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

IN IT'S COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION (LDG.) NO.29 OF 2017

B.E. Billimoria & Company Limited)
a Company incorporated and existing)
under the provisions of Companies Act,)
1956 and having its registered office at)
Shivsagar Estate, A Block, 2nd Floor,)
Dr.Annie Besant Road, Worli,)
Mumbai – 400 018) ...Petitioner

….Versus....

1. Mahindra Bebanco Developers Ltd.)
a company incorporated and existing)
under the provisions of Companies)
Act, 1956 and having its registered)
office at Mahindra Towers, 5th Floor,)
Worli, Mumbai – 400 018.)
)
2. Mahindra Lifespace Developers Ltd.)
a company incorporated and existing)
under the provisions of Companies)
Act, 1956 and having its registered)
office at Mahindra Towers, 5th Floor,)
Worli, Mumbai – 400 018.) ...Respondents

Mr.Janak Dwarkadas, Senior Counsel with Mr.Zal Andhyarujina, Mr.Kunal Dwarkadas, Mr.Amit Vyas and Mr.Rohan Mathur i/b Vertices Partners for the Petitioner.

Mr.Pravin Samdhani, Senior Counsel with Ms.Disha Kunder i/b Lodha Legal for the Respondent No.1.

Mr.Simil Purohit with Mr.Dhaval Mehta, Mr.Manish Vora, Mr.Swapnil Khatri and Mr.Akash Lodha i/b Wadia Ghandy & Co. for the

Respondent No.2.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 19TH APRIL, 2017
PRONOUNCED ON : 2ND MAY, 2017

JUDGMENT :-

1. By this petition filed under section 9 of the Arbitration & Conciliation Act, 1996 (for short "Arbitration Act"), the petitioner seeks an injunction against the respondent no.1 from taking any steps pursuant to their letters dated 5th January, 2017 and 13th January, 2017 and from in any manner breaching the agreement dated 28th September, 2011. The petitioner also seeks an order of *status-quo* with respect to the agreement dated 28th September, 2011 and seeks an injunction against the respondent no.2 from creating any third party rights / allotting any contract to carry out any construction / any development on the site and seeks other reliefs. Some of the relevant facts for the purpose of deciding this petition are as under :

2. In the month of March, 2008, Maharashtra Airport Development Company Limited (for short "MADC") invited the proposals for developing a residential township on an area of approximately 25.252 acres of land in Nagpur district. On 24th March, 2008, the petitioner and the respondent no.2 executed a Memorandum of Understanding to form a consortium to bid for the project and to jointly promote a company for the purpose of developing the residential township if the bid of the respondent no.2 was successful to jointly promote a special purpose vehicle for implementing the project.

3. On 18th April, 2008, the MADC accepted the proposals

submitted by the said consortium and issued a Letter of Intent to consortium for executing the said project.

4. On 14th September, 2010, the petitioner and the respondent no.2 executed a Term Sheet for award of the marketing contact to the respondent no.1 and construction contract to the petitioner for residential project. It was provided in the said Term Sheet that the said Terms Sheet will form part of the Shareholders Agreement between the respondent no.2 and the petitioner and will come into force on the date of signing of the Shareholders Agreement by the respondent no.2 and the petitioner. Both the parties signed the said Term Sheet. It is the case of the petitioner that it was always the understanding between the parties that the petitioner would be awarded the work of construction of the said project.

5. It is the case of the petitioner that pursuant to the said understanding between the parties, the respondent no.1 company was incorporated as a Special Purpose Vehicle of which 70% of the equity share capital is owned by the respondent no.2 and remaining 30% of the equity share capital is owned by the petitioner.

6. On 13th October, 2010, the MADC entered into a development agreement with the respondent no.1 granting the development rights for construction of the project.

7. On 27th May, 2011, the petitioner, the respondent no.1 and respondent no.2 entered into a Shareholders Agreement recording the rights and obligations of the petitioner and the respondent no.2 with regard to the management and operation of the respondent no.1.

It is the case of the petitioner that the said Term Sheet dated 14th September, 2010 formed an integral part of the Shareholders Agreement and was annexed thereto. Under the said Shareholders Agreement, it was agreed that the construction contract shall be awarded to the petitioner. Various terms and conditions were agreed upon by and between the parties to the said Shareholders Agreement, including their right to appoint the directors, deadlock procedures, affirmative voting rights etc.

8. On 28th September, 2011, the petitioner and the respondent no.1 entered into an agreement pursuant to which the respondent no.1 awarded the work of execution and construction of works to the petitioner on the terms and conditions recorded therein. The commencement date for construction was 18th October, 2011 under the said agreement and completion date was 10th January, 2017. The work was to be carried out by the petitioner in four phases. The petitioner was responsible for mobilizing workers, machinery and subcontractors, procuring materials and completing the project within the prescribed time period. The respondent no.1 was responsible for providing the drawings, designs, plans and specifications for construction of the project. The petitioner provided performance bank guarantees as well as other bank guarantees towards interest free mobilization advances and retention money aggregating to Rs.14,10,46,948/- and renewed those bank guarantees from time to time as required by the respondent no.1.

9. It is the case of the petitioner that the respondent no.1 had expressly recorded in the letter dated 7th September, 2015 that the respondent no.1 had adopted the practice of making payments

directly to the vendors and subcontractors of the petitioner instead of paying R.A. Bills of the petitioner from time to time. It is the case of the petitioner that it was thus the responsibility of the respondent no.1 to make payments to the vendors and suppliers of the petitioner.

10. The petitioner in its letter dated 11th September, 2015 has alleged to have explained the causes for delay in completion of the project and alleged that the delay was not attributable to the petitioner.

11. It is the case of the petitioner that in the meeting of the parties held on 24th October, 2015, the parties agreed that the completion date under the construction agreement be modified and extended till December, 2018 and all payments to the vendors and labour would be made by the respondent no.1. It is the case of the petitioner that the said decision was recorded in the minutes of meeting dated 24th October, 2015 which were forwarded by the respondent no.1 to the petitioner.

12. It is the case of the petitioner that on 4th November, 2015, the petitioner forwarded a corrected draft of the minutes of the meeting dated 24th October, 2015. The petitioner however, did not change the proposed date of completion of the construction as December, 2018 and also did not change the decision about the liability of the respondent no.1 to pay the vendors and suppliers directly however only with a rider that the petitioner would have to certify the bills first.

13. It is the case of the petitioner that during the period

between 28th September, 2012 to 27th September, 2015, due to various delays and disruptions attributable to the respondents, the petitioner could carry out actual work worth only Rs.51.71 crores as against the scheduled work of Rs.169.26 crores.

14. On 4th October, 2016, the petitioner addressed a notice to the respondent no.1 providing details of the delays and disruptions alleged to have been caused by the respondent no.1 and claimed compensation for the loss alleged to have been sustained by the petitioner on account of such delays. The respondent no.1 in response to the said letter dated 4th October, 2016 vide its letter dated 21st December, 2016 denied the claims made by the petitioner and conveyed its counter claims. The respondent no.1 made various allegations of breaches of construction agreement on the part of the petitioner in the said letter. The petitioner denied the counter claims made by the respondent no.1 in the said letter dated 21st December, 2016 by a letter dated 29th December, 2016.

15. On 4th January, 2017, the respondent no.1 invoked the performance bank guarantee as well as bank guarantees for mobilization advances. On 5th January, 2017, the petitioner addressed a letter to the respondent no.1 calling upon it to refund and return the encashed amount of Rs.14,10,46,948/-. On 5th January, 2017, the respondent no.1 sent a letter to the petitioner claiming that the Construction Agreement shall come to an end on 10th January, 2017 and calling upon the petitioner to remove itself and its subcontractors, workers, materials and machinery from the project site on or before 19th January, 2017.

16. The petitioner vide its letter dated 6th January, 2017 alleged that at a meeting held on 24th October, 2015, completion date had been already modified upto the end of December, 2018. By a letter dated 9th January, 2017, the petitioner called upon the respondent no.1 to pay its R.A. Bills which included the alleged outstanding dues of the vendors and suppliers of the petitioner of Rs.1,28,54,501/-. The respondent no.1 however, neither made any payment to the petitioner nor cleared the dues of the suppliers and vendors of the petitioner.

17. The respondent no.1 vide its letter dated 13th January, 2017 denied that any extension of time for completion of the project had been accepted by it and once again called upon the petitioner to demobilize by 19th January, 2017. On 14th January, 2017, the respondent no.1 pasted the notice on the project site warning all the workers and subcontractors that the respondent no.1 would not be responsible for the payment of their salaries and wages after 10th January, 2017.

18. On 17th January, 2017, the petitioner filed this arbitration petition *inter-alia* praying for various interim measures under section 9 of the Arbitration Act.

19. On 20th January, 2017, this Court granted *ad-interim* relief in favour of the petitioner in terms of prayer clauses (a) and (c) i.e. an injunction against the respondent no.1 from taking any steps in pursuance to their letters dated 5th January, 2017 and 13th January, 2017 and passed an order of *status-quo* with respect to the Agreement dated 28th September, 2011. The said *ad-interim* order

has been continued until 5th May, 2017. The respondent nos.1 and 2 have filed two separate affidavits in reply opposing the interim measures sought by the petitioner. The petitioner has filed rejoinder to the affidavit in reply filed by the respondent no.1.

20. Mr.Dwarkadas, learned senior counsel appearing for the petitioner invited my attention to the various provisions of the Memorandum of Understanding dated 24th March, 2008, Shareholders Agreement dated 27th May, 2011, Term Sheet dated 14th September, 2010, Development Agreement dated 13th October, 2010 and Agreement dated 28th September, 2011. He submits that under the Share Purchase Agreement, 70% of the equity share capital in the respondent no.1 is owned by the respondent no.2 and remaining 30% of the equity share capital is owned by the petitioner. The petitioner has only two directors on the Board of Directors of the respondent no.1 and has no control over the affairs of the respondent no.1 though the respondent no.1 is being run by the other directors according to the whims and fancies and at the behest of the respondent no.2 owning 70% equity share capital of the respondent no.1.

21. It is submitted that there was gross delay on the part of the respondent no.1 at site due to several reasons attributable solely to the respondent no.1. There was gross delay in providing foundation designs which were not even ready at the time of excavation. The RCC drawings for the foundation were issued about one month after completion of excavation work. The execution work in respect of some of the buildings and row houses were adversely affected and greatly hindered due to delay in shifting / relocating HT power line.

The petitioner was thus prevented from executing such construction work at the contract rate of progress and could carry out the work worth only Rs.51.11 crores for Phase I, II and IV against Rs.169.26 crores. The petitioner has suffered tremendous loss in view of the alleged delay on the part of the respondents. He submits that the petitioner has to recover substantial amount from the respondents towards the loss incurred by the petitioner. He submits that HT power line was shifted as late as on 2nd June, 2014.

22. Learned Senior Counsel for the petitioner placed reliance on the Minutes of the Meeting dated 24th October, 2015 and more particular on paragraph 3 and would submit that respondent no.1 had agreed to provide Provisional Rate @1825 per square feet w.e.f. from 1st April, 2015 to the petitioner for work done except Phase – I till final rate was decided. He also placed reliance on clause 3(h)(2) of the said Minutes and would submit that it was agreed that all efforts shall be made to complete project by end December, 2018 to meet the requirements of the MADC. He submits that at least these two conditions recorded in the said Minutes of the meeting were not disputed by the petitioner.

23. It is submitted that the date of completion of the contract was extended till end of December, 2018 in conformity with the extension granted by the MADC. He submits that till the matter is decided in the arbitral proceedings, the petitioner is ready and willing to continue to work at an *ad-hoc* rate of 1825 per square feet subject to the outcome of the arbitral proceedings and is willing to pay 30% of the expenses incurred by respondent no.1 for construction and if the balance 70% is born by respondent no.2. He also invited my attention

to the changes suggested by the petitioner in the said Minutes of the Meeting dated 24th October, 2015.

24. It is submitted by the learned senior counsel that the equipment of the petitioner today are at the site, respondent no.2 cannot appoint any new contractor without approval of the petitioner under the provisions of the Shareholders Agreement (SPA). In support of his submission, the learned senior counsel placed reliance on clauses 7.1 and 7.3.1. and 7.12 of the Shareholder's Agreement dated 27th May, 2011. He also placed reliance on clause 4.1 of the Shareholders Agreement. Learned Senior Counsel placed reliance on clause 10 of the Shareholders Agreement and submits that contract entered into between the petitioner and respondent no.1 is linked with the obligation of the respondent no.2 in the contract between respondent no. 2 and the MADC for the implementation of the project as per Development Agreement. He submits that both these contracts are interlinked and interwoven.

25. Learned senior counsel for the petitioner submits that thought the contract provides that the time was essence of the contract, the same is subject to the compliance of the reciprocal obligation of respondent no.2 and cannot be read in isolation. He invited my attention to clause 7.1 of the Agreement dated 28th September, 2011 entered into between the petitioner and respondent no.1 which provides for commencement and completion of work phase wise. Cause 7.2 provides for extension of time for completion. He submits that the said provision provides that disagreement between the parties on any matter arising under that clause has to be referred to Independent Quantity Surveyor whose decision shall be

final subject to any reference that may be made to the Arbitration under clause 18.4.

26. Learned Senior Counsel for the petitioner submits that since the petitioner has interest in the project, the judgment of this Court in the case of ***Chheda Housing Development Corporation vs. Bibijan Shaikh Farid & Ors.*** would apply to the facts of this case. He placed reliance on paragraphs 25, 27, 28 and 30 of the said Judgment.

27. Learned senior counsel for the petitioner placed reliance on the Judgment of the Supreme Court in case of ***Olympus Superstructures Pvt. Ltd. vs. Meena Vijay Khetan and ors.*** in particular paragraphs 25, 27, 28, 30, 34 and 37. He submits that since both the agreements entered into between the petitioner and respondent no.1 and Shareholders Agreement are interwoven, the disputes between all the three parties can be referred to arbitration to the same arbitrator.

28. Learned senior counsel for the petitioner placed reliance on the judgment of this Court in ***Rashmi Mehra & ors. vs. EAC Trading Ltd.*** and in particular paragraphs 1, 2, 42 to 44, 49 to 51 and 57 in support of his submission that since Shareholders Agreement and the Construction Agreement are interwoven the matter can be referred to arbitration against both the respondents with the petitioner.

29. Learned senior counsel for the petitioner placed reliance on the judgment of the Calcutta High Court in case of ***Ashok Kumar***

Jaiswal vs. Ashim Kumar Kar and in particular paragraphs 12 and 73 in support of his submission that a developer also can maintain a proceedings for an enforcement of his right against the owner.

30. Mr.Samdhani, learned senior counsel for respondent no.1 on the other hand submits that the petitioner cannot claim any interest in the assets of the respondent no.2 as a shareholder. The respondent no.1 has development rights and is responsible in all respect to the said MADC. The petitioner is merely a construction contractor. He submits that the said Shareholders Agreement does not create any interest in favour of the shareholders. The said construction contract was awarded to the petitioner at arm's length and on competitive basis. The *locus* is between respondent no.1 and the said MADC. For the default, if any, committed by the petitioner, Respondent no.1 would be responsible for such default to the MADC. He submits that the construction Agreement dated 28th September, 2011 and the Shareholders Agreement are not the documents executed contemporaneously, simultaneously or on the same day. No part of this Shareholder Agreement is incorporated by any specific reference into the construction contract.

31. It is submitted that in the said Shareholders Agreement, the petitioner and respondent no.2 are also parties. He submits that in so far as the reliance placed on clause 7.12 of the Shareholders Agreement by the petitioner is concerned, no board meeting has been called admittedly for fixing net present value in access of a sum to be stipulated by the board. Neither any agenda is fixed in any meeting nor any notice is issued by the company for any such meeting. He submits that there is no such grievance made in the

petition by the petitioner.

32. Reliance is placed on clause 10 of the Shareholders Agreement in support of his submission that respondent no.1 shall be responsible to MADC for implementation of the project as per the Development Agreement and is bound to *adhere* to all the obligations of the project completion as defined in the Development Agreement and to comply with the all the conditions precedent mentioned in the said Development Agreement. Under clause 10.3.3 respondent no.1 company has to obtain all requisite permission, release and sanction relating to said land and the project and also for building plans etc. Reliance is placed on clause 10.4 in support of his submission that in the Shareholder Agreement, it was clearly provided that the construction contract would be granted to the petitioner on competitive arm's length basis. He submits that Annexure-4 to the said Shareholders Agreement was only a Terms Sheet recording broad terms.

33. It is submitted by the learned senior counsel that the contract entered into between the petitioner and respondent no.1 was pure and simple construction contract. The said contract provides for termination of contract in the event of the petitioner committing default. Under clause 10.11, respondent no.1 was given rights to sell/dispose of/ lease/assign/transfer all the tenements, apartments, flats, parking spaces, shops etc. The respondent no.1 had agreed to perform obligations under the Development Agreement and was liable to the customers / Unit holders against the claim, if any, for breach of terms. Clause 15 of the said Agreement provided for the rights and obligation of the parties in case of deadlock. In the said

contract, a provision is made for exercising call option. The petitioner as a shareholder may receive his money. Clause 20.2.1 provides for arbitration in case of a dispute between the parties.

34. It is submitted that construction contract expressly sets out a list of documents which have to be read as part of the construction contract which list does not include the Shareholder Agreement. He submits that recital of the construction contract are irrelevant for the purpose of incorporating the document as it only provides historical background and cannot be read to incorporate the document. In support of his submission, the learned senior counsel placed reliance on a passage "***ODGERS' CONSTRUCTION OF DEEDS AND STATUES"***. He submits that if there is any dispute, the same has to be resolved by an Independent Quantity Surveyor or Technical Referee.

35. It is submitted by the learned senior counsel that Minutes of Meeting dated 24th October, 2015 could not be read as modification of the construction contract as the said Minutes of the Meeting are not agreed upon by and between the parties. None of the parties have accepted the said Minutes of the Meeting as originally drawn. In support of his submission, the learned senior counsel for respondent no.1 placed reliance on the Minutes of the Meeting sent by the petitioner to respondent no.1 with several addition / deletions and suggestions. He placed reliance on clause 6 of the construction contract which provides that any modification and alteration or amendment to the terms of the construction contract could only be made by way of execution of supplemental written agreement and by no other means or amendment. It is submitted that the said

construction contract would not be varied in any event by any such Minutes of the Meeting which are not even agreed upon and finalized or concluded.

36. Learned senior counsel for respondent no.1 placed reliance on clause 7.1 of the construction contract which provides for commencement and completion of works phase wise. He submits that even the last Phase i.e. Phase IV was to be completed by the petitioner on or before 10th January, 2017 which period has already expired. The petitioner did not give any notice for extension of time for completion as contemplated under Clause 7.2 of the construction contract. He submits that the said contract for construction entered into between the petitioner and respondent no.1 has expired by efflux of time. The petitioner has repudiated the contract which repudiation has been accepted by respondent no.1.

37. Learned senior counsel invited my attention to the notice dated 4th October, 2016 addressed by the petitioner to respondent no.1 raising a demand for Rs.40,59,48,882/- in respect of Time Related Costs Components and a further claim of Rs.12,90,58,871/- in respect of financial Loss for the period from 28th September, 2012 to 27th September, 2016 alleged to have been incurred by the petitioner. He also invited my attention to the reply given by respondent no.1 to the said notice vide letter dated 24th December, 2016 denying the said claim made by the petitioner and making a counter claim of Rs.77,64,01,508/- against the petitioner.

38. Mr.Samdhani, learned senior counsel, invited my attention to the averments made by the petitioner in paragraphs 2.12 and 2.13

of the Arbitration Petition and would submit that the petitioner has not made any statement in the petition that the Minutes of the Meeting dated 24th October, 2015 were not accepted by the petitioner or that the same were accepted by respondent nos.1 and 2.

39. Learned senior counsel invited my attention to letter dated 9th February, 2017 addressed by respondent no.1 to the petitioner during the pendency of this petition calling upon the petitioner to confirm within 48 hours from the date of receipt of the said letter without prejudice to the rights and contentions of respondent no.1 as to whether the petitioner would be completing the pending works in accordance with the provisions of the construction agreement. Respondent no.1 also conveyed that it was ready and willing to pay @ Rs.1825 per square feet upon the terms as per the construction agreement. Respondent no.1 made it clear that in the event the petitioner is not willing to proceed and complete the scope of work in accordance with the said letter, respondent no.1 was ready and willing to complete the scope of work in the mode and manner stated in the said letter by engaging necessary and required contractors / sub contractors with the leave of this Court. The petitioner vide its letter dated 13th February, 2017 raised various counter conditions in response to the said letter dated 9th February, 2017 including a conditions to pay to the petitioner the amount due against RA bills raised by the petitioner till date and to return the amount of Rs.14,10,46,948/- which was encashed by respondent no.1 by invoking eight bank guarantees provided by the petitioner.

40. It is submitted by the learned senior counsel that respondent no.1 has denied specifically that it was agreed by and

between the parties for extension of completion date of project till December, 2018. He submits that the said Minutes was initially forwarded by respondent no.1 to the petitioner with various stipulations. He submits that since none of the parties agreed to the terms and conditions stipulated in the said Minutes of the Meeting, no reliance thereon can be placed or no enforcement thereof can be sought by the petitioner. He submits that several portion of the Minutes forwarded to respondent no.1 were deleted and struck off or corrected by the petitioner. It is submitted that petitioner cannot select any particular clause of the said Minutes of the Meeting and cannot seek performance thereof against respondent no.1

41. It is submitted by the learned senior counsel that the construction contract which was entered into between the petitioner and respondent no.1 is even otherwise not specifically enforceable under section 14 of the Specific Relief Act, 1963. In support of his submission, learned senior counsel placed reliance on judgment of this Court in case of ***Nirmal Infrastructure Private Limited vs. Aanant Developers Private Limited*** and in particular paragraph 72 to 75. He submits that since the compensation in terms of money is an adequate relief in this case and since the performance of the contract runs into Minute or numerous details, specific performance cannot be granted by the arbitrator. It is submitted that the contract even otherwise is determinable and the performance of the contract would involve the performance of the continuous duties which the Court cannot supervise. He submits that such construction contract cannot be specifically enforced and thus no interim measure can be granted by this Court under Section 9 of the Arbitration and Conciliation Act, 1996.

42. It is submitted that the provision of Section 14(3) (c) of the Specific Relief Act, 1963 cannot be invoked by the petitioner since none of the conditions prescribed therein which are required to be fulfilled are not satisfied by the petitioner. He submits that petitioner has only completed the work of Phase I. In respect of Phase IV plans are also not finalized till date. The interest of the petitioner is only its mark-up under the construction contract. It is submitted that construction contract can be enforced only at the instance of the owner and not the contractor under Section 14(3) (c) (iii) of the Specific Relief Act, 1963. In support of his submission that the shareholders have no interest in the Assets and properties of the company, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of ***Bacha F. Guzdar, Bombay vs. Commissioner of Income Tax, Bombay*** and more particular in paragraphs 7 to 9. In support of his submission that the contract of the construction itself is determinable and the remedy of the petitioner thus would be only in damages, learned Counsel for respondent no.1 placed reliance on the following judgments :-

i). ***Oil & Natural Gas Corporation Ltd. vs. M/s. Streamline Shipping Co. Private Limited, 2002(3) Mh. L.J. 530*** at paragraph 10.

ii). ***Cox and Kings India Limited vs. Indian Railways Catering and Tourism Corporation Limited, (2012) 7 Supreme Court Cases 587*** at paragraph 26.

iii). ***Arun P. Goradia vs. Manish Jaisukhalal Shah and Others,***

2009(1) Mh.L.J. 611 at paragraph 41 to 43.

43. It is submitted by the learned senior counsel that the contract awarded to the petitioner has public interest element within it. The land belongs to Maharashtra Airport Development Corporation Limited. The plot has been given for construction of residential colony. The petitioner is appointed as construction contractor by the developer. If any injunction is granted by this Court as prayed, it would affect the public interest. He submits that the petitioner has not made out any *prima-facie* case, and even if any *prima-facie* case is made out, the balance of convenience does not lie in favour of the petitioner. In support of this submission, learned senior counsel placed reliance on the following judgments :

i). ***Assistant Collector of Central Excise, Chandan Nagar West Bengal vs. Dunlop India Limited & Ors, (1985) 1 SCC 260*** at paragraph 5 and 7.

ii). ***Shantilal J. Shah and Others vs. Jitendra Sanghavi & Others, 2014(1) Mh. L. J.*** at paragraph 15.

iii). ***Maytas Infra Limited vs. Utility Energytech and Engineers Pvt. Ltd. & Ors., 2009 SCC Bom. 734.***

iv). ***Hind Overseas Private Limited vs. Raghunath Prasad Jhunjhunwala & Anr., (1976) 3 SCC 259*** (Para 33 to 35)

44. It is submitted that the Court cannot compel respondent no.1 to continue the contract. If any injunction is granted by this Court

as prayed, it would amount to grant of specific performance of the contract at the stage of interim measure which is not permissible in law. Learned senior counsel submits that even after obtaining the *ad-interim* orders in this petition, the petitioner has not carried out any work. In these circumstances, there is no balance of convenience in favour of the petitioner. If the *ad-interim* order is not vacated by this Court, respondent no.1 may face litigations from MADC and others.

45. In so far as the judgment of the division Bench of this Court in case of ***Chheda Housing Development Corporation v. Bibijan Shaikh Farid & ors.*** (supra) is concerned, it is submitted by the learned senior counsel for respondent nos.1 that the said judgment has been dealt with by the learned Single Judge of this Court in case of ***Arun P. Goradia vs. Manish Jaisukhalal shah and others*** (supra) in paragraph 38 and it is held that a building construction contract is not specifically enforceable as it falls within ambit of sub section (a) and (d) of section 14(1) of the Specific Relief Act 1963 because non performance of such contract is compensable in terms of money. A performance of the suit contract would involve the continuous duties which the Court cannot supervise. This Court also held that clause 14(3)(c) specifically implies that the suit is filed by the owner against the defendant who has obtained possession of all or part of the land to develop it and even owner can sue for specific performance of the contract and have land developed by the contractor.

46. Mr.Purohit, learned Counsel for respondent no.2 adopted the submissions made by Mr.Samdhani, learned senior counsel for respondent no.1 and would submit that no breach of any provisions of

the Shareholder Agreement is alleged by the petitioner against respondent no.2 in the Arbitration petition. No resolution has been passed, no meetings are held, nor any notices are issued for holding any meeting for affirmative vote. He submits that the Shareholder Agreement clearly provides for mechanism in case of deadlock. He submits that the petitioner has not alleged any deadlock in the Arbitration petition.

47. Mr.Dwarkadas, learned senior counsel for the petitioner in re-joinder submits that both the agreements are interlinked. Both the agreements were executed contemporaneously. He submits that the agreements are not independent or separate agreements but are interwoven.

48. Learned senior counsel for the petitioner placed reliance on the judgment of this Court in case of ***Chheda Housing Development Corporation vs. Bibijan Shaikh Farid & ors.*** (supra) and particular in paragraphs 1, 2, 42 to 44, 49 to 51 & 57 and distinguished the judgment of Supreme Court in ***Bacha F. Guzdar, Bombay vs. Commissioner of Income Tax, Bombay*** (supra). It is submitted that the agreement will have to be read as a whole. It is submitted that the nature of contract and the relation between the petitioner and respondent nos.1 and 2 is in the nature of glorified partnership in the ratio of 30% and 70% respectively. There is equitable understanding between the parties.

49. Learned senior counsel placed reliance on the proviso to section 14(3)(c) of the Specific Relief Act, 1963. He submits that the petitioner has substantial interest in the performance of the contract.

He submits that all the three requirements set out in the said provisions are satisfied by the petitioner. He submits that the judgment of the division Bench of this Court in case of ***Chheda Housing Development Corporation vs. Bibijan Shaikh Farid & ors.*** (supra) would squarely apply to the facts of the present case.

50. In so far as the Minutes of the Meeting dated 24th October, 2015 are concerned, it submitted that the said document was sent along with email by respondent no.1 to the petitioner with signature of respondent no.1. The said meeting was a high level meeting attended by the top level officers of both the parties. He submits that even in the letter dated 9th February, 2017, respondent no.1 had agreed to pay to the petitioner @ Rs.1825 per square feet with effect from October, 2015. He submits that it is not alleged by respondent no.1 in the affidavit in reply that the Minutes of the said Meeting dated 24 October, 2015 were not in accordance with the clause 6 of the construction contract.

51. Learned senior counsel distinguishes the judgment of Supreme Court in case of ***Bacha F. Guzdar, Bombay vs. Commissioner of Income Tax, Bombay*** (supra) and also the judgment of this Court in case of ***Nirmal Infrastructure Private Limited vs. Aanant Developers Private Limited*** (supra) on the ground that the facts are totally different in those judgments. There were no joint venture agreement before this Court in case of ***Nirmal Infrastructure Private Limited vs. Aanant Developers Private Limited*** (supra)***,*** the developer had no interest in the project. He also distinguishes the judgment of Supreme Court in case of ***Cox and Kings India Limited vs. Indian Railways Catering and Tourism***

Corporation Limited (supra) on the ground that the contract in question before the Supreme Court was in respect of the right to operate manage and run the train. There was no dispute in respect of any immovable property and that termination of contract had already taken place.

52. In so far as the judgment delivered by the learned Single Judge of this Court in ***Arun P. Goradia vs. Manish Jaisukhalal Shah and Others*** (supra) is concerned, it is submitted that the said judgment is contrary to the view taken by the division Bench of this Court and is per *in curium*. He also distinguishes the judgment of this Court in case of ***Maytas Infra Limited vs. Utility Energytech and Engineers Pvt. Ltd. & Ors*** (supra) on the ground that in this case the construction work does not require any supervision of the Court. Judgment of this Court in case of ***Shantilal J. Shah and others v. Jitendra Sanghavi and Others*** (supra) is distinguished on the ground that the balance of convenience is in favour of the petitioner. Judgment of the Supreme Court in the case of ***Assistant Collector of Central Excise, Chandan Nagar West Bengal vs. Dunlop India Limited & Ors.*** is distinguished on the ground that the balance of convenience in this case is in favour of the petitioner. The petitioner is already at site. Phase I is already completed. Phase II can be completed shortly. He submits that if the injunction is not granted, the entire joint venture project would be jeopardized.

53. Mr.Samdhani, learned senior counsel for respondent no.1 submits that there is no averment in the Arbitration Petition that there was a glorified partnership between the parties. He submits that the judgment of the supreme Court in case of ***Ebrahimi and***

Westbourane Galleries Ltd. (1973) AC 360 (supra)**,** has been considered by the Supreme Court in the later judgment in ***Hind Overseas Private Limited vs. Raghunath Prasad Jhunjhunwala and Anr. (1976) 3 Supreme Court Cases 259*** (supra). He submits that in any event only in the case of deadlock situation provisions of glorified partnership can be invoked, which is not the case of the petitioner. It is submitted that it is also not the case of the petitioner that the contract of construction entered into between the petitioner and respondent no.1 is a development agreement. It is the case of the petitioner throughout that the said contract is a construction contract. He submits even shareholders agreement does not create any interest in favour of the petitioner.

54. It is submitted that construction contract provides a list of the documents forming part of the contract which does not include Shareholder Agreement. In so far as the reliance placed on terms sheets by the petitioner is concerned it is submitted that the said terms sheet records the pre-contract negotiation and no reliance thereon can be placed after execution of the agreement itself. He submits that in any event the said terms sheets only recorded broad terms and not all the terms.

55. Mr.Samdhani, learned senior counsel distinguishes the judgment of the full bench of the Calcutta High Court. He also distinguishes the judgment of the division Bench of this Court in case of ***Chheda Housing Development Corporation v. Bibijan Shaikh Farid & Ors.*** (supra) on the ground that it is not the case of the petitioner that as a construction contractor, the petitioner is entitled to sell any flat.

REASONS AND CONCLUSIONS :

56. It is not in dispute that the MADC had invited proposals for developing a residential township on an area of approximately 25.252 acres of land in Nagpur district. The said MADC had awarded the said contract to the respondent no.1. The petitioner, the respondent no.1 and the respondent no.2 had executed a shareholders agreement and terms and conditions were recorded in the said agreement. There was a separate construction contract between the petitioner and the respondent no.1 entered into on 28th September, 2011. It is not in dispute that under the said agreement entered into between the respondent no.1 and MADC, the time to complete the construction was extended upto December 2018.

57. The petitioner has heavily placed reliance on the minutes of the meeting dated 24th October, 2015 which was sent by the respondent no.1 to the petitioner. The petitioner in turn had made various suggestions by way of addition and deletion in the said minutes of the meeting dated 24th October, 2015. The fact remains that the said minutes of the meeting were not finalized by both the parties and no supplementary agreement was executed between the petitioner and the respondent no.1 incorporating the alleged agreed terms recorded in the minutes of the meeting dated 24th October, 2015. The petitioner is now seeking reliance on few clauses of the said minutes of the meeting dated 24th October, 2015 in isolation in support of the submission that the parties had already agreed that the contract period was extended till December 2018 and that the respondent no.1 had agreed to pay to the petitioner at the rate of 1825 per square feet w.e.f. October 2015. This Court has thus

perused the said draft minutes of the meeting dated 24th October, 2015 forwarded by the respondent no.1 to the petitioner and the corrections made by the petitioner to the said minutes of the meeting and forwarded to the respondent no.1 for approval. A perusal of the draft minutes of the meeting dated 24th October, 2015 and corrections suggested by the petitioner clearly indicates that the petitioner had made several additions/deletions in the draft minutes of the meeting sent to the respondent no.1 by the petitioner. It is thus clear beyond reasonable doubt that the said minutes of the meeting dated 24th October, 2015 were not finalized by and between the petitioner and the respondent no.1. In my view the petitioner thus cannot pick and choose few clauses of the said draft minutes of the meeting and to contend that the same are binding on both the parties and seek specific performance of such alleged terms. It is not in dispute that the respondent no.1 did not agree to the additions/suggestions made by the petitioner to the said draft minutes of the meeting dated 24th October, 2015.

58. Be that as it may, a perusal of clause 6 of the said construction contract entered into between the petitioner and the respondent no.1 clearly indicates that the amendment to the said agreement could be done only by a supplementary agreement to be entered into in writing which is admittedly not done in this case.

59. A perusal of the said construction contract indicates that the contract awarded to the petitioner was to be completed in four phases in the sum of Rs.169.26 crores. It is the case of the petitioner itself that the petitioner however could carry out the work of only Rs.51.11 crores. A perusal of the record *prima-facie* indicates that

the petitioner never applied for extension of time by issuing any notice under clause 7.2 of the construction agreement. Clause 7.1 of the construction contract provides for commencement and completion of work phase wise. The last Phase i.e. Phase IV was to be completed by the petitioner on or before 10th January, 2017 which period has already expired. The petitioner has only completed the work of Phase I. The plans in respect of Phases 4 are admittedly not even finalized till date.

60. Though this Court has granted *ad-interim* relief in favour of the petitioner by an order dated 20th January, 2017 in terms of the prayer clauses (a) and (c) thereby restraining the respondent no.1 from taking any steps in pursuance of their letter dated 5th January, 2017 and 13th January, 2017 and has granted status quo with respect to the agreement dated 28th September, 2011. It is an admitted position that the petitioner has not done any further progress since the date of granting *ad-interim* order passed by this Court in favour of the petitioner. It is not in dispute that the construction work which was awarded to the petitioner was for construction of residential colony.

61. It is not in dispute that the petitioner as well as the respondent no.2 are the shareholders in the respondent no.1 in the ratio 30% and 70% respectively. The respondent no.1 has been granted development rights by the MADC and is responsible in all respect to the MADC with the contract awarded to the respondent no.1 by MADC. The respondent no.1 in turn has awarded construction contract to the petitioner on the terms and conditions recorded therein. In my view the said shareholders agreement does

not create any interest in the assets and the properties in favour of the shareholders. The said construction contract was awarded to the petitioner at arms length competitive basis. A perusal of the contract entered into between the parties clearly indicates that the respondent no.1 would be responsible for defect if any, or in case of delay of the project to the MADC. A perusal of the record further indicates that the construction agreement dated 28th September, 2011 and the shareholders agreement were not executed contemporaneously, simultaneously or on the same day.

62. Insofar as reliance placed on clause 7.12 of the shareholders agreement by the learned senior counsel for the petitioner is concerned, it is not in dispute that no board meeting has been called for fixing the net present value for exercising any such alleged rights by the petitioner.

63. Division Bench of this Court in case of ***Chheda Housing Development Corporation*** (supra) has considered an issue as to whether the suit at the instance of a developer is not maintainable in view of section 14(3)(c) of the Specific Relief Act. This Court held that a suit at the instance of the developer where the developer is non-owner party to a development agreement is not prohibited under the provisions of section 14(3)(c) of the Specific Relief Act, 1963. It is held that in the case of the development agreement, the right to seek specific performance of the agreement is neither expressly nor by necessary implication prohibited by the Specific Relief Act, 1963. It is held that the question as to whether or not specific performance is to be granted and as to whether or not any interlocutory order in aid of the ultimate relief of specific performance shall be granted or not will

depend, *inter-alia*, on the nature of the agreement, the conduct of the parties, the surrounding circumstances and other relevant considerations.

64. Insofar as the judgment of the learned single Judge of this Court in case of ***Arun P. Goradia*** (supra) is concerned, the said judgment is set aside by the Division Bench of this Court on 19th July, 2010 in Appeal No.57 of 2009 by consent of parties in view of the settlement arrived at between the parties before the Appeal Court. In my view Mr.Samdhani, learned senior counsel for the respondent no.1 is right in his submission that in this matter, the development contract was awarded to the respondent no.1 by MADC and the respondent no.1 thereafter had awarded the contraction contract in favour of the petitioner. In my *prima-facie* view the construction contractor thus cannot maintain a suit for specific performance in view of section 14(3) (iii) of the Specific Relief Act.

65. This Court in case of ***Nirmal Infrastructure Private Limited*** (supra) after advertising to the judgment of this Court in case of ***Shapoorji Pollonji & Co. Ltd. vs. Jignesh Shah*** (supra) and in case of ***Chheda Housing Development Corporation*** (supra) has held that whether an agreement is capable of specific performance or not, the same has to be conclusively decided at the time of hearing of the arbitral proceedings. This Court held that the owner could not have waited indefinitely for the petitioner to commence the development in the suit lands. Before granting any interim measures under section 17 of the Arbitration and conciliation Act read with Order 39 of the Code of Civil Procedure, the applicant has to make out a *prima-facie* case and to show that the balance of convenience

was in favour of the applicant and not the respondent. The applicant also has to prove that irreparable loss suffered by the applicant, if any, cannot be compensated in terms of money.

66. This Court also adverted to the judgment of this Court in case of ***Chaurangi Builders & Developers Pvt. Ltd. Vs .Maharashtra Airport Development Co. Ltd.*** in its judgment dated 29th November, 2013 in Arbitration Petition (Lodging) No.1999 of 2013 and the judgment of the Supreme Court in case of ***Cox & Kings India Limited Vs. Indian Railways Catering & Tourism Corporation Limited, (2012) 7 SCC 587*** and the judgment of this Court in ***Maytas Infra Limited Vs. Utility Energytech & Engineers Pvt. Ltd. & Ors. 2009(4) Bom. C.R. 143*** and several other judgments and held that though a party had invested a large sum of money in the project, that cannot entitle it to pray for a mandatory order to operate the contract once it is noted that the remedy of the petitioner would be if any in action for damages against the respondent for breach of any of the terms and conditions of the contract.

67. This Court in that judgment refused to grant stay of termination of the agreement. This Court also considered the judgment of Supreme Court in case of ***Indian Oil Corporation vs. Amritsar Gas Services, 1991(1) SCC 533***. In the said judgment this Court held that even if the petitioner succeeds in the arbitral proceedings and even if it is proved that the respondent had failed to comply with its part of obligation under the development agreement or that the termination of the development agreement by the respondent was bad and illegal, the petitioner would be compensated in terms of money. Special Leave Petition against the said judgment of this Court

in case of ***Nirmal Infrastructure Private Limited*** (supra) is dismissed. In my view the principles laid down by this Court in the said judgment would squarely applies to the facts of this case. I am respectfully bound by the said judgment.

68. Division Bench of this Court in case of ***Oil and Natural Gas Corporation Ltd., Mumbai vs. M/s.Streamline Shipping Co. Pvt. Ltd.*** has held that the contract in question before the Division Bench of this Court was determinable and accordingly held that under section 41(1)(c) of the Specific Relief Act, a contract which is in its nature determinable cannot be specifically enforced. It is held that under section 14(e) of the Specific Relief Act, no injunction can be granted to prevent breach of contract, performance of which cannot be specifically enforced. It is held that once it is found that the contract cannot be specifically enforced because it is covered by section 14(1)(c) of the Specific Relief Act, no injunction can be granted to prevent breach of the said contract. This Court held that in that case, the respondent under the guise of interim injunction wanted specific performance of the contract which is not permissible in view of the provisions of section 14(1)(c) read with section 41 of the Specific Relief Act. In my view, the judgment of Division Bench of this Court in case of ***Oil and Natural Gas Corporation Ltd., Mumbai vs. M/s.Streamline Shipping Co. Pvt. Ltd.*** squarely applies to the facts of this case.

69. In the facts of this case, the original contractual period has already expired on 10th January, 2017. Out of four Phases, the petitioner has not even commenced any work in respect of Phase IV. there is no progress in respect of Phases II and III. The minutes of

the meeting held on 24th October, 2015 are not finalized. The parties have not extended the said contract till the end of December 2018 as canvassed by the learned senior counsel for the petitioner. In my view, reliefs as sought by the petitioner in this petition i.e. any *status-quo* as prayed by the petitioner in respect of the agreement in question or restraining the respondent from taking any action under those contract is not permissible under section 14(1)(c) read with section 41(e) of the Specific Relief Act. In my view if such injunction as prayed by the petitioner is granted, it will amount to grant of specific performance of the agreement in question at the stage of considering interim measures under section 9 of the Arbitration and Conciliation Act, 1996 which is not permissible.

70. Under Section 14(1)(a) of the Specific Relief Act, a contract, the non-performance of which, the compensation in terms of money is an adequate relief, then such contract cannot be specifically enforced. In my *prima-facie* view, the consideration for construction work has been agreed to be paid under the said construction agreement. If ultimately, the petitioner proves that the respondent was responsible for any breaches or had not granted extension of time to carry out work, the petitioner in that event would be entitled to be awarded compensation, if any proved. The petitioner has already quantified such claim in the notices of demand raised upon the respondent. In my *prima-facie* view, the petitioner cannot seek specific performance of the said contract itself and thus no interim measures can be granted in favour of the petitioner under section 9 of the Arbitration and Conciliation Act, 1996.

71. Section 14(1)(b) of the Specific Relief Act, 1963 provides

that a contract cannot be specifically enforced if the contract runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms. A perusal of the contract agreement entered into between the parties clearly indicates that both the parties were under obligation to comply with their various respective obligations provided under the said agreement. It is an admitted position that the plans in respect of the Phase IV are not even sanctioned. Even in respect of the other Phases also except Phase I there was any progress.

72. The Court or an arbitrator is not expected to supervise whether the parties to the agreement have complied with their respective obligations, whether the Municipal Corporation had sanctioned those plans or not, whether payments to the workers and suppliers are made by the parties or not, whether the work is carried out by the contractor in accordance with the specification and drawings supplied by the employers or not and within the time prescribed in the contract or not. Upon considering the terms and conditions of the contract construction agreement, I am of the *prima-facie* view that the nature of the contract is such that it runs into minute and numerous details and thus in my *prima-facie* view cannot be enforced, specifically. The contract is even otherwise determinable and thus in view of section 14(1)(c) of the construction agreement entered into between the parties even otherwise in my *prima-facie* view the contract cannot be specifically enforced. Section 14(1)(d) provides that a contract the performance of which involves the performance of a continuous duty which the Court cannot supervise, no such contract can be specifically enforced.

73. Insofar as reliance placed by Mr.Dwarkadas, learned senior counsel for the petitioner on section 14(3)(c) of the Specific Relief Act, 1963 is concerned, all the three conditions prescribed under section 14(3)(c)(i), (ii) and (iii) are required to be fulfilled for seeking enforcement of a contract for the construction of any building or execution of any other work or land. In this case the petitioner is entitled to recover the consideration for carrying out the construction but has not been granted any right to sell any property. In my view, the petitioner can be compensated in terms of money for non-performance of the contract which is an adequate relief. In this case the possession was granted to the petitioner for the purposes of carrying out a construction as a licencee and no right of any nature whatsoever either in the land or in the structure in favour of the petitioner has been created. In my *prima-facie* view, none of those conditions set out in section 14(3)(c) are satisfied by the petitioner for seeking enforcement of the construction contract.

74. The Supreme Court in case of ***Cox & Kings India Limited*** (supra) has considered similar reliefs and has held that even if the petitioner had invested large sums of money in the project, that cannot entitle it to pray for a mandatory order of injunction to operate the train once the lease agreement / arrangement had been terminated. The Supreme Court held that the remedy of the petitioner if any, would lie in an action for damages against the respondent for breach of any of the terms and conditions of the joint venture agreement and the memorandum of understanding. In my view by granting relief as claimed by the petitioner in this petition, it would amount to grant of mandatory order of injunction to carry out the

construction of the buildings and would amount to grant of decree for specific performance during the pendency of the arbitration proceedings in this petition filed under section 9 which cannot be granted. The principles laid down by the Supreme Court in case of ***Cox & Kings India Limited*** (supra) would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

75. The Supreme Court in case of ***Assistant Collector of Central Excise, Chandan Nagar, West Bengal*** (supra) has held that cases where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, a Court may well be justified in granting interim relief against public authority. But since the law presumes that public authorities function properly and *bonafide* with due regard to the public interest, a Court must be circumspect in granting interim orders of far reaching dimensions or orders causing administrative, burdensome inconvenience or orders preventing collection of public revenue for no better reason than that the parties have come to the Court alleging prejudice, inconvenience or harm and that a *prima-facie* case has been shown. In this matter the tenements which were to be constructed by the petitioner were for residential colony. A perusal of the record *prima-facie* indicates that the petition itself was responsible of gross delay in carrying out the work within the time prescribed under the agreement and thus if any interim measure as prayed by the petitioner is granted, it would affect not only the respondent but also a large number of third parties. The principles laid down by the Supreme Court in case of ***Assistant Collector of Central Excise, Chandan Nagar, West Bengal*** (supra) can be extended to the facts of this case.

76. Division Bench of this Court in case of ***Shantilal J. Shah and Others vs. Jitendra Sanghavi & Others, 2014(1) Mh.L.J. 193*** has held that a suit for specific performance is in the nature of an equitable remedy and the Court would not grant injunctive relief remedy because a *prima-facie* case is made out. The balance of convenience is against the grant of relief. This Court held that it was in the interest of the owners, occupants and tenants that a dilapidated cessed building should be redeveloped. In my view Mr.Samdhani, learned senior counsel for the respondent no.1 is right in his submission that even if the petitioner has made out a *prima-facie* case, the balance of convenience is against the grant of relief in favour of the petitioner and the balance of convenience is in favour of the respondent. The principles of law laid down by this Court in case of ***Shantilal J. Shah and Others*** (supra) applies to the facts of this case.

77. This Court in case of ***Maytas Infra Limited vs. Utility Energytech & Engineers Pvt. Ltd. and Ors., (2009) 4 Bom.C.R. 143*** has held that the Court cannot compel the respondent to continue with the contract. It is difficult for the Court even to supervise such performance of contract, based upon such type of public project. This Court accordingly refused to grant any relief under section 9 of the Arbitration and Conciliation Act, 1996 in favour of the petitioner. The said judgment would apply to the facts of this case. I am respectfully bound by the said judgment.

78. The issue raised by the petitioner whether the respondent no.2 can appoint a new contractor without approval of the petitioner

based on the various provisions of the shareholders agreement or not need not be considered at this sage. The respondent no.2 has not appointed any new contractor so far in place of the petitioner.

79. Insofar as submission of the learned senior counsel for the petitioner that the two agreements i.e. shareholders agreement and the construction contract are interlinked and interwoven are concerned, a perusal of the construction contract itself indicates that the said contract was awarded to the petitioner by the respondent no.1 at arm's length and on competitive basis. Shareholders agreement itself provides that the contract would be awarded to the petitioner at arm's length and on competitive basis. It is not in dispute that the construction contract was not awarded to the petitioner simultaneously or on the same day or contemporaneously when the shareholders agreement was executed. In my *prima-facie* view, there is no substance in the submission of the learned senior counsel for the petitioner that both the agreements were interlinked and interwoven. In my view, the petitioner thus could not seek relief against both the respondents together in this arbitration petition relying upon two different arbitration agreements on the ground that both the agreements were interlinked and interwoven.

80. A perusal of the construction contract clearly indicates that no part of the shareholders agreement is incorporated by any specific reference into the construction contract. The recital of the construction contract cannot be read to incorporate the shareholders agreement into the construction contract. In my view Mr.Samdhani, learned senior counsel for the respondent no.1 has rightly placed reliance on the ***"ODGERS' CONSTRUCTION OF DEEDS AND***

STATUES" which is useful to support the proposition canvased by the learned senior counsel for the respondent no.1. The recital in a document provides only a historical background and cannot be construed as terms and conditions of the contract recording any obligation on the part of the parties to the contract.

81. Insofar as judgment of Division Bench of this Court in case of ***Chheda Housing Development Corporation*** (supra) relied upon by the learned senior counsel for the petitioner is concerned, the said judgment would not forward the case of the petitioner. The development agreement was entered into between the MADC and the respondent no.1 whereas the construction contract was entered into between the petitioner and the respondent no.1. Under the construction agreement, the petitioner was only allowed to carry out the construction on payment of consideration amount and was not granted rights to sell any of the tenements or any part thereof.

82. Insofar as reliance placed on the judgment of Supreme Court in case of ***Olympus Superstructures Pvt. Ltd.*** (supra) is concerned, since this Court is of the *prima-facie* view that both the agreements were not interlinked and interwoven, the said judgment of Supreme Court would not assist the case of the petitioner. Similarly the judgment of this Court in case of ***Rashmi Mehra & Ors.*** (supra) also would not assist the case of the petitioner on the similar grounds.

83. The judgment of Calcutta High Court in case of ***Ashok Kumar Jaiswal*** (supra) would not assist the case of the petitioner in view of the fact that the petitioner herein cannot be construed as a developer under the said construction contract. Be that as it may, the

fact before the Calcutta High Court in the said judgment of ***Ashok Kumar Jaiswal*** (supra) are clearly distinguishable with the facts of this case.

84. A perusal of the shareholders agreement clearly indicates that the respondent no.1 had agreed to perform obligation under the development agreement entered into between the respondent no.1 and MADC and was liable to the customers and the unit-holders against the claims if any, for breach of any terms. It is not the case of the petitioner that there is any deadlock between the parties. Clause 15 of the agreement clearly provides for a mechanism for resolution in case of deadlock.

85. A perusal of the construction contract clearly provides that in the list of documents which forms part of the construction contract, shareholders agreement is not included. In my *prima-facie* view, there is substance in the submission of the learned senior counsel for the respondent no.1 that the petitioner not having applied for extension of time under clause 7.2 of the construction contract and the respondent no.1 not having granted any such extension, the contract awarded to the petitioner has expired by efflux of time on 10th January, 2017 and that the petitioner has repudiated the contract which has been accepted by the respondent no.1.

86. A perusal of the notice dated 4th October, 2016 issued by the petitioner to the respondent no.1 clearly indicates that the petitioner has already made a demand for huge compensation in respect of the alleged time related costs components and also in respect of the financial loss from 28th September, 2012 to 27th

September, 2016 alleged to have been incurred by the petitioner. The respondent no.1 also has made a counter demand of Rs.77,64,01,508/- against the petitioner. Both the claims in terms of money made by the parties against each other can be decided by the learned arbitrator if any appointed by the parties or by this Court at the later stage.

87. A perusal of the letter dated 9th February, 2017 addressed by the respondent no.1 to the petitioner during the pendency of the petition also indicates that the respondent no.1 had made a without prejudice offer to the petitioner calling upon the petitioner to complete the pending work in accordance with the provisions of the arbitration agreement on payment of Rs.1825 per sq.ft. subject to certain conditions. The petitioner in turn vide its letter dated 13th February, 2017 raised various counter conditions. Mr.Dwarkadas, learned senior counsel for the petitioner does not dispute that large amount of dues to the workers and suppliers are yet to be cleared and that the petitioner did not carry out any progress on the plot inspite of the *ad-interim* order passed by this Court.

88. The Supreme Court in case of ***Bacha F. Guzdar, Bombay*** (supra) has held that the shareholders of the company has no right in the assets of the company. In my view though the petitioner is admittedly a shareholder holding 30% shares, it cannot claim any right, title or interest whatsoever nature in the assets of the respondent no.1 company.

89. A perusal of the documents relied upon by both the parties in the aforesaid arbitration and on perusal of the provisions of the

contract entered into between the parties, I am of the view that the petitioner has not made out a *prima-facie* case for grant of any interim measures nor the balance of convenience is in favour of the petitioner. If the reliefs as prayed by the petitioner are granted in this petition filed under section 9 of the Arbitration and Conciliation Act, 1996, it would seriously prejudice the rights of not only the respondents but also the parties who would be occupying the premises after construction.

90. The petition is devoid of merits. I, therefore, pass the following order :-

a). The Commercial Arbitration Petition (Lodging) No.29 of 2017 is dismissed.

b). No order as to costs.

(R.D. DHANUKA, J.)

91. Learned counsel appearing for the petitioner seeks continuation of the *ad-interim* order passed by this Court on 20th January, 2017 which is vehemently opposed by Mr.Samdhani, learned senior counsel for the respondent no.1. Considering the facts of this case, I am not inclined to continue the *ad-interim* order passed by this Court. The application for continuation of *ad-interim* order is rejected.

(R.D. DHANUKA, J.)