IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L) NO. 72 OF 2016
IN
COMM. SUIT (L) NO. 86 OF 2016

Hari Om Sayaji Properties LLP ...Plaintiff

Versus

1) Yoga Yog Co-op. Housing Society
2) BrijKishor M. Halwai
3) Shanti J. Halwai
4) Dhananjay J. Halwai ...Defendants

Mr. Cherag Balsara, along with Mr. P. Colabawalla, instructed by M/s. Diamondwala & Co., for the Plaintiff.

Mr. Karl Tamboly, instructed by Mr. Jayesh Vyas, for Defendant No.1.

Mr. Sandeep Parikh, instructed by M/s. M.P.Vashi & Associates, for Defendant Nos. 2 to 4.

CORAM; S.J. KATHAWALLA, J.

DATE: 29th September,2016

P.C:

1. The Plaintiff is a registered Limited Liability Partnership firm formed for the purpose of redevelopment of the property belonging to the Defendant No.1 which is a Co-operative Housing Society. Defendant No.1 is the owner of the piece and parcel of freehold land lying, being and situated at C.T.S. No. bearing 1625, 1625/1, 1629(B), 1628, 162/1 to 1628/4 of Vile Parle(East), Mumbai-400 057 admeasuring in the aggregate 1790.60 sq. mtrs., as per City survey record and bearing Final Plot No. 197,201 of Vile Parle(East), T.P.S. No.II and Final Plot No.253 of Vile Parle(East) T.P.S. No.IV admeasuring 1747.80 sq. mtrs. as per town planning records, Sir Phirozha Mehta Road, Vile Parle(East), Mumbai-400 057 (hereinafter referred to as "**the said Plot"**) together with the three buildings (i.e., "Main Building" "Extended Building" and "Rear Building") standing thereon known as "Yoga Yog Co-operative Housing Society Ltd., (hereinafter referred to as "**the said Buildings**"). The said Buildings were constructed in the year 1969 in terms of the Sanctioned Plan. The said Buildings consist of 4 shops and 33 flats in all. The said Plot and the said Building are collectively referred to as "**the said Property**". Defendant Nos. 2 to 4 are family members and are related to each other and are members of Defendant No.1. Defendant No.2 is the owner of Flat No.18 admeasuring 413 sq.ft. carpet area. Defendant No.3 is the owner of Flat No.19 admeasuring 370 sq.ft. carpet area and Defendant No.4 is the owner of Flat No.23 admeasuring 371.86 sq.ft. carpet area.

2. The above Suit is filed by the Plaintiff for (i) declaration that the Development Agreement dated 28th January 2014, Power of Attorney dated 29th January 2014, read with Supplementary Agreement dated 28th April 2016, and Deed of Assignment dated 17th May 2016 and Substitution of Power of Attorney dated 17th May 2016(Exhibits-CC,DD,MM and PP to the Plaint) are valid, legal and binding on Defendant Nos. 2 to 4 and Defendant No.1 Society; (ii) an order directing Defendant No.1 Society and Defendant Nos. 2 to 4 to specifically perform the terms and conditions of the Development Agreement dated 28th January 2014, Power of Attorney dated 29th January 2014, read with Supplementary Agreement dated 28th April 2016, and Deed of Assignment dated 17th May 2016 and Substitution of Power of Attorney dated 17th May 2016 (Exhibits-CC,DD,MM and PP to the Plaint); (iii) an order directing Defendant Nos 2 to 4 to jointly and/or severally hand over peaceful possession of Flat Nos. 18,19 and 23 (the suit flats) to the Plaintiff for reconstruction and redevelopment of the suit property in accordance with the terms and conditions of the Development Agreement dated 28th January 2014, Power of Attorney dated 29th January 2014, read with Supplementary Agreement dated 28th April 2016, and Deed of Assignment dated 17th May 2016, and Substitution of Power of Attorney dated 17th May 2016(Exhibits-CC,DD,MM and PP to the Plaint).

3. The Plaintiff has in the above Suit also taken out Notice of Motion (L) No. 72 of 2016, inter alia, seeking interim reliefs i.e., (i) appointment of a Court Receiver, High Court Bombay as Receiver in respect of the Suit flats situated in the said buildings with all powers under Order XL, Rule 1 of the Code of Civil Procedure, 1908 including the power to take possession of the Suit Flats from the occupation of the Defendant Nos. 2 to 4 and/or any other person claiming through or under them, if need be, with the help of police assistance and to hand over vacant and peaceful possession of the same to the Plaintiff for redevelopment and to continue as Receiver till the possession of the new flats being Nos. A-101, A-102 and A-101a is handed over to Defendant Nos. 2 to 4; (ii) for an order and injunction restraining Defendant Nos. 2 to 4 by themselves, their agents, servants and/or any persons claiming through or under them from obstructing and/or creating any encumbrance or impediments in the development of the Suit Property; (iii) for an order and direction directing Defendant Nos. 2 to 4 either personally or through Court Receiver to hand-over peaceful possession of the Suit Flats for reconstruction and redevelopment of the Suit Property; (iv) for an order and injunction restraining Defendant Nos. 2 to 4 for themselves, their servants, agents and/or any person/s claiming through or under them from proceeding with Civil Suit (Stamp) No. 4485 of 2016 before the Bombay City Civil Court at Dindoshi against the Plaintiff and Defendant No.1.

4. Briefly set out are the facts as narrated by the Plaintiff.

4.1 Defendant No. 1 being the society of flat owners is the owner of the said property.

4.2 Defendant Nos. 2 to 4 are family members. They are Members of Defendant No.1 Society and owners of the suit flats. Defendant No.2 owns Flat No.18 admeasuring 413 carpet area, which includes attached otla. Defendant No. 3 owns flat no. 19 admeasuring 370 sq. ft carpet area, which includes attached otla. Defendant No.4 owns Flat No. 23 admeasuring 371.86 sq.ft. A sanctioned plan showing the Suit Flats in red colour is at Exhibit-A to the Plaint.

4.3 On 14th November 2007 a meeting was held wherein the members of Defendant No.1 agreed that since the buildings were dilapidated, they should go in for redevelopment.

4.4 On 21st November 2007 Defendant No.1 addressed a letter to its members seeking their consent for redevelopment. The members of Defendant No.1 including Defendant Nos. 2 to 4 consented to go in for redevelopment.

4.5 On 13th August 2010, Defendant Nos. 2, 3 and 4 by their separate letters, again gave consent for redevelopment. However they wanted that the allotments in lieu of Flat Nos. 18 and 19 should be adjacent to each other, road facing and on the ground floor of the new building and the allotment in lieu of flat No. 23 should be in the same wing on the next higher floor in the vicinity of two other flats

4.6 Defendant No.1 thereafter, invited tenders from various developers and received bids from several developers. In a Special General Body Meeting of the Defendant No. 1 held on 24th February 2013, three developers were shortlisted and it was unanimously decided to award the redevelopment of the Suit Property to the partnership firm, Hari Om Developers. Defendant Nos. 2 to 4 have signed the minutes of the said meeting.

4.7 Defendant No.1, by their letter dated 1st March, 2013 informed Hari Om Developers that they were selected as Developers for redevelopment of the said property.

4.8 Floor plans were then drawn up by the Project Management Consultant (PMC) appointed by the Society.

4.9 On 18th May 2013, Defendant Nos. 2 to 4 by their letters addressed to Defendant No.1 stated that they did not agree with the floor plan drawn by the PMC appointed by the Society.

4.10 On 26th October 2013 a letter was issued by Defendant No.1 to Defendant Nos. 2 to 4, inter alia recording that Defendant Nos. 2 to 4 had expressed their desire to have 4 flats instead of 3 in the new development on purchase of extra area. Considering the said requirement of Defendant Nos. 2 to 4, the PMC had prepared new tentative plans which were handed over on 17th October 2013 to Defendant Nos. 2 to 4. It was further stated in the said letter that since Defendant No.1 Society had not heard from Defendant Nos. 2 to 4, they presumed that the said plans were accepted.

4.11 On 27th October 2013, Defendant No.2 (for Flat Nos. 18, 19 & 23) by his letter addressed to Defendant No.1 inter alia, confirmed that the area of 55% over and above the existing area of their flats in the new construction, was acceptable to them.

4.12 On 27th October 2013, Defendant No.2 (for Flat Nos. 18, 19 & 23) addressed another letter to Defendant No.1, inter alia claiming that the garden adjacent to his flat and the loft above flat No. 18 were not taken into consideration though the same were part of his usable area. Defendant No.2 also stated that in the new development Defendant Nos. 2 to 4 wanted two flats adjacent to each other on the ground floor and one flat in close vicinity. Defendant No.2 also stated that upon measurement the usable area of his flat came to 393 sq.ft. whereas the actual area was 413 sq.ft. It was stated that the Defendants were ready and happy to be part of the redevelopment.

4.13 On the same day, i.e., 27th October 2013, a joint meeting between Sanjay Halwai, PMC, Hari Om Developers and Defendant No.1 was held to discuss new plans for Defendant Nos. 2 to 4.

4.14 On 31st October 2013 Defendant No.1 addressed a letter to Defendant Nos. 2 to 4 forwarding revised building plans for flats on the first floor and one on second floor based on their request in the meeting held on 27th October 2013.

4.15 After receipt of the said revised plans from Defendant No.1, discussions ensued between Defendant Nos. 2 to 4 and the said Hari Om Developers, wherein Defendant Nos. 2 to 4 wanted all three flats on the 1st floor. Accordingly, there was another revision of plans by the Developer to accommodate all 3 flats on the 1st floor. The said revised plans showing all three flats on the 1st floor were forwarded by the Developer to Defendant Nos. 2 to 4. On 14th December 2013, Defendant No.2 (for Flat Nos. 18, 19 & 23) addressed a letter to Defendant No.1, accepting the allotment of all flats on the first floor as shown in the revised plans. This was however, without prejudice to his contention that the usable area of Flat No.18 should include the adjacent garden and area of the loft.

4.16 On 15th December 2013 a special general body meeting of Defendant No. 1 was held at which Defendant No. 4 was present. The members of the society unanimously approved the Development Agreement and Power of Attorney in favour of Hari Om Developers.

4.17 On 16th December 2013, Defendant No.4 by his letter requested to transfer 45 sq.ft. of area to be purchased by him to the original Flat No.18.

4.18 On 16th December 2013, Defendant Nos. 2 to 4 by their letter addressed to Defendant No.1 submitted their inputs on the Development Agreement.

4.19 On 18th December 2013, the developer issued an allotment letter to Defendant No. 2 in respect of Flat No. A101 in the new building admeasuring 779 square feet being the Carpet Area of 413 square feet (as stated by Defendant No.1) and an additional area of 227.15 sq.ft. being 55% of 413 square feet) and an additional area of 138.5 square feet carpet area which the Defendant No. 2 desired to purchase for a sum of Rs. 38,87,800/-. Out of this sum Defendant No. 2 paid 7,77,560/- which the developer acknowledged. The said letter was received by Defendant No.2 with an endorsement "without prejudice".

4.20 On 18th December 2013 the developer issued an allotment letter to the Defendant No. 4 in respect of Flat No. A102 in the new building admeasuring 619 square feet including an additional area of 42.62 square feet carpet area which the Defendant No. 4 desired to purchase for a sum of Rs. 11,93,276/-. Out of this sum Defendant No. 4 paid Rs. 2,38,655.50 which the developer acknowledged. There is no without prejudice endorsement on this letter.

4.21 On 20th December 2013 the Developer by 3 separate letters addressed to Defendant Nos.2, 3 and 4 respectively, made payment of 20% hardship compensation to Defendant Nos. 2 to 4 at the rate of Rs.4,600/- per sq.ft. Defendant No.2 was paid on the basis of the stated carpet area of 413 sq.ft.

Defendant Nos. 2 to 4 accepted the said payment. Defendant Nos. 2 to 4 have accepted the said letter with an endorsement "without prejudice". Receipts have been issued by Defendant Nos. 2 to 4 for the said amounts received. There is no "without prejudice" endorsement on the said receipts.

4.22 On 8th January 2014, a Special General body meeting of Defendant No. 1, was held, wherein an amendment to the termination clause in the development agreement was approved by the members. Defendant Nos. 2 to 4 were also represented at this meeting.

4.23 On 28th January 2014, the Development Agreement was executed between Defendant No.1 and Hari Om Developers. The same was duly stamped and registered. In the said Development Agreement, it was inter alia provided that:

(i) Defendant No.1 Society has 37 members of which 33 were residential and 4 were shops.

(ii) The carpet area of the flat/shop in the new building to be allotted to each of the present members in the process of redeveloping the property shall be 55% more than the carpet area of the flat/shop presently occupied by the respective present members.

(iii) Any additional/further FSI becoming available for consumption/utilization on the said property on and after the execution thereof shall be available to the society alone.

(iv) If the area of the said property on physical measurement is found to be less than the area shown in the documents, the members entitlement shall be proportionately reduced.

(v) The Developers shall pay to the members an amount of Rs.4,600/- as compensation for inconvenience.

(vi) Members shall vacate their flats within 60 days of the Developer fulfilling his obligations including purchasing and loading the requisite TDR.

(vii) Developers to provide an irrevocable bank guarantee to the society for Rs.7 Crores in two stages i.e., (i) Rs.5 Crores before obligation to vacate and (ii) Rs.2 Crores on the completion of the 5th slab.

(viii) The amount of the bank guarantee shall be reduced to Rs.3 Crores upon the Developers completing the RCC work of the new structure and to Rs. 25 lakhs upon the completion of the building with amenities. Bank guarantee of Rs.25 lakhs will be released upon the Developers applying for the Building Completion Certificate.

4.24 On 29th January 2014 Defendant No.1 executed an Irrevocable Power of Attorney in favour of Hari Om Developers, which was also stamped and registered.

4.25 On 12th February 2014 a letter was addressed by Defendant No.1 to Defendant No.2, inter alia stating that the Loft of 40 sq.ft. which was above the common toilet meant for usage of shop owners was the common property of the society. It was stated that the same cannot be taken by Defendant No.2 for his carpet area entitlement. It was also stated that the garden space of 160 sq.ft. was part of compulsory front open space as shown in the approved municipal plans and that the same is common property of the society. Defendant No.2 was further informed that the loft area of 40 sq.ft..and the garden area of 160 sq.ft. were common areas and could not be included in the usable area of Flat No.18.

4.26 On 3rd August 2015, the Intimation of Disapproval (IOD) was issued by the Municipal Corporation of Greater Mumbai.

4.27 On 3rd August 2015, plans were sanctioned as per which the Defendant Nos. 2 to 4 were entitled to the allotment of three new flats situated on the first residential floor of the new building.

4.28 On 8th September,2015, modifications in the Development Agreement were proposed and a draft Supplementary Deed was circulated amongst the members of Defendant No.1. Vide the Supplementary Deed it was proposed that in order to achieve faster execution of redevelopment and in view of revised financial benefits negotiated by the Society, the Society would grant consent to M/s. Hari Om Developers to carry out the redevelopment of the Society in joint venture with Sayaji Realty Pvt. Ltd. for which a separate Deed of assignment and/or other documents as required would be executed by the Society with the Developers and Sayaji.

4.29 On 10th September 2015, Defendant No.2 stated his objections to the proposed Supplementary Agreement.

4.30 On 12th September 2015, the Annual General Meeting of Defendant No.1 was held at which the Supplementary Agreement was unanimously approved by the members of Defendant No.1.

4.31 On 21st December, 2015 a Special General Body Meeting of Defendant No 1 was held where the Supplementary Development Agreement and the assignment of development rights was discussed with all members who consented for the said assignment.

4.32 On 8th February, 2015 a Special General Body meeting was held where the Supplementary Development Deed and the documents relating to the assignment were approved, confirmed and consented to by the members.

4.33 On 21st February 2016, Defendant Nos. 2 to 4 addressed a letter to Defendant No.1 inter alia, stating their objections to the Supplementary Deed.

4.34 On 25th April 2016, Defendant Nos. 2 to 4 addressed separate letters to Defendant No.1, inter alia recording their various objections. They inter alia, objected to the allotment of flat No.23 on the first residential floor of the building and stated that it should be on the second residential floor.

4.35 On 28th April 2016, Defendant No.1 executed a Supplementary Deed in favour of Hari Om Developers as approved by Defendant No.1 in its Annual General Meeting held on 12th September 2015. The same was stamped and registered. In the said Supplementary Agreement, it was inter alia provided that:

(i) The clauses of the Development Agreement dated 28-1-2014 shall apply to the Supplementary Agreement mutatis mutandis save and except the amendment/modification through clauses stated therein.

(ii) Developers shall give an irrevocable Bank Guarantee to the society for Rs.7 Crores i.e., (i) Rs.2 Crores before members vacate their flats/shops; (ii) Rs. 2 Crores to be submitted on the completion of the 5th slab of the building; and (iii) security by way of a flat being flat B2-2 on the 2nd floor in lieu of Bank Guarantee for Rs.3 Crores.

(iii) The Developers shall be entitled to replace and release the security by giving a Bank Guarantee of Rs.3 Crores before the Developers complete the RCC work.

(iv) After the RCC work is complete the security in form of flat or Bank Guarantee of Rs.3 Crores will come to an end.

(v) The Developers shall be entitled to give notice to vacate to the members after the developers procure the TDR but the members shall be liable to vacate only after confirmation from the Developers that the TDR has been fully loaded on the property.

(vi) All other provisions of the Development Agreement shall continue to be binding on the parties.

4.36 On 30th April 2016, a letter was addressed by Defendant No.1 to the Registrar, Co-operative Societies informing him regarding the modification of the

Development Agreement dated 28th January 2014 vide Supplementary Deed dated 28th April 2016. By the said letter, Defendant No.1 informed the Registrar that it had been unanimously resolved to allow the said Hari Om Developers to develop the property in an LLP known as Hari Om Sayaji Property LLP; that Defendant No.1 had verified all the requisite documents relating to the said LLP and had satisfied themselves with regard to every aspect of the said LLP; that in order to overcome technical difficulties in developing the said property jointly by Hari Om Developers and Sayaji Realty Pvt. Ltd., they had agreed and confirmed that Hari Om Developers will execute a Deed of Assignment of development rights in favour of Hari Om Sayaji Property LLP; that the said facts were put before all the members of the society in the general/special body meeting held on 21st December 2015; that 100% of the members of the society have agreed, accepted and consented for such assignment after extensively discussing the same; and that pursuant to the decision taken by all the members of the society for such assignment, a deed of assignment and such other documents are being executed in favour of the Plaintiff LLP.

4.37 On 11th May 2016 the Deputy Registrar Co-operative Societies gave his consent for the assignment in favour of the Plaintiff.

4.38 Clause 3 of the Supplementary Deed which provided for implementation of redevelopment by a Joint Venture between Hari Om Developers and Sayaji Realty Pvt. Ltd. for which a separate Deed of Assignment was to be executed and deleted.

4.39 On 12th May 2016, the partners of Hari Om Developers by a Limited Liability Partnership Agreement, entered into with Sayaji Realty Pvt. Ltd., formed the Plaintiff LLP to jointly develop the property of Defendant No.1.

4.40 On 17th May 2016, a Deed of Assignment was executed whereby the said Hari Om Developers assigned the rights under the Development Agreement and Supplementary Agreement in favour of the Plaintiff. Defendant No.1 Society was a confirming party to this Deed of Assignment. The said document is stamped and registered.

4.41 Thereafter, there was a substitution of the Power of Attorney in favour of the Plaintiff in view of assignment of Development Agreement in its favour. The said Substitution of Power of Attorney is stamped and registered.

4.42 On 21st May 2016, the Plaintiff called upon Defendant No.1 to hand over vacant and peaceful possession of all flats to the Plaintiff.

4.43 On 27th May 2016, Defendant Nos. 2 to 4 addressed a letter to Defendant No.1 refusing to hand over possession of the Suit Flats.

4.44 On 16th June 2016, Defendant Nos. 2 to 4 filed a suit being Suit No. 1648 of 2016 in the City Civil Court Bombay at Dindoshi, inter alia, for (i) declaration that the Development Agreement and Supplementary Agreement are bad in law and not binding on them; (ii) declaration that the Resolution and minutes of meeting with respect to redevelopment are bad and illegal; (iii) in the alternative, for a declaration that they are entitled to include 40 sq. ft. of Loft and 160 sq. ft. of

Garden to the carpet area of the Flat totaling 614.51 sq. ft. as usable area for redevelopment; (iv) declaration that Defendant No.2 herein is entitled for commercial area in addition to residential area in lieu of Flat No.18; (v) direction to the Society to allot Defendant No.3 herein a flat on the ground floor and Defendant No.4 herein a flat on the 3rd floor in new building.

4.45 No reliefs were granted in favour of Defendant Nos. 2 to 4 in the said suit filed in City Civil Court, Bombay at Dindoshi. It was submitted by the Plaintiff that the contentions in the said Suit are sought to be re-agitated as a defence in the present suit.

4.46 The Plaintiff filed the present suit on 10th August 2016 seeking the afore-stated reliefs and also moved the Court for interim reliefs. Thereafter, the Defendants filed their respective replies, the Plaintiff its rejoinder and Defendant Nos. 2 to 4 their sur-rejoinder.

5. By an order dated 31st August, 2016 passed by consent of the Plaintiff and Defendant Nos. 2 to 4, M/s. Shetgiri & Associates were directed to inspect Flat No.18 and submit a report on its area. As per the said Report, (i) the carpet area of Flat No.18 including otla is 386.42 sq.ft. The loft comprising of 40.61 sq.ft. is part of the common area but is being used by Defendant No.2; (ii) open space of 171.86 sq.ft. on the front side of the main entrance to the flat i.e., the garden is also part of the common area, however the same is in exclusive possession of Defendant No.2 (iii)the loft of 40.61 sq.ft. and the garden of 171.86 sq.ft. are part of the common area of the building. Defendant Nos. 2 to 4 have filed their reply to the said Report wherein there is no dispute on the measurements carried out by M/s. Shetgiri & Associates. The only dispute raised by Defendant Nos. 2 to 4 is that the loft area and the garden area outside the flat constitute the carpet area of the flat.

6. The following submissions are advanced on behalf of the Plaintiff:

6.1 That the Development Agreement dated 28th January 2014, the Power of Attorney dated 29th January 2014 read with Supplementary Deed dated 28th April 2016 entered into between Defendant No.1 and Hari Om Developers are stamped and registered documents. The said documents were executed by Defendant No.1 after seeking approval of its members including Defendant Nos. 2 to 4.

6.2 That by a Deed of Assignment dated 17th May 2016, Hari Om Developers assigned their rights under the aforesaid Development Agreement and Supplementary Agreements in favour of the Plaintiff. It is submitted that Defendant No. 1 Society is also a confirming party to this Deed of Assignment dated 17th May 2016.On the same day i.e., on 17th May 2016, there was a substitution of the Power of Attorney by Hari Om Developers in favour of the Plaintiff. Both the aforesaid documents are duly stamped and registered.

6.3 That the redevelopment of the suit property has been undertaken following the due process of law and has been approved by all members of Defendant No.1 Society including Defendant Nos. 2 to 4 as well as the Registrar Cooperative Housing Society.

6.4 That Defendant Nos. 2 to 4 have in fact stated that they are in favour of redevelopment. However, they have raised objections regarding the usable carpet area of flat No.18 and the floors on which flats in the new building are to be allotted in lieu of the suit flats.

6.5 That as far as the usable carpet area of flat No.18 is concerned, the carpet area of the said flat was 393 sq.ft. (according to their measurements). However, the area given by Defendant No.1 Society for the purpose of redevelopment was 413 sq.ft. It is further submitted that in fact, the actual usable carpet area of the said flat No.18 as per the Report made by Shetgiri & Associates is 386.42 sq.ft. Therefore, in any event, Defendant No. 2 stands to benefit as the area for the purpose of redevelopment is given as 413 sq.ft. There was no dispute raised by Defendant Nos.2 to 4 in respect of the actual measurement carried out by M/s. Shetgiri & Associates. Defendant Nos. 2 to 4 had only disputed what constituted the actual carpet area of flat No.18.

6.6 That the claim of Defendant No. 2 that the loft area of 40 sq.ft. ought to be considered and added to the useable carpet area of flat No.18 is untenable. Though the said loft is used exclusively by Defendant No.2, the said loft is over a toilet which forms part of the common area of the building. The loft area admeasuring 40.61 sq.ft. was in fact made on account of the additional height over a common toilet used by the shopkeepers. The said toilet was adjacent to the said flat No.18 but outside the said flat and the said toilet could not be accessed from the said flat. The Report of Shetgiri & Associates dated 20th September 2016, states that the said loft admeasures 40.61 sq.ft. and is a part of the common area. Even the sanctioned plans of the said building do not show the said loft as being part of flat No.18. The area of a loft in any event cannot be used for calculating the usable area of a flat in redevelopment. The area of the flat as per the report of Shetgiri & Associates is 386.42 sq.ft. whereas the area of the flat counted for redevelopment is 413 sq.ft. Therefore, Defendant No.2 is in any event, compensated as far as the loft is concerned.

6.7 That the submission of Defendant No. 2 that the area of the garden of 170 sq.ft. in front of flat No.18 should be added to the usable carpet area of flat No.18 for the purpose of redevelopment is also untenable. The said portion is part of the frontage of the building and forms part of the common area. The said garden area was actually the common area between the building line and the boundary wall. Defendant No.2 had actually created a fencing on the Society's boundary wall and had erected steel fencing internally in order to exclusively use the said area of 171.86 sq. ft. Even in the Report dated 20th September 2016 made by Shetgiri & Associates it is stated that the area of the said garden/frontage is 171.86 sq.ft. and is part of the common area of the building.

6.8 That it is not even the case of Defendant Nos. 2 to 4 that the said loft and the garden area are owned by them. The said two areas of loft and garden have never been assessed to property tax by MCGM and could not be included as carpet area of flat No.18. The said areas are common areas of the building. Just because

Defendant Nos. 2 and 4 used the said area, the same cannot be counted as part of flat No. 18.

6.9 That the allotment of flats in the new building in respect of flat Nos. 18, 19 and 23 on the first floor has been in accordance with the wishes of Defendant Nos. 2 to 4. Initially, Defendant Nos. 2 to 4 wanted new flats in lieu of flat Nos. 18 & 19 on the ground floor and flat No.23 in close vicinity on the next higher floor. Thereafter, Defendant Nos. 2 to 4 by their letter dated 14th December 2013 (Exhibit-S to the Plaint) have accepted the allotment of all flats on the first floor. The said acceptance was however, without prejudice to their claim in respect of 40 sq.ft. loft and 160 sq.ft. garden area to be added to the usable carpet area of flat No.18. Once the said allotment is accepted, the Defendants now cannot keep changing their demands.

6.10 That Defendant Nos. 2 to 4 after duly consenting to the said redevelopment and having accepted the allotment of flats in the new building on the first floor, ought to vacate the said flats for redevelopment. The Plaintiff has complied with all their obligations under the Development Agreement dated 28th January 2014 and Supplementary Agreement dated 28th April 2016, including the loading of TDR in accordance with the Development Agreement dated 28th January 2014 Defendant Nos. 2 to 4 are holding the Plaintiff to ransom to succumb to their untenable claim in respect of the area of the loft and garden. Defendant Nos. 2 to 4 therefore be directed to vacate their flats and handover the same for redevelopment.

7. The following submissions are advanced on behalf of Defendant Nos. 2 to 4.

7.1 That the loft area of 40.61sq.ft. and the garden area of 171.86sq.ft. (as per the report of M/s. Shetgiri & Associates) in front of flat No.18 have been in exclusive use of Defendant No. 2 since inception and therefore, the same ought to be considered for ascertaining the usable carpet area of flat No.18 for the purposes of redevelopment, and the same cannot be taken as common area of the building for the purpose of redevelopment. Again the garden area admeasuring 160 sq. ft. and loft area admeasuring 40 sq. ft., is required to be considered in the area of Flat No. 18 as Clause 2A of the Development Agreement states that the members of the Defendant No. 1 society are entitled to receive additional benefit of 55% more than the carpet area of the flat "presently occupied" by the members.

7.2 That the terrace area of the 4^{th} floor flat is included in the area of the 4^{th} floor flat and therefore garden area claimed by Defendant No. 2 as part of the Flat No. 18 is required to be included as the carpet area of Flat No.18 on the same basis.

7.3 That the allotment of flats in the redeveloped building are not as sought by them. They had asked for two adjoining flats on the ground floor in lieu of flat Nos. 18 & 19 and one flat in lieu of flat No.23 on the next higher floor in the vicinity of flat Nos. 18 & 19.

7.4 That in the new plans submitted for the allotment of new flats in respect of flat Nos. 18 and 19, the toilet opens up into the living room, which is not acceptable to them.

7.5 That the assignment of Development Rights by M/s. Hari Om Developers and Defendant No. 1 by executing Deed of Assignment dated 17th May, 2016 is in contravention of clause 11 (7) of the Government of Maharashtra Notification dated 3rd January, 2009 issued under Section 79A of the Maharashtra Co-operative Societies Act, 1960, which provides that development rights vested in the developer will be non-transferable.

7.6 That Defendant No. 1 by its letter dated 30th April, 2016 addressed to the Registrar of Co-operative Societies falsely represented that Defendant No.1 requested Hari Om to form a Joint Venture with Sayaji.

7.7 That the Supplementary Agreement makes it mandatory to furnish the written confirmation from the Project Management Consultant stating that the Plaintiff has complied with its obligation of loading of TDR and it is only thereafter that the occupants of the said flat could be vacated. Without the aforesaid written confirmation by the Project Management Consultant, Defendant Nos. 2, 3 and 4 were not under an obligation to vacate from their respective flats.

7.8 That the Plaintiff is a Limited Liability Partnership, which is not beneficial to Defendant No.1 and its members since the liability of the partners is limited. The Plaintiff is not financially sound and therefore, the same would be prejudicial to Defendant No.1 and its members.

7.9 That by the Supplementary Agreement dated 28th April 2016, the clause in respect of the Bank Guarantee to be given by the Plaintiff has been amended/changed to the detriment of Defendant No. 1. In the said Supplementary

Agreement dated 28th April 2016 it is provided that the Plaintiff shall provide security in the form of a flat on the second floor in lieu of the Bank Guarantee of Rs.3 Crores. The same shows that the Plaintiff is not in a good financial position and that the said clause is detrimental to the interest of Defendant No. 1 and its members.

7.10 That certain committee members have been favoured by the Plaintiff as far as allotment of flats in the new building is concerned.

8. In rejoinder, the submissions earlier made and recorded hereinabove are reiterated on behalf of the Plaintiff. In addition it is submitted as follows:

8.1 That though it is true that Clause 2A of the Development Agreement states that the members of the Defendant No. 1 society are entitled to receive additional benefit of 55% more than the carpet area of the flat "presently occupied", the words "presently occupied" would mean the area legally occupied by the occupants. The garden area is obviously outside the flat and the same is apparent from the Report dated 20th September, 2016 submitted by M/s Shetgiri and Associates who was appointed by consent of the parties vide order dated 31st August, 2016. Defendant No. 2 has categorically stated through his counsel that the same has never been assessed to rateable value. Moreover, photos of the said area clearly show that the same is enclosed by erecting a fence on the outside boundary wall. The said area is open to sky and merely fenced off. Defendant No. 2 has admitted that he did not have any Municipal approvals or sanction and the same is not subject to any Municipal assessment . In so far as the loft is concerned, the Defendant No.2 has contended that the same is merely 40 sq. ft. As per the Report dated 20th September 2016 made by Shetgiri & Associates, the area of the said flat including the otla is 386.42 sq.ft. and the area considered for redevelopment is 413 sq.ft. which itself is a benefit to Defendant No.2 in respect of flat No.18.

8.2 That the terrace area of the 4th floor flat is included in the area of the 4th floor flat because the same is a pocket terrace having exclusive use and entrance from the said terrace flat. The assessment records show that the said terrace area has been assessed as a part of the said 4th floor flat. Therefore, the garden area of Flat No.18 cannot be included in the carpet area of the said Flat No.18 on the basis of the area of the terrace on the 4th Floor being included as carpet area of the 4th floor Flat.

8.3 That as far as the allotment of flat on the first floor is concerned, the same has been done pursuant to the letter of Defendant Nos. 2 to 4 dated 14th December 2013 (Exhibit-S to the Plaint). Having once accepted the same, Defendant Nos. 2 to 4 now cannot keep changing their demands.

8.4 That as far as the objection regarding toilet opening up into the living room is concerned, the same can be addressed by the Plaintiff if legally and technically possible.

8.5 That the submission of Defendant Nos 2 to 4 that the Deed of Assignment dated 17th May, 2016 is in contravention of the Government of Maharashtra Notification dated 3rd January, 2009 issued under Section 79A of the Maharashtra Co-operative Societies Act, 1960 more particularly Clause 11 (7) of the aforesaid

Notification is devoid of any substance. The Supplementary Deed was initially circulated to the members and thereafter approved at the Annual General Meeting held on 12th September, 2015. The said Supplementary Agreement in clause 3 expressly stated therein that a Joint Venture between Hari Om Developers and Sayaji Realtors would be entered into and that the said Joint Venture would implement the said re-development. Clause 3 of the said Supplementary Agreement was as per the directions of the Sub-Registrar of Assurances deleted at the time of registration of the said Supplementary Agreement on 28th April, 2016. Thereafter a general/special body meeting was held on 21st December, 2015 where 100% of the members agreed, accepted and consented for an assignment of the development rights by Hari Om Developers to the Plaintiff, a Limited Liability Partnership constituted by all the Partners of the said Hari Om Developers and Sayaji Realty Pvt. Ltd. The said draft and the terms recorded therein were duly approved, confirmed and consented to by all the members of Defendant No 1 society by a general body resolution dated 8th February, 2016. After the said Resolution was passed at the said General Body Meeting approving the development by the said Joint Venture, Defendant No 1 Society addressed a letter dated 30th April, 2016 to the Registrar of Co-operative Societies seeking his No Objection Certificate. In response to the aforesaid, the Registrar of Co-operative Societies has granted it's No Objection Certificate dated 11th May, 2016. It is only after the aforesaid NOC was granted to Defendant No.1 that the said Deed of Assignment was executed and registered. The aforesaid Deed of Assignment has been executed on 17th May, 2016 and registered on 17th May 2016, the General Body

Resolution dated 8th February, 2016 was actually given effect to after the requisite NOC from the Registrar of Co-operative Societies. Under such circumstances, it cannot be said that there has been an infraction of Clause 11(7).

8.6 That in any event the wording of Clause 11(7) shows that the restriction on the transfer of Development Rights granted by the society to the Developer is a restriction for the benefit of the society. The said restriction not being absolute can be overcome by General Body Resolution and consequently approval by the Assistant Registrar of Co-operative Societies which is more or less the same procedure required to be followed for the purpose of appointment of the developer at the first instance. Again, in any event, the aforesaid action of the Partners of Hari Om Developers being a part of the Plaintiff along with Sayaji Reality Private Ltd. for the purpose of implementing the aforesaid redevelopment would not constitute a transfer in as much as all the partners of Hari Om Developers would continue to be a part of the Plaintiff for implementing the present redevelopment.

8.7 That the submission of Defendant Nos. 2 to 4 that Defendant No. 1 by its letter dated 30th April, 2016 addressed to the Registrar of Co-operative Societies falsely represented that Defendant No.1 requested Hari Om Developers to form a Joint Venture with Sayaji Reality Private Ltd is without any merit, as there have been General Body Resolutions dated 21st December, 2015 and 8th February, 2016 approving the Assignment of the development rights by the said Hari Om Developers to the Plaintiff and a consequent NOC dated 11th May, 2016 issued by the Registrar of Co-operative Societies.

8.8 That the submission of Defendant Nos. 2 to 4 that the Supplementary Agreement makes it mandatory to furnish the written confirmation from the Project Management Consultant stating that the Plaintiff has complied with its obligation of loading of TDR and it is only thereafter that the occupants of the said flat could be vacated is without merit. During the course of the argument, the Plaintiff stated that TDR had already been loaded in terms of the Development Agreement dated 28th January, 2014 and the Supplementary Agreement dated 28th April, 2016. The Plaintiff has also tendered in Court a photocopy of DRC showing that 1180 sq. mtrs. have been loaded on the aforesaid plot. As the certificate itself is placed on record, it is a technical argument that despite the MCGM certifying the loading of TDR, the written confirmation of the BMC also is required to be taken. Clause 12 of the Supplementary Agreement dated 28th April, 2016 states that occupants are liable to be vacated after the Project Management Consultant or the Developer gives confirmation that TDR has been fully loaded on the suit Property. As the developer has placed the statement on record, the question now requiring the Project Management Consultant also to give its written confirmation does not arise.

8.9 That the submission of Defendant Nos. 2 to 4 that the Plaintiff being a LLP is not beneficial to Defendant No.1 and its members since the liability of the partners is limited and the contention of Defendant Nos. 2 to 4 that the Plaintiff is not financially sound and the same would therefore be prejudicial to Defendant No.1 is incorrect. The Plaintiff is in a sound financial condition especially with the joining of Sayaji Realty Pvt. Ltd. in the redevelopment. In fact, as recorded in the letter dated 30th April 2016 (Exhibit-QQ to Plaint), addressed by Defendant No.1 to the Registrar, Defendant No.1 has verified all documents pertaining to the LLP and has satisfied themselves with every aspect of the LLP. Therefore, Defendant Nos.2 to 4 cannot now raise any objection to the same. The total cost of the project is Rs.50 crores out of which Rs.17.37 crores have already been spent by the Plaintiff. Of the balance Rs.32.63 crores, Rs.12 crores are receivable from the areas sold to members, leaving a balance expenditure of approximately Rs.20.63 crores. The Plaintiff has applied for finance from Reliance Home Finance Limited, which has been sanctioned to the tune of Rs. 20 crores. Further, revenue from the free sale flats is expected to be approximately Rs.60 crores. Therefore, a major portion of the project itself is a self-financing project and in any event, any apprehensions of the Defendants as far as financial viability is concerned are unfounded.

8.10 That the contention of Defendant Nos. 2 to 4 that the amendment of the Bank Guarantee clause is prejudicial to the interest of Defendant No.1 and its members and shows that the Plaintiff is not financially sound, is totally unfounded. In fact, a perusal of the Bank Guarantee Clause in the Development Agreement and the amended Bank Guarantee clause in the Supplementary Agreement would show that the Defendant No.1 and its members also benefit from the said amendment. Under the Bank Guarantee clause under the Development Agreement, after the RCC work of the building was completed, the Bank Guarantee available to Defendant No.1 was to be reduced to Rs.3 Crores. However, under the amended clause, the Bank Guarantee available to Defendant No.1 after the RCC work is completed is Rs.4 Crores. Therefore, under the amended Bank Guarantee clause, the Defendant No.1 has benefitted to the tune of Rs.1 Crore more being available to it to complete the project in case the Plaintiff does not complete the same. Therefore, Defendant No.1 has also benefitted from the amendment to the said Bank Guarantee clause.

8.11 That the submission of Defendant Nos. 2 to 4 that certain committee members of Defendant No. 1 Society have been favoured in respect of allotment of new flats is unsubstantiated and without any merits.

9. The Learned Advocate appearing for the Society has adopted the submissions advanced on behalf of the Plaintiff. It is submitted that Defendant Nos. 2 to 4 are obstructing the redevelopment without any valid/legitimate ground/s. It is submitted that because of this obstruction by three members belonging to one family the entire body of members along with their families are put to inconvenience and deprived of their entitlement to the ownership flats of larger areas as agreed under the development agreements. It is submitted that balance of convenience is totally in favour of the Plaintiff and Defendant No. 1 Society and its members.

10. I have considered the submissions advanced by the Learned Advocates appearing for the parties.

11. Defendant No.1 is a Co-operative Housing Society, and is the owner of the said property. The said Buildings were constructed in the year 1969 in terms of the Sanctioned Plan. The said Building consist of 4 shops and 33 flats.

12. On 14th November 2007 a meeting was held wherein the members of Defendant No.1 agreed that since the **said three** buildings were dilapidated, they should go in for redevelopment. On 21st November 2007 Defendant No.1 addressed a letter to its members seeking their consent for redevelopment. The members of Defendant No.1 including Defendant Nos. 2 to 4 consented to go in for redevelopment. On 13th August 2010, Defendant Nos. 2, 3 and 4 by their separate letters, again gave consent for redevelopment. Their only requirement was that allotments in lieu of Suit Flat Nos. 18 and 19 should be adjacent to each other, road facing and on the ground floor of the new building. The allotment in lieu of suit flat no. 23 should be in the same wing on the next higher floor in the vicinity of two other flats. Defendant No.1 thereafter, invited tenders from various developers and received several tenders and to short list the developers, a Special General Body meeting was held on 24th February 2013. In the said meeting, three developers were shortlisted and it was unanimously decided to award the redevelopment of the Suit Property to the partnership firm, Hari Om Developers. Defendant Nos. 2 to 4 have signed the minutes of the said meeting.

13. On 1st March 2013, Defendant No.1, by their letter informed Hari Om Developers about their appointment as Developers for the redevelopment of the said Property. At the Special General Body meeting held on 15th December 2013 at which Defendant No. 4 was present, the members of the society unanimously approved the Development Agreement and Power of Attorney in favour of Hari Om Developers. Again at the Special General Body meeting held on 8th January

2014, at which Defendant Nos. 2 to 4 were present, an amendment to the termination clause in the development agreement was approved by the members.

14. On 28th January 2014, the Development Agreement was executed between Defendant No.1 and Hari Om Developers. The same was duly stamped and registered. On 29th January 2014 Defendant No.1 executed an Irrevocable Power of Attorney in favour of Hari Om Developers, which was also stamped and registered. Thereafter, modifications in the Development Agreement were proposed and a draft Supplementary Agreement was circulated amongst the members of Defendant No.1. At the Annual General Meeting of Defendant No.1 held on 12th September 2015, the Supplementary Agreement was approved by the members of Defendant No.1. At the General Body Meetings of Defendant No.1 held on 21st December, 2015 and 8th February, 2016, the assignment in favour of the Plaintiff was discussed and approved by majority members of Defendant No 1 society. On 21st February 2016 Defendant Nos. 2 to 4 addressed a letter to Defendant No. 1 recording their objections to the Supplementary Agreement. On 28th April 2016, Defendant No.1 executed a Supplementary Development Agreement in favour of Hari Om Developers as approved by Defendant No.1 in its Annual General Meeting held on 12th September 2015. The same was stamped and registered.

15. On 30th April 2016, a letter was addressed by Defendant No.1 to the Registrar, Co-operative Housing Society informing him regarding the modification of the Development Agreement dated 28th January 2014 vide Supplementary Deed dated 28th April 2016. By the said letter, Defendant No.1 informed the Registrar that it had unanimously allowed the said Hari Om Developers to develop the property in an LLP known as Hari Om Sayaji Property LLP; that Defendant No.1 had verified all the requisite documents relating to the said LLP and had satisfied themselves with regard to every aspect of the said LLP; that in order to overcome the technical difficulty of developing the said property jointly by Hari Om Developers in the said LLP, they had agreed and confirmed to execute a deed of assignment whereunder the development rights of Hari Om Developer's would be assigned to Hari Om Sayaji Property LLP; that the said facts were put before all the members of the society in the general/special body meeting held on 21st December 2015; that pursuant to the decision taken by all the members of the society, a deed of assignment along with the other necessary documents are being executed in favour of the Plaintiff LLP.

16. On 11th May, 2016 the Registrar, Co-operative Housing Society gave its No Objection to the assignment in favour of the Plaintiff. On 12th May 2016, the partners of Hari Om Developers by a Limited Liability Partnership Agreement, entered into with Sayaji Realty Pvt. Ltd., formed the Plaintiff LLP to jointly develop the property of Defendant No.1. On 17th May, 2016 a Deed of Assignment was executed whereby the said Hari Om Developers assigned the rights under the development Agreement and supplementary Agreement in favour of the Plaintiff. Defendant No 1 was a confirming party to the said agreement and the same is stamped and registered. Thereafter, there was a substitution of the Power of Attorney in favour of the Plaintiff in view of assignment of Development

Agreement in its favour. The said Substitution of Power of Attorney is stamped and registered.

17. From the afore-stated facts it is clear that the redevelopment and the execution of the Development Agreement dated 28th January 2014, Power of Attorney dated 29th January 2014, read with Supplementary Deed dated 28th April 2016, and Deed of Assignment dated 17th May 2016 and Substitution of Power of Attorney dated 17th May 2016 was with the prior approval and consent of all the members of Defendant No.1 Society or in any event the majority of members and approved by the Registrar, Co-operative Housing Society.

18. The next point/issue to be considered is whether Defendant No.2 is entitled to have the area of loft and garden/area in front of flat No.18 (loft 40.61 sq.ft. and area in front of lawn 171.86 sq.ft. as per report of Shetgiri and Associates) included in the usable carpet area of flat No.18 for the purpose of redevelopment?.

19. It is not in dispute that Defendant No.2 does not claim ownership of the loft or garden/area in front of flat No.l8. It is his contention that the said loft and garden/area in front of flat No.18 are being used by him exclusively since inception and therefore, the said area should be taken into account in order to ascertain the area of flat No.18 for the purpose of redevelopment. It is also not in dispute that the areas of the loft and garden/area in front of flat No.18 have never been assessed to property tax by MCGM.

20. The loft area was in fact made on account of the additional height over a common toilet used by shopkeepers. The said toilet is adjacent to the said flat

No.18 but outside the said flat. The toilet could not even be accessed from the said flat. The garden area is the common area between the building line and the boundary wall. Defendant No.2 has created a fencing on the society's boundary wall and erected a steel fencing internally in order to exclusively use the said area.

21. M/s. Shetgiri & Associates by their report dated 20th September 2016 have stated that the area of flat No.18 is 386.42 sq.ft. They have further stated that the garden area admeasuring 171.86 sq.ft. is a part of common spaces. However the occupants of suit flat No.18 have barricaded the open space with wall and M.S. fence including M.S. gate on front side of the main entrance to the suit and are exclusively using the same. The loft admeasuring 40.61 sq.ft. is provided over the common toilets **exterior to the flat** and is also projecting outside the flat boundary profile (external wall), though the access to the loft is from inside the bedroom No.1 of the said suit flat. Therefore according to the said report the area of suit flat No.18. is 386.42 sq.ft. and the loft admeasuring 40.61sq.ft. and garden area admeasuring 171.86 sq.ft. forms part of the common areas. In the Affidavit filed by Defendant Nos. 2 to 4 (objection to the report) there is no dispute raised by Defendant Nos. 2 to 4 in respect of the actual measurement carried out by Shetgiri & Associates. They have only disputed what constituted the actual area of flat No.18. They have at Exhibit-A to the said Affidavit annexed a receipt dated 7th October 2000 in respect of the repairs of the flat which shows that the area of the flat is 413 sq.ft. The area considered for the purpose of redevelopment is in any event 413 sq.ft. though the actual area of the flat on measurement is 383.42 sq.ft. Defendant No.2 is in any event benefitting from the same. It is also to be noted that Exhibit-A to the said Affidavit is a receipt issued in the year 2000 showing the area of the flat as 413 sq.ft. If the area of the flat was more than 413 sq.ft. (i.e. if the area of loft and garden was included in the said area) then Defendant No.2 would surely have objected to the same at that time.

22 As far as Clause 2A of the Development Agreement which states that the members of the Defendant No. 1 society are entitled to receive additional benefit of 55% more than the carpet area of the flat "presently occupied" by the members, I am inclined to accept the submission of the Plaintiff that the words "presently occupied" would mean the area legally occupied by the occupants.

23. Defendant Nos. 2, 3 and 4 are also not justified in making a grievance that the terrace area of the 4th flat is included in the area of the said flat because the said terrace area is assessed as a part of the said 4th floor flat. The said terrace is pocket terrace having exclusive access from the said flat.

24. For the aforesaid reasons I am of the view that the area of the loft and garden cannot be included in the usable carpet area of flat No.18 for the purpose of redevelopment.

25. The next point for consideration is the allotment of flats in the new building. On 13th August 2010, Defendant Nos. 2, 3 and 4 by their separate letters whilst giving consent for redevelopment, stated that the allotments in lieu of flat Nos. 18 and 19 should be adjacent to each other and on the ground floor of the new building. Further, allotment in lieu of flat No.23 was sought for in the same wing on the next higher floor in the vicinity of the two other flats. On 27th October 2013, Defendant No.2 (for flat Nos. 18, 19 and 23) addressed a letter to Defendant No.1, inter alia stating that they wanted two flats adjacent to each other on the ground floor and one flat in close vicinity to the said two flats. On 31st October 2013, Defendant No.1 addressed a letter to Defendant Nos. 2 to 4 forwarding revised building plans for two flats on the first floor and one on the second floor based on a request made by Defendant Nos. 2 to 4 in a meeting held on 27th October 2013.

26. On 14th December 2013, Defendant No.2 (for flat Nos. 18, 19 and 23) addressed a letter to Defendant No.1, inter alia accepting the allotment of all flats on the first floor. This was however, without prejudice to the contention that the usable area of flat No.18 included the adjacent garden area and the loft. The said letter reads thus:

> *" I am ready to accept and confirm the allotment of flats given by you as per our discussions which are as follows:-*
>
> *1. Flat No. A-1,Wing-A, Floor - 1st.*
>
> *2. Flat No. A-10,Wing-A, Floor-1st*
>
> *3. Flat No. A-2, Wing-A. Floor - 1st.*
>
> ***I am accepting the aforesaid Allotment without prejudice to my right in respect of our claim against the Builder and Society for giving us less area and also charging maintenance and repair charges on the 20 sq.ft. area which was not provided and also construction charges were taken by the Builders.***
>
> ***I am accepting the allotment** without prejudice to other claim in respect of loft 40 sq.ft. and Garden of 160 sq.ft. area which are*

> *not taken into consideration at the time of measurement of usable area of my flats".*

Having accepted the allotment of alternate flat No.A101 in lieu of flat No.18, Defendant No.2 can at best have a claim for damages for the loft area and garden area if Defendant No.2 is found to be entitled to the same at the time of final hearing of the said suit.

27. On 18th December 2013, the developer issued an allotment letter to Defendant No.2 in respect of flat No.A101 in the new building on the first floor. The said letter was received by Defendant No.2 with an endorsement "without prejudice". On the same day, i.e. 18th December 2013, the developer also issued an allotment letter to Defendant No.4 in respect of flat No.A102 in the new building in lieu of flat No.23. This letter has been accepted carrying no endorsement "without prejudice". Therefore, after addressing a letter to Defendant No.1 that they were agreeable to accept the new flats on the first floor in the new building, Defendant Nos. 2 to 4 have also accepted the allotment letters. Having done so, the said issue of allotment becomes conclusive and Defendant Nos. 2 to 4 are now precluded from changing their mind for allotment of flats in the new building. If this was to be permitted, allotment of flats would be a never ending process with each flat owner wanting to change his preference continuously delaying the redevelopment. Therefore, I am of the view that the allotment of flats to Defendant Nos. 2 to 4 cannot again seek a change in allotment of flats.

28. The next objection of Defendant Nos. 2 to 4 is that the plans submitted to them in respect of flat No. A101 shows a toilet opening into the living room of the said flat. The Plaintiff has submitted that the said objection of Defendant Nos. 2 to 4 will be addressed by them.

29. The next contention of Defendant Nos 2 to 4 is that the Deed of Assignment dated 17th May, 2016 is in contravention of the Government of Maharashtra Notification dated 3rd January, 2009 issued under Section 79A of the Maharashtra Co-operative Societies Act, 1960 more particularly Clause 11 (7) of the aforesaid Notification. The Supplementary Deed was circulated to the members. Clause 3 of the Supplementary Deed is reproduced as under:

> *"3. That with the intent to achieve faster execution of the redevelopment in view of revised financial benefits now negotiated by the Society, it hereby grants its consent to M/s. Hari Om Developers to carry out redevelopment of the Society in joint venture with M/s. Sayaji Reality Private Limited for which a separate Deed of Assignment and/or other documents as required shall be executed by the Society with the Developers and Sajaji.''*

Thereafter at the Annual General Meeting held on 12th September, 2015 the said Supplementary Agreement was approved. Clause 3 of the Supplementary Agreement stated that a Joint Venture between Hari Om Developers and Sayaji Realtors would be entered into and that the said Joint Venture would implement the said re-development. The said Clause 3 of the said Supplementary Agreement as explained by the Plaintiff in paragraph 5 of the Written Submissions, was deleted at the time of registration of the said Supplementary Deed dated 28th April, 2016 on 28th April 2016 as per the directions of the Sub-Registrar of Assurances. Thereafter a general/special body meeting was held on 21st December, 2015 where the members agreed, accepted and consented for an assignment of the development rights by Hari Om Developers in favour of the Plaintiff. The said draft Deed of Assignment by Hari Om Developers in favour of the Plaintiff and the terms recorded therein were duly approved, confirmed and consented to by the members of Defendant No 1 society by a general body resolution dated 8th February, 2016.

30. After the aforesaid Resolution was passed at the said General Body Meeting approving the development by the Plaintiff, Defendant No 1 Society addressed a letter dated 30th April, 2016 to the Registrar of Co-operative Societies seeking his No Objection to the assignment of development rights by the said Hari Om Developers in favour of the Plaintiff.

31. In response to the aforesaid, on 11th May, 2016 the Registrar of Co-operative Societies has granted it's No Objection. After the aforesaid NOC was granted to Defendant No.1 the said Deed of Assignment between Hari Om Developers, the Plaintiff and with Defendant No. 1 as a confirming party was executed and registered. The aforesaid Deed of Assignment has been executed on 17th May, 2016 and registered on 17th May 2016, after the Resolution dated 8th February, 2016 was passed by the General Body of the Defendant No.1 and after receiving the NOC dated 11th May, 2016 from the Registrar of Co-operative Societies.

32. I am also in agreement with the submission of the Learned Counsel of the Plaintiff that the restriction on the transfer of Development Rights granted by the society to the Developer is a restriction for the benefit of the society and not an absolute one. An assignment after a General Body Resolution and a no objection issued by the Assistant Registrar of Co-operative Societies shows that the procedure followed is more or less the same which is required to be followed for the purpose of appointment of the developer at the first instance and the same would therefore not be in contravention of the Government of Maharashtra Notification dated 3rd January, 2009 issued under Section 79A of the Maharashtra Co-operative Societies Act, 1960 more particularly Clause 11 (7) of the aforesaid Notification. No provision in the Co-operative Societies Act or the Rules or any other legal provisions has been brought to my notice which would curtail the right of the Society to redevelop the property when the General Body of the Society intends to do so. Essentially, that is the commercial wisdom of the General Body of the Society. It is not open for the Court to sit over the wisdom of the General Body as an Appellate Body/Appellate Authority, merely because some members in minority disapprove of 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. The aforesaid view has consistently been taken by this Court in (i) *Girish Mulchand Mehta and another vs. Mahesh S. Mehta and another*[1], *(ii) M/s. Akash Pruthvi Lifestyle vs. Akash Co-op. Hsg. Soc. Ltd. and another*[2] and *(iii) M/s. Maya Developers vs. Neelam R. Thakkar and others*[3]. In the present case the General Body took a conscious decision after due deliberations to redevelop its property. It is now well settled in the case of *Maya Developers*

1 2010 (1) BomCR 31

2 Notice of Motion (L) No. 1518 of 2013 in Suit (L) No. 666 of 2013

3 Notice of Motion (L) No. 834 of 2015 in Suit No. 435 of 2015.

(supra) that the 2009 direction is not mandatory when there is substantial compliance. Moreover, 34 out of 37 occupants have vacated the said building without any demur or protest showing that the majority overwhelmingly supported the development by the Plaintiffs, amendment of the Bank Guarantee clause and execution of the Supplementary Deed as well as the Deed of Assignment. Defendant Nos. 2 to 4 have also addressed a letter dated 27th May, 2016 (Exhibit-SS to the Plaint) wherein they have stated that they were ready for an amicable solution so that the redevelopment process goes as per schedule and that they were not against redevelopment. I find that in the present case there is substantial compliance and the actions of the Society are supported by all its members save and except Defendant Nos. 2, 3 and 4.

33. In any event all the partners of Hari Om Developers continue to be a part of the Plaintiff for the purpose of implementing the aforesaid redevelopment and therefore the same is not transfer to an absolutely different entity.

34. The next contention of Defendant Nos. 2 to 4 is that Defendant No. 1 by its letter dated 30th April, 2016 addressed to the Registrar of Co-operative Societies falsely represented that Defendant No.1 requested Hari Om Developers to form a Joint Venture with Sayaji Reality Private Ltd. Since the General Body Resolutions dated 21st December, 2015 and 8th February, 2016 have approved the Assignment of Deveopment rights by Hari Om Realtors in favour of the Plaintiff and thereafter a NOC dated 11th May, 2016 has also been issued by the Registrar of Co-operative

Societies, the said contention of Defendant Nos. 2 to 4 does not take their case any further.

35. Defendant Nos. 2 to 4 have next contended that the Supplementary Agreement makes it mandatory to furnish the written confirmation from the Project Management Consultant stating that the Plaintiff has complied with its obligation of loading of TDR and it is only thereafter that the occupants of the said flat could be asked to vacate their tenements. During the course of the argument, the Learned Counsel for the Plaintiff has stated that TDR had already been loaded in terms of the Development Agreement dated 28th January, 2014 and the Supplementary Agreement dated 28th April, 2016. In support of the statement, the Plaintiff has produced a photocopy of DRC showing that 1180 sq. mtrs. has been loaded on the plot. As the certificate itself is placed on record, it is a technical argument that despite the MCGM certifying the loading of TDR, the written confirmation of the PMC also is required to be taken. Clause 12 of the Supplementary Agreement dated 28th April, 2016 states that occupants are liable to be vacated after the Project Management Consultant or the Developer gives confirmation that TDR has been fully loaded on the suit Property. As the developer has placed the statement on record, in my view there is sufficient compliance of Clause 12 of the Supplementary Agreement dated 28th April, 2016. Hence the said contention is required to be rejected.

36. Defendant Nos. 2 to 4 have also raised the issue that the Plaintiff is an LLP which is not beneficial to Defendant No.1 and its members since the liability of the partners is limited. It is contended that the Plaintiff is not financially sound and therefore, the same would be prejudicial to Defendant No.1 and its members. In the letter dated 30th April 2016 addressed by Defendant No.1 to the Registrar, it is recorded that Defendant No.1 has verified all documents pertaining to the LLP and has satisfied themselves with every aspect of the LLP. It was further stated in the said letter that all the facts were put before all the members of the Society in the General/Special Body meeting held on 12th September 2015 and that 100% of the members of the society agreed, accepted and consented for such assignment after extensively discussing the same. All the members of the Society including Defendant Nos. 2 to 4 having considered and consented to the assignment of the development in favour of the LLP, the contention of Defendant Nos. 2 to 4 that the LLP is not beneficial to Defendant No.1 and its members cannot be accepted. As far as the financial position of the Plaintiff is concerned, the Plaintiff has handed over the project costs and expenses relating to the said project as well as the funding mechanism in respect of the same. The Plaintiff submitted that the cost of the project was Rs.50 Crores, out of which Rs.17.37 Crores has already been spent by the Plaintiff. Of the balance Rs.32.63 Crores, Rs.12 Crores are receivable from the areas sold to members, leaving a balance expenditure of approximately Rs.20.63 crores. The Plaintiff has submitted that it has applied for finance from Reliance Home Finance Ltd. and finance to the extent of Rs.20 Crores has been sanctioned. As submitted by the Plaintiff, the revenue from the free sale of flats is expected to be Rs.60 Crores and therefore, a major portion of the project is self-financed. Defendant No.1 Society has not raised any doubts as to the financial position of the LLP. In fact, Defendant No.1 in its letter to the Registrar, as stated aforesaid, has recorded that it has verified all the documents pertaining to the LLP and had satisfied itself with every aspect of the LLP. I am therefore of the view that the said contention of Defendant Nos. 2 to 4 being an LLP and therefore, not in the interest of Defendant No.1 and its members is unfounded and so is their apprehension of the financial viability.

37. Defendant Nos. 2 to 4 have also contended that the amendment to the Bank Guarantee clause by the Supplementary Agreement dated 28th April 2016 is prejudicial to the interest of Defendant No.1 and its members and that the same shows that the Plaintiff is not financially sound. The Bank Guarantee clause in the Development Agreement dated 28th January 2014 provides that the developers will provide an irrevocable bank guarantee to the Society for Rs.7 Crores i.e., Rs.5 Crores before the obligation to vacate and Rs.2 Crores on the completion of the 5th slab. It is further provided in Clauses 40 and 41 of the Development Agreement that the amount of the bank guarantee shall be reduced to Rs.3 Crores upon the Developers completing the RCC work of the new structure and to Rs. 25 lakhs upon the completion of the building with amenities. Bank guarantee of Rs.25 lakhs will be released upon the Developers applying for the Building Completion Certificate.

38. The Bank Guarantee clause in the Supplementary Deed dated 28th April 2016 provides that the developers shall give an irrevocable Bank Guarantee to the society for Rs.7 Crores i.e., (i) Rs.2 Crores before members vacate their flats/shops; (ii) Rs. 2 Crores on the completion of the 5th slab of the building; and (iii) security by way of a flat being flat B202 on the 2nd floor in lieu of Bank Guarantee for Rs.3 Crores. It is further also provided that the developer shall be entitled to replace and release the security by giving a Bank Guarantee of Rs.3 Crores before the developers complete the RCC work. It is further provided that such security in favour of the Society either in form of the said flat No.B202 or in form of another Bank guarantee as envisaged shall come to an end on the developers completing the RCC work of the new structure being constructed on the said property.

39. Therefore the said amended Bank guarantee clause provides for a lesser amount of Bank guarantee to be given before the flats are vacated i.e., Rs. 2 Crores as against the initial amount of Rs.5 Crores. In addition to the aforesaid Bank Guarantee of Rs. 2 crore, the Developer has agreed to keep Flat No. B-202 on the 2nd floor admeasuring carpet area of 814 sq.ft. as security with a specific undertaking that no third party rights would be created in respect of the same. The aforesaid security is in lieu of security for Bank Guarantee for Rs. 3 crores. In addition to the aforesaid, a Bank Guarantee of Rs. 2 crores is to be furnished on completion of the 5th floor slab. Clause No. 8 of the Supplementary Deed provide for release of the said flat only on furnishing of a Bank Guarantee of Rs. 3 crores. The said Bank Guarantee would remain in force for the due compliance of clause 40 of the Development Agreement. Hence, I am of the view that there is no prejudice caused to Defendant No. 1 by the aforesaid modification. Defendant No.1 Society and its members have discussed the various provisions of the Development

Agreement and the Supplementary Deed in their Special General Body meeting/Annual General meeting. After the said drafts were approved, the Development Agreement and the Supplementary Development Agreement have been executed. The same having been executed after being duly approved by all the members, I am unable to accept the contention of Defendant Nos. 2 to 4 that the same is not beneficial to Defendant No.1 and or its members. In fact, Defendant Nos. 2 to 4 have also given their approval for the said Development Agreement as well as Supplementary Development Agreement. I am also of the view that the Bank guarantee clause is not an indicator of the financial condition of the Plaintiff.

40. As far as contention of Defendant Nos. 2 to 4 that certain committee members of Defendant No.1 Society have been favoured in respect of allotment of new flats is concerned, the same is unsubstantiated and therefore no cognizance is taken with regard to the same.

41. As far as the objection regarding toilet opening into the living room is concerned, the construction of the new building and the flats therein would be as per the plans submitted to the Corporation as approved by the General Body of the Defendant No. 1 Society. It is not the case of the Defendants that only the flats which are allotted to them have a toilet opening up into the living room. However, the Plaintiff has assured the Court that they will endeavour to address the said issue raised by Defendant Nos. 2, 3 and 4, if the same is legally and technically possible. The assurance is accepted.

42. Defendant Nos. 2 to 4 have filed Suit No. 1648 of 2016 in the City Civil Court wherein Defendant Nos. 2 to 4 have prayed for the reliefs (i) declaring the Development Agreement and Supplementary Agreement as bad in law and not binding on them; (ii) declaration that the Resolution and minutes of meeting with respect to redevelopment are bad and illegal; (iii) in the alternative, for a declaration that they are entitled to include 40 sq. ft. of Loft and 160 sq. ft. of Garden to the carpet area of the Flat totaling 614.51 sq. ft. as usable area for redevelopment; (iv) for a declaration that Defendant No.2 herein is entitled for commercial area in addition to residential area in lieu of Flat No.18; (v) for a direction to the Society to allot Defendant No.3 herein a flat on the ground floor and Defendant No.4 herein a flat on the 3rd floor in new building. No reliefs have been granted to the Plaintiff till date in the said Suit. Despite no reliefs having been granted by the City Civil Court, I have heard the contentions of the Defendants in that regard to the extent to which the same were agitated by Defendant Nos. 2 to 4 in the present Suit.

43. In the present case, out of a total of 37 occupants, 34 have vacated their flats. In fact it is only because of the obstructive attitude of Defendant Nos. 2 to 4 that the entire project involving inter alia, the rehabilitation of 34 families have been stalled. The delay in getting permanent alternative accommodation is solely on account of the conduct of Defendant Nos. 2 to 4. The balance of convenience is entirely in favour of the occupants who have vacated and are waiting to be rehabilitated. Defendant Nos. 2 to 4 have raised pleas which are totally specious and untenable. Hence the following order:

(i) Defendant Nos. 2 to 4 are ordered and directed to vacate the said flat Nos. 18, 19 and 23 on or before 15th January,2017 and hand over the same to the Petitioner.

(ii) In the event of Defendant Nos. 2 to 4 failing to hand over the flats as directed in clause (i) above, the Court Receiver, High Court, Bombay, will stand appointed as Receiver in respect of Flat Nos. 18, 19 and 23 and take forcible possession of the said flat Nos. 18, 19 and 23 with police assistance if necessary and hand over the same to the Plaintiff.

(iii) The Plaintiff will pay all the amounts to Defendant Nos. 2 to 4 agreed to be paid under the Development Agreement and the Supplementary Development Agreement simultaneously with Defendant Nos. 2 to 4 vacating their respective flats.

Notice of Motion is disposed off with no order as to costs.

(S.J. KATHAWALLA, J.)