

(2014) 11 BOM CK 0072

In the Bombay High Court

Case No : Notice of Motion No. 166 of 2014 with Notice of Motion (L) No. 1885 of 2014 in Suit (L) No. 95 of 2014

Vardhaman Developers Limited

APPELLANT

Vs

Andheri Krupa Prasad Cooperative Housing Society Limited

RESPONDENT

Date of Decision : 10-11-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8, 9
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11(a)
Maharashtra Co-operative Societies Act, 1960 — Section 164, 36, 73(1AB), 91

Citation : (2015) 1 ABR 266 : (2015) 4 ALLMR 651 : (2015) 1 BomCR 857

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

Bench : Single Bench

Advocate : S.U. Kamdar, Sr. Advocate and Chetan Kapadia i/by Kishore Thakordas and Co, Advocate for the Appellant; Chirag Balsra, Medhavin Bhatt i/ by M. Bhatt and Co., Ahmad Abdi, S.Y. Sharma i/by Abdi and Co. and P.K. Mishra, Advocate for the Respondent

Judgement

R.D. Dhanuka, J.—Plaintiffs have filed Notice of Motion No. 16 of 2014 inter alia praying for appointment of court receiver of 17 flats described in prayer (a) of Notice of Motion with a direction to take forcible possession from defendant no. 2 to 21 and to hand over the same to the plaintiff for demolition and for carrying out redevelopment of the said property and to shift to the transit accommodation of their choice by accepting transit corporation, corpus fund and transportation charges as have been paid by the plaintiffs to the other members of the defendant no. 1 society. The plaintiffs also seek an injunction order against those defendants from entering upon the suit property as well as the 17 flats described in prayer (a). In so far as Notice of Motion (L) No. 1885 of 2014 is concerned, the said notice of motion is filed by the defendant no. 13 inter alia praying for rejection of the plaint under Order VII rule 11(a) of Code of Civil Procedure, 1908 on the ground that the plaint is filed without any cause of action. I have heard the Notice of Motion (L) No. 1885 of 2014 first followed by Notice of Motion No. 166 of 2014. Both the motions are disposed of by a common order. Some of the

relevant facts for the purpose of deciding these two Notice of Motions are summarized as under :

2. The defendant no. 1 society is the owner of the property bearing CTS No. 64 admeasuring about 5075 sq. mtrs approximately consisting of two buildings of ground plus four upper floors. The building no. 1 consists of 55 flats and the building no. 2 consists of 19 flats totaling to 74 flats. There are also other two structures on the said property one is known as Krushna Kunj consisting of 21 tenements and second "Vasant Niwas" consisting of 4 tenements in occupation of total of 25 tenements on the said property.

3. It is the case of the plaintiff that the suit property is in a dilapidated condition and was in need of major repairs. The defendant no. 1 society appointed their project management consultant (PMC) for preparing and finalizing the feasibility report and for floating tenders for the redevelopment of the suit property. The society issued an advertisement in the local newspapers inviting offers for redevelopment of the property. The defendant no. 1 society accepted the offer of the plaintiffs on 29th August, 2005 and appointed them as the developers of the suit property. The defendant no. 1 however, by letter dated 16th August, 2006 terminated and cancelled the appointment of the plaintiffs as developers of the suit property. The plaintiffs filed arbitration proceedings. In the special general body meeting, members of the society passed a resolution on 6th April, 2008 and unanimously decided to resolve all the pending issues between the parties and confirmed the grant of development rights to the plaintiffs.

4. On 8th April, 2008 the plaintiff and defendant no. 1 by virtue of the said resolution dated 6th April, 2008 entered into a development agreement which was registered and duly stamped on the terms and conditions recorded therein. The plaintiffs and defendant no. 1 filed consent terms in the arbitration proceedings. It is the case of the plaintiffs that pursuant to the development agreement, the defendant no. 2 to 17 and/or their predecessors or joint holders executed irrevocable consent affidavit thereby agreeing the appointment of the plaintiffs as developers. Defendant no. 3 and 4 are joint holders of flat no. 102. consent has been issued by defendant no. 3 in respect of flat no. 201. The joint holders are defendant no. 10 and 11. The consent letter has been executed by defendant no. 10. In respect of flat no. 303. Defendant no. 12 along with her deceased husband who were the joint holders, both of them have executed the irrevocable consent.

5. On 31st August, 2009 the society passed a resolution and agreed to modify the agreement dated 8th April, 2008 and accordingly entered into a supplemental development agreement dated 30th November, 2009 with the plaintiffs. The Plaintiffs and defendant no. 1 entered into second supplemental redevelopment agreement on 24th May, 2012. The said second supplemental redevelopment agreement was executed pursuant to the resolution dated 12th May, 2012 thereby making further modification to the earlier agreements.

6. Under the agreements entered into between the plaintiffs and the society, the plaintiffs agreed to provide various tenements to the members and tenants free of cost and also licence fee/compensation for transit accommodation at the rate of Rs. 70 per sq. ft. per month on the carpet area of the existing residential flats during the period of construction. The plaintiffs also undertook to furnish a bank guarantee in the sum of Rs. 6.5 Crores for construction and Rs. 1 Crore for timely honour of post dated cheques of rental compensation which would stand reduced proportionately in accordance with the progress of reconstruction work of the new buildings on the suit property.

7. Under clause (3) of the development agreement, it is provided that it would be responsibility and obligation of the society absolutely to obtain the consent of all its members and the vacant and peaceful possession of their respective flats/premises for the redevelopment of the suit property failing which the plaintiff shall be entitled for extension of stipulated period of completion of the redevelopment of the suit property. It was provided under the said agreement that within thirty days from obtaining the sanctioned plans and IOD from the Municipal Corporation and on communication thereof to the society, its members will have to vacate their respective premises by accepting cheques for transit compensation, corpus fund and transportation charges. It is the case of the plaintiff that majority of the members of the society including defendant no. 2 to 17 have though already executed their irrevocable consent affidavits agreeing to redevelopment. Defendant no. 2 to 22 however are now refusing to vacate the premises in their occupation. Copies of the irrevocable consent affidavits signed by defendant nos. 2 to 17 are annexed to the plaint.

8. On 5th March 2011, the Municipal Corporation issued Intimation of Disapproval (IOD) and sanctioned plans put up by the plaintiffs on various terms and conditions. The plaintiffs forwarded the tripartite agreement to be executed between plaintiff, defendant no. 1 and individual members along with the cheques for rental accommodation, transportation charges as well as part of the corpus fund to respondent no. 1 payable in terms of the agreement to the members. It is the case of the plaintiff that during the period between October, 2013 and 31st December, 2013 the plaintiffs have already received tripartite agreements from 57 members duly executed against the receipt of transit rent, corpus fund as well as transportation charges and have also received vacant possession from 57 members. Defendant no. 2 to 21 however, neither executed the individual tripartite agreement nor accepted the transit compensation and have refused to vacate the premises in their occupation. Defendant no. 5, 7 and 13 have filed separate suits in the city civil court, Dindoshi Branch seeking revocation of the irrevocable consent executed by them. By letter dated 11th October, 2013 plaintiffs requested defendant no. 18 to 21 to execute tripartite agreements and to accept cheques for rental compensation, transportation charges and corpus funds and to hand over their respective premises for the purpose of demolition. 9.

9. By another letter dated 12th December, 2013 the petitioner called upon the defendant no. 2 to 17 to hand over vacant possession of their respective premises to the plaintiffs. Defendant no. 5 to 7, 13, 14, 16 and 17 by their letter dated 18th December, 2013 refused to vacate their respective premises. Similar contention was also raised by defendant no. 18 to 21 by letter dated 20th Nov. 2013 by Defendant no. 2 and 3 by an undated letter received by plaintiffs on 1st January, 2014 and also by Defendant no. 8, 12 and 15. The plaintiffs have described the list of all the non cooperative members in Exh. M of the plaint. On 16th January, 2014 the plaintiffs filed a suit in this court. The contesting defendants filed an application under section 8 of the Arbitration and Conciliation Act, 1996 for referring the parties to arbitration. The said application came to be rejected by order dated 20th February, 2013. Special Leave Petition against the said order is rejected on 5th May, 2014.

10. On 5th May, 2014, defendant no. 13 filed notice of motion (L) No. 1022 of 2014 inter alia praying for rejection of plaint under Order VII rule 11(a) of Code of Civil Procedure, 1908 on the ground of alleged non compliance of notice under section 164 of the Maharashtra Cooperative Societies Act, 1960. On 7th May, 2014 the plaintiffs issued notice under section 164 of the Maharashtra Cooperative Societies Act to the Registrar of Societies without prejudice to their contentions that no such notice was required.

11. The plaintiffs thereafter filed a chamber summons (734 of 2014) praying for deletion of defendant no. 1 society and for amendment of plaint by annexing notice issued under section 164 and prayed for re-impleadment of the defendant no. 1. By an order dated 21st August, 2014 the said chamber summons is allowed. The notice of motion (L) No. 1022 of 2014 filed by the defendant no. 13 came to be rejected. By an order dated 12th September, 2014 appeal filed by Defendant no. 13 against the said order dated 21st August, 2014 came to be rejected.

12. The defendant no. 1 society has filed an affidavit on 5th February, 2014 and referred to various resolutions passed by the society. It is stated in the affidavit that the suit property is in dilapidated condition and in need of major repairs. The society has placed on record the steps taken by the society for entering into a development agreement and the supplementary agreements with the plaintiffs. It is stated that more than 90% of the total members of the society have already consented to the redevelopment of the suit property by the plaintiffs. Defendant no. 2 to 17 have submitted their irrevocable consent affidavits in respect thereof. It is stated that the redevelopment agreement is signed by the society with the consent of majority of the members and after following due process. Due to the non cooperation of defendant no. 2 to 21 society has suffered a loss of around Rs. 47 lacs of the corpus fund. The defendant no. 1 society brought on record the obstructive attitude of defendant no. 2 to 21.

13. The other defendants have also filed affidavits in reply opposing this notice of motion on various grounds. I shall first summarize the submissions made by the

learned counsel appearing for defendant no. 13 in support of the Notice of Motion (L) No. 1885 of 2014. It is submitted by the learned counsel for the applicant to the said Notice of Motion that the redevelopment is not the business of defendant no. 1 society and in any event on the date of execution of development agreement, the redevelopment was not its object. All the resolutions thus passed by the society and all subsequent actions of the plaintiffs and defendant no. 1 in pursuance of such agreements and resolutions being beyond the purview of the objects of the society are ultra vires null and void and unenforceable. It is submitted that the suit is thus without any cause of action and is liable to be rejected under Order VII rule 11(a) of the Code of Civil Procedure, 1908. It is submitted by the learned counsel that in the special general body meeting of the society held on 15th June, 2013, it was resolved to adopt new byelaws. Byelaw 5(c) of the adopted byelaws provides "to initiate development of the building as per the norms of the authority". It is submitted that the plaintiffs have admitted that the subject matter of the instant suit does not touch the business of the society. Under section 36 of the Maharashtra Cooperative Societies Act, 1960, society being a body corporate has to do all the acts which are necessary for the purpose of which it is constituted. It is submitted that the defendant no. 1 society has not amended its byelaws and did not include "redevelopment" as the object and/or business of the society.

14. Mr. Kamdar learned senior counsel appearing for the plaintiffs on the other hand submits that the redevelopment is necessitated because of the dilapidated condition of the suit property and the same need not be an object of the society under its byelaws. It is submitted that redevelopment is also not a business of the society. Reliance is placed by the learned senior counsel on the judgment of Division Bench of this court in case of Mohinder Kaur Kochar Vs. Mayfair Housing Private Ltd. and Others, . Reliance is placed on paragraph 11, 15 and 19 of the said judgment and it is submitted that merely because the society has undertaken the project of redevelopment of its property, it cannot be said that society was engaged in the business of redevelopment. Reliance is also placed on the judgment of this court in the case of Vardhaman Developers Ltd. Vs. Borla Coop. Hsg. Soc and Ors. Delivered on 22nd October, 2012 in Notice of Motion No. 1081 of 2010 in Suit No. 1442 of 2009. It is submitted that the plaint discloses cause of action. This court has to consider the averments made in the plaint. There is thus no substance in the notice of motion filed by the defendant no. 13.

15. I shall now deal with the submissions made by Mr. Kamdar learned senior counsel for plaintiffs and the learned counsel appearing for the defendants in the Notice of Motion No. 166 of 2014.

16. It is submitted by Mr. Kamdar that the defendant no. 1 society after passing a resolution which was approved by majority of the members has entered into a development agreement with the plaintiffs which agreement has been modified by two supplementary agreements which also were entered into after passing appropriate resolutions by the society and after following due process of law.

Majority of the members have already entered into individual agreements with the plaintiffs and have handed over vacant possession of their flats/premises to the plaintiffs for demolition and for the purpose of redevelopment. Even most of the defendants though have also signed irrevocable consent letters in favour of the plaintiffs, however, have now refused to hand over possession of their respective flats/premises with oblique motives. It is submitted that plaintiffs have already handed over the cheques for compensation and part of the corpus amount payable under the development agreements approximately in the sum of Rs. 6 Crores to all the members who have already vacated their respective premises. The plaintiffs have spent approximately Rs. 3 Crores for obtaining appropriate approval and for carrying ancillary works over the suit property. Plaintiffs have also invested huge amount towards the redevelopment project and are ready and willing to complete the redevelopment of the suit property within the stipulated period agreed between the plaintiffs and the society and its members subject to the defendant's immediately vacating and handing over peaceful possession of their respective premises. It is submitted that more than 75% members have accepted the cheques for transit accommodation, corpus funds and transportation charges and have vacated their premises. In view of the defendant no. 2 to 21 however, refusing to vacate their respective premises, the entire redevelopment work is stalled causing inconvenience not only to the plaintiffs but also to the other members of the society who have cooperated by signing the tripartite permanent alternate accommodation agreement and vacating their premises.

17. Learned senior counsel submits that merely because terms and conditions of the development agreement are not acceptable now to defendant nos. 2 to 21 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 submitted that the members of the society claim through the society and have no independent rights except those given to them by the statute and bye laws of the society.

18. It is submitted that under the development agreement, the plaintiffs have agreed to demolish the existing structures, carry out construction on the suit plots and to handover possession of the respective flats/premises to the members of the society in terms of the development agreement within the time agreed and because of the obstructive attitude of the defendant nos. 2 to 21, plaintiffs are not in a position as on today to comply with their part of the obligation under the development agreement. The plaintiffs are still ready and willing to comply with their part of obligation and construct the premises and handover to the members of the society and for such purpose, the plaintiffs have rightly filed this proceedings inter alia praying for appointment of court receiver with power to take forcible possession of the flats/premises from the defendant nos. 2 to 21 and to handover the same to the plaintiffs for demolition and for redevelopment of the property.

19. Learned senior counsel submits that in several orders passed by this court,

receiver has been appointed with a direction to take forcible possession from such non co-operative members and the developers have been handed over possession for the purpose of demolition and redevelopment at the interim stage. Learned senior counsel placed reliance on some of such judgments delivered by learned single judge and the division bench of this court in support of this submission which will be referred in the later part of this judgment.

20. Learned senior counsel also tendered a copy of the chart showing the gist of the objections raised by the other defendants in the Notice of Motion no. 166 of 2014 and has dealt with those objections in detail which I shall deal with in rejoinder argument of Mr. Kamdar, learned senior counsel.

21. Mr. Abdi, learned counsel appearing for defendant nos. 2 to 4, 8, 12 to 18, 20 and 21 also submitted similar chart showing the gist of objections raised by his clients in the affidavit in reply. It is submitted by the learned counsel that if the reliefs claimed in the notice of motion are granted which are in the nature of final reliefs, nothing will survive in the suit. No such relief can be granted in the notice of motion. It is submitted that as on today there is no project management consultant appointed by the society in place of earlier consultant who has been earlier removed by the society. It is submitted that the IOD dated 5th March 2011 which was valid for three years has expired. Revalidation of IOD has also expired on 26th October, 2014. In any event the plaintiff has to submit fresh plans to the corporation since 20% of the constructed area has to be provided for the weaker section.

22. It is submitted by the learned counsel that the plaintiff is bound to follow the directives dated 3rd January, 2009 issued by the Maharashtra Government. The plaintiff is also bound to follow the provision for fungible FSI. It is submitted that the minutes of the general body meeting dated 17th July 2004 does not reveal any resolution for redevelopment. The developer has to give bank guarantee of an amount equivalent to 20% of the project cost. The plaintiff has no capacity to complete the project. The project cost in this case is more than 100 crores and therefore plaintiff should have provided minimum bank guarantee of Rs. 20 crores. The defendants are entitled to additional 35% under fungible FSI. The members of the managing committee have not furnished bond under section 73(1AB) of the Maharashtra Co-operative Societies Act and thus non compliance of the said provision will lead to automatic vacation of office by the concerned members of the committee. No elections are held for past 10 years. The dealing of the society with the plaintiffs is not transparent. The plaintiffs do not have good reputation in the matter of redevelopment. There are complains against the developers for their alleged fraudulent and dishonest practice. It is submitted that the building of the society is not dilapidated. No notice under section 164 of the Maharashtra Co-operative Societies Act, 1960 is given by the plaintiffs. Plaintiffs have put up their security guards in the society premises. It is submitted that the development agreements are unjust, unfair and detrimental to the interest of the members of the society. The society has failed to make any

provisions in the development agreement for proper and fair sharing of extra FSI that might approve.

23. Learned counsel submits that the some of the members have already filed a dispute under section 91 of the Maharashtra Co-operative Societies Act, 1960 bearing Application No. CCIV/53 of 2014 against the plaintiffs as well as the society inter alia praying for a declaration that the managing committee of the society has functioned illegally and in violation of the Maharashtra Co-operative Societies Act and the rules and also the bye-laws of the society for the period 2003 to 2013 and that none of the decisions taken by the managing committee are binding on the members of the society. The said dispute is filed on 11th April, 2014.

24. Learned counsel appearing for the defendant no. 1 society supported the case of the plaintiffs and would submit that all the agreements entered into between the plaintiffs and the society are entered into after majority of the members having passed resolution thereby agreeing to carry out redevelopment, after calling the tenders and approving the tender submitted by the plaintiffs. Most of the members of the society have acted upon the development agreement and have vacated their respective flats/premises and have handed over the same to the plaintiffs. The plaintiffs have also paid the compensation and part of the corpus amount to the members of the society who have vacated their flats. Most of the members have also entered into with the individual agreement with the plaintiff. The society is unnecessarily suffering because of the obstructive attitude of the defendant nos. 2 to 21. In so far as allegations of non transparency made by defendant nos. 2 to 21 are concerned, it is submitted that the managing committee has always acted fairly and only in the interest of the society. In so far as submission of bond is concerned, it is submitted that M-20 bonds were duly submitted by the managing committee in the month of August 2008 which fact is disclosed in the additional affidavit in reply of the society filed on 7th February 2014. In so far as suits filed by three of the members in the City Civil Court for their revocation is concerned, it is submitted that no reliefs have been granted in those suits.

25. In so far as submission of Mr. Abdi learned counsel appearing for some of the defendants that development agreements were unjust, unfair and detrimental to the interest of the members of the society is concerned, it is submitted that the draft of the development agreement was circulated to all the members and then final draft was unanimously accepted in its general body meeting held on 6th April, 2008. The society has already appointed proper advisors for advising the redevelopment of its property. Reliance is placed on paragraphs 15 to 18 of the additional affidavit in reply filed by the society on 7th February, 2014.

26. In so far as allegations regarding no proper and fair sharing of extra FSI is concerned, it is submitted that appropriate provisions are made in the development agreement with respect to availability of additional FSI. Reliance is placed on paragraphs 18 of the additional affidavit in reply filed by the society on

7th February, 2014. In so far as termination of the project management consultant is concerned, it is submitted that the said project management consultant has stopped advising the society from March 2007 and had also made errors in calculation of area of the society and therefore its services were terminated in 2008. The society however has already appointed proper advisors for advising the society in the matter of redevelopment of its property. In so far as issue of bank guarantee raised by the other defendants is concerned, it is submitted that the plaintiffs have already furnished the agreed bank guarantee of Rs. 7.5 crores to the society.

27. Mr. Kamdar, learned senior counsel appearing for the plaintiffs in rejoinder submits that the suit buildings are already dilapidated as is clear from the resolution passed by the society. It is not necessary for the society to wait till the building is declared dangerous, inhabitant or collapses. The resolution passed by the general body of the society is binding upon all its members.

28. In so far as submission of the contesting defendants that grant of any reliefs in the notice of motion would amount to a decree in the suit is concerned, it is submitted that no prejudice would be caused to the contesting members as all the members of the society will be re-housed in the new building and much larger area will be provided alongwith corpus fund, transit compensation and transportation charges. Majority of the members have already vacated their respective premises. Plaintiffs are unable to demolish the suit buildings and to commence redevelopment and thus it is a fit case for appointment of court receiver with appropriate directions as prayed.

29. In so far as submission regarding issuance of notice under section 164 of Maharashtra co-operative societies act 1960 is concerned, it is submitted that the plaintiffs have by way of abundant caution has already issued a notice under section 164. This court has already permitted the plaintiffs to carry out appropriate amendment by allowing the Chamber Summons No. 734 of 2014. This argument of the contesting defendant thus does not survive.

30. In so far as submission of the contesting defendant's that plaintiffs have put up their security guard in the society premises is concerned, it is submitted that since 57 members as well 25 tenants have already handed over possession of their respective flats to the plaintiffs, the plaintiffs are bound to provide security guards for the security of said 57 premises handed over by the members and 25 tenants. Plaintiffs have already spent crores of rupees on the project and thus suit buildings are required to be protected by appointment of security guards. The interest of the contesting defendants is not affected but on the contrary is protected.

31. In so far as allegations of the contesting members that the plaintiffs have committed any fraud or mischief in respect of other project is concerned, the said allegations have denied. In so far as allegations of the contesting members that development agreements are unjust, unfair and detrimental the interest of the

members of the society is concerned, it is submitted that there is no whisper about these allegations like lesser area, not being paid sufficient transit rent and/or corpus fund and thus these allegations are baseless. Some of these members are blackmailing the plaintiffs by refusing to vacate their premises. Some of such members wanted the new premises in the sale building instead of rehab building.

32. In so far as allegations regarding FSI is concerned, it is submitted that by way of amendment, the plaintiffs has already provided fungible FSI in lieu of free FSI and concessional areas which were earlier granted for which the developers have to pay the additional premium. In so far as quantum of bank guarantee is concerned, it is submitted that the suggestion for enhancement of the bank guarantee amount is beyond the terms of the development agreement and cannot be insisted.

33. I will first deal with the Notice of Motion(L) No. 1885 of 2014 filed by the defendant no. 13 inter alia praying for rejection of plaint under order VII rule 11(a) of the Code of Civil Procedure, 1908.

34. It is not in dispute that the defendant no. 1 society has passed a resolution on 6th April, 2008 that the property of the society shall be redeveloped by appointing the plaintiff as the developer. The buildings of the society are in dilapidated condition. The buildings were constructed on the plot of the society long back. The members of the society resolved to carry out the redevelopment by demolishing the existing buildings by appointing a developer.

35. This court in case of Mohinder Kaur Kochar Vs. Mayfair Housing Private Ltd. and Others, has held that when the society had purchased the land and got the flats constructed in accordance with the provisions of the Ownership Flats Act and the rules made thereunder, the object of the society was not to engage in the business of real estate and demolition of buildings. The society had purchased the land and got the flats constructed and allotted the same to its members. After more than 40 years, when the society had undertaken the project of redevelopment of its property, it cannot be said that the society had engaged in the business of redevelopment. Paragraph 14, 15 and 19 of the said judgment of the division bench read thus :-

13. On the other hand, even according to defendant No. 1, the objects of respondent No. 4-Society are as per the Model Bye-laws for Co-operative Housing Societies. Byelaw No. 5 reads as under:

5. The objects of the society shall be as under:

*(a) to obtain conveyance from the owner/Promoter (Builder), in accordance with the provisions of the Ownership Flats Act and the Rules made thereunder, of the right, title and interest, in the land with building/buildings thereon, the details of which are as hereunder:

The building/buildings known/numbered as..... constructed on the plot/plots Nos..... of..... admeasuring..... sq. metres, more

particularly described in the application for registration of the Society;

OR

(APPLICABLE FOR PLOT PURCHASED TYPE SOCIETY)

*(a) to buy or take on lease a plot or plot nos..... of..... admeasuring..... sq. metres and to construct flats thereon for allotment to the members of the society for their authorised use.

OR

To purchase a building or buildings known as..... constructed on the plot/plots nos..... of..... admeasuring..... sq. metres for allotment of flats therein to the members of the society for their authorised use.

(b) To manage, maintain and administer the property of the society;

(c) To raise funds for achieving the objects of the society;

(d) To undertake and provide for, on its own account or jointly with a co-operative institution, social cultural or recreative activities;

(e) To do all things, necessary or expedient for the attainment of the objects of the society, specified in these bye-laws.

*Struck whichever is not applicable

14. It is thus clear that respondent No. 4, by the very nature of its object, had purchased land and got the flats constructed in accordance with the provisions of the Ownership Flats Act and the Rules made thereunder. The object of the society was not to engage in the business of real estate and demolition of buildings, as it was in Marconi's case (supra). When the Society was formed in or about year 1965, it had purchased land and got the flats constructed and allotted the same to its members. After more than 40 years, when respondent No. 4-Society has undertaken the project of re-development of its property, it cannot be said that respondent No. 4-Society has engaged in the business of re-development, i.e., as has specifically been held by this Court in the decision dated 7 March, 2011 in Vardhaman Developers Limited v. Thailambal Co-operative Housing Society Ltd. & Ors., wherein the learned Single Judge observed as under:

"Section 91 (of the Act) brings within its purview disputes touching inter alia the constitution, management or business of a society. Now in the present case, 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. The demolition of the existing building and the reconstruction of the building of the society is not the business of the society. Section 91 is therefore not attracted."

19. When a co-operative housing society initially constructs the buildings for its members, it is not a redevelopment, but the initial development of the property.

The initial construction of the property for a cooperative housing society is one of its prime objects. The two activities namely, initial construction of a building and its redevelopment are different activities. By passage of time, as the building becomes older, the Housing Society may take a decision to repair or redevelop the property. Such activity is totally different from initial development of the building. The dispute arising from such redevelopment, which becomes necessary by passage of time, is not "business" of the society. Such activity cannot be considered as "touching the business" of the society. The dispute involving members, developers, managing committee in respect of redevelopment of the property which becomes necessary in view of passage of time, is not relatable to the business of the society. The initial development of the co-operative housing society of constructing the building may be business of the society, but the subsequent redevelopment is not.

36. This court in case of Vardhaman Developers Limited vs. Borla Co-operative Housing Society Ltd. and others in the judgment delivered on 22nd October, 2012 in Notice of Motion No. 1081 of 2010 in Suit No. 1442 of 2009 has held that the redevelopment project being carried out by the society would not amount to the business of the society. Paragraphs 22 and 23 of the judgment of the learned single judge of this court in case of Vardhaman Developers Limited (*supra*) read thus :-

22. The question arises for consideration of this court is whether the resolution passed by defendant no. 1 society to confer development rights in favour of the plaintiff for redevelopment of the property of the first defendant, would amount to business of defendant no. 1 society and any dispute arising out of such resolution would require compliance of notice under section 164 of the Maharashtra Cooperative Housing Societies Act, 1960.

23. It is not in dispute that in the object clause of the society for which society was formed, redevelopment of the property of the society was not the object or business of the society. In my view, the members of the society having agreed in the general body meeting to get the property redeveloped for the benefit of its members, through plaintiff, would not amount to business of the society and notice U/s. 164 of the Maharashtra Cooperative Societies Act, 1960 would not be mandatory before filing any such suit by the plaintiffs.

37. I am of the view that in view of the fact that the construction of the buildings of the society was carried out long back and the buildings have become older and being in dilapidated condition, society through its members are entitled to take a decision to repair or redevelop the property. In my view the redevelopment of the property may be necessitated in view of the buildings being in dilapidated condition or in view of passage of time. The redevelopment thus in my view would be a requirement and/or necessity and cannot be termed as business. The society is thus not required to carry out any amendment to the bye-laws or to include the "redevelopment of the buildings" as one of the object of the society before taking any decision to redevelop its properties. In my view there is no

merit in the submission of the learned counsel for the applicant that the resolution passed by the society for carrying out redevelopment without the same being one of the object or that the same being not business of the society, is illegal and cannot be acted upon. The Notice of Motion filed by the applicant under order VII rule 11(a) is without any merits and thus deserves to be dismissed.

38. In so far as Notice of Motion No. 166 of 2014 filed by the developer is concerned, a perusal of the record indicates that the society has passed resolutions from time to time. The project management consultant had prepared and finalised the feasibility report and had floated tenders for redevelopment of the suit property. The building No. 1 consist of 55 flats and building no. 2 consist of 19 flats totalling to 74 flats. There are other 25 tenements on the said property. It is not in dispute that the Municipal Corporation had already issued IOD and sanctioned plans put up by the plaintiffs. Though the construction could not be commenced since the defendant nos. 2 to 21 have not handed over the vacant possession of the premises in their occupation, the plaintiffs can always get the plans revalidated on the defendant nos. 2 to 21 handing over vacant possession of the premises in their occupation. There is no merit in the submission of the contesting defendants that the validity of the sanction plan has expired.

39. A perusal of the record indicates that 57 members have already executed agreement with the plaintiffs and have received transit rent, part of corpus fund as well as transportation charges and have handed over vacant possession to the plaintiffs. Though the defendant nos. 2 to 21 have executed irrevocable consent letters have now refused to handover possession of the premises in their occupation and have refused to enter into individual agreement with the plaintiffs on the same terms and conditions which are incorporated in the development agreement and on the line of the agreements already entered into between the plaintiffs and the other 57 members.

40. According to the plaintiffs, they have already spent crores of rupees on payment of transit rent, corpus fund and also on getting various permissions from the authorities. Under the development agreement, the plaintiffs have agreed to start commencement of the construction within the time prescribed upon the society getting vacant possession of the flats and premises from the members. Though 57 members have handed over vacant possession, defendant nos. 2 to 21 on one or the other ground refused to handover possession. Society is not able to get the vacant possession of the flats from the contesting defendants. The plaintiffs have thus filed the notice of motion for appointment of court receiver and other reliefs.

41. In so far as objection of the contesting defendants that if the reliefs as claimed in the notice of motion are granted nothing will survive in the suit is concerned, Mr. Kamdar learned senior counsel for the plaintiffs have invited my attention to several judgments of this court including the judgment of Division

Bench in case of Mohinder Kaur Kochar vs. Mayfair Housing Private Limited, judgment in case of Vardhaman Developers Ltd. vs. Borla Co-operative Housing Society Limited and others in Notice of Motion no. 1081 of 2010 judgment of this court in case of M/s. Akash Pruthvi Lifestyle vs. Akash Co-operative Housing Society Limited and another in Notice of Motion (L) No. 1518 of 2013, judgment of this court in case of Wadhwa Estate Pvt. Ltd. vs. Omprakash Raheja and others in Notice of Motion No. 1259 of 2013 and judgment of this court delivered in petition under section 9 of the Arbitration and Conciliation Act in Arbitration Petition No. 199 of 2013 in case of Bharat Infrastructure and Engineering Pvt. Ltd. vs. Park Darshan CHS Ltd. & Ors. A perusal of all these judgments clearly indicate that at the interim stage, this court has appointed court receiver in respect of the flats/tenements which the minuscule members of the society have refused to handover to the developer for demolition and redevelopment though majority of the members of the society have handed over possession of their respective flats pursuant to the resolution passed by the society by majority.

42. It is held by this court in the above referred judgments that merely because some members in minority disapprove of the decision of the general body of the society, that cannot be the basis to negate the decision of the general body unless it is shown that the decision was the product of fraud or misrepresentation or was opposed to some statutory prohibition. It is held by this court that once a member 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.

43. In my prima facie view the general body of the defendant no. 1 society has taken a conscious decision to redevelop the buildings of the society by passing appropriate decision by majority and the said resolution has not been stayed and/or set aside by the appropriate court so far and thus no member of the society can refuse to act upon such resolution passed by the overwhelming majority. The minuscule non co-operative members cannot stall the redevelopment project on flimsy grounds. The entire project has been stalled because of the obstruction created by defendant nos. 2 to 21 who in my view are in minuscule minority. 57 members have already shifted to some other accommodation and are waiting for completion of construction and for getting their flats in the new building. This court has ample powers to appoint court receiver in this circumstances with a direction to take forcible possession from such non co-operative members and to hand over the same to the developer for demolition and redevelopment even at this stage.

44. In so far as objection regarding fungible FSI is concerned, the record indicates that the plaintiffs have already made appropriate provisions in respect thereof.

45. One of the grievance of the contesting defendants is that the developer has

to give bank guarantee of 20 % i.e. to the tune of Rs. 20 crores, the project cost being more than 100 crores. It is not in dispute that the plaintiffs have already furnished bank guarantee as agreed under the development agreement. There is no merit in the submission of the contesting defendants on this issue. The managing committee of the society has already submitted requisite bond as is apparent from the affidavit in reply filed by the society. This submission of the non cooperative members is also devoid of merits and is rejected.

46. The contesting members have also alleged about the alleged bad reputation of the plaintiffs in their affidavit in reply. The society in the general body meeting by overwhelming majority has taken a conscious decision to enter into a development agreement with the plaintiffs. The draft development agreement as well as final development agreement has been approved by the majority of the members. The society has considered all the aspects before awarding development rights to the plaintiffs. There is thus no merit in this submission also of the contesting members.

47. In so far as submission of the contesting members that notice under section 164 of the society is not issued is concerned, this court has already taken a view in case of Bharat Infrastructure and Engineering Pvt. Ltd. (supra) after adverting to the judgment of Division Bench that redevelopment of the property does not amount to business and thus notice under section 164 of the Maharashtra Co-operative Societies Act, 1960 is not mandatory. There is thus no merit in this submission of the contesting members. Be that as it may, the plaintiffs have already issued a notice under section 164 on 7th May, 2014. This court has already permitted the plaintiffs to carry out amendment by passing an order in the Chamber Summons No. 734 of 2014 which order not has been impugned by any of the defendants. There is thus no merit in this submission of the contesting members.

48. In so far as the submission of the defendants that the plaintiffs could not have appointed the security guard of the property is concerned, in my view since 57 members have already handed over possession of their flats to the plaintiffs and the plaintiffs have spent huge amount and have to carry out redevelopment under the agreements with the society, plaintiffs are entitled to protect the suit property from any encroachment. Employment of security guard by the plaintiffs of the suit property would be for the benefit of not only for the plaintiffs but also all the members including the contesting members. The objection of the contesting members is thus without any merits.

49. In so far as allegations of the contesting members that the development agreement are unjust, unfair and detrimental to the interest of the members is concerned, the dissenting members are not able to point out any instance in support of this allegation. The draft agreements as well as final agreements are duly approved by the members of the society by overwhelming majority. There is no merits in this submission of the contesting members.

50. In so far as the submission of the contesting members that no project management consultant has been appointed by the society in place of the earlier consultant is concerned, the learned counsel appearing for the society submits that the society has already appointed proper adviser for advising the society in the matter of redevelopment of its property. There is thus no merit in this submission of the contesting members.

51. Mr. Abdi learned counsel for the contesting members has tendered a copy of the proceedings in Appeal From Order (Stamp) No. 26547 of 2014 arising out of the ad-interim order passed by the City Civil Court in draft Notice of Motion in SC Suit No. 2270 of 2014 filed by Mr. Mahendra P. Jain, one of the defendants. A perusal of the papers and proceedings in the said appeal indicates that the learned trial judge has refused to grant ad-interim relief to that member by an order dated 19th September 2014. It appears that the said Mr. Mahendra Jain has filed the said suit for injunction against the developer from demolishing the suit structure without due process of law. The City Civil Court has observed that the said Mr. Mahendra Jain had already filed a suit (1585 of 2012) in the City Civil Court for the similar relief and had not obtained any ad-interim relief. The City Civil Court has observed that the said plaintiff Mr. Mahendra Jain had suppressed these facts. Ad-interim relief is accordingly rejected by the City Civil Court. No relief has been granted so far by this court in the appeal from order filed by Mr. Mahendra P. Jain.

52. Mr. Abdi learned counsel also tendered copy of the application No. CCIV/53 of 2014 filed by Mr. P.C. Tated, Mina J. Shah and Alkaben Khandwala, three members of the defendant no. 1 society against the plaintiffs and defendant no. 1 society under section 91 of the Maharashtra Co-operative Societies Act 1960, inter alia praying for a declaration that the managing committee of the society functioned illegally and in violation of the Maharashtra Co-operative Societies Act, rules and bye-laws for the period 2003 to 2013 and for a declaration that all the decisions taken by the managing committee of the society are illegal, in-operative, without authority of law and are not binding on the members of the society. The applicants in the said dispute have also applied for declaration that the development agreement entered into between the plaintiffs and the society are null and void and not binding on any member of the society. The said dispute appears to have been filed on 2nd August 2014. Mr. Abdi learned counsel could not point out any order staying the effect of the resolutions passed by the society so far.

53. After conclusion of arguments parties tried to settle the matter but could not arrive at any terms.

54. In my view the contesting members who are in minuscule minority after signing the irrevocable letters of consent and after passing of the resolution by the overwhelming majority which is binding on all the members including the dissenting members cannot stall the redevelopment project. Most of the other members have already shifted to some other premises. In my view the plaintiffs

have thus made out a case for appointment of court receiver with a direction to the court receiver to take forcible possession of the premises/flats in the defendant no. 1 society which are in occupation of the defendants nos. 2 to 21 through themselves or their agents and servants or persons claiming through them and to hand over the same to the plaintiffs for demolition and redevelopment. I, therefore pass the following order :-

(a) Notice of Motion (L) No. 1885 of 2014 is dismissed,

(b) Notice of Motion No. 166 of 2014 is allowed in terms of prayers (a) and (C). The court receiver shall implement this order within four weeks from today. The parties to the proceedings as well as the court receiver to act on the authenticated copy of this order.

(c) There shall be no order as to costs.

At this stage, learned counsel appearing for defendant nos. 2, 3, 4, 8, 12 to 18, 20 and 21 seeks stay of the operation of the order for appointment of court receiver. Learned counsel appearing for the plaintiffs state that plaintiffs would not apply to the court receiver for implementation of this order for a period of two weeks. Statement is accepted. In view of this statement, it is not necessary to consider the application of the learned counsel appearing for defendant nos. 2, 3, 4, 8, 12 to 18, 20 and 21 for stay of the order appointing the court receiver.

It is made clear that other part of the order passed by this court is not stayed.