

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****ARBITRATION PETITION NO. 852 OF 2014**

Shri Krishan Sai Development Corporation

... Petitioner

Versus

Young Men's Progressive Cooperative Society
Limited and Ors.

... Respondents

Mr. M.M. Vashi, Senior Advocate, instructed by M/s. M.P Vashi & Associates, for the Petitioner.

Mr. Vijay Patil, instructed by Mr. Nitesh Bhutekar, for Respondent No. 1.

Mr. Vishal Kanade, instructed by Mr. D.S. Patil, for Respondent Nos. 2 and 3.

CORAM : S.J. KATHAWALLA, J.

Order reserved on: 3rd February, 2015.

Order pronounced on: 8th May, 2015

JUDGMENT:

1. The above Arbitration Petition is filed by the Petitioner - Shri Krishan Sai Development Corporation against Respondent No. 1 - Young Men's Progressive Cooperative Society Limited (the Society), Respondent No. 2 – Mr. Ravi V. Botlaje and Respondent No. 3 – Mr. Avinash Babar, who are the Members of a Society, under Section 9 of the Arbitration and Conciliation Act, 1996 ('the Act') for the following reliefs :

“a. That the Court Receiver, High Court, Bombay or any other just and proper person be appointed Receiver with respect of Flat Nos. 404 and 202 of Respondent Nos. 2 and 3 respectively with further direction :

i. To take quite vacant and peaceful possession of the said flats

from Respondent Nos. 2 and 3.

ii. In case of obstruction by Respondent Nos. 2 and 3 with police protection.

iii. Handover possession of the said two flats to the Petitioner.

So that the Petitioner can demolish the same and proceed with the redevelopment work.

b. That in the alternative of prayer (a), the Respondent Nos. 2 and 3 be ordered and directed by mandatory order of this Hon'ble Court to handover vacant and peaceful possession of Flat Nos. 404 and 202, respectively to the Petitioner so that the Petitioner can demolish the same to proceed with the redevelopment work”.

2. The relevant facts for deciding the present Petition, are briefly set out hereunder :

2.1. In the year 1956, the Respondent No. 1 – Society had made an Application to the State Government for allotment of a plot of land to the Society to construct houses for backward class families.

2.2. Thirty years after the receipt of the said Application, the State Government allotted to the Society a plot of land bearing Survey No. 111-D, CTS No. 825 (part), Building No. 9, Opposite Gyan Kendra School, Lokandwala Road, Four Bungalow, Andheri (West), Mumbai – 400 053 (‘the said plot’) to Respondent No. 1 – Society for construction of a building having 20 flats. As it took 30 years for the State of Maharashtra to allot the plot, some of the original Members of the Society either died or were not interested in pursuing the matter with the State Government.

2.3. After the Society started the construction work, some of the Members tendered their resignations. The Respondent No. 1 – Society was therefore facing financial problems. The Respondent No. 1 – Society could not get Members from the reserved category. The Respondent No. 1 – Society therefore accepted some Members from the open category, who contributed their share for construction of the Society building. Accordingly, in the year 1990, the Society building was constructed ('the said building'). The said plot alongwith the said building shall hereinafter be referred to as the said Property.

2.4. It is not the case of Respondent Nos. 2 and 3 that they were not aware of this fact. In fact, according to the Respondent Nos. 2 and 3, the Additional Collector had issued Show Cause Notices on 24th November, 1994, 21st March, 1996 and 26th December, 2008 to the Society, to show cause as to why the land should not be repossessed for breach of the terms and conditions of allotment. It therefore appears that the Office of the Collector was aware since inception that the flats were allotted to some members who are from the open category without taking prior permission of the Government / Collector.

2.5. On 7th August, 2008 the Society had forwarded a circular to all its Members recording therein that there are now only four Members of the Society whose names appear in the original approved list. In view thereof, the remaining 16 members are required to get approval either from the Collector or the Social Welfare Officer. The Society had therefore called for necessary information from the Members. According to the Respondent Nos. 2 and 3, six of the Members

belonging to the backward class including the Respondent Nos. 2 and 3 obtained the necessary approval from the Collector and therefore the Society had 10 approved Members out of the 20 members / occupants.

2.6. In the Special General Body meeting of the Society held on 21st December, 2008, Respondent Nos. 2 and 3 were present. The issue pertaining to the redevelopment of the Society property / building was discussed at the said Meeting.

2.7. Though Respondent Nos. 2 and 3 were well aware that the membership / occupation of some of the Members was yet to be approved / regularized, Respondent Nos. 2 and 3 gave their written consent dated 15th January, 2009 and 6th January, 2009 respectively, stating that they have no objection for redevelopment of the Society building by demolishing the old structure and constructing a new building as per Development Control Rules, using Transfer of Development Right (T.D.R.), as decided in the Special General Body Meeting of the Society held on 21-12-2008, and that they are, through their said consent letters, offering full co-operation to the Society.

2.8. Sometime in October, 2009, the Society got its Property inspected through Mr. Satish K. Kulkarni, Consulting Engineer. Mr. Kulkarni in his Report dated 1st November, 2009 (Exhibit-A to the Petition) has set out the following facts / observations :

- i. That the building consists of ground plus four upper floors.
- ii. That the building is R.C. framed structure with brick masonry walls, which

are not load bearing.

iii. That the said structure has after its construction undergone major repairs on two occasions.

iv. That major cracks were observed in the slabs, beams and columns of the building. These cracks are indicative of failure of the structural member to withstand the imposed load, and / or its ability to carry the imposed load has been considerably reduced, giving cause for concern.

v. That the columns and beams have developed new cracks (as per the observation of members of the Society) over a period of one year, suggesting the rate of deterioration.

vi. That considering the age of the building and the general life of R.C. framed structure, the repairs / preventive measures would economically not be possible.

vii. That the said structure is in a dangerous condition and mishaps may happen if proper care is not taken.

viii. That the said structure is required to be completely demolished and reconstructed.

ix. That the present condition of the structure makes it non-habitable and risky to human life.

2.9. In the Special General Body Meeting of the Society held on 28th March, 2010, it was decided to appoint the Petitioner as the Developer to develop the Society Property. Both Respondent Nos. 2 and 3 attended the Meeting and voted in favour of the Petitioner being appointed as the Developer

to redevelop the Property of the Society.

2.10. The draft Development Agreement was placed for approval in the Annul General Body Meeting of the Society held on 8th August, 2010. The said Meeting was attended by Respondent No. 2 as well as Respondent No. 3. 14 out of 20 Members including Respondent No. 2 approved the draft Agreement. Respondent No. 3 initially stated that the Society should go for redevelopment after getting the names of the Society Members approved. However, as can be seen from the said minutes, Respondent No. 3 as well as the other two opposing Members later submitted that, *“they are favouring the resolution on the point that the meeting is arranged with the Developer to clear some of their difficulties”*.

2.11. The Development Agreement was executed by and between the Society and the Petitioner on 21st September, 2010. The relevant terms of the Development Agreement are set out hereunder :

- i. The Petitioner / Developer agreed and undertook to abide by the terms and conditions of allotment of the land to the said Society and to obtain permission, NOC, sanction from the Government for development of the land by demolishing the old building and constructing a new building in its place.
- ii. The Petitioner / Developer agreed to pay Rs.3,36,000/- to each Member in advance, for alternate accommodation for 11 months at the rate of Rs.18,000/- per month vide post-dated cheques and also agreed to pay an amount of Rs.10,000/- to each Member towards transportation for shifting and re-shifting, and also one month rental i.e. Rs.18,000/- in advance, for bearing the cost of

brokerage for alternate accommodation.

iii. The Petitioner / Developer agreed to pay to every Member Rs.7 Lacs by way of Corpus Fund, as compensation for loss of their fixtures, fittings, etc. in the old building due to demolition and also to meet the additional burden of property tax and increased maintenance after construction of the new building.

iv. The Petitioner / Developer agreed to construct and provide absolute free of cost to the Members of the Society, a self contained flat comprising of two room, hall, kitchen, two toilets cum bathroom, ad-measuring usable 575 sq.ft. carpet area.

v. The Petitioner / Developer agreed to complete the construction of the new building within a period of 18 months from the date of receipt of the Commencement Certificate ('CC').

vi. The Petitioner / Developer agreed to execute a general Bank Guarantee in favour of the said Society for Rs.1,25,00,000/- from any nationalized bank.

2.12. The Respondent Nos. 2 and 3 have alleged that the Society has in its letter dated 5th November, 2011 addressed to the Collector, made a misrepresentation by alleging that 90% of the Members of the Society are from the backward class and 10% Members are from the open category, and has through the said representation subsequently obtained NOCs from the Collector / Social Welfare Officer. However, as the facts further unfold hereinafter, it will be clear that the Collector and / or the Social Welfare Officer have not proceeded on the basis of such representation from the Society, and

have in their respective orders taken care of unauthorized transfers, by laying down the necessary conditions.

2.13. The State Government by an Order dated 31st October, 2012 granted conditional permission for redevelopment of the building. By the said Order the State Government directed the Collector to verify the eligibility of the existing Members of the Society and also placed a condition that the enrollment of the new Members will be subject to the approval of the Collector.

2.14. The General Body Meeting of the Society held on 31st March, 2013 was attended by Respondent No. 2 as well as Respondent No. 3. As can be seen from the Minutes of the Meeting, at the said Meeting the members were informed that the Developer has through the Society already submitted an Application to the Chief Secretary Revenue and Forest Department, Mantralaya, Mumbai on 4th December, 2012, seeking a change in the ratio of membership i.e. 80% open category and 20% reserve category. In the said Meeting, the Respondent Nos. 2 and 3 alongwith some other Members have expressed their displeasure qua the Petitioner. They were therefore reminded that the Petitioner was appointed in the Special General Body Meeting held on 28th March, 2010 when Respondent Nos. 2 and 3 were present. It was further pointed out that in fact thereafter except for three Members, all the other Members including Respondent No. 2 have given their written undertakings in August, 2010, stating that they have gone through the Development Agreement proposed to be executed with the Petitioner and approved in the General Body Meeting held on 8th August, 2010,

and have given their unconditional No Objection for the development of the project of the Society through the Petitioner, and have further undertaken to vacate their flats whenever the Society would ask them to do so.

2.15. The Collector issued an approval dated 16th May, 2013 to the redevelopment, inter alia on the condition that the unauthorized transfers shall require approval from the Collector, without which the development work shall not commence.

2.16 A Meeting of the Members of the Society along with the Director of the Petitioner was held on 9th June, 2013, which was attended by Respondent No. 2 as well as Respondent No. 3. In fact, the Minutes of the Meeting held on 9th June, 2013 are relied upon by Respondent Nos. 2 and 3 in support of their contentions that the Petitioner has in the said Meeting boasted before the Members that he is attempting to clear the proposal file by using political influence. However, Respondent Nos. 2 and 3 have lost sight of the fact that Respondent No. 3 who now states that the Society cannot be allowed to allot 80% of its premises to the open category members and 20% to the reserved class members, has in the said Meeting supported one Mr. Mishra in informing the Developer that the Members of the Society will not vacate their premises unless the Developer obtains the order allowing the Society to use its flats / tenements in the said 80% - 20% ratio as promised. As can be seen from the said Minutes, the Petitioner pointed out to the Members that similar orders have been passed qua the other Societies and the work of demolition can commence pending the

said order. Respondent No. 2 along with Mr. Mishra (a Member of the Society) expressed doubt as to their security in getting their flats back after demolition of the old building and construction of the new one. As can be seen from the Minutes of the said Meeting, Mr. Kalal, Legal Advisor of the Society responded to this apprehension of the Respondent No. 3 and Mr. Mishra by stating that if any Members had doubts in their minds then he would request the Developer to execute individual agreements with each of the Members. He also promised to extend his help to get those agreements registered. It is further recorded in the Minutes that in view of this statement made by the Legal Advisor, the Members were totally satisfied and they agreed to vacate their flats and thanked the Legal Advisor for the proper guidance given to them. Again from the Minutes, it can be seen that the Chairman informed the Members that Respondent No. 3, Mr. A.V. Kanade and Ms. S.T. Borker have not given their respective undertakings approving the Development Agreement and to vacate the flats as was done by other Members, to which Respondent No. 2 responded by saying that, *“he was never against the said redevelopment project but expected a meeting of Developer”*. It is further recorded that thereupon all the three Members agreed and promised to give their consent to the Petitioner / Developer within a weeks time. It is also recorded in the said Minutes that the Respondent No. 2 along with Mr. A.V. Kanade, Ms. S. T. Borker and also Respondent No. 3, *“expressed their views that they were very much happy and pleased to meet the Developer Mr. Khandelwal, passed the remark that they are impressed by such a frank speaking and decision*

making and Cooperating Developer and agreed that if they would have met him before then they would have given their total cooperation such as consent / undertaking immediately but repented that this day has come too late. However, they seemed to be very happy and pleased with Developer and were willing to show their co-operation so that the majority members do not suffer due to their non cooperation". The last paragraph of the said Minutes is very relevant, wherein it is recorded that, "all the members present were pleased with the Developer and agreed to vacate their flats by 30th September, 2013 and promised to extend their cooperation to the Developer if and when required for redevelopment of the said building and requested the Developer to get all the permissions to immediately start the work of reconstruction by 30th September, 2013".

2.17 In furtherance of the Order dated 31st October, 2012, the Collector issued to the Society Conditional NOC dated 29th July, 2013 for redevelopment. As per Condition No. 6, it was obligatory on the Society to obtain approval from the Social Welfare Officer with respect to the unauthorized transfers. Such approval was to be obtained before the commencement of development. All the three orders dated 31st October, 2012, 16th May, 2013 and 29th July, 2013 therefore show that the representation made by the Society in the year 2011, that there were no unauthorized transfers was not accepted by the State Government or by the Collector. In fact, both the authorities have by laying down necessary conditions in its orders, taken care of the unauthorized transfers in their respective orders.

2.18 Thereafter on 26th August, 2013, the Developer has obtained an IOD from the Municipal Corporation, Greater Mumbai.

2.19 On 23rd September, 2013, the Petitioner and the Society submitted an Application to the Ministry, Revenue and Forest Department seeking permission to admit 80% Members from the open category and 20% from the reserve category.

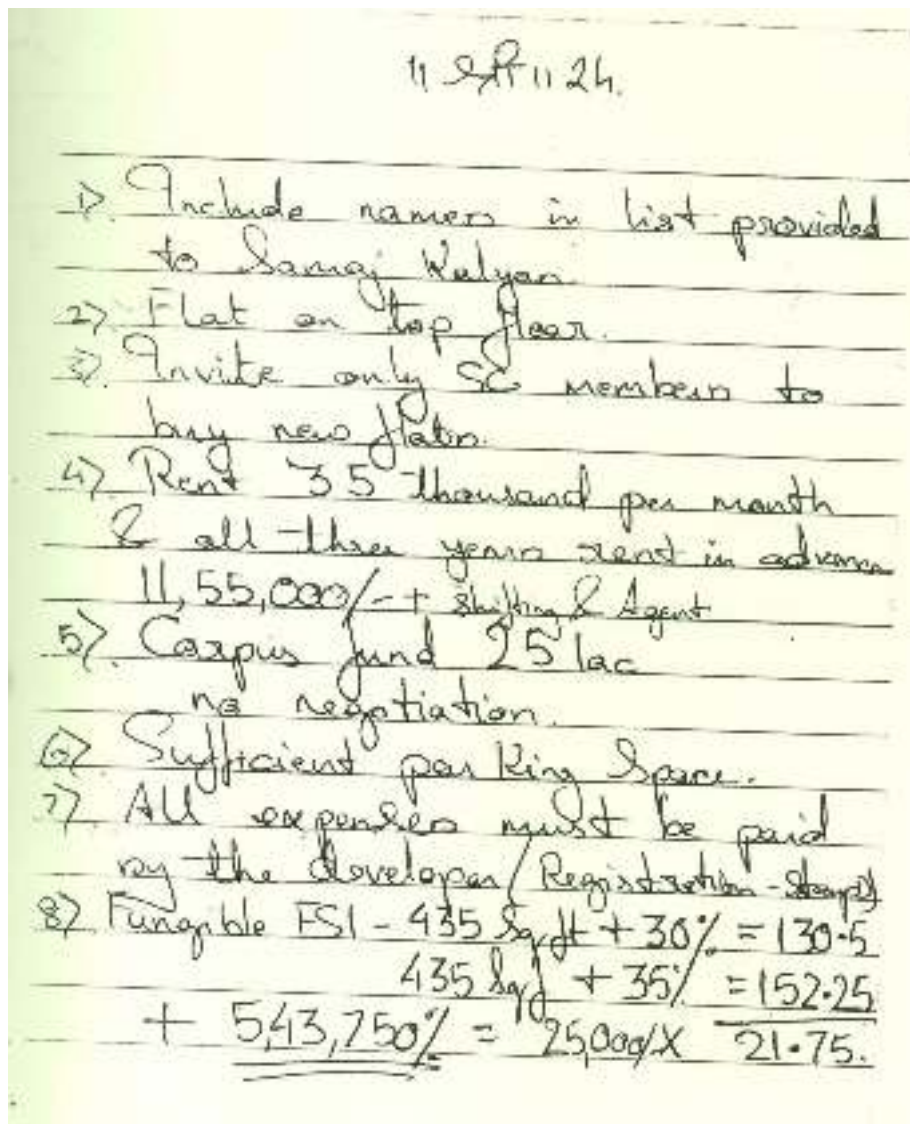
2.20 In the General Body Meeting of the Society held on 27th October, 2013, the Members of the Society agreed to vacate their respective flats between 15th November, 2013 to 30th November, 2013. Thereafter, 18 Members of the Society have vacated their flats and the Petitioner started paying monthly compensation to the said 18 Members towards alternate accommodation.

2.21 Respondent Nos. 2 and 3 through their Advocate issued a notice dated 29th October, 2013 to the Petitioner raising various contentions. However, it is pertinent to note that though the said notice runs into several pages, not a whisper has been made on behalf of Respondent Nos. 2 and 3 that the Society cannot apply for and obtain permission from the State Government / Collector to allow 80% occupation of the premises by the open category Members and 20% by the reserved category Members. The same can be said qua the detailed letter dated 5th November, 2013 written by the Respondent Nos. 2 and 3 inter alia to the Chairman, Secretary, Advocate and Architect of the Society.

2.22 Since 18 out of the 20 Members / occupants had vacated their respective premises, on 28th December, 2013, the Society gave its No Objection

to the Petitioner to demolish the flats in case where possession was obtained from the Members / occupants. The Respondent No. 3 obstructed the said demolition and therefore police assistance was sought by the Petitioner for the purpose of carrying out the demolition. The Petitioner demolished the internal walls of those flats where possession was handed over to the Petitioner.

2.23 In February, 2014 the Respondent Nos. 2 and 3 and their family members had a meeting with the Petitioner – Developer at Juhu Gymkhana Club, where the Respondent Nos. 2 and 3 placed their demands before the Petitioner. The demands which are written in the handwriting of Respondent No. 2 are reproduced hereunder :



2.24 As can be seen from the above demand, the Respondent Nos. 2 and 3 made a demand for flats on the top floor, rent of Rs.35,000/- per month for all three years in advance aggregating to Rs.11,55,000/-, corpus fund of Rs.25 Lacs and flats of larger area. No demand is made qua regularization of unauthorized occupation of flats.

2.25. On 22nd March, 2014 Respondent No. 3 admittedly took an amount of Rs.1 Lac from the Petitioner and issued a receipt for the same. Respondent No. 3 also issued a fresh consent letter / declaration to the Petitioner wherein he has undertaken to vacate his flat immediately upon receipt of the amounts set out therein. The said consent letter / declaration is annexed to the Affidavit of the Petitioner dated 5th September, 2014.

2.26 On 22nd August, 2014 the Assistant Commissioner, Social Welfare, Mumbai Suburban, issued a NOC for redevelopment, subject to the condition that the occupation of the Members of the Society should be regularized before obtaining the building completion certificate.

2.27. On 12th September, 2014 the Secretary of the State Government granted NOC to the Society to have 80% Members from the open category and 20% Members from the reserved category. The Respondent Nos. 2 and 3 have filed Writ Petition No. 3196 of 2014 challenging the NOC dated 12th September, 2014 granted by the Under Secretary, State of Maharashtra. However, till date no relief is granted in favour of Respondent Nos. 2 and 3 in the said Writ Petition.

2.28. On 19th November, 2014, the Collector has granted permission to the Respondent No. 1 to have 80% Members from the open category and 20% Members from the reserved category.

3. The learned Advocate appearing for the Petitioner has submitted that Respondent Nos. 2 and 3 were at all times aware that all the Members of the Society were not from the reserved category and that some were from the open category. They were also aware that since the year 1994 Show Cause Notices were issued by the Collector pertaining to the said issue. Despite being aware of the same, both Respondent Nos. 2 and 3 had in the year 2009 given their consent for redevelopment of the said property. Respondent Nos. 2 and 3 also participated in the General Body Meetings and supported the appointment of the Petitioner as a Developer to redevelop the said property.

4. It is submitted on behalf of the Petitioner that Respondent No. 2 alongwith other Members also approved the Development Agreement and the layout plan. Respondent No. 3 initially did oppose the approval of the Development Agreement on the ground that the names of all the Members should be approved prior to the approval of the Development Agreement but at the same meeting subsequently stated alongwith two other opposing Members that, *“they are favouring the resolution on the point that the meeting is arranged with the Developer to clear some of their difficulties”*. Subsequently, a meeting was held with the Developer, which was attended by Respondent Nos. 2 and 3 and at which meeting all the Members including Respondent Nos. 2 and 3 decided to

vacate their respective flats / premises. It is submitted that it is true that while granting redevelopment permission on 31st October, 2012, the State Government imposed a condition that the Collector should verify the eligibility of the existing Members of the Society and pursuant thereto the Collector by his order dated 29th July, 2013 imposed a further condition that if the transfers in favour of the existing Members are without prior approval, then, such transfers are to be approved by the District Social Welfare Officer, and until such approval the development shall not commence. However, the Assistant Commissioner, Social Welfare, Mumbai Suburban on 22nd August, 2014 issued a NOC for redevelopment subject to the condition that the occupation of all the Members of the Society be regularized before obtaining the building completion certificate upon redevelopment. It is submitted that therefore the condition in the NOC dated 29th July, 2013 stood modified by NOC dated 22nd August, 2014. It will not be out of place to mention here that since Respondent Nos. 2 and 3 had submitted in Court that despite the condition in the NOC dated 22nd August, 2014, the Collector can resume the land on which the said building is situated, on the ground that the condition in the NOC dated 29th July, 2013 was breached, this Court with a view to assist the parties directed the Assistant Commissioner, Social Welfare Mumbai Suburban to remain present in Court and sought a clarification on the aforesaid controversy raised by the parties. However, the Officer from the Social Welfare Department except for confirming that the NOC dated 22nd August, 2014 was in fact issued by the Social Welfare Department

was unable to assist the Court in any manner.

5. It is further submitted on behalf of the Petitioner that on 12th September, 2014 the Government permitted the Society to admit 80% Members from the open category and 20% from the reserved category. Pursuant thereto, the Collector has passed his order dated 19th November, 2014 in similar terms. Though Respondent No. 3 and others had earlier insisted that the Society/Petitioner should seek necessary permissions to allow the Society to admit 80% Members from the open category and 20% from the reserved category, which was not opposed by Respondent No.2, now the Respondent Nos. 2 and 3 filed a Writ Petition (L) No. 3196 of 2014 challenging the order dated 12th September, 2014 on the ground that such permission cannot be granted. Again, they have in the last several months not made any Application for placing the said Writ Petition on board for Admission or for ad-interim reliefs. It is submitted that the Respondent Nos. 2 and 3 cannot impugn the order passed by the Collector or the Commissioner, Social Welfare before this Court in the present proceedings.

6. It is further submitted on behalf of the Petitioner that in February, 2014 Respondent Nos. 2 and 3 had approached the Petitioner with various claims, which the Petitioner was unable to comply with. In fact, Respondent No. 3 in March, 2013 admittedly took an amount of Rs.1 Lac from the Petitioner and executed a fresh consent letter, wherein Respondent No. 3 undertook to vacate his flat upon receipt of payment set out therein. Since the Petitioner was not

willing to comply with the claims / demands of Respondent Nos. 2 and 3, Respondent Nos. 2 and 3 are wrongly refusing to hand over possession of their respective flats for the purpose of redevelopment, on grounds which are untenable, and are thereby stalling the entire redevelopment process.

7. It is further submitted on behalf of the Petitioner that 18 out of the 20 Members are already out of their respective flats since November, 2013 and are waiting to get possession of their newly constructed flats. However, except for breaking the internal walls of the flats, the Petitioner has been unable to proceed with the development work since Respondent Nos. 2 and 3 are not handing over physical possession of their flats. It is therefore submitted that the Petitioner is entitled to relief sought in the above Petition and Respondent Nos. 2 and 3 are wrong in contending that the reliefs as sought cannot be granted in the above Petition. In support of the contention that the reliefs can be granted by this Court, the Petitioner has relied on the decisions of the Division Bench of this Court in the case of *Girish Mulchand Mehta and Anr. Vs. Mahesh S.Mehta and Anr.*¹, and *M/s. Sarthak Developers Vs. Bank of India Amrut Tara Staff Cooperative Housing Society Limited and Ors.*²

8. The learned Advocate appearing for the Petitioner has also submitted that there is no mention in the Development Agreement that the Petitioner has to carry out additional construction at its cost for the Members, in case the Members are entitled to any FSI free of cost. It is also submitted that the

1 2010 (1) Bom.C.R.31

2 Unreported decision dated 5th December, 2012 passed in Appeal (L) No. 310 of 2012

allegations made by Respondent Nos. 2 and 3 that the Petitioner is making use of fungible FSI for the saleable area/portion, which is available only for the residents / occupants of the Society is incorrect, and the Petitioner undertakes to this Court not to use any such fungible FSI for the saleable area/portion.

9. It is further submitted on behalf of the Petitioner that since partial demolition of the flats has already taken place, there is a grave risk of the building structure collapsing during the monsoon season, which will cause grave harm and injury to life and property, including persons living in the near vicinity. It is submitted that the balance of convenience is also in favour of the Petitioner and the occupants, who have already handed over possession of their flats and are currently residing in alternate accommodation. It is therefore submitted that the reliefs sought in the Petition be granted, failing which grave harm, injury, hardship and prejudice would be caused to the Petitioner as well as to the Members who have vacated their premises since November, 2013, and are patiently waiting to get their newly constructed flats.

10. The learned Advocate appearing for Respondent Nos. 2 and 3 has submitted that the Petitioner / Developer is not entitled to any relief since he has failed to comply with the prerequisite condition imposed by the State Government and the Collector by their orders dated 30th October, 2012, 16th May, 2013 and 29th July, 2013 while granting redevelopment permission. It is submitted that the Social Welfare Officer has not yet approved / regularized transfers of the 10 Members of the Society, and unless and until the said

transfers are approved by the Social Welfare Officer, the Petitioner / Developer cannot commence the development work including the demolition of the existing building. It is submitted that the order passed by the Government dated 12th September, 2014 permitting the Society to admit 80% Members from the open category could never have been passed. The said order has been passed without taking prior approval / permission of the Chief Minister and by wrongly relying on Government Resolutions dated 25th May, 2007 and 25th July, 2007, which are not applicable to the Society enjoying the benefit under the "Post War Reconstruction Scheme 219". It is submitted that Respondent Nos. 2 and 3 have already filed Writ Petition (L) No. 3196 of 2014 in this Court challenging the said order dated 12th September, 2014 inter alia on the aforesaid grounds. It is submitted that though Respondent Nos. 2 and 3 are not against the redevelopment, they apprehend that in the event of it being ultimately established that the Society has acted in breach of law, the Government may repossess the land and Respondent Nos. 2 and 3 will be deprived of their shelter.

11. It is further submitted on behalf of Respondent Nos. 2 and 3 that they are deprived of the benefit of fungible FSI and the Petitioner / Developer is unlawfully making use of the said FSI for the saleable area / portion. It is also submitted that the reliefs sought by the Petitioner cannot be granted in a Petition under Section 9 of the Act. It is therefore submitted that the above Arbitration Petition be dismissed.

12. I have perused the pleadings alongwith the exhibits annexed

thereto and have also considered the submissions advanced by the learned Advocates appearing for the Parties and the case law relied upon by them.

13. As stated hereinabove, the Society had in the year 1956 made an Application to the State Government for allotment of a plot of land to the Society to construct houses for backward class families. Thirty years after receipt of the said Application, the State Government allotted the said plot to the Society for construction of building having 20 flats ('the said flats'). Due to this delay, some of the original Members passed away or were not interested in pursuing the matter with the State Government. The Society therefore faced financial problems. Thus the Society accepted some Members from the open category and constructed a building in the year 1990. The Office of the Collector was aware of this fact and also issued notices to the Society dated 24th November, 1994, 21st March, 1996 and 26th December, 2008 to show cause why the land should not be repossessed on account of the breach of terms and conditions of allotment. In fact, on 7th August, 2008 the Society itself forwarded a circular to all its Members recording therein that there are only four Members of the Society whose names appear in the original approved list and therefore the remaining 16 Members ought to seek approval either from the Collector or from the Social Welfare Officer. Pursuant thereto, six Members belonging to the reserve category including Respondent Nos. 2 and 3 obtained necessary approval from the Collector and therefore, the membership of 10 out of the 20 Members of the Society was approved. Respondent Nos. 2 and 3 despite being

aware of this fact decided to go for redevelopment of the said property. In fact, Respondent Nos. 2 and 3 also gave their written consent dated 15th January, 2009 and 6th January, 2009 respectively, stating that they have No Objection for redevelopment of the Society building by demolishing the old structure and constructing a new building as per Development Control Rules, using (T.D.R.) Transfer of Development Right, as decided in the Special General Body Meeting of the Society held on 21st December, 2008 and they through their consent letters offered full co-operation to the Society.

14. In the year 2009, the Society got its property inspected from the Consulting Engineer, who has opined that the building is R.C. framed structure with brick masonry walls, which are not load bearing, the columns and beams of the building have developed cracks and the building needs to be completely demolished and reconstructed. It was also recorded that the present condition of the structure makes it non-habitable and risky to human life.

15. On 28th March, 2010 Respondent Nos. 2 and 3 attended the Special General Body Meeting of the Society, and alongwith other Members approved the appointment of the Petitioner as the Developer, to develop the Society property. On 8th August, 2010, 14 Members including Respondent No. 2 approved the draft Development Agreement. Respondent No. 3 initially stated that the Society should go for redevelopment after getting the names of the Society members approved. However, as can be seen from the same Minutes, Respondent No. 3 as well as the other two Members later submitted that, "*they*

are favouring the resolution on the point that the meeting is arranged with the Developer to clear some of their difficulties". Thereafter, the Development Agreement was executed by and between the Society and the Petitioner on 21st September, 2010. The salient features of the Development Agreement are set out in paragraph 2.11 hereinabove.

16. Respondent Nos. 2 and 3 have relied on the Minutes of the Meeting of the Society held on 9th June, 2013 in support of their contention that the Petitioner has in the said Meeting boasted before the Members that he was attempting to clear the proposal file by using political influence. However, as can be seen from the very same Minutes, both the Respondent Nos.2 and 3 have at the said Meeting expressed regret qua their earlier decision of non-cooperation with the Petitioner and have also agreed to vacate their flats by 30th September, 2013. The issue of obtaining approval qua the flats allotted to the Members from the open category was not made a condition precedent before vacating the flats. It is very pertinent to note here that in fact at the said Meeting, Respondent No.3 along with some of the Members insisted that the Petitioner should obtain the necessary permission allowing the Society to use 80% of the flats by the Members from the open category and 20% from the reserve category, before vacating their respective premises, as earlier promised by the Petitioner. Respondent No. 2 who was also present at the Meeting did not object to the said demand made by Respondent No. 3 and some other Members.

17. It is submitted on behalf of Respondent Nos. 2 and 3 that the

Society has in its letter dated 5th November, 2011 addressed to the Collector made a representation to the effect that 90% of the Members of the Society are from the backward class and 10% Members from the open category. Though, the Society ought not to have made an incorrect representation, the same was inconsequential since the Office of the Collector as mentioned hereinabove, was aware of the fact that some of the Members of the Society were from the open category. In fact, the State Government had by an order dated 30th October, 2012 granted conditional permission for redevelopment of the building directing the Collector to verify the eligibility of the existing Members of the Society. The Collector had by his order dated 29th July, 2013 granted NOC on the condition that approval of the Social Welfare Department will be sought qua the Members who are not from the reserved category, prior to redevelopment. The Asstt. Commissioner of Social Welfare Department has by his order dated 22nd August, 2014 directed the Society/Developer to get the possession of the Members from the open category regularized prior to receipt of the Completion Certificate.

18. In the Special General Body Meeting held on 27th October, 2013, the Members of the Society agreed to vacate their respective flats between 15th November, 2013 to 30th November, 2013 and thereafter 18 Members of the Society have vacated their flats and the Petitioner started paying monthly compensation to the said 18 Members towards alternate accommodation. The Respondent Nos. 2 and 3 through their Advocates addressed a letter dated 29th October, 2013 to the Petitioner raising several objections. Again Respondent

Nos. 2 and 3 by their letter dated 5th November, 2013 addressed a letter to the Society, the Petitioner raising several objections. However not a whisper is made in either of the letters qua the attempt on the part of the Society/Petitioner to seek approval for use of flats in the ratio of 80 : 20 i.e. 80% for the open category and 20% for the reserved category. Though Respondent No.3 has admittedly made alternate arrangements and has shifted from the suit flat, Respondent Nos. 2 and 3 have refused to hand over possession of the flats in their occupation. The Petitioner / Developer has demolished the internal walls of the flats in cases where the possession has been handed over to the Petitioner, but despite the same, is unable to demolish the entire structure in view of the aforestated conduct of Respondent Nos. 2 and 3 not handing over possession of their respective flats to the Society/Petitioner.

19. The malafides on the part of the Respondent Nos. 2 and 3 now clearly surface as follows:

After creating obstruction in the manner as detailed hereinabove, Respondent Nos. 2 and 3 held a meeting at Juhu Gymkhana Club with the Petitioner / Developer and submitted their demands to the Petitioner in writing as set out in paragraph 2.22 above, which shows that Respondent Nos. 2 and 3 have demanded additional area, additional corpus amount and additional monthly compensation than what was provided to the other Members. There is no demand made by Respondent Nos. 2 and 3 that the Petitioner / Developer prior to demolition of the building should get the names of the Members

belonging to the open category approved from the Collector. Though, Respondent No.3 along with some other Members had in the Meeting held on 9th June, 2013 insisted that the Petitioner should obtain permission to use the Society property in the 80:20 ratio, and which demand was not opposed by Respondent No.2, at the Meeting held at Juhu Gymkhana Respondent Nos.2 and 3 demanded that the new Members enrolled should be from the reserved category. This goes to show that the issue of enrolling members from the reserved category which is otherwise not only forgotten but pressed to the contrary by Respondent Nos.2 and 3, again surfaces only when Respondent Nos.2 and 3 want to use it as a ruse to extract their pound of flesh from the Petitioner. What followed is still worst. After the said meeting, the Respondent No. 3 in March, 2013 admittedly took an amount of Rs.1 Lac from the Petitioner and executed a fresh undertaking to vacate his flat upon payment of the amount mentioned therein and thereafter went back on his words.

20. Respondent Nos. 2 and 3 therefore, as set out hereinabove, agreed to the redevelopment of the property, issued Consent Letters for the same, regretted their non-cooperative conduct, agreed to vacate their flats without insisting that the Petitioner/Society should first obtain approval of the Government / Social Welfare Officer with respect to unauthorized transfers, and since October 2013 started taking objection qua the redevelopment. In February 2014 they made demands on the Petitioner for additional corpus component and area which the Petitioner could not comply with. They

therefore, as set out hereunder also opposed the permission obtained by the Society/Petitioner to use 80% of the tenements for the open category members which they themselves had earlier insisted that the Petitioner should obtain.

21. It is true that by an order dated 31st October, 2012, the State Government granted conditional permission for redevelopment of the building. By the said order, the State Government directed the Collector to verify the eligibility of the existing Members of the Society and had also provided for the enrollment of the new Members, subject to the approval of the Collector. Pursuant to the said order of the State Government, the Collector has granted conditional NOC dated 29th July, 2013 for redevelopment requiring the Society to obtain approval from the Social Welfare Officer with respect to the unauthorized transfers before the commencement of the development. The Assistant Commissioner, Social Welfare, Mumbai Suburban, by his order dated 22nd August, 2014 has given his NOC for redevelopment of the said property subject to the condition that the memberships should be regularized before obtaining the Completion Certificate. The order dated 22nd August, 2014 is not impugned by Respondent Nos. 2 and 3 before any Court of Law.

22. As recorded in the Minutes of the General Meeting dated 9th June 2013, Respondent No.3 and some other Members insisted and informed Mr. Khandelwal of the Petitioner that the Society/Petitioner should obtain the necessary orders allowing 80% Members from the open category and 20% Members from the reserved category to use the tenements, and only thereafter,

the Members shall vacate their respective premises. Respondent No.2 also did not object to the said demand. Again as set out hereinabove in the detailed letters dated 29th October 2013 and 5th November 2013 written by the Advocate for Respondent Nos. 2 and 3 and by the Respondent Nos.2 and 3 themselves, not a whisper of an objection is made by Respondent Nos. 2 and 3 qua the Application filed by the Society through the Petitioner seeking permission to have 80% Members from the open category and 20% Members from the reserved category. However, after the said order is obtained by the Society/Petitioner allowing 80% of the tenements to be used by the open category Members, Respondent Nos. 2 and 3 are now contending that the said order could not have been obtained or passed, and have also filed Writ Petition (L) No. 3196 of 2014 in this Court challenging the NOC dated 12th September, 2014 granted by the Under Secretary, State of Maharashtra. In fact after the NOC dated 12th September, 2014 was issued by the State Government, the Collector has by his order dated 19th November, 2014 granted permission to the Society to have 80% Members from the open category and 20% Members from the reserved category. Respondent Nos. 2 and 3 despite having filed the Writ Petition in the year 2014 have not obtained any reliefs in the said Petition. The fact remains that as on date, the Society/Petitioner have orders dated 22nd August, 2014, 12th September, 2014 and 19th November, 2014, which are not set aside by any court of law. This Court in the present proceedings cannot test the merits of the said order. However, this Court has no hesitation in recording that

from the aforesaid conduct of Respondent Nos. 2 and 3 this Court is satisfied beyond any doubt that the Respondent Nos.2 and 3 have taken different stands at different times only to blackmail the Developer and extract the maximum possible benefits from him. When the Respondent Nos.2 and 3 failed to make the Petitioner succumb to their demands, the permission which they had insisted upon is challenged by them, by pretending to be the messiah of the backward class. The conduct of the Respondent Nos. 2 and 3 therefore completely lacks bonafides and smacks of malafides.

23. The submission made on behalf of Respondent Nos. 2 and 3 that they are entitled to additional area in view of the fungible FSI, which is made available free of charge under the Development Control Regulations to the tenants / occupants and instead the same is used by the Petitioner for his saleable area, also cannot be accepted. There is no condition set out in the Development Agreement requiring the Developer to give additional area to the Members of the Society free of charge in the event of any fungible FSI being available, free of charge, only for the use of the tenants / occupants of the flats. To give any additional area to the tenants in lieu of the free FSI would cost the Developer an additional amount running into several lacs/crores of rupees. The Petitioner has submitted that in the present case, at the time of executing the Development Agreement, he had agreed to give the maximum possible usable area (i.e. 575 sq.ft. carpet) to the tenants and therefore cannot afford to give any thing more. Appreciating this fact, none of the other Members have made any

demand for additional area. In fact, earlier in the General Meetings when the Members of the Society including Respondent Nos. 2 and 3 had agreed to vacate their flats, they had not made their promise to vacate their respective flats conditional on getting any additional area, than what was agreed in the Development Agreement. However, the Petitioner has given a written undertaking to the Court that he has not used and will not use the 35% FSI available free of cost to the tenants / occupants for the sale portion / area.

24. The Respondent Nos. 2 and 3 have also contended that the Petitioner is not entitled to the reliefs as prayed against them in the present Petition. Respondent Nos. 2 and 3 are not correct in their submission. In the case of *Girish Mulchand Mehta and Ors. Versus Mahesh S. Mehta and Ors* (supra) this Court has held as under :

“the jurisdiction under Section 9 can be invoked only by a party to the arbitration agreement. Section 9, however does not limit the jurisdiction of the Court to pass order of interim measures only against party to an arbitration agreement or arbitration proceedings ; whereas the Court is free to exercise same power for making appropriate order against the party to the petition under Section 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to the arbitration agreement or arbitration proceedings does not affect the jurisdiction of the Court under Section 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the arbitration agreement”

25. Again in the case of *M/s. Sharthak Developers V/s. Bank of India*

Amrutara Staff Cooperating Housing Society Limited (supra) this Court has held as under :

“14. A member of a cooperative society cannot assert a right in respect of a flat occupied by him independent of the rights of the co-operative society. Each of the dissenting members continues to be a member of the co-operative society and continues to be bound by the agreement that was entered into by the society with the developer. Under Section 9 of the Arbitration and Conciliation Act, 1996, a party to an arbitration agreement is entitled to apply to a Court for an interim measure of protection including for appointment of a receiver. The property in respect of which a Receiver is sought to be appointed may well be in possession of a third party. The crucial test for the application under Section 9 is whether the party moving the application under section 9 is a party to the arbitration agreement and whether the appointment of a receiver is sought in respect of property which forms the subject matter of arbitration agreement. In the present case, the dissenting Respondent are subsumed within the identity of a co-operative society of which they are members. Each one of them is bound by the agreement which was entered into by the Co-operative Society of which they are members, with the Appellant. The First Respondent society has supported the redevelopment through the Appellant. In these circumstances, a Petition under Section 9 would be maintainable”.

Similarly, in paragraph 17 of the Judgment in the case of *M/s. Sarthak Developers* (supra), this Court has held as under:

“17. The appointment of a Receiver is undoubtedly a drastic

order, but the Court is empowered to do so on well-established principles of it being just and convenient. There are several reasons which must weigh in favour of the appointment of a receiver. Firstly, the condition of the property in question is a matter of importance in the city of Mumbai which is affected by high degree of saline corrosion. The buildings are admittedly dilapidated and in urgent need of repair or redevelopment. The Society was not in a position to carry out repairs having regard to the fact that in August, 2007 the cost of repair was estimated at Rs. 1.65 crore by its structural consultant. Hence, the option of redevelopment which has been accepted in the resolution passed by the Society would have to be respected. Secondly, in the present case, an overwhelmingly large proportion of the members of the Society have consented to the scheme of redevelopment and have in fact vacated their premises. The interests of those 149 members who are supporting redevelopment and of whom 143 have vacated are of paramount concern. Thirdly, unless a receiver was to be appointed, it will be open to a dissenting minority of a few members to obstruct and defeat the will of the large majority. Fourthly, each of the dissenting members is also, like all the members of the Society, entitled to permanent alternate accommodation free of cost in the redeveloped building. An enhancement of the existing areas in occupation is envisaged in the redeveloped building. In the meantime, each of the members shall be entitled to compensation for transit accommodation as agreed with the Co-operative Society and as paid to all other members. This is not a case where a scheme of redevelopment is oppressive to the legitimate interests of a minority nor has any such submission been urged.”

26. Since Mr. Kanade the learned Advocate appearing for the Respondent Nos.2 and 3 submitted before this Court that the Respondent Nos.2 and 3 are not wanting to come in the way of the redevelopment but are only scared that they may loose their shelter, if the State Government repossesses the said plot of land allotted to the Society, this Court enquired from Mr. Kanade whether Respondent Nos.2 and 3 would agree to vacate their flats, if the Court obtains an undertaking from the Petitioner that in the event of Respondent Nos. 2 and 3 not getting possession of their respective flats within a period of 36 months from the date of commencement of construction for any reason whatsoever, the Petitioner shall provide ownership flats admeasuring 575 sq.ft. to Respondent Nos. 2 and 3 in the same vicinity. Respondent Nos. 2 and 3 who were present in Court, agreed to handover possession of their flats to the Petitioner upon the Petitioner giving such an undertaking. The Petitioner too agreed to give such an undertaking. The matter was therefore, adjourned only to enable the Parties to file the Minutes of Order. However, on the next date of hearing, Respondent Nos. 2 and 3 for reasons best known to them went back on the agreement arrived at in Court (which was not a without prejudice agreement) and prayed that the Court should decide the matter on merits.

27. The conduct of Respondent Nos. 2 and 3 has caused and is causing grave prejudice to the Petitioner who has till date spent more than Rupees Two crores towards the redevelopment project, and to the other tenants of the building who have vacated their flats in November 2013 and are waiting patiently to get

possession of the newly constructed flats. The structure which was admittedly weak has become weaker since the internal walls of most of the flats are broken. Respondent No. 3 has already vacated his flat. The entire redevelopment project is stalled because Respondent Nos. 2 and 3 are refusing to give possession of their flats. The balance of convenience is completely in favour of the Petitioner and the members of the Society and against Respondent Nos. 2 and 3.

28. In these circumstances, the following Order is passed :

- i. The Court Receiver, Bombay High Court is appointed as the Receiver of the flats presently in occupation of Respondent Nos. 2 and 3.
- ii. The Respondent Nos. 2 and 3 shall handover possession of their flats to the Court Receiver on or before 15th June, 2015.
- iii. The Receiver shall thereupon handover the said flats to the Petitioner to demolish the same and proceed with the development work.
- iv. The Petitioner shall before accepting possession from the Receiver deposit with the Receiver the amount payable to Respondent Nos. 2 and 3 under the Development Agreement, which amount shall be handed over by the Receiver to Respondent Nos. 2 and 3.
- v. The above Arbitration Petition is accordingly disposed of.

(S.J. KATHAWALLA, J.)