
(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed : See Love and Steward v. Instone, where the parties failed to agree the intended strike clause and Hussey v. Horne-Payne, where Lord Selborne said at page 323:

> *"…… The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound, and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement" (My emphasis)*

(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled.

(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

(6) ***It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true***

> *: the law cannot enforce an incomplete contract. If by essential one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous; If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so called 'heads of agreement'.*
>
> *61. The above principles, therefore, require an in-depth search of the agreement between the parties, on the essential terms and if it is so, then the matters of detail can be left over, for a subsequent acts of the parties. The word 'essential terms' necessarily is indicative of such terms, without which the contract cannot exist and it is only on an agreement on these terms, the contract is said to come into existence.*
>
> ***[Emphasis Supplied]***

53. There can be no quarrel about the above proposition declared in ***Pittie Antariskh*** as a statement of the declaration of law. It has to be applied to the facts of the case. However, as observed by the Learned Single Judge, one has to look to the entire correspondence and decide whether in its true construction, the parties had agreed on the same terms in the same manner. Towards this end, the extract in ***Pittie Antariskh*** from *Pagnan S.P.A. Vs. Feed Products Ltd.* (***Pagnan***) cited by the Learned Single Judge bears mention. Paragraph 6 in the summarization contained in ***Pagnan*** would be an excellent pointer to bear in

mind. The parties must necessarily agree on the "essential" terms, and consider whether indeed the matter of detail is to be left over for future. That is the question to be examined in the context of the facts of the case.

54. In the instant case, the parties already had the DA and SDA agreed and in place. The question before this Court is whether the Revised Proposal, the Members' Approval, the Heritage Clarification, read with the Madhugiri Approval Communication would lead to a reasonable inference of an amendment agreement having been reached. The very reason for which the parties were in negotiation was to agree on the plot development potential and the sharing of the entitlement arising out of such potential. On that subject, the parties had extensive negotiations. The parties had not arrived at a common consensual view on what that break-up of the plot potential and benefits should be. The material on record shows that the parties engaged on this very issue, and eventually it was on June 28, 2023, that the Draft Revised SDA disclosed numerical quantum of such benefits and its sharing, for the first time. In fact, after such numbers became known, the members of the Society in fact, once again, resolved to terminate the DA and the SDA. Taking a holistic view of the matter, since it was only well after the aforesaid four instruments came into existence that the parties even got a sense of the precise quantum of plot potential that was being negotiated, an essential element of the subject matter of the negotiation for the proposed amendment was elusive. Therefore, in my view, by no stretch, can it be said that the essential facets of the proposed amendment had been agreed.

55. ***Pittie Antariksh*** is being dealt with since this was the one case that Mr. Dhond fairly stated comes closest to the matter at hand. The other judgments, which deal with the proposition of law as to whether execution of a contract would be regarded as a mere formality when the firm understanding can be inferred, do not need elaborate analysis since the principles contained in those judgments are indeed unexceptionable and well known. It is the application of the principles declared as the law, to the facts at hand that is relevant for a decision in this matter. Therefore, to avoid prolixity, I do not think it necessary to analyse any other case law.

Conclusion:

56. For the aforesaid reasons, the appeal in this Section 37 Petition is ***dismissed***. Having examined the facet of costs, this being a commercial arbitration, on the facts of the case, I am convinced that costs is a subject matter that is the domain of the Learned Arbitral Tribunal. I would leave the consideration of costs, including any costs relating to this Petition, to the Learned Arbitral Tribunal.

57. In view of the dismissal of this Petition, any attendant Interim Application is also ***disposed of***.

58. After this judgement was pronounced, Learned Counsel for the Petitioner submits that the restraint on appointing an alternate developer should be continued for three weeks more on the premise that such restraint had been in force since May 9, 2024.

However, in view of what is articulated in this judgment, it would not be appropriate to continue such a restraint any further. The request is rejected.

59. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]