2024:BHC-OS:9924

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

COMMERCIAL ARBITRATION PETITION (L) NO. 13474 OF 2024

M/s. Dem Homes LLP … Petitioner

Vs.

Taruvel C.H.S.L. & Ors. … Respondents

Mr. Sarosh Bharucha, Mr. Shrey Fatterpekar, Mr. Jay Vakil, Mr. Omkar Savarkar for the Petitioner.
Mr. Anuj Desai a/w Meet Vora for Respondent No.1.
N. R. Bubna a/w Ms. Pooja Malik for Respondent Nos.2, 3 & 4.
Mr. Pankaj Pandey a/w Seema Pandey for Respondent No.7.
Ms. Chandralata Motwani for Respondent No.9.
Mr. Subham K. i/by Gajendra Rajput for Respondent No.12.
Mr. Divesh Mittal, partner of the Petitioner is present.

CORAM : ARIF S. DOCTOR, J.
DATE : 1ST JULY 2024

P.C. :

1. The Petitioner is a Developer appointed by Respondent No. 1 (Society) for redevelopment of a building known as 'Taruvel' situated at Dr. Karanjia Marg (Tarun Bharat Road), Near Cigarette Factory, Chakala, Andheri

East, Mumbai – 400 099. The present Commercial Arbitration Petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 The Petitioner essentially seeks reliefs against Respondent No. 2 to 11 who are all stated to be non-cooperating members of Respondent No.1 (Society) since they have refused to vacate/hand over possession of their flats pursuant to the redevelopment agreement which has been entered into between the Petitioner and Respondent No. 1 (Society) as set out below.

2. The relevant facts as set out in the Petition are as follows, viz.

i. Respondent No.1 had on 29th August 2021 in a Special General Body Meeting of the members of Respondent No. 1, confirmed the appointment of the Petitioner as the developer to undertake redevelopment of the said building. On the same day, i.e. 29th August 2021 the adjoining society, namely one Suvarna Kalash Co-operative Housing Society Ltd. had also in a Special General Body Meeting passed a resolution appointing the Petitioner as a developer for redevelopment. The appointment of the Petitioner as a developer was thereafter confirmed by the Deputy Registrar, C.S., (K-E Ward) by a letter dated 1st September 2021 addressed to Suvarna Kalash Co-operative Housing Society Ltd.

ii. Suvarna Kalash Co-operative Housing Society Ltd. and Respondent No. 1 thereafter merged as recorded in an order dated 9th March 2023 passed by the Deputy Registrar, Co-operative Societies under Sub-section (1) of Section 17 of the Maharashtra Co-operative Societies Act, 1960 read with Rule 16 of the Maharashtra Co-operative Societies Rules, 1961.

iii. On 30th April 2023 Respondent No. 1 in a Special General Body Meeting circulated a draft of the redevelopment agreement ('Development Agreement') proposed to be entered into with the Petitioner. The Development Agreement was unanimously approved by the General Body of the members of Respondent No. 1 vide a resolution of the same date. Consequently, on 5th September 2023 the Development Agreement came to be executed with Respondent No.1 for redevelopment of the said building 'Taruvel'.

iv. On 4th October 2023 a structural audit of the building Taruvel was carried out by VJTI who vide a report dated 25th October 2023 declared the building as C-1 (dilapidated) category.

v. The Petitioner then as per clause 8 of the Development Agreement on obtaining the IOD addressed a letter dated 6th March 2024 calling upon

the Society members to vacate the said building which they were bound to do on or before 6th April 2024 as per the said Agreement. The Petition sets out in the below extracted table giving the details of the non cooperating members of Respondent No. 1, viz.

Party No.	Flat Premises
Respondent No.2	Flat No. A-19, total admeasuring 485 sq ft
Respondent No.3	Flat No. B-08, total admeasuring 325 sq ft
Respondent No.4	Flat No. A-20, total admeasuring 485 sq ft
Respondent No.5 is claiming to be the owner of the Flat And Respondent No.6 is in possession/occupation	Flat No. B-6, total admeasuring 485 sq ft
Respondent No.7	Flat No. B-15, total admeasuring 485 sq ft
Respondent Nos.8 to 10	Flat No. C-15, total admeasuring 485 sq ft

Respondent No.11 is the owner Respondent No.12 has charge on the flat	Flat No. F-001 total admeasuring 410 sq ft

Mr. Bharucha submits that it was thus that the Petitioner was constrained to approach this Court by filing the present Petition for reliefs under Section 9 Arbitration and Conciliation Act, 1996. He however fairly points out that since the filing of the present Petition, Respondent No. 5, 6 and 7 have vacated their respective flats and thus the Petition is being pressed only against Respondent Nos. 2 to 4 and 8 to 11.

3. The Petition has been resisted by Respondent Nos. 2 to 4 who have filed what is stated to be an Affidavit in Reply to the Petition. I say stated to be an Affidavit because the same is not in conformity with the Bombay High Court Original Side Rules Rule, in particular Rules 193 to 195. The 'Affidavit' (a) does not have a deponent (b) does not bear the necessary description/details of any deponent and (c) is not in the first person. The 'Affidavit' infact reads like a pleading, and a pleading which is in my view entirely lacking in any merit.

4. Mr. Bharucha then submitted that it was only too well settled that dissenting minority members of a Co-operative Housing did not have any independent right to oppose redevelopment once the same had been approved

by the majority members of the Society. In the present case he pointed out that an overwhelming majority of the members who were present at the Special General Body Meeting of Respondent No. 1 held on 29th August 2021 had voted in favour of appointing the Petitioner as a Developer. He submitted that the draft of the development agreement was also approved by an overwhelming majority of the members of Respondent No. 1. He pointed out that it was in these circumstances that the development agreement came to be executed and that the said building was in a dilapidated condition. He further submitted that a majority of the members of Respondent No.1 who were senior citizens had even handed over possession of their flats for redevelopment.

5. Mr. Bharucha then fairly pointed out that Respondent No. 2 to 4 had filed a Suit in the City Civil Court challenging the Development Agreement and had also challenged certain acts of Respondent No.1 before Deputy Registrar of Co-operative Societies. He however submitted that there was no stay granted in either proceeding. He thus submitted that in these facts there was no impediment in the redevelopment proceeding as per the agreed terms of the said Agreement. He submitted that it was infact imperative that the redevelopment shall proceed expeditiously in the interest of the overwhelming majority of the members of Respondent No. 1, the majority of who, he pointed out, were senior citizens. Mr. Bharucha additionally submitted that grave

prejudice was also being caused to the Petitioner on the Respondents failing to vacate their respective flats in terms of the Development Agreement, since the Petitioners had commenced paying the hardship compensation, rent, brokerage, transportation charges to all the members, who had vacated their respective flats.

6. Mr. Bharucha placed reliance upon a judgement of the Division Bench of this Court in the case of ***Vipul Fatehchand Shah vs. Nav Samir Cooperative Housing Society & Ors.***[1] and pointed out that this Court had in the said judgement made expressly clear that inter se disputes *qua* title and/or entitlement to the flat which was being subject to redevelopment were not factors which were decided and/or adjudicated upon in such proceedings. He submitted that the Division Bench of this Court had in the said case made specifically clear that the person who in possession of the flat which is handed over for redevelopment would be entitled to transit rent and other benefits under the development agreement etc. and would also have to be put back in possession of the redeveloped flat on completion of the redevelopment.

7. Mr. Bharucha also placed reliance upon a judgement of this Court in the case of ***Shubham Builders vs. Kanchan Villa CHS Ltd. & Ors.***[2] and pointed

1 Order dated. 6th October 2023 in Commercial Appeal (L) No.25162 of 2023

2 Order dated 4th April 2024 in Commercial Arbitration Petition (L) No.19952 of 2023

out therefrom that directives issued under Section 79A of the Maharashtra Co-operative Societies Act are merely directory and were not of a binding nature and would thus not overrule the decision of the majority members of a Co-operative Society. From the said judgement he also pointed out that this Court had held that when the majority of the members of a Co-operative Housing Society had taken a conscious decision to go ahead with the redevelopment, the Court would not substitute its decision with that of the majority and would not go behind the commercial wisdom exercised by such Society.

8. Drawing a parallel to the facts of the present case, he submitted that (i) there was no dispute that the redevelopment had been approved by an overwhelming majority of the members of Respondent No. 1 (ii) that the Development Agreement was validly executed after the same was approved by the majority of the members of Respondent No.1 (iii) that there was no impediment/stay granted by any court in the implementation of the said redevelopment and (iv) that the majority of members had already vacated their flats. He thus submitted that the judgment in the case of ***Shubham Builders*** (supra) would apply on all fours to the facts of the present case. He reiterated that the Respondents were thus bound by the decision of the majority and could not thus act contrary to the decision of Respondent No. 1 Society.

9. Mr. Bharucha then also placed reliance upon the judgement of another Division Bench of this Court in the case of ***Nirmala A. Pillai & Ors. vs. Shubham Builders & Anr.***[3] and pointed out that the Division Bench had after reiterating that minority members could not hold up the redevelopment which was approved by the majority and had infact proceeded to award cost by recording as follows:-

> *"15. We note that while the building may not be in a state of imminent collapse, it is evident that the inability to move on with the redevelopment would indeed lead to material deterioration. It is for the members who are affected by this state of affairs to come together and re-arrange their positions to take the best decision as a collective. The learned Single Judge has noted that a majority of 16 members have decided that progressing with the redevelopment in terms of the Development Agreement as modified by the Supplementary Agreement is the best course of action and in their best interests. This is the wisdom of the Housing Society acting through a majority. This majority of 16 members has walked the talk, and vacated their residences, and handed over possession to the Developer while the minority is holding up the redevelopment, now demanding a fresh conduct of the selection process all over again. Meanwhile, the Developer is going out of pocket by paying transit rent to those who have vacated, without being able to commence work of redevelopment since the dissident members are refusing to vacate. We note that the minority cannot be said to be minuscule (eight out of 24) but equally, the majority that has taken a conscious decision cannot be wished away without any substantive violation of law on account of their action.*

3 Judgement dated 7th May 2024 in Commercial Arbitration Appeal (L) No.12654 of 2024

Costs :

20. We note that these proceedings deal with a commercial dispute. Therefore, as a matter of law, we are required to address the issue of costs. Taking all circumstances into account, including the nature of the dispute, the length of time invested in the dispute, the nature of the allegations, the time and expense spent on the litigation, and the impact on the members of the Housing Society, we are convinced that "costs must follow the event".

21. We called for costs incurred in this Appeal. The Developer has submitted costs in the sum of Rs.4,60,500/-. The Housing Society has not submitted its costs. Taking into account the nature of the litigation, and balancing it with the age of the Appellants, we grant total costs in the sum of Rs. 4,50,000, which shall be borne by the Appellants equally. The costs shall be paid to the Developer and the Housing Society, in equal shares within a period of four weeks from today. The costs awarded to the Housing Society, shall be distributed equally to the 16 members who have vacated their residential premises. If these costs are not paid as directed above, the Housing Society and the Developer may recover the same as arrears of land revenue under the provisions of the Maharashtra Land Revenue Code, 1966. The concerned authorities shall act and recover the costs on production of an authenticated or digitally signed copy of this order."

10. Basis the above, he submitted that the present Petition deserved to be allowed in terms of prayer clause (a), which he submitted, was the only prayer which was being pressed today.

11. I then heard Ms. Pooja Malik on behalf of Respondent Nos.2 to 4 briefly in the morning session. She was unable to really counter the submissions made or deal with the judgements upon which Mr. Bharucha placed reliance. When I put to her if she was aware of the now well settled position in law qua the rights of minority members of a Society to oppose redevelopment and if whether in light of the settled position in law Respondent Nos 2 to 4 would still like to oppose the present Petition, she requested the matter be kept back at 2:30 pm for her to take instructions. When the matter was called in the afternoon session Mr. Bubna appeared for Respondent Nos. 2 to 4 and informed the Court that Respondent Nos. 2 to 4 were not willing to vacate their respective flats. I also put to Mr. Bubna if he was aware of the law laid down qua the rights of minority members of a Society to oppose redevelopment. To this he submitted that he had taken instructions from Respondent Nos 2 to 4 who had instructed him to oppose the Petition.

12. Mr. Bubna then opposed the present Petition by submitting that the Petitioner was disentitled to any reliefs since the Petitioner was not ready and willing to perform its obligations under the said development agreement. In support of his contention, he invited my attention to prayer clause (d)[4] of the

4 *(d) That this Hon'ble Court be pleased to pass an order exempting the Petitioner from executing Permanent Alternate Accommodation Agreements with Respondent Nos.2 to 11 before grant of Commencement Certificate*;

Petition and pointed out that by seeking the said prayer it was clear that the Petitioner was not ready and willing to abide by its obligation under the said Development Agreement by seeking exemption from executing the Permanent Alternate Accommodation Agreement (PAAA) with dissenting members.

13. He then invited my attention an order passed by the Bombay City Civil Court, Borivali Division, Dindoshi (Branch) in Notice of Motion No.1227 of 2023 filed in S.C. Suit No.802 of 2023 and pointed out that by the said order the City Civil Court had granted an injunction against Respondent No. 1 and Respondent No. 3 from creating any third party rights in respect of Flat No. 08 in the B Wing of Taruvel. He thus submitted that the Petitioner ought to have first approached the City Civil Court by filing an appropriate application seeking modification of the said order. He submitted that the Petitioner could not in these proceedings act in a manner which was contrary to the said order of injunction. In support of his contention, he placed reliance upon a Division Bench Judgement of this Court in the case of ***Keshrimal Jivji Shah & Anr. vs. Bank of Maharashtra & Ors.***[5] to submit that any transfer of immovable property in violation of an order of the Court would not create any right, title or interest in the transferee. It was thus he submitted that the Petition deserved to be dismissed.

5 2004(3) Mh.L.J.893

14. Mr. Bharucha in dealing with the contentions of Mr. Bubna first submitted that the contention that the Petitioner was not ready and willing to execute the Permanent Alternate Accommodation Agreement (PAAA) was entirely misconceived. He pointed out that the Petitioner had infact executed the PAAA's with all those members of Respondent No. 1 who had vacated their respective flats. He then submitted that Respondent No. 2 to 4 had completely misconstrued prayer clause (d) and the context in which the same had been sought for. He then pointed out that the said prayer had only been sought for a safeguard and to preempt relevant permissions not being granted to the Petitioner on account of the non-cooperating members refusing to execute the PAAA's. He clarified that the Petitioner would execute the PAAA's with the Respondents as contemplated under the Development Agreement in the same manner as had been done with the other members of the Respondent Society who had vacated their respective flats. He assured the Court that the Petitioner would also treat the Respondents on par with the other member of Respondent No. 1 who had vacated their respective flats from the date on which such members hand over possession of their respective flats to the Petitioner for the purposes of redevelopment. He also clarified that the Petitioner was not pressing for any reliefs in terms of prayer clause (d) and were confining their reliefs to only prayer clause (a).

15. Mr. Bharucha then submitted that the next contention of Mr. Bubna that the Petitioner was required to approach the City Civil Court for modification/variation of the order passed in S.C. Suit No.802 of 2023 was also equally misplaced and without any merit. While he did not dispute the proposition of law laid down by the Division Bench of this Court in the case of ***Keshrimal Jivji Shah*** (supra), he submitted that the same was wholly inapplicable to the facts. He pointed out from the judgement in the case of ***Keshrimal Jivji Shah*** (supra) that what fell for consideration in that case were the following questions, viz.

> *"3. The questions are :--*
>
> *i) is transfer of an immovable property in contravention of a prohibitory or injunction order of a Court illegal or void;*
>
> *ii) Whether and to what extent, the procedure under Rule 11 of Second Schedule to Income Tax Act, 1961 is applicable in execution of a recovery certificate issued under Section 19(7) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short RDB Act)"*

Mr. Bharucha pointed out that in the present case, there was infact no transfer of any immovable property at all. He took pains to point out that on completion of the redevelopment Respondent Nos. 2 to 4 would be in the exact same position qua their respective flats as they presently were. He

reiterated that by virtue of the redevelopment no right, title or interest of theirs *qua* the flats in which they were occupying would in any manner be altered and/or affected. He reiterated that this Court had in the case of ***Vipul Fatehchand Shah*** (supra) made this explicitly clear. He thus submitted that there was no question of there being any breach and/or violation of any order of injunction passed by the City Civil Court, Mumbai since in fact there was no disposal or creation of any third party rights or renewal of leave and license agreement in respect of the suit premises (Flat No.B-08) therein. He thus submitted that the issues pending adjudication before the City Civil Court in S.C. Suit No. 802 of 2023 would thus remain unaffected by any order passed in these proceedings.

16. After the above submissions were made, Ms. Motwani sought time of two weeks to file Affidavit in Reply on behalf of Respondent No.9. This is opposed by Learned Counsel for the Petitioner, who submitted that Respondent No.9 had been duly served and had chosen not to appear. Mr. Bharucha placed reliance upon an Affidavit of Service of today's date to show that Respondent Nos.8, 9 and 10 had been served at the addresses shown in respect of Flat Nos.C-15 and additionally through email. He submitted that the notice of the hearing was also given to Respondent No.8, 9 and 10 and in WhatsApp group of the Society Members. He then pointed out that the delivery report of the

letters sent to Respondent No.8, 9 and 10 showed that the envelopes had been returned back with the noting 'left' which itself confirmed that they were not presently residing in the said flats. Ms. Motwani confirmed that Respondent No. 9 is not living in Taruvel but lives in Dahisar.

17. I have heard Learned Counsel for the Petitioner, Respondent Nos. 2 to 4 and considered the request made by Ms. Motwani on behalf of Respondent No. 9. Before proceeding further it is essential to note that (i) that the majority members of Respondent No.1 (Society) have passed a resolution for redevelopment, (ii) that the majority members of Respondent No.1 (Society) have approved the draft of the Development Agreement, (iii) that the building in question, viz., 'Taruvel' has been declared C-1 and it is in dilapidated condition, (iv) there is no order of any Court/Authority which today restrains the enforcement of the Development Agreement or the resolutions of Respondent No. 1 (Society). Given this, I find it apposite to set out the findings of a Division Bench of this Court in the case of ***Girish Mulchand Mehta vs. Mahesh S. Mehta***[6] which settled the law on this point as far back as in the year 2009 and has since been consistently followed in a catena of judgements. The judgment sets out as follows, viz.

6 AIR Online 2009 Bom 1

"16. In the present case, it is not in dispute that the General Body of the Society which is supreme, has taken a conscious decision to redevelop the suit building. The General Body of the Society has also resolved to appoint the respondent No.1 as the Developer. Those decisions have not been challenged at all. The Appellants who were members of the Society at the relevant time, are bound by the said decisions. The appellants in the dispute filed before the Co-operative Court have only challenged the Resolution dated 27-4-2008, which challenge would merely revolve around the terms and conditions of the Development Agreement. As a matter of fact, the General Body of the Society has approved the terms and conditions of the Development Agreement by overwhelming majority. Merely because the terms and conditions of the Development Agreement are not acceptable to the appellants, who are in minuscule minority (only two out of twelve members), cannot be the basis not to abide by the decision of the overwhelming majority of the General Body of the Society. By now it is well established position that once a person becomes a member of the Co-operative Society, he loses his individuality with the Society and he has no independent rights except those given to him by the statute and Bye-laws. The member has to speak through the Society or rather the Society alone can act and speaks for him qua

the rights and duties of the Society as a body (see Daman Singh & ors. v/s. State of Punjab reported in AIR 1985 SC 973). This view has been followed in the subsequent decision of the Apex Court in the case of State of U.P. vs. Chheoki Employees Cooperative Society Ltd., reported in AIR 1997 SC 1413. In this decision the Apex Court further observed that the member of Society has no independent right qua the Society and it is the Society that is entitled to represent as the corporate aggregate. The Court also observed that the stream cannot rise higher than the source. Suffice it to observe that so long as the Resolutions passed by the General Body of the Respondent No. 2 Society are in force and not overturned by a forum of competent jurisdiction, the said decisions would bind the appellants. They cannot take a stand alone position but are bound by the majority decision of the General Body. Notably, the appellants have not challenged the Resolutions passed by the General Body of the Society to redevelop the property and more so, to appoint the respondent No.1 as the Developer to give him all the redevelopment rights. The propriety rights of the appellants herein in the portion (in respective flats) of the property of the Society cannot defeat the rights accrued to the Developer and/or absolve the Society of its obligations in relation to the subject matter of the Arbitration Agreement. The fact that the relief prayed by the

respondent No. 1 in section-9 Petition and as granted by the Learned Single Judge would affect the propriety rights of the appellants does not take the matter any further. For, the propriety rights of the appellants in the flats in their possession would be subservient to the authority of the General Body of the Society. Moreso, such rights cannot be invoked against the Developer (respondent No.1) and in any case, cannot extricate the Society of its obligations under the Development Agreement. Since the relief prayed by the respondent No.1 would affect the appellants, they were impleaded as party to the proceedings under section 9 of the Act, which was also necessitated by virtue of Rule 803E of the Bombay High Court (Original Side) Rules. The said Rule reads thus:-

*"**R. 803-E**. Notice of Filling Application to persons likely to be affected.-*

Upon any application by petition under the Act, the Judge in chambers shall, if he accepts the petition, direct notice thereof to be given to all persons mentioned in the petition and to such other persons as may seem to him to be likely to be affected by the proceedings, requiring all or any of such persons to show cause, within the time specified in the notice, why the relief sought in the petition should not be granted."

17. *The respondents have also placed reliance on the decision of the Delhi High Court in the case of Value Advisory Services vs. ZTE Corporation & ors. in OMP. No. 65/2009 decided on 15th July, 2009. One of the issue considered in this decision is whether in exercise of powers under section 9 of the Act, the Court can make an order against or with respect to any party other than a party to the arbitration agreement. The Court observed that no general principle of maintainability/applicability or non-maintainability/non-applicability can be laid down. It will have to be determined by the Court in the facts of each case whether for the purpose of interim measure of protection, preservation, sale of any goods, securing the amount in dispute and order affecting the third party can be made or not. Similar view can be discerned from another decision of the Delhi High Court in the case of Arun Kapur vs. Vikram Kapur, 2002 DLT 95-42. The Court was considering the distinction between the scope of application under section 9 and section 17 of the Act. It observed that it is settled that section 9 is attracted only if the nature of dispute is subject matter of Arbitration proceedings or agreement. It does not contemplate any such relief which does not stem from the Arbitration Proceedings or the disputes referred to in arbitration for adjudication. It observed that section 9 is distinct*

from section 17 in as much as Petition under section 17 is moved before the Arbitrator for an order against a party to the proceedings, whereas section 9 vests remedy to a party to arbitration proceedings to seek interim measure of protection against a person who need not be either party to the arbitration agreement or to the arbitration proceedings.

18. *We have no hesitation in taking the view that since the appellants were members of the Society and were allotted flats in question in that capacity at the relevant time are bound by the decision of the General Body of the Society, as long as the decision of the General Body is in force. As observed earlier, the appellants have not challenged the decisions of the General Body of the Society which is supreme, in so far as redevelopment of the property in question or of appointment of the respondent No.1 conferring on him the development rights. The appellants have merely challenged the Resolution which at best would raise issues regarding the stipulations in the Development Agreement. The General Body of the Society has taken a conscious decision which in this case was after due deliberation of almost over 5 years from August, 2002 till the respondent No. 1 came to be finally appointed as Developer in terms of Resolution dated 2nd March, 2008. Moreover, the General Body of the Society by overwhelming majority not only approved*

the appointment of respondent No. 1 as developer but also by subsequent Resolution dated 27th April, 2008 approved the draft Development Agreement. Those terms and conditions have been finally incorporated in the registered Development Agreement executed by the Society in favour of respondent No.1. That decision and act of the Society would bind the appellants unless the said Resolutions were to be quashed and set aside by a forum of competent jurisdiction. In other words, in view of the binding effect of the Resolutions on the appellants, it would necessarily follow that the appellants were claiming under the Society, assuming that the appellants have subsisting proprietary rights in relation to the flats in their possession. It is noticed that as of today the appellants have been expelled from the basic membership of the Society. Their right to occupy the flat is associated with their continuance as member of the Society. It is a different matter that the decision of expelling the appellants from the basic membership of the Society will be subject to the outcome of the decision of the superior authority where the appeals are stated to be pending. If the decision of the Society to expel the appellants is to be maintained, in that case, the appellants would have no surviving cause to pursue their remedy even before the Co-operative Court much less to obstruct the redevelopment proposal. As a matter of

fact those proceedings will have to be taken to its logical end expeditiously. Even if the appellants were to continue as members, they would be bound by the decision of the General Body whether they approve of the same or otherwise. In any case, keeping in mind that the Development Agreement does not absolutely take away the rights of the appellants in the flats in question, as after demolition of the existing building, the appellants would be accommodated in the newly constructed flats to be allotted to them in lieu of the existing flats, on the same terms as in the case of other members, provided the appellants continue to remain members of the Society. Under the Development Agreement, the respondent No. 1 is obliged to complete the project within 18 months from the date of receipt of full Commencement Certificate from the Corporation. The full Commencement Certificate would be issued only upon the vacant possession of the entire building is delivered to the respondent No.1 who in turn would demolish the same with a view to reconstruct a new building in its place. Significantly, out of twelve (12) members, ten (10) members have already acted upon the Development Agreement as well as have executed separate undertaking-cum-agreement with the respondent No. 1 Developer. They have already vacated flats in their occupation to facilitate demolition of the existing building and have shifted to alternative

transit accommodation as back as in February, 2009. The project has been stalled because of the obstruction created by the appellants herein who are in minuscule minority. The said ten members of the Society who have already shifted their premises, they and their family members are suffering untold hardship. At the same time, the respondent No. 1 who has already spent huge amount towards consideration of the Development Agreement and incurred other incidental expenses to effectuate the Development Agreement in addition will have to incur the recurring cost of paying monthly rent to the ten members who have already shifted to transit accommodation. The learned Single Judge has noted that the appellants are not in a position to secure the amount invested and incurred including the future expenses and costs of the respondent No.1 herein in case the project was to be stalled in this manner. Even before this Court the appellants have not come forward to compensate the respondent No.1 herein and the other ten members of the Society for the loss and damage caused to them due to avoidable delay resulting from the recalcitrant attitude of the appellants. Considering the impact of obstruction caused by the appellants to the redevelopment proposal, not only to the respondent No. 1 Developer but also to the overwhelming majority of members (10 out of 12) of the Society, the learned Single Judge

of this Court opined that it is just and convenient to not only appoint the Court Receiver but to pass further orders for preservation as well as protection and improvement of the property which is subject matter of Arbitration Agreement. We have already noticed that the Court's discretion while exercising power under section 9 of the Act is very wide. The question is whether in the fact situation of the present case it is just and convenient to appoint Court Receiver coupled with power conferred on him to take over possession of the entire building and hand over vacant and peaceful possession thereof to the respondent No. 1 who in turn shall redevelop the property so as to provide flats to each of the members of the Society in lieu of the existing flats vacated by them as per the terms and conditions of the Development Agreement, as ordered by the learned Single Judge. For the reasons noted by the Learned Single Judge which we have reiterated in the earlier part of this decision, we find that it would be just and convenient to not only appoint Court Receiver to take over possession of the property but also pass further order of empowering the Court Receiver to hand over vacant possession of the suit building to the respondent No. 1 to enable him to complete the redevelopment work according to the terms and conditions of the Development Agreement."

Thus, given the law laid down by the Division Bench of this Court in the aforesaid case, it is clear beyond doubt the Respondent Nos. 2 to 4 being a minuscule minority of the members of Respondent No. 1 would have absolutely no right to oppose the redevelopment of the building Taruvel. Thus in my view, there is no legal impediment today which would prevent the Petitioner and Respondent No. 1 acting in furtherance of the said Agreement. Hence the Petitioner has made out a case for grant of relief in terms of prayer clause (a) which is the only prayer which the Petitioner has sought for.

18. Since however Mr. Bubna had made essentially two submissions to resist the Petition I must deal with them. *First*, the contention that the Petitioner was seeking to act contrary to the development agreement since the Petitioner had in prayer (d) sought exemption of executing the PAAA's with Respondent Nos. 2 to 11 is plainly misconceived. Mr. Bharucha has clarified that the said prayer was sought for only to ensure that the commencement certificate is not withheld on account of non cooperating members who refused to execute the PAAA and thereby holding to ransom the entire redevelopment. However, Mr. Bharucha has not pressed for prayer clause (d) and has infact made a statement to the Court that the PAAA's will be executed with all members, who hand over possession of their flats to the Petitioner. He submitted that there would be no discrimination with Respondent Nos 2 to 4 as well and that they would be

treated at par with the other members of Respondent No 1. Hence the first contention of Mr. Bubna clearly falls to the ground.

19. Mr. Bubna's second next contention, i.e., that proceeding with the redevelopment would be in violation of the order passed by the City Civil Court in Suit No.802 of 2003 is equally misconceived. The order upon which Mr. Bubna has placed reliance granted an injunction in terms of prayer clauses (a) and (b) of the Notice of Motion taken out in the Suit No.802 of 2003. Prayer clauses reads thus:

> *"a) Pending the hearing and final disposal of the suit the Defendant No.1 his relatives, servants, agents and/or any person claiming through him be temporarily restrained from disposing off and/or creating any third party rights in respect of the suit premise i.e. Flat No.08, 'B' wing, 1st Floor, Taruvel Co-op. Housing Society Ltd., CTS No.466A, 476C of Village Kondivita, Taluka Andheri MSD, Karanjia Marg, Nr. Cigarette Factory, Chakala, Andheri (East), Mumbai – 400 099.*
>
> *b) Pending the hearing and final disposal of the suit the Defendant No.1, his relatives, servants, agents and/or any person claiming through him be restrain from further renewing the Leave and License Agreement executed by the Defendant No.1 with the*

Licensee in respect of the suit premises i.e. Flat No.08, 'B' wing, 1st Floor, Taruvel Co-op. Housing Society Ltd., CTS No.466A, 476C of Village Kondivita, Taluka Andheri MSD, Karanjia Marg, Nr. Cigarette Factory, Chakala, Andheri (East), Mumbai – 400099;"

Thus from the above prayers it is clear beyond any doubt that the injunction is only *qua* ***creating any third party rights*** in Flat No. 08, 'B' wing, 1st Floor, in the said building. The said injunction therefore does not in any manner restrain the redevelopment of the said building. Also, as held by the Division Bench of this Court in the case of ***Vipul Fatehchand Shah*** (supra) that the question of title and/or entitlement to the flat, which is the subject matter of redevelopment, is not in any manner affected much less decided by the process of redevelopment. Given this, I do not see on what basis it can be contented that the redevelopment would be in violation of the order passed by the City Civil Court. Thus, not only is the submission of Mr. Bubna legally untenable but is also factually incorrect. Hence there is absolutely no merit in the same.

20. As I have noted above, I had specifically put to both Learned Counsel appearing for Respondent Nos. 2 to 4 as to whether they were aware of the well settled law laid down in matters of the rights of minority members to oppose redevelopment of a Cooperative Housing Society. Both of them then on

instructions pressed their opposition to the Petition. As I have noted above, the contentions taken to oppose are entirely devoid of merit. Such conduct of non-consenting minority members has its own deleterious consequences as it not only prejudices the entire body of members of a society who seek to benefit from the redevelopment but infact also puts to risk the entire redevelopment. A developer who enters into a Development Agreement with the Society has to then start making payment of rent etc. to the members who vacate. This at times on account of frivolous and misconceived opposition by a few members who refuse to vacate could have a huge financial impact on developers sometimes where the entire redevelopment becomes unworkable. This conduct therefore frustrates the entire redevelopment which is meant of the benefit of the Society as a whole at the hands of a few. It was thus that a Learned Single Judge of this Court, lamenting on the rising number of such frivolous opposition to redevelopment by minority members had in the case of ***Westin Sankalp Developers vs. Ajay Sikandar Rana & Others***[7] noted that the time had come to impose costs after observing as follows, viz.

> *"1. This is the second case in as many weeks of dissenting members of a cooperative society holding up its re-development, though this re-development is approved by a vast majority of the general body. Mr. Pachundkar urges the same point of law that has been raised and*

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negatived repeatedly by this court. He claims that since his clients, Respondents Nos. 1 and 2, have not signed the development agreement, they are not bound by the arbitration clause and no relief in Section 9 can be made against them. The question is no longer res integra. It has not been res integra for many years. Every dissenting member of society after society constantly repeating the same jaded mantra again and again, totally unmindful of the law, is a practice that must now be deprecated in the strongest possible terms. This is now the very last time I will refrain from imposing severe costs. These are claims in the Commercial Division of this court and we are under the Commercial Courts Act, 2015. That Act amended the provision for costs in Section 35 of the Code of Civil Procedure, 1908. One of the factors to be borne in mind while awarding costs — which can be actual costs and even exemplary costs — is the frivolity of the defence and whether the party against whom costs are to be made has wasted the Court's time. Every such untenable and unsustainable objection by a dissenting member is a colossal waste of judicial time. The next such matter will receive, first, an order of immediate eviction of the dissenting member (i.e., vacating that very day, or at best the next), and, second, an appropriately severe order of costs. That order will be made keeping in mind the costs incurred by the Society, the loss to other society members, and the actual loss suffered by the developer

on account of the delay occasioned by such members. Consequently, the order of costs is unlikely to be moderate or modest. This is, in my view, only fitting, for there is nothing moderate or modest about the opposition by these dissenting members. They behave as if they are not bound by orders of this Court or by the law. They are."

21. I find that the stand taken by Respondent Nos. 2 to 4 makes it amply clear that nothing has changed. The docket of this Court continues to be flooded with several such matters where minority members continue to attempt to stymie redevelopment on grounds which are *ex facie* frivolous, untenable and contrary to the well settled position in law. It was thus that the Division Bench of this Hon'ble Court in the case of ***Nirmala A. Pillai and others*** (supra), had awarded costs to the Petitioners therein, as already extracted above. Given that these proceedings deal with a commercial dispute, therefore, as a matter of law, I am required to address the issue of costs. Taking all circumstances into account, including the nature of the dispute, the length of time invested in the dispute, the nature of the allegations, the time and expense spent on the litigation, and the impact on the members of the Housing Society, I am satisfied that "*costs must follow the event*". It was thus that I had called for the costs incurred in this Petition. The Petitioner/Developer has submitted costs in the sum of Rs 48,52,500/- and Respondent No. 1 – Society has submitted costs in

the sum of Rs. 3,17,500/-. Considering the frivolity of the defense and complete disregard for the well settled position in law to the issue at hand and balancing it with the age of the members of the Respondent No. 1 Society, I deem it fit to grant costs. However, I shall refrain from granting actual costs but in my discretion grant an amount of Rs. 5,00,000/- as cost. The cost shall be payable only in the event that the Respondents do not vacate their respective flats within a period of two weeks from the date of this order being uploaded. In the event all or any of them do not, then costs shall be borne by those of whom do not. The costs shall be paid to the Developer and the Housing Society, in equal shares within a period of four weeks from today. The costs awarded to the Housing Society, shall be distributed equally to the members who have vacated their residential premises. If these costs are not paid as directed above, the Housing Society and the Developer may recover the same as arrears of land revenue under the provisions of the Maharashtra Land Revenue Code, 1966. The concerned authorities shall act and recover the costs on production of an authenticated or digitally signed copy of this order.

22. It is thus that I pass the following order, viz.

i. The Petition is allowed in terms of prayer clause (a) in respect of those respondents who have not vacated their respective flats. This

order is to take effect after a period of two weeks from the date of this order being uploaded.

ii. In the event the Respondent Nos. 2 to 4 and 8 to 11 or any of them handover possession of their respective flats within a period of two weeks from the date of the order, no costs shall be paid by those Respondents who handover possession.

iii. However, in the event all or any of the Respondent Nos. 2 to 4 and 8 to 11 do not hand over possession within a period of two weeks from the date the order is uploaded, then costs as quantified above shall be paid by those Respondents in the manner detailed above.

(ARIF S. DOCTOR, J.)