
(2012) 08 BOM CK 0180

In the Bombay High Court

Case No : Appeal No. 413 of 2011 In Notice of Motion No. 172 of 2010 In Suit No. 144 of 2010 With Appeal No. 487 of 2011 In Notice of Motion No. 173 of 2010 In Suit No. 145 of 2010

M/s. Sumer Associates

APPELLANT

Vs

Margaret Almeida and Others
 The Bombay Catholic
Co. op. Housing society Ltd. Vs Priti G. Mungrey and Others

RESPONDENT

Date of Decision : 09-08-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 1 ABR 48 : (2013) 2 ALLMR 669

Hon'ble Judges : Mohit S. Shah, C.J;N.M. Jamdar, J

Bench : Division Bench

Advocate : Rafiq Dada with Dr. Birendra Saraf with Mr. Vatsal Merchant instructed by M/s. Kishore Thakordas and Co., Appeal No. 413 of 2011 In Notice of Motion No. 172 of 2010 In Suit No. 144 of 2010, Mr. Ravi Kadam with Dr. Birendra Saraf with Vatsal Merchant instructed by Kishore Thakordas and Co., Appeal No. 489 of 2011 In Notice of Motion No. 172 of 2010 In Suit No. 144 of 2010, Mr. Prasad Dhakephalkar with Mr. Vineet Naik and Mr. Lalan Gupta instructed by M/s. Dhruve Liladhar and Co. Appeals 489 and 487 of 2011 Bombay Catholic CHS, for the Appellant; Rohit Kapadia instructed by Mr. Amardev Uniyal for Respondents Nos. 1 to 9, Mr. Iqbal Chagla with Mr. F. Devitre, Sr.Counsel and Mr. J.P. Sen, Gaurav Joshi and Mr. Vishesh Malviya and Mr. R.P. Carvalho instructed by M/s. Federal and Rashmikant for Respondent Nos. 27 and 28, Mr. Clive D'souza for Respondent No.20, Mr. V.A. Thorat with Mr. Chetan Kapadia and Mr. Ivon Peter D'cruz instructed by Lokhandwala and Co. for Respondents Nos. 30 and 31, Appeal No. 413 of 2011 In Notice of Motion No. 172 of 2010 In Suit No. 144 of 2010, Mr. Rohit Kapadia with Mr. Aditya Thakkar instructed by Mr. Rafique Vanoo for Respondents Nos. 1(I), 1(II), 2, 3 and 5, Mr. E.P. Bharucha with Mr. Farhan Dubhash and Mr. Cyrus Bharucha instructed by Mr. Amardev Unniyal for Respondents Nos. 3, 5, 6, 7A, 8, 9, 11, 12 and 13 in Appeal No. 489 of 2011, for the Respondent

Final Decision : Allowed

Judgement

Mohit S. Shah, Chief Justice

1. All these appeals are directed against the order dated 5 May 2011 of the learned trial Judge of this Court allowing the respondents/plaintiffs' notice of motion and granting injunction in terms of prayer (a)(i) of the notice of motion and also directing all the parties to maintain status-quo in respect of the suit property pending the hearing and final disposal of the suits, being suit No.144 of 2010 and suit No.145 of 2010. Prayer clause (a)(i) of the notice of motion reads as under:

(a)(i) Issue an Order and Injunction restraining the Defendant Nos. 1 to 26 and Defendant No.29 from taking any steps in furtherance of the said purported Resolution dated 6th December 2009 and/or Conveyance dated 7th December 2009.

Broad facts leading to filing of these appeals are as under:

The land in question admeasuring about 5 1/2 acres in Santacruz, Mumbai belongs to Bombay Catholic Co-operative Housing Society Ltd. ("the Society" for brevity). There are 25 structures of the Society scattered over the land. There are 69 tenements in these 25 structures. The tenements are occupied by 69 tenants, out of whom 54 are members of the Society. Other 15 tenants are tenants simplicitor. The challenge in the suits filed by 15 persons is to the Resolution dated 6 December 2009 passed by the Society for giving development rights to Robin Home Developers Pvt.Ltd., who have nominated M/s.Sumer Associates as their nominees. As per the said Resolution the developer is to construct 230 tenements-69 to be allotted to the 69 tenants in possession of the existing tenements and 161 to be allotted to the members (allottees members) who had applied more than 40 years back for allotment of tenements.

2. 25 structures in question were constructed some time in the year 1930 and the Society had passed a Resolution on 25 September 1966 to demolish the existing structures and to construct new tenements. That Resolution and the order of the Registrar of the Co-operative societies, Mumbai rejecting challenge to the said Resolution were assailed in Misc.Petition No.250 of 1972 filed by the petitioners who are plaintiffs in the present suits. Misc.petition came to be dismissed by judgment dated 17 April 1972 of a learned Single Judge of this Court.

3. The learned Single Judge held that the petitioners therein, who are present plaintiffs, have no proprietary interest in the land and tenements belong to the Society which is the absolute owner of the property. The aforesaid judgment of the learned Single Judge was confirmed in appeal, which came to be dismissed by the judgment dated 25 July 1972.

4. Some time in the year 1979, some tenant-members of the Society made an application dated 3 June 1979 to the Deputy Registrar of Co-operative Societies for bifurcation of the Society u/s 18 of the Maharashtra Co-operative Societies

Act, 1961 (hereinafter referred to as "the Act"). By order dated 22 February 1983, that application was granted, but the said order was challenged by the Society by filing a writ petition in this Court. The writ petition against the order of bifurcation came to be dismissed by the learned Single Judge of this Court by judgment dated 21/22 October 1999. However, by judgment dated 4 August 2007, the Division Bench in appeal No.20 of 2000 set aside the said judgment and remanded the matter to the authorities under the Act for considering the question of bifurcation. The Deputy Registrar of Co-operative Societies by order dated 29 September 2009 ultimately dismissed the application for bifurcation. However, the Joint Registrar of Co-operative Societies in appeal remanded the matter back to the Deputy Registrar. That order of the Joint Registrar came to be challenged in revision before the Minister of Co-operation. During the pendency of the proceedings before the Minister, the Association of Tenant-members, who had made the application for bifurcation, decided to withdraw the application and to co-operate with the Society for redevelopment and also for implementation of the Society's Resolution dated 6 December 2009. By order dated 31 May 2010, the Minister accordingly allowed the revision and quashed the bifurcation proceedings.

5. Aggrieved by the above order of the Minister, the present plaintiffs filed a writ petition. The plaintiffs also filed suits challenging the Resolution dated 6 December 2009 of the Society and the subsequent conveyance deed dated 7 December 2009. The learned Single Judge has, by the impugned order dated 5 May 2011, granted interim injunction after giving prima facie finding that the question of implementation of the Society's Resolution dated 6 December 2009 cannot be considered so long as the issue of bifurcation is not finalized and the learned Single Judge also found fault with some of the clauses of the Resolution under which the tenant-members were going to lose their membership. The learned Single Judge also held that it was not certain as to how the amount of Rs.70 crores offered by the developer and deposited in the escrow account was to be disbursed amongst the members of the Society. The learned Single Judge accordingly granted interim injunction directing the parties to maintain status-quo in respect of the suit property, that is all the structures on the land and the land admeasuring 5 1/2 acres in Santacruz, Mumbai, till final disposal of the suit.

6. Mr. Rafiq Dada, learned senior counsel appearing for the developer, Mr.Thorat, learned senior counsel appearing for the majority of the tenant-members and Mr. Dhakephalkar, learned senior counsel appearing for the Bombay Catholic Co-operative Housing Society have made the following submissions:

(i) The learned Single Judge has held that the clause requiring the members, who are going to be allotted tenements under the development agreement, to give up membership of the present Society runs counter to Co-operative principles, because member can not be expelled u/s 35 of the Act except for reasons indicated in the said section and without the approval of the Registrar, but the present situation cannot be said to be falling u/s 35 of the Act.

The learned counsel submitted that there is no question of the tenant-members losing their membership. Once 69 tenant-members as well as 131 allottees will be given tenements to be constructed under the development agreement, they will have to become members of the Co-operative Society to be formed by the developer u/s 10 of the Maharashtra Ownership of Flats (Regulation of the Promotion, Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as "MOFA") and rule 10 of the rules framed thereunder. Since such tenant-members and the allottees cannot continue to be members of two Co-operative housing societies, they will have to give up the membership of the Bombay Catholic CHS.

It is further submitted that this process, apart from not causing any loss to the tenant-members like plaintiffs or to other tenants, will, in fact, confer much higher rights of ownership on the tenants and, therefore, the Resolution is for the benefit of the tenant-members and there is no loss or prejudice to the tenant-members, who otherwise also have no proprietary interest in the property as already held by this Court as far back in the year 1972 in the misc. petition filed by these very plaintiffs, which judgment has become final and, therefore, operates as res-judicata.

(ii) As regards bifurcation of the Society u/s 18 of the Act, it is submitted by the appellants that the bifurcation issue has already been closed by the Association of the Tenant-members having decided to withdraw the application for bifurcation and the government having closed the proceeding. Out of 69 tenant-members only 16 persons are invoking the provisions of section 18 for bifurcation of the Society. It would, therefore, not be possible for any authority to accept any such request, when 16 plaintiffs have flats scattered in some of the 25 structures (belonging to the Society) which are themselves scattered over the 5 1/2 acres of land belonging to the Society.

(iii) It is submitted that the Resolution passed by majority of the members, who attended the Special General Meeting on 6 December 2009 after a notice of 10 days as against the requirement of giving only 5 days notice under Bye-law No.44, is binding on all the members of the Society, and no member has a right to challenge such Resolution merely because the member does not agree with the view of the majority. It is also submitted that the notices for the above meeting were published in newspapers like Times of India, Economic Times and Maharashtra Times. Agenda of the meeting and a detailed explanatory note was submitted to the members in advance. Intimation about the meeting was also given to the Registrar of Co-operative Societies and in its report dated 30 December 2009 the Deputy Registrar, Co-operative Societies specifically mentioned that the meeting was held properly.

It is submitted that in view of the report of the Deputy Registrar of Co-operative Societies it is clear that the Society had complied with all the legal formalities and the Special General Meeting was held properly, peacefully and democratically and that the members present were also given proper opportunity to express

their views and thereafter the Resolution was passed.

(iv) It is, therefore, submitted that the majority of the members of the Society having already passed the Resolution and having decided to enter into development agreement with the developer, the plaintiffs have no right to make any grievance about any alleged illegalities.

(v) It is also submitted that as against 230 members, who are going to get new tenements under the development agreement, (including 131 allottee members who are going to be allotted tenements under the redevelopment agreement and 54 tenant-members), only 15 members have filed the present litigation and therefore such a small majority should not be allowed to stall the redevelopment of the property of the Society for which more than 200 members have been waiting for the last more than 45 years.

7. Mr. Rohit Kapadia, learned senior counsel appearing for the original plaintiff and Mr. Bharucha, the learned senior counsel appearing for some of the tenant-members, all of whom aggregate to 16 in number, have supported the order of the learned Single Judge.

8. At the hearing of these appeals, Mr. DeVitre, learned senior counsel for the another developer called "Chavan" submitted that his client was ready to offer Rs.125 crores to the Society and, therefore, also the injunction granted by the learned Single Judge ought to be confirmed.

9. Before we proceed to consider the rival contentions, we may briefly indicate the contentions raised by the plaintiff which fall under two heads,

(a) The tenant-members of the society constitutes a different category than the other members and form a class by themselves. It is, thus, necessary to have a bifurcation of the society and permit the tenant-members to develop the property in their possession on their own and till such bifurcation takes place, injunction should be continued;

(b) Even assuming that the appellants are considered as members of the society, the decision of the society needs to be stayed and no action on the basis of it be taken, as the decision is contrary to the spirit of co-operative movement and is also passed in breach of the Rules and Regulations;

10. We will take up the contention regarding bifurcation first. This argument proceeds on the premise that the tenant-members have a separate identity, proprietary interest and form a class by themselves. The question whether the tenant-members have a separate identity and right, arose for consideration before the learned Single Judge of this Court in Misc. Petition No.252 of 1972. The applicants in the Misc. Petition and plaintiffs in the present suits are same. The learned Single Judge considered the argument made on behalf of applicants that they have a proprietary right in the property as tenant-members. The learned Single Judge (Vimadalal, J.) observed as under:

This is an entirely frivolous petition by the members of a co-operative society for writs and order under Art.226 of the Constitution quashing the orders passed by the respondents. The effect of the impugned orders was that the suit filed by the present petitioners for declarations that the Resolutions passed at the annual general meeting of the first respondent society were illegal, void and inoperative in law and that the present petitioners to quiet and peaceful enjoyment of their respective tenements, stood dismissed by the appropriate authorities under the Maharashtra Co-operative Societies Act, 1960. In challenging the said orders by the present petition, the petitioners have raised various contentions, but I need refer to only three of them, and they are as follows:

(1) that the general body of the first respondent society has no power to deprive the petitioners of their tenements;

.....

In support of the first proposition, Mr. B.R. Nayak has relied on the decision of the Full Bench of this Court in the case of Manohar Vs. Konkan Co.op.Housing Society (63 Bom. L.R. 1001 at 1006), but I am afraid the said decision instead of helping Mr. Nayak on the point, is against him in so far as it lays down in unmistakable terms that it is the society alone which is the absolute owner of the property and the members of the Society have merely the rights and obligations conferred by the various provisions of the statute itself. It is, therefore, quite clear that it is the society that, as the absolute owner of the property, would have all the rights which any other owner of the property has, and that the petitioners have no proprietary interest at all in their tenements. Under the circumstances, the petitioners do not have even a prima facie case on the point that the first respondent society has no right to deprive them of their tenements.

(emphasis supplied)

11. The learned Single Judge (Vimadlal, J.) accordingly dismissed the Misc. Petition by his judgment and order dated 17 April 1972. The applicants therein filed an Appeal No.74 of 1972, which was dismissed by the Appeal Bench by order dated 25 July 1972. The contention that tenant-members have a proprietary interest in the property was thus conclusively negated by the order passed by the learned Single Judge on 17 April 1972 and by Appeal Bench on 25 July 1972. These judgments and orders are passed between the same parties as in the present suit. The findings recorded by the learned Single Judge and the Appeal Bench have attained finality, as far as the parties are concerned, and the said findings operate as res-judicata. It is, thus, not open to the plaintiffs to contend that the plaintiffs have a special proprietary interest in the property and the society cannot remove them from their possession.

12. In view of the decision rendered inter se between the parties in respect of the rights of the original plaintiffs, reliance placed by the by the learned counsel for the original plaintiffs on the decisions of the Apex Court in Sanwaramal Kejriwal v/s. Vishwa Cooperative Housing Society Ltd & ors., 1990(2) SCC 282

and in Anita Enterprises and Another Vs. Belfer Coop. Housing Society Ltd. and Others, will be of no assistance.

13. Apart from findings recorded by the learned Single Judge referred to above, by the order dated 12 April 2012, even the Deputy Registrar has rejected the application of the plaintiffs and others for bifurcation of the society. The issue of bifurcation is going round from Court to Court for the last 30 years and ultimately by order dated 12 April 2012, the application for bifurcation has been rejected. The plaintiffs are stated to have filed an appeal. The position as on today, however, is that the authorities of the Co-operative department have rejected the application for bifurcation and this order has not been set aside.

14. It was contended that in the earlier round of litigation when the matter was remanded back for fresh consideration on the issue of bifurcation, this Court (D.K. Deshmukh & J.H. Bhatia, JJ) had passed an order of remand only on a technical ground and the fact that bifurcation was necessary was upheld. We have perused the order passed by the Division Bench dated 4 August 2007, on which reliance is placed by the plaintiffs. While remanding the matter, the earlier order in favour of the plaintiffs in respect of bifurcation was set aside. We do not find that the power of the concerned authority to decide the issue afresh was curtailed in any manner. Thus, it cannot be said that the order passed by the Deputy Registrar of Co-operative Societies dated 12 April 2012 was in any way in contravention of the order passed by the Division Bench dated 4 August 2007.

15. Apart from the legal aspect of the claim for bifurcation of the society, we have to take note of the practical side of the claim. The plaintiffs seek the bifurcation not for the sake of bifurcation alone but in furtherance of a particular purpose. They want the society to be bifurcated so that the tenant-members can develop the suit plot on their own. First hurdle in their way, however, is the plaintiffs do not represent all the tenant-members who are 69. The plaintiffs are only 15 and the suit is not filed in a representative capacity. It cannot be presumed that the plaintiffs are agitating the issue on behalf of all or at least majority of tenant-members. No leave of the Court is sought to agitate the issue on behalf of the other tenant-members. In fact an unregistered association of tenant-members is party to these proceedings and they have strongly disputed the claim of plaintiff. The second hurdle is that, as acknowledged by the learned counsel for the plaintiffs, if the tenant-members are to develop the property on their own, they will have to accommodate the 162 allottee members. There is no material placed on record to show that these 162 allottee members are agreeable to occupy flats in the building to be constructed by the plaintiffs. The suits having not been in representative capacity, the burden was on the appellants to show that they had the support of all tenant-members as well as the allottee members. No such evidence is placed on record. Thus, the position that emerges is: bifurcation has not been permitted, the plaintiffs are only 15 out of 69 tenants, they have not filed the suits in representative capacity, they have not demonstrated that they have support of 162 allottee members. In view of

this position, we fail to appreciate how the plaintiff can claim that they will construct the building on their own and not abide by the decision of the Society. We do not find even prima facie merit in this claim.

16. We called upon the learned counsel appearing for both parties to produce a sketch showing the location of structures in possession of the plaintiffs. A sketch has been produced on record. It reveals that the bungalow type structures in possession of the plaintiffs are widely scattered and do not constitute homogeneous block. The third hurdle is, therefore, formidable. It is difficult to appreciate as to how these 15 plaintiffs can develop the property together when their own structures are scattered at different places and are inter-spaced with structures of other tenant-members, who are opposing the plaintiff. The only way the plaintiffs can carry out redevelopment is by developing the entire suit plot. For that purpose, the plaintiffs must demonstrate that all the tenant-members are agreeable for the redevelopment through the plaintiffs. Even assuming that bifurcation of the society is allowed, it is not demonstrated how the plaintiffs will surmount these practical difficulties.

17. The plaintiffs have been successful in stalling the redevelopment for almost 40 years, that is in spite of a clear finding that they have no proprietary interest or ownership rights in the property. The plaintiffs are seeking to develop the suit property through respondent No.27-Mr.Chavan and his assignee. It is the intention of the plaintiffs to seek bifurcation of the society and then to get the property developed through the respondent No.27 and his assignee. For that purpose reliance has been placed on Memorandum of Understanding (MOU) entered into with the respondent No.27 dated 30 June 1987. We have gone through the MOU. It appears that only 8 tenant-members had entered into an agreement with respondent No.27 for development of the property. Once there is a finding, which binds the parties, that the tenant-members have no independent right, the agreement executed by them, that too only by 8 tenant-members, prima facie cannot be relied upon.

18. Thus, we find merit in the submission of the learned counsel for the appellant that the issue of bifurcation is kept alive by the plaintiffs only at the behest of the respondent No.27 and his assignee, so as to somehow stall the redevelopment of the property. We have noted that even if bifurcation is allowed, it is practically impossible for the plaintiffs to develop the property on their own.

19. Thus, we do not find that, merely because the issue of bifurcation is raised by the plaintiffs, redevelopment of the suit property needs to be stayed, till that issue is decided.

20. The next point that arises for consideration is the validity of the decision of the Society to entrust the work of development to M/s.Sumer Developers. The contention is assuming the Society is not bifurcated and original plaintiffs are members of the Society, they are entitled to challenge the decision of the Society, if it is not in consonance with law and spirit of co-operative movement.

21. The learned counsel for the original plaintiffs has drawn our attention to Clause 6 of the Resolution dated 6 December 2009. Clause 6 of the Resolution reads as under:

6. The Allottee and Tenant members immediately on execution of the Conveyance of the said Land by the Society shall be deemed to have ceased to be members of the Society in lieu of their right of allotment and right of acquiring accommodation on the said land as provided under the said Conveyance.

22. Relying on this clause, it is submitted that upon conveyance being completed with Sumer Associates by the Society, allottee and tenants-members will cease to be members of the Society and such course of action is clearly not in the spirit of co-operative movement. It is submitted that a Resolution that states that the allottee members and the tenant-members would be thrown out of the Society, is bad on the face of it. However, as rightly pointed out by the learned counsel for the Society, membership of a co-operative Society cannot be automatically cancelled. Sections 25, 25A and 35 of the Maharashtra Co-operative Societies Act lay down a procedure for removal of a member from a co-operative Society. It can not possibly be done by a mere resolution. Prescribed procedure under the Act for removal of a member will have to be followed. The learned counsel for the Society has further pointed out that the said clause is not to operate by itself. It is merely a step towards transferring the membership of the tenant-members and allottee members to the new building. It is pointed out that when the new building will be constructed, under the provisions of Maharashtra Ownership of Flats (Regulation of the Promotion, Construction, Sale, Management and Transfer) Act, 1963 a co-operative society will be formed of the occupants of the new building. It will be mandatory u/s 10 read with Rule 8 of the MOFA to make such tenant-members and allottee members, members of the new Society. We find this explanation satisfactory. The clause in the Resolution does not purport to remove the original plaintiffs as members of the Society, but it is incorporated only to facilitate the smooth induction of the tenants and allottee members in the new building. Thus, we find no substance in the argument of the plaintiffs that the Resolution of the Society is against the spirit of co-operative movement on this count.

23. Next argument is based on the period of notice calling the meeting. Relevant pleadings in the plaint in this regard are as-

17. Meanwhile, during the pendency of the aforesaid proceedings and the challenge to the Order dated 29 September 2009 of the Divisional Joint Registrar, by a Notice dated 26 November 2009 (with an 'Explanatory Statement' thereto), Defendant No.1 Society convened a Special General meeting on 6 December 2009 to consider a proposal for conveyance of the said property i.e. Willingdon East to Defendant No.30 or to their nominee Defendant No.29 on 'as on where is basis' on certain terms including inter alia, payment of a sum of Rs.70 crore to the Society and provision of accommodation to certain classes of

persons including the tenant-members and allottee-members. The said Notice and Explanatory Statement thereto is plainly tricky and misleading in material particulars. Also, the said notice was convened by giving a very short notice of merely 10 days, considering the large number of members viz, approximately 762 members of Defendant No.1 Society.

24. The notice of the meeting was circulated to all the members. No grievance is made that the notice was not received by the original plaintiffs. A contention has been raised that the notice did not give adequate time to the members to prepare themselves for the meeting. We find no substance in this argument. Bye-laws of the Society have been placed on record. Bye-law No.44 reads as under:

44. Notice convening every General Meeting shall state the time and place thereof and the office bearers, if any, to be elected there at the every purpose for which it is being conveyed and shall be posted or sent to the registered addresses of the members in the case of the annual General Meetings not less than 10 days before the date of the Meeting and in the case of a special General Meeting not less than 5 days before the date of the meeting, unless in the case of an emergency the Committee, unanimously direct shorter notice to be given. No General Meeting shall be invalidated by the non-receipt of any notice thereof by any members.

25. Notice for Special General Meeting of the Society requires 5 days period. Admittedly the notice has been issued for a period of 10 days. The notice has been widely published in the newspapers. It has been published in the leading English and regional language dailies, such as Times of India, Economic Times and Maharashtra Times. 255 members attended the meeting and the Resolution was passed by the requisite majority. No fault can be found with the procedure adopted by the Society for passing the Resolution. Notice as required under the Bye-laws was given and the Resolution is passed by a requisite majority of members.

26. It is the contention of the plaintiffs that the meeting was held in undemocratic manner and even the officers of the Co-operative Department were not allowed to attend the meeting. The report made by the officers of the Co-operative Department in respect of the meeting is placed on record. The Deputy Registrar made the report to the Additional Registrar of Co-operative Societies in respect of the meeting dated 6 December 2009. The Deputy Registrar was directed to attend the meeting dated 6 December 2009 by the Additional Registrar. The Deputy Registrar reported as under:

7. I have personally found that nearly 250 members were present. The S.G.M. was conducted in a very proper and democratic manner. The members present were given proper opportunity to express their views on Managing Committee six members raised questions against the proposals and many spoke in favour. The Office bearers were replying the queries properly and to satisfaction of the members. At the end, an arrangement was made to have secret ballots, where

all members were provided free, close and proper arrangement to cast their votes. The office bearers, committee members were sitting on dais and not interfering with the voting process. No any outsiders were present, save and except myself and my staff. There were no complaints of any members even after meeting was concluded. I am thus, of the view that the S.G.M. Of the Society was held properly, peacefully democratically.

27. No reason is placed on record to doubt the version of the Registrar. Thus, we find no merit in the contention of the original plaintiffs that the meeting was held in an illegal manner.

28. It was then contended by the plaintiffs that the meeting was just a farce and the Society had decided in advance to grant the work of redevelopment to M/s.Sumer Associates and its pre determination is evident from the fact that the MOU was executed immediately on the next day. It was also urged that when an offer of Rs.75 crore was made as against the offer of Rs.70 crore of M/s.Sumer Associates, the Society did not even bother to consider that offer. However, when the meeting took place, it was not a stand alone incident. The meeting took place with the backdrop of forty years of litigation. We may refer to the explanatory note circulated along with the notice of the meeting dated 6 December 2009. This explanatory note gives a brief background of the circumstances in which the meeting was called. Following paragraphs are relevant:

(1) Members are aware that the Deputy Registrar of Co-op.Societies H/West Ward, Mumbai had vide Order dated 28-11-2007 bifurcated our Society whereby over 500 members would have been left without any hope of accommodation or any compensation in lieu thereof. Under the Order those 500 members would be joined into a Society of plot holders while another Society comprising all tenants (including non-members) and allottees would be given the entire 5 1/2 acres of land. Both Societies would be formed under new bye-laws and The Bombay Catholic Co-op. Housing Society Ltd. Would stand dissolved.

1.1) The Society had Appealed against the said Order dated 28-11-2007 which, after vigorous effort was stayed only 24 hrs before. It could become effective. Apprehending prejudicial action by the co-operative department the Society had petitioned the Hon''ble High Court which vide Order dated 06.03.2009 granted a stay for four weeks on any Order passed by the Divisional joint Registrar Co-op. Societies, Mumbai. Ultimately vide Order dated 29.09.2009 the Divisional Joint Registrar, Co-op.Societies, Mumbai had set aside the bifurcation but with a direction that it should be considered afresh and then a fresh Draft Order be prepared. Despite specific directions by the Hon''ble High Court the various points of merit submitted in the Society''s favour were not considered in the Order dated 29.09.2009.

1.2) This unfortunately has put the Society back to the same position where it was in 1979 with one important difference. In 1979 there was only one builder involved with our tenants while today there are three builder groups involved

with either the tenants or allottee members. With this scenario it is not surprising that in the course of various hearings before the Deputy Registrar Co-op. Societies and Divisional Joint Registrar Co-op. Societies, Mumbai it has been found that many points of merit and fact which prove that there should be no grounds for bifurcation are not recorded and considered. The full order dated 29-09-2009 of the Divisional Joint Registrar Co-op. Societies, Mumbai along with the Society's written submissions in the matter are available for inspection at the Society's office during office hours.

1.3) Despite the Stay Order it was shocking to note that the Deputy Registrar, Co-operative Societies, H/West Ward sought to start the bifurcation hearing afresh on 15.10.2009 in gross Contempt of Court. The Society has opposed all attempts to bifurcate our Society and thereby deprive any selection of our members their bonafide, genuine right and entitlement to a share in our Society and in its property.

(2) Without doubt, the new Building Scheme (NBS) if implemented by the Society itself, especially within the parameters approved at the Annual General Meeting on 5.11.2000 would result in excellent benefit to all members. However, as it is now well known, the society is saddled with unnecessary litigation before various Courts and legal forums. Many tenants have opposed the NES. Initially, Mr. B. Chavan actively assisted many tenants of the society and subsequently he also involved the Meredlas in their application for Bifurcation of the Society. It is presently therefore, impossible to proceed further or implement the NBS as previously envisaged especially in view of subsequent development.

2.1) Unfortunately some allottee members involved one Mr. Sudhir Shetty/Charisma Builders to intervene and take over the Willingdon Estate property provided only allottees were accommodated. Charisma offered the Society Rs.5 crores for the property. These allottees later also entered into agreements with Kaybee Developers Pvt. Ltd., which while making no offer to the Society joined the Chavan-Meredla tenant group to seek a bifurcation of the society.

(2.2) With resourceful builders supporting our opponents, the Society has been unable to end the litigation favourably and hence we have been unable to commence any development. Furthermore the prospects of any development by the Society itself are now bleak. Despite detailed directions from the Hon'ble High Court vide its Order dated 06.03.2009, the relevant facts, Orders and Decrees were being attempted to be overlooked and not completely recorded during the hearings. The Society is apprehensive that, due to the opposing influences, prejudicial Orders would be hurriedly passed against the Society and thereby involving endless further litigation. This will deny our members any benefit and only lead to further complications.

(3) In this situation and background and with a view to put an end to the litigation which is going on for several decades the Committee was compelled to explore all possibilities of an amicable settlement which would benefit all

members. Accordingly attempts were first made to settle directly with Chavan-Meredia and with Kaybeen Developers Pvt. Ltd. When these attempts failed the offers received from Orbit Corporation, M/s. Kamla Builders; Robin Home Developers Pvt. Ltd., Akruti Nirman, Aththi-Aristto and many others were reviewed. Unfortunately due to the litigations no known large builder was prepared to make an unconditional offer or "as is where is" basis. Most offers wanted the Society to first settle the pending litigations favourably before release of any payments. It is not possible for the Society to commit to settling its litigations on its own in the foreseeable future.

3.1) Considering the nature and/or complexity of the issues involved, and the imminent possibility of losing everything it was felt that the Society would require the assistance of a powerful and resourceful party to arrive at the final settlement with all concerned. In the totality of facts and circumstances and all offers it was found that the offer for purchase of the property from Robin Home Developers Pvt. Ltd. (RHDPL) was most favourable and meets the requirements of all the members. They finally agreed to get the issue of Bifurcation resolved in favour of the Society provided that after which the society, would not entertain any other offers to enable a peaceful resolution they negotiated for settlements with all the three builder groups which had previously intervened with the intention of favouring only one section of members. Accordingly a detailed offer was negotiated with RHDPL where-under all sections of members were considered and this was approved by the Committee after it was discussed and considered at length on 17.09.2009, subject to General Body's sanction. On 29.09.2009 the Order of Bifurcation was quashed. Thereafter, RHDPL has tied up and nominated the main implementing company/builder M/s. Sumer Associates to complete the development. This overall settlement was the only way whereby all members could be benefited in some way whether by accommodation or by way of monetary compensation towards acquiring accommodation elsewhere.

(emphasis supplied)

29. These passages give an explanation as why the Society decided to go ahead with the resolution in an expedited manner. In spite of wide publicity given by the Society, only Robin Home Developers/M/s.Sumer Associates came forward with a proposal of redevelopment and many other developers did not show any interest in the redevelopment proposal. An amount of Rs.70 crore was kept in escrow by M/s.Sumer Associates. The Society, at the time of meeting, had only one proposal i.e. of M/s.Sumer Associates, who had ensured the sum of Rs.70 crore. During the meeting some of the tenants-members made an offer of Rs.75 crore orally. The Society, thus, had to weigh this oral offer made without depositing of single paisa, as against the concrete proposal of M/s.Sumer Associates, who had already kept the amount of Rs.70 crore in escrow. In the circumstances which have been narrated in the note above, we do not find anything suspicious or malafide in the action of the Society in not considering the offer of Rs.75 crore made by some of the tenant-members last minute during the

meeting. The learned counsel for M/s.Sumer Associates and the Society have placed on record documents to demonstrate that the offer of Rs.75 crore made by tenant-members was in fact made by Mr. Chavan just to scuttle the redevelopment project being given to M/s. Sumer Associates. With litigation between the parties spanning forty years and imminent likelihood of an exparte ad-interim orders being sought by other developers acting against the interest of the Society, the action of the Society of immediately executing agreement next day, can be well understood.

30. Thus, we do not find that any prima facie case is made out to doubt the validity of the decision of the Society to award the work of redevelopment to M/s. Sumer Associates. The meeting was called as per the bye-laws, wide publicity was given; only one developer had come forward with a concrete offer, who kept an amount of Rs.70 crore in escrow; the meeting was attended by requisite majority, thus the Resolution was validly passed. We are not in agreement with the learned Single Judge that the plaintiffs have made out a prima facie case.

31. The next question that would arise is whether there is any balance of convenience or special equity in favour of the plaintiffs. It has to be appreciated that the Society had taken a decision to redevelop the property as far back as in 1966. Thus, it is for last almost 40 years the property has remained to be developed. The issue whether the tenant-members have any proprietary interest was settled as far back as 1972. In spite of this position, some of the tenant-members have not permitted the redevelopment to take place by pursuing applications for bifurcation of the Society. As regards bifurcation, we have already recorded our opinion in the earlier paragraphs. Out of 762 members of the Society, only 15 persons have filed two suits and thus, the entire project is held up by a microscopic minority of the Society. This minuscule minority has successfully managed to stall the decision of overwhelming majority of members to redevelop the property. The developer, M/s.Sumer Associates has kept the amount of Rs.70 crore in escrow for the last almost 3 years. We have also noted that apart from the legal questions it will be practically not possible for these 15 persons to develop the property separately.

32. It was urged by the learned counsel for the appellants that Mr. Chavan is instigating the plaintiffs to carry on the litigation. Bills submitted by the Attorneys have been placed on record, to show that Mr. Chavan has been actively instrumental in giving instructions to the solicitors/counsels for the plaintiffs. The correspondence is placed on record to demonstrates that the offer of Rs.75 crore has been made at the behest of Mr. Chavan. Mr.Chavan is a party to the proceedings and his right, if any, is based on the MOU executed in his favour by only 8 tenant-members. Mr.Chavan was present at the conferences held by the plaintiff" solicitors as evidenced from the bills sent by the solicitors for the conferences held on 29 September 2009, 4 December 2009, 5 December 2009 and 12 December 2009 regarding writ petitions/suits filed by the plaintiffs against the Society. Having seen the conduct of the said developer-Mr.Chavan,

the Society had no confidence in him and his associates and has expressed confidence in the M/s.Sumer Associates. It is for the Society to decide who should be given the development rights and not for a small minority of 15 persons like the plaintiffs. The plaintiffs urged at length before us that the course adopted by the Sumer Associates is inequitable and bad in law. However, when the counsel for Mr. Chavan at the end of the hearing made an offer for higher figure and act exactly in the same manner as M/s. Sumer Associates, no objection was raised by the plaintiffs. No contention was then raised that development through Mr.Chavan in the same manner as M/s.Sumer Associates will affect the claim of plaintiffs of bifurcation of the Society. Thus upon offer of Mr.Chavan, all arguments of the plaintiffs based on law and equity vanished. This conduct of the plaintiffs is relevant when the Court considers passing equitable orders. Such conduct of the plaintiffs themselves is against the spirit of co-operative movement and there can be no other higher breach of principles of co-operative movement when a small minority of members stall the decision of overwhelming majority of members and deprive the members of their legitimate claim. The Court proceedings cannot be used as an instrument of harassment and extortion. Prima facie, we find substance in the contention of the Society that Mr. Chavan is using the plaintiffs as a tool to block the redevelopment of the Society.

33. On the other hand, the Society has pointed out that the Society has already paid Capital Gain Tax of Rs.11 crore on Rs.70 crores, which have been deposited by M/s.Sumer Associates. The amount of Capital Gain Tax is substantial. It has been placed on record that as per the conveyance executed by the Society in favour of M/s.Sumer Associates, 652 members will be benefited from the redevelopment. Each of the 54 tenants-members + 15 tenants will be provided new housing on ownership basis free of cost. 161 allottee members who have been waiting since 1960 will also receive housing on ownership basis. Remaining 427 members will receive monetary compensation out of Rs.70 crore, which has been deposited by M/s.Sumer Associates.

34. Thus we find that the balance of convenience is clearly against the plaintiffs. Majority members of the Society cannot be deprived of their rightful claim to monetary compensation and housing on ownership basis any further. The plaintiffs are litigating for 40 years on an issue which was settled in the year 1972 itself. Apart from the legal issues, bifurcation and redevelopment by plaintiffs practically does not seem to be possible. Merely because some challenge is likely to be made against the order rejecting bifurcation, in its third round, the development of the Society cannot be stalled any further. Even the support of tenant-members in respect of their demand of bifurcation has dwindled steadily and now only 15 persons arrayed as plaintiffs. It will, therefore, be no longer equitable to stall the redevelopment of the Society linking it to the demand of bifurcation. The continuance of injunction on the ground that a minority of the tenant-members are pursuing their demand for bifurcation has now become unjust and inequitable. There is no unanimity amongst tenant-

members regarding a development of the suit land by themselves. The original plaintiffs do not represent all the tenant-members. Today after forty years of litigation, with dissenting persons reduced to 15, it is no longer equitable to let the redevelopment drag behind the issue of bifurcation. It is time that the will of majority prevails and path for redevelopment is cleared. It will be in the interests of justice to vacate the order of interim injunction granted by the learned trial Judge.

35. It is also submitted by the Society that the amount is to be disbursed amongst the members, who are having shares in the Society and that the amount will be disbursed after verifying their share holdings and addresses and that in order to avoid the allegations being made by the plaintiffs, the Society is ready to make such disbursement under intimation to the Deputy Registrar of Co-operative Societies to make the procedure transparent to ensure that the amount will be disbursed to the rightful claimants.

36. In view of the above discussion, all these appeals are allowed. The judgment and order dated 5 May 2011 of the learned Single Judge in Notices of Motion Nos.172 and 173 of 2010 in Suits nos.144 and 145 of 2010 is hereby set aside and the said Notices of Motion filed by the plaintiffs in the above suits stand dismissed, subject to following directions and clarification:

(a) The members of Bombay Catholic Co-operative Housing Society (the Society), who are presently occupying the tenements shall not be treated as having given up their membership till they are allotted tenements in the structures to be constructed under the development agreement entered into on the basis of the impugned Resolution dated 6 December 2009 of the Society.

However, they shall be treated to have given up such membership upon allotment of new tenements to them and thereafter they will be entitled to become members of the Co-operative Society to be formed u/s 10 of the Maharashtra Ownership of Flats (Regulation of the Promotion, Construction, Sale, Management and Transfer) Act, 1963.

(b) Disbursement of the amounts out of Rs.70 crores deposited by developer M/s.Sumer Associates shall be made at the meeting/s of the Managing Committee of the Society after prior intimation to the Deputy Registrar of Co-operative Societies about the purpose of meeting.

37. At this stage, learned counsel for the original plaintiffs prays for stay of operation of this judgment and order for some time in order to have further recourse in accordance with law. While declining to grant such stay, we direct that the plaintiffs shall not be evicted from the tenements in their occupation for two months from today, but it will be open to the Society and the developer to take further steps for implementation of the Resolution dated 6 December 2009. The amounts deposited by the developer M/s.Sumer Associates shall not be disbursed to members of the Society till 14 September 2012.