

(2013) 11 BOM CK 0036
In the Bombay High Court
Case No : Arbitration Petition No. 638 of 2013

M/s. Calvin Properties and Housing

APPELLANT

Vs

Green Fields Co-operative Housing Society Limited and
Others

RESPONDENT

Date of Decision : 19-11-2013

Acts Referred:

Citation : (2014) 1 ABR 252 : (2014) 2 BomCR 398

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Sean Wasoodev, for the Appellant; Santosh Shetty for Respondent No. 1, Mr. Mayur Khandeparkar, instructed by . Mr. Yatin Shah for Respondent Nos. 2 and 3, Mr. Vishal Kanade, A/w. Mr. Sandeep Bhimekar, instructed by . DSK Legal for Respondent Nos. 4 and 5, Party in Person Respondent Nos. 6(a), for the Respondent

Judgement

R.D. Dhanuka, J.—By this petition filed u/s 9 of the Arbitration and Conciliation Act, 1996 (for short "Arbitration Act"), petitioner seeks appointment of the Court Receiver in respect of the tenements occupied by respondent nos. 2 to 5 and 6A to 6C viz. Flat Nos. 18-A, 9-A, 2-A and garage No. 2B in the building of respondent no. 1 society viz. "Greenfields", situated on Plot No. 40, CTS NO. G-505, Village Bandra, Taluka Andheri, Mumbai 400 054 with a direction to take physical possession of the same from respondent nos. 2 to 5 and 6A to 6C and if necessary with police help and by breaking open the locks. Petitioner also seeks mandatory order and direction against respondent nos. 2 to 5 and 6A to 6C to handover tenements in their possession to the petitioner to enable the petitioner to demolish the same, reconstruct the new building and handover the flats to respondent nos. 2 to 5 and 6A to 6C and other members of the respondent no. 1 society. Some of the relevant facts for the purpose of deciding this petition are as under:- Petitioner is a partnership firm and is a developer. Respondent no. 1 is a co-operative housing society registered under the Maharashtra Co-operative Societies Act, 1960 (for short the said "Societies Act"). Respondent nos. 2 to 6

are the members of respondent no. 1 society. Respondent nos. 2 and 3 are joint members holding five shares and are in occupation of flat no. 18-A on the first floor of the society building and also are in occupation of enclosed garage in the compound of the society building. Respondent nos. 4 and 5 are joint members holding five shares and are in occupation of flat no. 9-A on the ground floor of the building. Original respondent no. 6 was a member of the society holding five shares and was in occupation of flat no. 2-A on the ground floor of the society building. On demise of respondent no. 6, her legal heirs are brought on record and are impleaded as respondent nos. 6A to 6C. The building of the society consists of two wings, each wing consisting of ground and three upper floors. There are 34 flats and four enclosed garages and 34 members of the respondent no. 1 society. Members of the 1st respondent society are occupying flats of different sizes described in paragraph (3) of the petition. The buildings of the society standing on the said property are 48 years old and are stated to have been in deteriorated condition over the years. It is the case of the petitioner and the society that the members of the society were not financially capable of incurring huge expenses for the repairs of the buildings. In the Special General Body Meeting of the society held on 30th August, 2009 which was attended by 26 members in which a letter signed by 19 members of the society was discussed. 25 members of the society voted in favour of the redevelopment of the property and decided to demolish the garage and to construct flats of larger area.

2. On 4th October, 2009 another Special General Body Meeting of the society came to be held in which the society decided to appoint M/s. V.V. Joshi and Associates as a Project Management Consultant (PMC). After considering various aspects, the said PMC drafted a project report and tender for the project which was placed before management committee of the society on 10th March, 2010. The managing committee of the society decided to hold a Special General Body Meeting to consider and approve the same. In the Special General Body Meeting of the society held on 28th March, 2010, society approved and accepted the project report prepared by the said PMC and also the tender. Members who attended the meeting also decided on the manner in which the offers would be invited from interested developers and appointment of one of such developer for the project. Accordingly, society invited offers from the developers. Members were also called upon to suggest the names of reputed developers. Society received proposals from various developers including the petitioner. Tenders received from all the bidders were opened by the society in the meeting held on 11th July, 2010 and were examined and tabulated by the said PMC. In the Special General Body Meeting held on 15th September, 2010 petitioner was accepted as a developer for the purpose of redevelopment. The said resolution was unanimously approved by all 29 members present in the meeting which was presided over by the Deputy Registrar, Co-operative Societies, H (West) Ward. Deputy Registrar issued an order on 18th September, 2010 certifying that 29 members were present at the special general meeting and the procedure had

been meticulously followed.

3. Respondent no. 1 society issued a letter of intent to the petitioner on 17th September, 2010. Society resolved to execute a development agreement with the petitioner and authorised its chair person, Honorary Secretary and treasurer to sign the development agreement, power of attorney and all other documents required to be signed by the society for the re-development of the property. At the meeting of the managing committee held on 9th June, 2011 the draft of the development agreement, power of attorney and other related documents were discussed. It was decided to hold a special general body meeting to table the said documents and to take decision thereon. That development agreement, power of attorney were circulated amongst the members. At the special general body meeting held on 20th May, 2012, such draft documents were tabled and discussed. It is the case of the petitioner and the society that after incorporating the suggestions of the members, drafts were approved and it was resolved to execute the said documents. Appropriate resolution was accordingly passed at the said meeting. In the annual general body meeting held on 14th August, 2012 of the society, development agreement together with proposed plans were approved and accordingly development agreement came to be executed on 31st August, 2012 between the petitioner and respondent no. 1 society. All relevant resolutions passed by the society from time to time for redevelopment have been recited in details in the said development agreement. In the said agreement, details of the existing flats and shares occupied by the members of the 1st respondent society are enclosed at Ex. B. Petitioner paid a sum of Rs. 50 lacs to the respondent no. 1 society which payment was duly acknowledged by the society.

4. Clause 41.1 provides for mediation. Clause 41.2 provides that in the event that the parties are unable to resolve the dispute or difference by mutual discussion within 45 days of it being referred for mediation, dispute shall be referred to arbitration which will be governed by the Arbitration and Conciliation Act, 1996. The said development agreement is duly registered. Under the said development agreement, the petitioner agreed to construct flat for members free of costs and also agreed to pay consideration of Rs. 9,21,49,200/- to the members. Time was made the essence of the contract. Area of each of the member's new flat as well as other details were specified in the said agreement. Petitioner also agreed to pay compensation at different rates in respect of the flats and commercial premises to the members for temporary accommodation to be arranged by the members for themselves. Petitioner also agreed to pay one time amount of Rs. 30,000/- towards packing to and fro moving charges. It was provided that the members of the respondent no. 1 society shall handover possession of their existing premises within 45 days of the date of receipt of IOD and if any member commits delay in handing over his existing premises to the petitioner, such member shall be liable to pay penalty as per clause 20.3.2 of the said agreement. In case of completion of the project by the petitioner, petitioner had agreed to pay the compensation to the members at the rate provided in the

said agreement. Society also executed power of attorney dated 31st August, 2012 in favour of two of the partners of the petitioner.

5. On 20th February, 2013, petitioner obtained IOD. On 25th February, 2013, petitioner forwarded certified copies of IOD, sanctioned plans and copies of D.R. Certificate evidencing loading of TDR FSI on the property and conveyed their readiness and willingness to pay for temporary accommodation, packing and moving charges and compensation towards brokerage etc. The petitioner also conveyed their readiness and willingness for payment of the balance consideration payable to the members aggregating to Rs. 8,29,34,282/- and the balance consideration dues to the members aggregating to Rs. 8,29,34,282/-. The petitioner also agreed to handover two separate bank guarantees of Rs. 3 crores each and agreed to pay stamp duty on the individual agreements of the members' new flat and to execute the same as per clause 20.3.2 of the said development agreement. Petitioner called upon the society to handover a letter executed by all members for vacating the premises in terms of clause 20.2 of the development agreement.

6. On 10th March, 2013 respondent no. 1 society held a special general body meeting. It was resolved that all members would vacate their respective flats on or before 11th April, 2013 and handover the set of keys alongwith the letter of surrender to the secretary of the society. Vide letter dated 23rd March, 2013, respondent no. 4 informed respondent no. 1 society that he had not consented for redevelopment and was taking legal advice and would respond within 30 days. Vide letter dated 24th March, 2013 respondent no. 6 sought various information and details from the society.

7. Vide letter dated 3rd April, 2013, society informed the petitioner that 31 members had signed the letter recording their agreement to vacate their flats on or before 11th April, 2013 and three members had not yet confirmed the date of vacating in writing. The petitioner was informed that though society had made efforts to obtain such writing from remaining three members, the same was of no avail. The society had given final limit of three days to these three members to confirm the acceptance of the date for vacating in writing.

8. Vide letter dated 12th April, 2013, petitioner invoked arbitration clause and nominated Mr. Sandeep Parikh, advocate as sole arbitrator and called upon the society to concur in the appointment of the said advocate as sole arbitrator. Since society did not handover possession of the flats and garages to the petitioner in view of respondent nos. 2 to 6 not handing over their respective premises, petitioner filed this petition u/s 9 of the Arbitration and Conciliation Act, for appointment of Court Receiver and for mandatory order and injunction.

9. Mr. Wasoodev, learned counsel appearing for the petitioner submits that pursuant to the resolution passed by respondent no. 1 society, the said PMC had prepared a draft tender stating the requirements of the society for redevelopment. Tender submitted by the petitioner was accepted in the meeting

held by 1st respondent society. Draft development agreement, power of attorney and various other documents were approved after circulation of such documents to each of the members in the meeting held by the society. Each of such resolution has been approved by more than 3/4 majority of the members. It is submitted that none of these resolutions or the execution of development agreement in favour of the petitioner by the society has been challenged by any of the members in any court of law. These resolutions are thus binding on all the members of the society including respondent nos. 2 to 6. It is submitted that some of the meetings were attended by some of the respondents. Pursuant to execution of such agreement in favour of the petitioner, petitioner has already paid Rs. 50 lacs to the society as a lumpsum consideration.

10. Petitioner has paid an amount of Rs. 4,47,78,240/- towards purchase of TDR for being loaded on the said property, Rs. 13,43,400/- towards stamp duty on the purchase of the said TDR, premiums for Fungible F.S.I. to the Municipal Corporation of Greater Mumbai aggregating to Rs. 6,29,57,400/- fees of the architects and legal fees amounting to Rs. 11,13,300/-. Petitioner has also offered to pay various amounts towards compensation to each of the member in compliance with various provisions of the said development agreement. The petitioner has already received IOD and has got a sanctioned plan. TDR certificate evidencing loading of TDR FSI on the property has been already furnished to the respondent no. 1 society. Petitioner also agreed to handover bank guarantee and various other amounts as agreed under the development agreement. It is submitted that though 31 members out of 34 members agreed and signed the letter recording their agreement to vacate their flats by 11th April, 2013, three members and/or persons claiming through those members who are respondent nos. 2 to 5, 6A to 6C have not confirmed the date of vacating their premises. Learned counsel submits that in view of such obstructive attitude on the part of the three members of the society, not only the petitioner is suffering but the majority of the members of the society are also suffering. The petitioner has not able to commence demolition of the existing structure and to commence redevelopment of the plot. The cost of the project has gone up tremendously in view of the society and respondent nos. 2 to 5 and 6A to 6C not complying with their obligations to handover their respective tenements. Learned counsel submits that the petitioner has complied with their part of the obligation and have further agreed to comply with the remaining obligation but respondent no. 1 society and respondent nos. 2 to 5 and 6A to 6C have failed to comply with their obligations. It is submitted that in view of respondent nos. 2 to 5 and 6A to 6C which are in minority, entire project of the society is held up causing tremendous hardship to the petitioner as well as other members of the society. It is submitted that thus the Court Receiver shall be appointed by this Court in respect of the premises occupied by respondent nos. 2 to 5 and 6A to 6C with a direction to take physical possession from them with the help of police if necessary and with a direction to handover the same to the petitioner to enable the petitioner to demolish the same and to reconstruct the new building and to

handover respective flats and other tenements to the members of the society as per the terms of the development agreement.

11. Respondent no. 1 society has no objection if the reliefs as claimed by the petitioner is granted. Learned counsel appearing for the society submits that since respondent nos. 2 to 5 and 6A to 6C have not agreed to handover vacant possession of the premises, Society could not comply with their part of the obligation. It is submitted that remaining 31 members have already handed over possession and such decision has been already communicated to the petitioner by the society. It is submitted that because of the obstructive attitude of the respondent nos. 2 to 5 and 6A to 6C, majority of the members are suffering. Learned counsel submits that condition of the building is deteriorated and the requires immediate redevelopment.

12. Mr. Khandeparkar, learned counsel appearing for respondent nos. 2 and 3 submits as under:-

(a) There is no arbitration agreement between the petitioner and respondent nos. 2 and 3 as contemplated u/s 7 of the Arbitration Act. There is no dispute between the petitioner and respondent no. 1 society in relation to development agreement. No relief thus can be granted in this proceedings.

(b) Petitioner has not complied with various terms and conditions of the development agreement. Bank guarantee has not been executed as per clauses 20 and 21. Various payments are not made by the petitioner. Building plans and/or IOD are not as per agreed terms of the petitioner and the society. No notice u/s 164 of the Societies Act has been issued to the Registrar before filing arbitration petition. Clause 16 of the development agreement was not approved by respondent nos. 2 and 3 or by the society prior to execution thereof. Respondent nos. 2 and 3 have not agreed to accept any compensation as recorded in the development agreement for handing over vacant possession of the garage in lieu of additional car parking space. Dispute to arbitration cannot be referred since no steps have been taken by the petitioner to resolve the same by mutual discussion or without first being referred to mediation. Precondition to clause 41.2 is thus not complied with. In view of clause 40 of the development agreement which provides that in case of dispute during the redevelopment, section 91 of the Arbitration Act shall be applicable, this petition filed u/s 9 of the Arbitration Act is not maintainable.

(c) Under MOFA, garage is included within the meaning of term "Flat" u/s 2(a-1), and thus the area of garage has to be included within the area of flat. Petitioner is bound to provide the area of new flat by adding 51% of the existing flat in case of residential premises and 37% in respect of area in case of it being used for non-residential purpose. The petitioner has wrongly excluded the area of garage from being added in relation to the flat. Respondent nos. 2 and 3 are entitled to larger area than what is offered by the petitioner to respondent nos. 2 and 3.

(d) Managing Committee has not acted in good faith and in the interest of the society.

13. Mr. Khandeparkar placed reliance on the judgment of the Supreme Court in case of Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Ltd., in support of his submission that the developer cannot separately sell the garage. Flat includes garage. It is submitted that petitioner developer is under an obligation to consider the area of garage alongwith area of flat.

14. Mr. Khandeparkar placed reliance on the judgment of the Supreme Court in case of Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, in support of his submission that since there is no arbitration agreement between the petitioner and respondent nos. 2 and 3, no reliefs u/s 9 can be granted by this court against these respondents.

15. Mr. Khandeparkar submits that respondent nos. 2 and 3 would be entitled to get 50% of 939 sq. ft. area and not 749 sq. ft.

16. Mr. Kanade, learned counsel appearing for respondent nos. 4 and 5 adopt the submission made by Mr. Khandeparkar, learned counsel appearing for respondent nos. 2 and 3 and would further submit that since petitioner has not taken any steps for referring the matter for mediation which was one of the condition precedent before invoking arbitration agreement, no relief u/s 9 can be granted in favour of the petitioner. It is submitted that reliefs sought by the petitioner in the present proceedings would be final reliefs and thus cannot be granted u/s 9. It is submitted that some of the members of respondent no. 1 society are given additional area which would amount to discrimination between respondent nos. 4 and 5 and other members. It is submitted that in respect of shop no. 9A, which is being used for commercial purpose, petitioner has offered compensation offered for residential premises which is not acceptable to respondent nos. 4 and 5. Learned counsel submits that though under the tender documents, it was provided that bidder shall have to mutually discuss with the shop owner regarding location, no such discussion ever took place between the petitioner and respondent nos. 4 and 5. Learned counsel submits that if structures are demolished at this stage and if respondent nos. 4 and 5 succeeds in any proceedings, compensation would not be adequate relief.

17. Respondent no. 6A who represents himself and respondent nos. 6B and 6C submits that the managing committee member acted bias in allotment of flats to various members of society. It is submitted that respondent no. 6 is entitled to larger area than what was allotted to respondent no. 6. Petitioner ought to have given bank guarantee for securing performance as per terms of development agreement which the petitioner has restrained. It is submitted that there is no separate agreement signed between the petitioner and respondent no. 6.

18. Mr. Wasoodev, learned counsel appearing for the petitioner in rejoinder invited my attention to various resolutions passed by the society from time to time. My attention is also invited to the definition of garage defined u/s 2(a-1) of

MOFA. It is submitted that there is no provision in the Development Control regulation for enclosed garage. It is submitted that in this case, garage was not attached to the flat and is not a part of the FSI. Even respondent nos. 2 and 3 had paid stamp duty @ 25% of the market value in respect of such garage. Petitioner has agreed to give Rs. 40 lacs plus open parking space in respect of such garage occupied by respondent nos. 2 and 3 which has been also offered to the other garage owners who have agreed to accept such compensation and open parking space without any objection. It is submitted that petitioner is not selling any car parking space. Learned counsel submits that respondent no. 1 society appointed PMC who had considered area occupied by each member and had incorporated the same in the tender document. It is submitted that once development agreement has been entered into between the parties, the said agreement would prevail and not the tender document. It is submitted that there is no discrimination in making any allotment in so far as petitioner is concerned. In respect of one of the member, open terrace was enclosed to the flat having no independent excess. In so far as respondent nos. 4 and 5 are concerned, it is submitted that the erstwhile members had converted this flat meant for residential use into a shop. It is submitted that in respect of commercial area as per development control regulation, FSI is less in comparison to residential area and thus there is difference in the additional area offered to the members of the society. It is submitted that in respect of shops, the petitioner has not offered compensation of 110 sq. ft. per month but has agreed to make payment at the rate of 250 per month per sq. ft. In so far as issue of referring the dispute to the mediation before invoking arbitration agreement is concerned, learned counsel submits that IOD was issued on 20th February, 2013. On 25th February, 2013, the petitioner had furnished copy thereof to the society with a request to fix a date for vacating the premises by members. The society conveyed to the petitioner that out of 34 members, 31 members were ready to vacate but respondent nos. 2 to 5 and original respondent no. 6 refused to vacate. It is submitted that the society has thus waived their rights to refer the dispute to mediation in view of the society not able to get the vacant possession from three of its members.

19. Mr. Wasoodev, placed reliance on the following judgments in support of his submission:-

1. Girish Mulchand Mehta and Durga Jaishankar Mehta Vs. Mahesh S. Mehta and Harini Cooperative Housing Society Ltd.,
2. Mohinder Kaur Kochar Vs. Mayfair Housing Private Ltd. and Others,
3. M/s. Sarthak Developers vs. Bank of India Amrut-Tara Staff Co-operative Housing Society Ltd. in Appeal (L) No. 310 of 2012 delivered on 5th December, 2012.
4. Bharat Infrastructure and Engineering Pvt. Ltd. vs. Park Darshan CHS Ltd., delivered on 18th March, 2013 by Single Judge of this court in Arbitration Petition

No. 199 of 2013.

20. Mr. Wasoodev also distinguished the judgments relied upon by Mr. Kanade.

21. I have heard the learned counsel appearing for parties and respondent No. 6A appearing in person at length and have given anxious consideration to the rival submissions made by the parties.

22. I shall first deal with the objections raised by respondent Nos. 2 to 6C that in view of the agreement between the parties that dispute if any arising out of development agreement, Section 91 of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred as The Societies Act for short) would be applicable and this application u/s 9 is not maintainable. It is not in dispute that the existing buildings are owned by respondent No. 1 society. The object of the society is not to carry on the business of redevelopment. In view of the building of the society having required heavy repairs which could not be carried out by the members of the society, it was resolved by more than 3/4 majority to demolish the existing building and redevelop the plot for the benefit of the members. Respondent No. 1 society had accordingly passed an appropriate resolution resolving to demolish the existing buildings and to appoint a developer for the purpose of redevelopment of the property of the society. Since the object of respondent No. 1 society was not to carry on business of redevelopment, Section 91 of the Societies Act, would not be attracted to the dispute having arisen between the parties arisen out of redevelopment agreement. It is not in dispute that respondent No. 1 society has not raised any such objection about the maintainability of this petition on the ground that dispute between the petitioner and respondent No. 1 society arising out of redevelopment agreement can be filed only before the Co-operative Court u/s 91 of the Societies Act and no proceedings can be filed u/s 9 of the Arbitration Act against the society arisen out of such agreement. Be that as it may, even if no such objection is raised by the society, since the dispute arisen is not touching the business of society, such dispute cannot be filed before Co-operative Court u/s 91 of the Societies Act. Even if the agreement between the parties provides for application of Section 91 to such dispute since Co-operative Court has not jurisdiction to decide such dispute, in my view by agreement parties cannot confer jurisdiction on such Court to decide such dispute which Court does not have jurisdiction.

23. Division Bench of this Court in case of Mohinder Kaur Kochar (supra) has approved the Judgment delivered by learned single Judge of this Court in case of Vardhaman Developers Limited Vs. Thailambal C-operative Housing Society Ltd. & Ors. Learned single Judge of this Court in the Judgment of Vardhaman Developers (supra) has held that the process of re-development of the society by the developer does not constitute the business of the society within the meaning of Section 91 and thus demolition of the existing building and the reconstruction of the building of the society is not the business of the society and thus Section 91 is not attracted. In my view, since it is not the business of respondent No. 1 society to redevelop the property of the society, for dispute arisen under the said

development agreement, Section 91 of the Societies Act would not be attracted. I am respectfully bound by the Judgment of this Court in case of Mohinder K. Kochar (supra) and in case of Vardhaman Developers (supra). There is thus no merit in the submission of learned counsel appearing for respondent Nos. 2 to 5 that in view of the agreement between the parties recorded in Clause-40 of the development agreement, this petition u/s 9 is not maintainable.

24. Next objection raised in affidavit in reply by the respondents is that notice u/s 164 of the Societies Act was mandatory before filing arbitration petition. In my view, arbitration petition u/s 9 of the Arbitration Act is not a suit. Section 164 of the Societies Act is thus not attracted. In any event, since the business of the society is not of redevelopment, Section 164 of the Societies Act would not be applicable for filing proceedings against the Society. This issue also has been dealt with by the division bench of this Court in case of Mohinder Kaur Kochar (supra). It has been held by the division bench that Section 164 of the Societies Act would not be applicable to a dispute which does not touch the business of the society. I am respectfully bound by the judgment of division bench of this Court in case of Mohinder K. Kochar (supra). Objection thus raised by the respondent about maintainability of this petition on such ground is devoid of any merits and is rejected.

25. The next objection raised by the respondents is that respondent Nos. 2 to 6C are not party to the development agreement which contains arbitration clause and thus no reliefs u/s 9 which is in aid of final relief can be granted against those respondents. In support of this submission, the respondents have placed reliance on the Judgment of Supreme Court in case of Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, . Supreme Court has held that an arbitration agreement can come into existence only in the manner contemplated u/s 7. It is not in dispute that individual members of the society have not signed the said development agreement. Question however that arises for consideration of this Court is whether any interim measure can be granted by this Court against respondent Nos. 2 to 6C though they were not the signatories to the development agreement between petitioner and respondent No. 1 society.

26. Division Bench of this Court in case of Girish Mulchand Mehta (supra) has considered this issue in detail. Division Bench has held that Section 9 can be invoked even against a third party who is not a party to arbitration agreement or arbitration proceedings, if he was to be a person claiming under a party to the agreement and accordingly to be affected by interim measure. Such party who is likely to be affected by interim measure will have to substantiate that he was claiming independent right in respect of any portion of the subject matter of the arbitration agreement on his own and not claiming under a party to the arbitration agreement. This Court has held that in absence of such situation, Court has jurisdiction to pass appropriate order by way of interim measure even against such party irrespective of the fact that they are not party to arbitration agreement or the arbitration proceedings. This Court has also considered Rule

803E of the Bombay High Court (Original Side) Rules, which provides that notice of filing application has to be issued to all persons likely to be affected. Paragraphs 12 to 14 and 16 of the Judgment of division bench on this issue would be relevant which read thus:

12. The next question is whether order of formulating the interim measures can be passed by the Court in exercise of powers u/s 9 of the Act only against a party to an Arbitration Agreement or Arbitration Proceedings. As is noticed earlier, the jurisdiction u/s 9 can be invoked only by a party to the Arbitration Agreement. Section 9, however, does not limit the jurisdiction of the Court to pass order of interim measures only against party to an Arbitration Agreement or Arbitration Proceedings; whereas the Court is free to exercise same power for making appropriate order against the party to the Petition u/s 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to the Arbitration Agreement or Arbitration Proceedings does not affect the jurisdiction of the Court u/s 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the Arbitration Agreement.

13. The Appellants, however, place reliance on the decision of the Kerala High Court in the case of Shoney Sanil Vs. M/s. Coastal Foundations (P) Ltd. and Others, . In that case the question considered was whether the writ-petitioner, admittedly, a third party to an alleged Arbitral Agreement between the Respondents inter se, and who had in his favour a confirmed Court sale and certificate of such sale and delivery of possession, following and arising under an independent decree, could be dispossessed, enjoined or subjected to other Court proceedings u/s 9 of the Act? The Kerala High Court held that orders u/s 9(ii)(c) can be passed only in relation to subject matter of dispute in arbitration which may be in possession of any party since it is not the intention of the Act or any arbitration proceedings as conceived by the law of Arbitration to interfere with or interpolate third party rights. It concluded that on a plain reading of Section 9 of the Act and going by the Scheme of the said Act, there is no room to hold that by an interim measure u/s 9, the rights of third party holding possession on the basis of Court sale could be interfered with, enjoined or subjected to proceedings u/s 9 of the Act. Instead, it held that Section 9 of the Act contemplates issuance of interim measures by the Court only at the instance of party to Arbitration Agreement with regard to the subject matter of the Arbitration Agreement. The Court has, however, noted that such order can be only against the party to an Arbitration Agreement or at best against any person claiming under him. The Principle expounded in this decision is that if a third party has independent right in the subject matter of the Arbitration Agreement, Section 9 cannot be invoked to affect his rights. At the same time, the Kerala High Court has plainly opined that it is possible to pass orders u/s 9 against a third party if such person is claiming under the party to the Arbitration Agreement. Thus understood, Section 9 can be invoked even against a third party who is not party to an arbitration agreement or arbitration proceedings, if

he were to be person claiming under the party to the arbitration agreement and likely to be affected by the interim measures. The Appellants herein will have to substantiate that they were claiming independent right in respect of any portion of the subject matter of the Arbitration Agreement on their own and not claiming under the Respondent No. 2 Society who is party to the Arbitration Agreement. In absence thereof, the Court would certainly have jurisdiction to pass appropriate order by way of interim measures even against the Appellants herein, irrespective of the fact that they are not party to the Arbitration Agreement or the Arbitration Proceedings.

14. Reliance was placed on another decision of the Delhi High Court in the case of Impex Trading GmbH Vs. Anunay Fab. Ltd. and Others, . In this case relief was sought against the bankers of the Respondent No. 1 and Petitioner respectively. The Court found as of fact that the Bankers (Respondents 2 to 4) were regulated in their working by various articles of the UCP500. The liability of the Bank under the document was independent of any dispute as to breach of contract between the seller and the buyer. On this finding, the Court went on to hold that Petition u/s 9 of the Act against the Bankers who are not even party to the Consignment Agreement and the Arbitration Clause is not maintainable and deserves dismissal qua them. Once again that was not a case of person claiming under the party to the Arbitration Agreement, unlike in the present case where the Appellants were members of the Respondent No. 2 Society and would be therefore bound by the Award against the Society. The fact that the Appellants have proprietary rights in the flats occupied by them does not mean that they were claiming such right dehors the rights of the Society in the said flats. For, the Society is the owner of the land and structure standing thereon. The flats occupied by the Appellants are part thereof and in fact, allotted to the Appellants in the capacity of members of the Society. In that sense, the Appellants are persons claiming rights in the flats situated in the property which is the subject matter of the Arbitration Agreement, under the Respondent No. 2 Society who is party to the said Arbitration Agreement. Accordingly, even this decision will be of no avail to the Appellants.

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 Cooperative 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 Cooperative 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 and Others Vs. State of Punjab and Others*,). This view has been followed in the subsequent decision of the Apex Court in the case of *State of U.P. and another etc. Vs. C.O.D. Chheoki Employees' Co-op. Society Ltd. and others etc.*, . 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 proprietary 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 proprietary rights of the Appellants does not take the matter any further. For, the proprietary 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 u/s 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:

R803E. 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.

27. On perusal of the prayers in the arbitration petition, it is clear that petitioner seeks appointment of Court Receiver and mandatory injunction against respondent Nos. 2 to 6C in respect of the premises in their occupation. It is thus clear beyond reasonable doubt that any order if passed in this petition as prayed,

respondent Nos. 2 to 6C would be affected. Such parties are thus rightly impleaded as parties to the present petition and are given an opportunity of being heard and to oppose this petition. Without going into the larger issue whether respondent Nos. 2 to 6C are party to the arbitration agreement or not, not being signatories to the development agreement, in view of the fact that each of these respondents are claiming through respondent No. 1 society in respect of the properties of the society in which these members have subservient rights and in view of the fact that any orders that would be passed in these proceedings would seriously affect the rights of the respondent Nos. 2 to 6C, such interim measure can be granted by this Court u/s 9 of Arbitration Act against such parties even if they are not parties to the arbitration agreement. In my view there is no merit in the submission made by the learned counsel appearing for respondent Nos. 2 to 5 and reliance placed by the learned counsel appearing for the respondents on the Judgment of Supreme Court in case of Indowind Energy (*supra*) would be thus of no assistance to the respondents.

28. The next question that arises for consideration of this Court is whether individual members of Society can oppose the reliefs sought by the petitioner u/s 9 of Arbitration Act for seeking interim measures in view of the dispute having arisen between the petitioner and the society under development agreement pursuant to the resolution passed by more than 3/4 of majority of the members without challenging such resolutions in Court of law. On perusal of resolutions passed by the society in various Special General Body Meetings some of which were also attended by one or the other party who are parties to these proceedings, it is clear that more than 3/4th majority of the members have resolved that the existing buildings and the premises occupied by the members shall be demolished and the property be redeveloped by appointment of a developer. Society had appointed a Project Management Consultant for the purpose of preparing a report and draft tender. Tender document prepared by the said PMC appointed by the Society disclosed the area in possession of each member. Based on such tender document prepared by the society, various bidders including the petitioner submitted their bid. All these bids were opened by the society. It was resolved by the society to appoint the petitioner as developer. Draft development agreement and Power of Attorney was circulated to all the members including respondent Nos. 2 to 6. There was some suggestion given by some of the member. Perusal of the record indicates that some of the suggestions were also incorporated in draft development agreement. Draft development agreement and other documents were thereafter approved by the members of the society in one of the Special General Body Meeting by more than 3/4 majority. Some of the office bearers of the society were authorised to execute such agreement and the other documents with the petitioner developer. It is not in dispute that any of these resolutions which were passed by more than 3/4 majority as well as development agreement entered into between the petitioner and society have been impugned by any of the members in any Court of law. These resolutions, in my view are thus binding on all the members of the

society under the provisions of Societies Act and bye-laws of the society.

29. Division Bench of this Court in case of Girish Mulchand Mehta (supra) has also considered this issue at length. Paragraphs 18 of this Judgment which is relevant for the purpose of deciding this issue reads thus:

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 u/s 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.

30. It has been held by the division bench of this Court that merely because terms and conditions of development agreement are not acceptable to the members who are in minuscule minority, cannot be the basis not to abide by the decision of the overwhelming majority of the General Body of the society. It is held 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 stature 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. This Court has also adverted to the Judgment of Supreme court in case of Ramesh Himmatlal Shah Vs. Harsukh Jadhavji Joshi, in which it is held that the right so enjoyed by the member is the species of the property namely the right to occupy a flat, which assumes significant importance and acquires under the law a stamp of transferability in furtherance of interest of commerce. This Court has held that a member cannot be allowed to say that his rights in the flat occupied by him were de hors the rights of the society therein and that he is not claiming through society at all. Division Bench of this Court has held that a member is bound by the decision of the General Body of the society till it is in force.

31. In the facts of this case, it is clear that more than 3/4 of the majority of the society have passed a resolution to get the existing buildings demolished and to get the same redeveloped by appointment of the petitioner as developer. Respondent Nos. 2 to 6C who are in minority occupying three flats and few garages cannot be permitted to obstruct the society or majority members from implementing the project of redevelopment. In my view, since these respondents have not challenged the resolution passed by the society in its Special Annual General Meeting, each of such resolution is binding on the respondents. These respondents cannot be allowed to act contrary to the resolution passed by the general body of the society and are bound to follow such resolutions. This Court thus at this stage while hearing application u/s 9 of the Arbitration Act 1996 cannot consider any arguments of the members of the society contrary to such resolutions which are binding on them since such resolutions are not challenged by any of these members and are in force. Decision taken by the General Body of the society which is supreme confirming the development rights in favour of the petitioner are final and binding on all the members including respondent Nos. 2 to 6C.

32. On perusal of the record, it is clear that out of 34 members, 31 members have signed letters showing their willingness to hand over the possession to the petitioner for re-development. Only respondent Nos. 2 to 6C who have refused to vacate the premises in their occupation on one or the other grounds by not following the resolution passed by the society by 3/4th majority.

33. On perusal of record it is revealed that petitioner has taken various steps in furtherance of the execution of development agreement and has spent incurred

huge amounts on the project. Members of the society were liable to vacate their respective premises in the month of April 2013 which have not been vacated so far. In view of the obstructive attitude on the part of respondent Nos. 2 to 6C, the entire project is held up. Plans are sanctioned. IOD has been issued. Petitioner has already got the TDR loaded on the property and has spent substantial amount for acquisition of TDR. Under the development agreement, petitioner is under an obligation to construct the entire building within the time specified, time having been made the essence of the contract. Because of the obstructive attitude of respondent Nos. 2 to 6C, existing buildings could not be demolished and development process could not commence.

34. On perusal of the record, it appears that the grievance made by respondent Nos. 2 to 6C is regarding the area offered by the petitioner to respondent Nos. 2 to 6C in lieu of existing area in their occupation. The dispute has been raised also in respect of the compensation in lieu of the garage occupied by one of the member. In support of this submission, respondent Nos. 2 to 5 placed reliance on the Judgment of Supreme Court in case of Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Ltd. (supra) on the issue whether flat includes a garage or not. In my view, 31 members of the society not having disputed the provisions of development agreement and the society not opposing the reliefs prayed by the petitioner, dispute if any interest between respondent Nos. 2 to 6C with the developer or with the society will have to be decided finally in appropriate proceedings. During the course of argument upon making enquiry from the learned counsel appearing for respondent Nos. 2 to 5 as to whether they were agreeable to appear before the arbitral tribunal and make their claim if any in arbitration proceedings against the developer or the society, respondent Nos. 2 to 5 did not agree to appear before arbitral tribunal and to seek redressal of their grievance against the developer or the society. In my view, in these proceedings u/s 9 of Arbitration and Conciliation Act, this Court cannot adjudicate upon the merits of individual claims of the respondents members of the society and the same can be adjudicated only in appropriate proceedings. In these proceedings only interim measures can be granted by this Court. This Court is thus not adjudicating on the issue raised by respondent Nos. 2 to 6C whether they are entitled to any larger area as claimed. In view of the fact that more than 3/4th majority of members have passed resolution and have agreed to appoint the petitioner as developer on the terms and conditions agreed upon and recorded in development agreement, in my view, respondent Nos. 2 to 6C cannot stop the redevelopment project.

35. As far as submission of respondent Nos. 2 to 6C that even if arbitration agreement exists, since no steps were taken by the petitioner for settling the dispute by mediation which was condition precedent before invoking arbitration agreement, no relief u/s 9 can be granted in this proceedings is concerned, on perusal of record it is clear that 31 members out of 34 have agreed for redevelopment. Society is not opposing granting of any relief as it would affect majority members of the society. Three members of the society had refused to

vacate though society has passed a resolution to vacate within the time specified. Such refusal on the part of respondent Nos. 2 to 6C was already communicated to the petitioner. It is thus clear that procedure to refer the dispute to mediation before invoking arbitration agreement has been waived by the society and its member. In any event, respondent Nos. 2 to 6C having refused to abide by the resolution of the society and to implement is in teeth of the resolution passed by more than 3/4th majority and not having challenged such resolution in Court of law cannot be allowed to raise such plea. Society has not raised such plea. There is thus no merit in this submission made by respondent Nos. 2 to 6C.

36. This Court has in case of Raja Construction Co. V/s Sahara Co-op. Hsg. Ltd. & Ors., in its Judgment dated 31st August 2009 in Notice of Motion No. 2753 of 2007 has held that Court Receiver can be appointed in this type of situation with a direction to ask the members to vacate the suit premises and if necessary with the help police assistance to dispossess the occupants.

37. Division Bench of this Court in case of M/s. Sarthak Developers V/s Bank of India Amrut-Tara Staff Co-operative Housing Society Ltd. has considered this aspect and has held that dissenting minority members cannot be heard or cannot be allowed to obstruct the development project agreed by the developer having spent large amounts. It is held that appointment of a receiver is warranted having due regard to the fact that majority of the members of the society are supporting the redevelopment and have vacated their flats and if Court Receiver is not appointed, such majority members would be left in lurch at the behest of a miniscule minority. Paragraphs 16 and 17 of the said Judgment would be relevant which read thus:

16. The material before the Court is sufficient to indicate that the Appellant has a strong prima facie case for the appointment of a receiver, having invested valuable consideration towards and in execution of the agreement. But most significantly, the appointment of a Receiver is warranted having due regard to the fact that unless such an order were to be passed, 149 members of the society, who are supporting the redevelopment and of whom 143 have vacated their flats, would be left in the lurch at the behest of a miniscule minority.

17. The appointment of a receiver is undoubtedly a drastic order, but the Court is empowered to do so on well-established principles of it being just and convenient. There are several reasons which must weigh in favour of the appointment of a receiver. Firstly, the condition of the property in question is a matter of importance in the City of Mumbai which is affected by a high degree of saline corrosion. The buildings are admittedly dilapidated and in urgent need of repair or redevelopment. The Society was not in a position to carry out repairs having regard to the fact that in August 2007 the cost of repair was estimated at Rs. 1.65 crore by its structural consultant. Hence, the option of redevelopment which has been accepted in the resolution passed by the Society would have to be respected. Secondly, in the present case, an overwhelmingly large proportion

of the members of the Society have consented to the scheme of redevelopment and have in fact vacated their premises. The interests of those 149 members who are supporting redevelopment and of whom 143 have vacated are of paramount concern. Thirdly, unless a receiver was to be appointed, it will be open to a dissenting minority of a few members to obstruct and defeat the will of the large majority. Fourthly, each of the dissenting members is also, like all the members of the Society, entitled to permanent alternate accommodation free of cost in the redeveloped building. An enhancement of the existing areas in occupation is envisaged in the redeveloped building. In the meantime, each of the members shall be entitled to compensation for transit accommodation as agreed with the Co-operative Society and as paid to all other members. This is not a case where a scheme of redevelopment is oppressive to the legitimate interests of a minority nor has any such submission been urged.

38. In my view, petitioner has made out a case for appointment of Court Receiver in terms of prayer clauses (a) and (b) as prayed. In view of such obstructive attitude on the part of respondent Nos. 2 to 6C, petitioner deserves the relief of appointment of Court Receiver with further directions as prayed.

39. Arbitration petition is made absolute in terms of prayer clauses (a) and (b). Till Court Receiver takes possession, ad interim order passed by this Court to continue. No order as to costs.

Learned counsel appearing for respondent nos. 2 and 3 prays for stay of operation of this order for a period of six weeks from today which is vehemently opposed by the learned counsel appearing for the petitioner. Operation of this order is stayed for the period of three weeks from today. It is made clear that no further extension will be granted.