

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

IN ITS COMMERCIAL DIVISION

**COMMERCIAL ARBITRATION APPLICATION NO. 106 OF 2017
WITH
COMMERCIAL ARBITRATION PETITION NO. 393 OF 2017
WITH
IN PERSON APPLICATION NO. 166 OF 2017
WITH
IN PERSON APPLICATION NO. 169 OF 2017**

Shreejee Buildcon Homes LLP .. Petitioner/Applicant
Vs.

Mulund Mrug Archana Co-operative
Housing Society Limited & 3 Ors. .. Respondents

Mr.Piyush M. Shah and Ms. Meetal Savla i/b P.M. Shah for
petitioner/applicant.

Mr. Dishang Shah i/b Payal Shethia for respondent no.1.

Mr. Vikee Vaman Yelve for respondent no.2.

Mr.N.V. Sharma for respondent Nos.3 and 4.

Mr. Ritesh H. Thakker-Partner of petitioner present.

Mr. Prabhakar Mohit-Chairman of respondent no.1.

**CORAM : K.R.SHRIRAM, J.
DATE : 6TH DECEMBER 2017**

P.C.

COMMERCIAL ARBITRATION PETITION NO. 393 OF 2017

1. This petition is filed under Section 9 of the Arbitration and

Conciliation Act, 1996 (The said Act) by petitioner and though prayers appear to be in the nature of the mandatory final order, in the facts and circumstances of the case, I do not find it wrong for petitioner to ask for and for court to grant such a relief. Extraordinary situations require extraordinary orders.

2. Petitioner carries on business of real estate developers. Respondent no.1 is Co-operative Housing Society registered under the provisions of Maharashtra Co-operative Societies Act, 1960 situated at Mulund Mrug Archana CHS Ltd., Govind Nagar, Sarojini Naidu Road, Mulund (West), Mumbai 400 080 (The said property). It must be noted that counsel for respondent no.1-society stated that respondent no.1-society fully supports petitioner in this petition. Respondent Nos. 2 to 4 are the members of respondent no.1-society. Respondent Nos. 2 to 4 are dissenting members for proposed redevelopment against the majority of 34 members of respondent no.1-society. Respondent nos. 2 to 4 have right, title and interest in respect of their respective flats being Flat Nos. A-15 (3rd Floor), A-11 (2nd Floor) and B-32 (3rd Floor) in the buildings of the society.

3. Respondent no.1-society situated on the said property is consisting of two Wings, namely, 'A' Wing comprising of ground plus four upper floors

and 'B' Wing comprising of ground plus four upper floors totally consisting of 37 flats.

It is the case of petitioner, who is supported by respondent no.1 that the said building “Mulund Mrug Archana” in general and the R.C.C. framework in particular are in a weak and dilapidated condition and, over the years, have been showing increasing signs of stress. With each passing year, the condition of RCC framework has deteriorated further, cracks have developed at several places, the steel reinforcements have corroded extensively, and there is a discontinuity in the reinforcements. Besides the aforesaid, there are leakages in several of the Members' existing flats in the building and the water, which is constantly seeping into slabs/RCC structure, is further compounding the problem. While the society has carried out major works of repairs as well as maintenance works to the buildings from time to time, the same have only provided temporary relief and in view of the opinion of the Architects, Structural Auditors and Consultants such repairs are only a temporary solution to the problem, and hence respondent no.1-society unanimously decided to redevelop the said building instead of carrying out any further repairs.

4. Petitioner further states that at the Special General Body meeting of respondent no.1 society (wherein respondent Nos.2 to 4 were also present

and signed the Register maintained by respondent no.1-society) the issues of the condition of the building of the society were discussed at length and the members were of the opinion that they should demolish the existing buildings and construct a new building thereon. However, since neither the society nor the members had the finance nor the expertise to carry out such work, it was decided that the task of carrying out such demolition and reconstructing flats for the members should be entrusted to professional developers who could carry out the development work free of cost to the members of the society and construct for the members new flats free of cost. In return for the same, the Developers could be granted the right to bring in and utilize TDR/FSI and sell the remaining premises not earmarked for the members and appropriate the sale proceeds into themselves. The members took a unanimous decision and formed a special committee comprising of a few chosen members for the purpose of inviting proposals from various developers for development of the property of the society. The Managing Committee has been empowered and was invested with the powers of considering the various proposals/offers of developers, finalizing the best available and putting the same before the General Body for its final approval.

5. Respondent no.1-society held a General Body Meeting on 24th

September 2009 in respect of the redevelopment of the building of the said society, wherein respondent Nos. 2 to 4 were also present and have duly signed the Minute Book/Register and have accepted the redevelopment scheme and selected the process and the procedure followed by respondent no.1-society. It is further stated that after following due compliance of the required procedure in General Body Meeting with consent of all the members including respondent Nos. 2to 4, respondent no.1-society had appointed one Strut Consultants Pvt. Ltd. as their Project Management Consultant.

6. Thereafter, respondent no.1-society invited offers from various developers and pursuant to the negotiations and on perusal of various offers, respondent no.1 society unanimously resolved to redevelop the said property through one Rite Developers Pvt. Ltd. pursuant to Resolution dated 8th May 2011, passed in its Special General Body Meeting. This resolution is discussed later in this order.

7. Thereafter, pursuant to a Development Agreement dated 29th November 2012 executed between respondent no.1 society and the said Rite Developers Pvt. Ltd., respondent no.1-society granted redevelopment rights in respect of the said property to the said Rite Developers Pvt. Ltd., and

respondent no.1 society had also executed a Power of Attorney dated 1st February 2013, in favour of the said developer for effectually carrying out the redevelopment work in respect of the said property. The said Development Agreement and the said Power of Attorney are registered.

8. It is also stated in the petition that in the meanwhile, a Structural Audit Report dated 18th August 2015 prepared by one M/s. ANA Consulting, Structural Engineering was obtained by respondent no.1 society, wherein it has been categorically stated that the building of respondent no.1- society is in bad shape and given the age of the structure and seriousness of structural damages, structural repairs do not seem to be a feasible option as the costs of the repairs will run into huge amounts and it was opined to go for demolition and reconstruction. A copy of this report is annexed to the petition.

9. Petitioner stated that the said Rite Developers Pvt. Ltd., had complied with all the terms and conditions of the said Development Agreement dated 29th October 2012 and with their confirmation, respondent no.1-society agreed to appoint petitioner as the new developer for redeveloping the said property.

10. Petitioner stated that in meetings held between the representatives of petitioner and members of respondent no.1-society, various issues were discussed and logical answers and explanation to all the members were given by the representatives of petitioner. It is also stated that even during such meetings, respondent nos. 2 to 4 did not raise any specific issue either with or the managing committee members of respondent no.1-society.

11. It is further stated that pursuant to a Resolution passed in the Special General Body Meeting dated 24th July 2016, respondent no.1 society granted its specific consent to execute a Joint Venture Development Agreement in favour of petitioner and pursuant thereto, a Joint Venture Development Agreement dated 18th October 2016 is executed between respondent no.1-society, therein referred to as the society of the First Part, various members of the society, therein referred to as the members of the Second Part, Rite Developers Pvt. Ltd., therein referred to as the Old Developer (Confirming Party) of the Third Part and M/s. Shreejee Buildcon Homes LLP (i.e., petitioner), therein referred to as the New Developer of the Fourth Part (the Development Agreement). The Development Agreement is duly registered with the office of the Sub-Registrar of Assurances at Kurla under Serial No.KRL1-10631-2016. Respondent Nos.3 and 4 have also signed the said Development Agreement in their capacity as members of respondent no.1-

society in respect of their flats. A copy of the said Development Agreement dated 18th October 2016 is annexed to the petition.

12. Petitioner further stated that in or about December 2016 onwards petitioner entered into individual Alternate Accommodation Agreement from time to time with 34 members of respondent no.1-society, out of the total 37 members, i.e., except with respondent Nos. 2 to 4. Petitioner also started the process of amending the IOD and procured NOC of CFO and EETC as per the new amended plan and also re-validate the Intimation of Disapproval (IOD). The re-validated IOD is valid until February 2018.

Admittedly, respondent no.2 has not signed the Development Agreement. The Development Agreement, however, has been signed by respondent nos.3 and 4. The Development Agreement provides for arbitration. The arbitration clause is clause No.41 and the same reads as under :-

“41 All the disputes/differences between the parties hereto arising out of any manner concerning or relating to this agreement as to the true meaning of the recitals or covenants or to the construction thereof, then the same shall be referred to the arbitration of a sole Arbitrator if the parties can agree upon the appointment of the sole Arbitrator. If the parties do not arrive at a common sole Arbitrator, then, in that event, this arbitration clause shall be deemed as if there is no arbitration then the proceedings shall be covered under the provisions of Indian Arbitration and Reconciliation Act, 1996.”

13. Therefore, petitioner has filed this petition and also an application under Section 11 of the Arbitration and Conciliation Act, 1996 (the said Act).

14. It is the case of petitioner, who is supported by respondent no.-1 society and counsel for respondent no.1 also agrees with the statements made by Mr.Piyush Shah for petitioner, that 34 out of 37 members of respondent no.1 society have vacated the building and the deadline of the members to vacate the building was July 2017. Mr.Shah submitted that in or about December 2016 onwards petitioner herein entered into Individual Alternate Accommodation Agreement with 34 members of respondent no.1-society out of total 37 members, i.e., except respondent Nos. 2 to 4. Mr. Shah also submitted that Intimation Of Disapproval (IOD) was received on 22nd February 2017, Fire NOC was received 28th April 2017, Traffic NOC was received on 30th June 2017 but petitioner is unable to start demolishing the building and take further steps because respondent Nos.2 to 4 are obstructing and refusing to vacate the buildings. Mr. Shah also states that petitioner has an obligation to give a bank guarantee in the sum of Rs. 2.85 crores to respondent no.1 on the date when all the 37 members of respondent no.1-society vacate the buildings. Mr. Shah further states that beginning March-2017, when the first of the members vacated, petitioner

has been paying the alternate accommodation compensation of Rs.25,000/- per month per member. This works out to about Rs.8.50 lakhs per month for the members who have vacated.

15. When the counsel for petitioner made his opening submissions, the Court asked the dissenting members, viz., respondent nos. 2, 3 and 4 what their problem was with the other members of respondent no.1- society and if this Court could assist them in resolving their disputes so that respondent nos.2, 3 and 4 can also get the alternate accommodation and also get possession of a new flat when the buildings are redeveloped. The counsel for respondent no.2 and counsel appearing for respondent Nos.3 and 4 were not interested in resolving the problem. Respondent no.2, husband of respondent no.3 and, respondent no.4 were also present in Court and did not evince any interest in resolving the issues.

16. I have considered the affidavits in reply on behalf of respondent Nos.2, respondent nos. 3 and respondent no. 4 and also the letters sent on behalf of respondent nos. 3 and respondent no.4, copies whereof are at Exh. 'K' and Exh.'L' to the petition. It is impossible to make out the reason for their fight with all other 34 members of respondent no.1-society and why they are objecting and refusing to vacate and abide by the Development

Agreement. Even the counsel for respondent no.2, respondent no.3 and respondent no.4 were of no assistance. I have, however, made an attempt to decipher from the affidavits in reply their objections.

17. In the affidavit in reply of respondent no.2, four main objections/allegations have been raised as to why he is opposing redevelopment. Petitioner has relied upon a Resolution passed in the Special General Body meeting held on 8th May 2011 of respondent No.1-Society appointing earlier developer Rite Developers Pvt. Ltd. for redevelopment of the buildings. The attendance sheet copy of the Special General Body Meeting can be found at Page 594 of the affidavit in reply filed by respondent no.2. Against Flat No.15, there is a signature, which according to petitioner and respondent no.1, is the signature of respondent no.2 and that respondent no.2 had attended the Special General Body Meeting in which the Resolution as mentioned above was passed unanimously. This is relevant to the first defence which I am going to mention of respondent no.2. According to respondent no.2, this signature has been forged, he never attended the meeting and he has lodged a criminal complaint against the members of respondent no.1-society. Counsel for respondent no.2 relied upon a letter dated 23rd August 2017, copy whereof is at Exh.'Y' to the affidavit in reply which is a letter from Mulund Police Station to respondent

no.2. Though English translation has not been provided, the counsel stated that in this letter the police is stating that the complaint filed by respondent no.2 is being investigated. As a copy of the complaint was not available, the Court asked counsel for respondent no.2 as to when did respondent no.2 lodge the complaint. The counsel stated that the complaint was lodged sometime in February 2016.

It should be noted that the complaint is basically challenging a resolution passed on 8th May 2011 agreeing to the appointment of Rite Developers Pvt. Ltd. as the Developer. It should also be noted that the complaint has been lodged, as per respondent no.2 more than five years after the resolution has been passed and his signature is alleged to have been forged.

18. The second objection/defence of respondent no.2 is that there is some suit pending before this Court being AO No.19 of 2015 and therefore this arbitration petition is not maintainable and members of respondent no.1- society do not have right to enter into third party agreement. There is no description given as to what is the nature of the suit and if it is AO bearing No.19 of 2015, it cannot be a suit. There is no explanation as to why this petition is not maintainable.

The third objection is respondent no.2 has lodged Police complaint

against the old Developer, new fake developer-petitioner regarding forged documents for redevelopment of the society. Again there are no details provided.

The fourth objection of respondent no.2 is that there are criminal cases filed against society regarding fraud, for making forged document, Fake membership, 80% B.M.C. Home loan Scam etc. Again there are no details. Despite opportunities given, counsel for respondent no.2 was not even able to assist the Court.

19. So far as respondent Nos.3 and 4 are concerned, there are three affidavits on their behalf which can be found in the records and proceedings, two of which are by Mr. Sharma, the Advocate on record for respondent nos. 3 and 4. The first affidavit is dated 12th August 2017 which is affirmed by Advocate Mr. Sharma. He is basically stating that he was unwell and according to him, he has number of illegal records of petitioner. To the affidavit are annexed photocopies of his hospital bills and nothing more. There is another affidavit, again of Advocate Mr. Sharma, dated 7th September 2017 but affirmed on 8th September 2017. In this affidavit, it is basically alleged that the petition which is being heard by this Court has been taken out with mala-fide intention to cheat the advocate of respondent nos. 3 and 4 and to pressurize respondent nos.3 and 4 to leave the premises.

How the Advocate is personally involved is difficult to understand or fathom. First of all an advocate on record cannot file such personal affidavit on behalf of party or parties. Further to say that he was the advocate for the society and he has various documents in his possession which he obtained while advising society and that it can be used against the society aggravates the misconduct. Even assuming he has the alleged documents, those are privileged documents obtained from a client and it is improper to threaten to use those documents against the client. This, in my view, amounts to professional misconduct.

Moreover, there is nothing on record to show that Advocate Sharma has been authorized to file any such affidavit on behalf of respondent nos.3 and 4. Therefore, a copy of this order be sent to Bar Council of Maharashtra and Goa to consider whether any action against the Advocate Mr. Nagabhushan Virupaxayya Sharma has to be taken.

Further, the documents annexed to the affidavit are absolutely irrelevant inasmuch as they are again copies of medical bills of the Advocate and a letter written by the Advocate to Chief Minister of Maharashtra for taking action against the petitioner regarding alleged fraud that petitioner is playing on respondent no.1-society and consequently against respondent nos.3 and 4.

20. The third affidavit on behalf of respondent no. 3 and respondent no.4, which is on record is dated 26th August 2017 filed by one Mr. Elangoven Rathinam Mudaliar and one Mr. Rajkumar Prabhakar Borikar. Mr. Borikar is respondent no.4 but he has not verified the affidavit. Respondent no. 3 has not filed an affidavit, opposing the petition. Moreover, this affidavit also does not state anywhere that Mr.Elangoven Rathinam Mudliar has been authorized by respondent no.3 to file this affidavit. While this Court was dictating, Mr. Sharma pointed out that Mr. Mudliar is the Associate Member with respondent no.3. In this affidavit, it is stated that respondent nos. 3 and 4 have filed criminal complaints which are pending in 27th MM Court Mulund (W) and the criminal Revision petition before the Gr. Sessions Court and therefore, unless those complaints are finally investigated and disposed, redevelopment should not be permitted. No documents are annexed to the affidavit and there is no explanation whatsoever in the affidavit as to what these complaint and CRA relate to and why this Court should not entertain this petition until the hearing and final disposal of those criminal complaint/CRA. The documents annexed to this affidavit are again photocopies of medical reports of advocate Sharma.

21. In my view, the attempt of respondent no.2, 3 and 4 is only to obstruct the redevelopment of the society without any cogent or valid or acceptable

reason. These three persons are only holding the society to ransom for some perceived apprehensions by taking stand which is totally mala-fide, unjustified, untenable and frivolous and only with an intention to cause obstruction and interruption to the redevelopment project. Otherwise there is no reason for respondent nos. 2, 3 and 4 not to co-operate and support the redevelopment project. If they have problem regarding redevelopment, it can be sorted out so that they can also live happily in the society. It should be noted that 34 members out of 37 members, which will be more than 91% of the society members have vacated the premises with a dream to move back into a flat which will be better than what they were living in till now. By the dishonest and mischievous stand of respondent nos. 2 to 4, more than 91% of the members are going to be affected and deprived of their enjoyment of life. In effect, when one considers the affidavits in reply filed on behalf of respondent nos. 2 to 4, there is no reason why this petition should not be allowed.

22. The counsel appearing for respondent no.2 stated that respondent no.2 not having consented to the Development Agreement, no order can be passed against respondent no.2.

I am afraid, this is not the correct position. Petition under Section 9 of the said Act is maintainable even against parties who are not parties to the

arbitration agreement. A Division Bench of this Court in **Girish Mulchand Mehta & Anr. Vs. Mahesh S. Mehta & Anr.**¹, has held that Section 9 can be invoked even against a third party who is not party to an arbitration agreement or arbitration proceedings, if he was likely to be affected by the interim measures. Paragraphs 12 and 13 of the said judgment read as under :

12 *The next question is whether order of formulating the interim measures can be passed by the Court in exercise of powers under Section 9 of the Act only against a party to an Arbitration Agreement or Arbitration Proceedings. As is noticed earlier, 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.

13 *The Appellants, however, place reliance on the decision of the Kerala High Court in the case of Shoney Sanil v/s. M/s. Coastal Foundations (P) Ltd. & Ors. reported in AIR 2006 Kerala (206). In that case the question considered was whether the writ-Petitioner, admittedly, a third party to an alleged Arbitral Agreement between the Respondents inter se, and who had in his favour a confirmed Court sale and certificate of such sale and delivery of possession, following and arising under an independent decree, could be dispossessed, injuncted or subjected to other Court proceedings under Section 9 of the Act? The Kerala High Court held that orders under Section 9 (ii)(c) can be passed only in relation to subject matter of dispute in arbitration which may be in possession of any party since it is not the intention of the Act or any arbitration proceedings as conceived by the law of Arbitration to interfere with or interpolate third party rights. It concluded that on a plain*

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

reading of Section 9 of the Act and going by the Scheme of the said Act, there is no room to hold that by an interim measure under Section 9, the rights of third party holding possession on the basis of Court sale could be interfered with, injuncted or subjected to proceedings under Section 9 of the Act. Instead, it held that Section 9 of the Act contemplates issuance of interim measures by the Court only at the instance of party to Arbitration Agreement with regard to the subject matter of the Arbitration Agreement. The Court has, however, noted that such order can be only against the party to an Arbitration Agreement or at best against any person claiming under him. The Principle expounded in this decision is that if a third party has independent right in the subject matter of the Arbitration Agreement, Section 9 cannot be invoked to affect his rights. At the same time, the Kerala High Court has plainly opined that it is possible to pass orders under Section 9 against a third party if such person is claiming under the party to the Arbitration Agreement. Thus understood, Section 9 can be invoked even against a third party who is not party to an arbitration agreement or arbitration proceedings, if he were to be person claiming under the party to the arbitration agreement and likely to be affected by the interim measures. The Appellants herein will have to substantiate that they were claiming independent right in respect of any portion of the subject matter of the Arbitration Agreement on their own and not claiming under the Respondent No. 2 Society who is party to the Arbitration Agreement. In absence thereof, the Court would certainly have jurisdiction to pass appropriate order by way of interim measures even against the Appellants herein, irrespective of the fact that they are not party to the Arbitration Agreement or the Arbitration Proceedings.

The Court has held that under Section 9 of the said Act, parties who would be incidentally affected by grant of any interim measure, are required to be impleaded in view of Rule 803E of the Bombay High Court (Original Side) Rules. This has also been followed by a Single Judge of this Court in ***Calvin Properties & Housing Vs. Green Fields Cooperative Housing & Ors.***²

² 2014 (2) Bom.CR.398

23. Mr. Shah relied upon ***Bharat Infrastructure and Engineering Pvt. Ltd. Vs. Park Darshan CHS Ltd. & Ors.***³ to submit that it is now well established position that once a person becomes a member of the Co-operative Society, he loses his individuality with the Society and he has no independent rights except those given to him by the statute and Bye-laws. The member has to speak through the Society or rather the Society alone can act and speak for him qua the rights and duties of the Society as a body. Counsel also submitted that respondent nos. 2 to 4 will be getting the flats having same area, facilities and fixtures etc. as the other 34 members of the society are going to get. Mr. Shah stated petitioner is ready and willing to undertake to perform its obligations under the Development Agreement. Counsel assures that notwithstanding non-co-operation shown by respondent nos. 2 to 4, they will not be discriminated against and they will also get all benefits of respondent no.1-society. The counsel further assures to this Court, on instructions from the Chairman of the society who is present in Court, that respondent Nos. 2 to 4 will not be discriminated against or targeted for their objections and non-co-operation till date. It should be noted that petitioner has also spent a substantial amount of money in this project and at least from July 2017 has been paying Rs. 8.50 lakhs per month to the members of the society towards compensation for

3 2013 SCC On Line BOM 466

individual alternate accommodation. Any further delay would cause further loss to petitioner and also to the society as well as other 34 members of the society, who have already vacated their respective flats and they would not be able to go back to their new flats upon reconstruction of the building. Mr. Shah states petitioner has no objection to pay compensation to respondent no.2 to respondent no.4, as noted above, at the same rate being paid by petitioner to the other 34 members, in accordance with the Individual Accommodation Agreement/Tripartite Agreement entered into between petitioner and respondent no.1 and other 34 society members. Mr. Shah also states that he has no objection if respondent no.2 joins in the arbitration proceedings to be commenced. Mr. Shah states his statement may be recorded as undertaking of petitioner's partner Mr. Ritesh H. Thakker, who is present in Court and Mr. Shah identifies him.

24. Counsel for petitioner also submitted that if respondent nos. 2, 3 and 4, who have occupied their flats, are deliberately not handing over their flats to the society with an intention to obstruct the redevelopment work, it would amount to a breach on the part of respondent no.1-society as the society would not be able to hand over possession of 37 flats.

Mr. Dishang Shah for respondent no.1-society submitted that respondent no.1-society has no objection if the relief as claimed by

petitioner is granted and petitioner is allowed to commence redevelopment of the property which would be in the interest of the society and its members.

25. The society has passed a resolution to invite tenders for redevelopment of the said property and has executed agreement for redevelopment in favour of petitioner in view of the dilapidated condition of the building. Respondent nos. 3 and 4 have also signed this Development Agreement. This Court in *Bharat Infrastructure* (supra) has held that merely because the terms and conditions of the development agreement are not acceptable to the members who are in minuscule minority, cannot be the basis not to abide by the decision of the overwhelming majority of the General Body of respondent no.1- society.

This Court has held that once a person becomes a member of the Co-operative Society, he loses his individuality with the Society and he has no independent rights except those given to him by the statute and Bye-laws.

26. Perusal of the records indicates that resolutions have been passed by the Society by overwhelming majority of members of respondent no.1- society and 34 out of 37 members have already handed over possession of their respective flats to the society and society, in turn, has handed over

possession of the same to petitioner. Respondent Nos. 2 to 4, who are members of respondent no.1-society, are bound by the resolution passed by respondent no.1-society which in this case was passed unanimously to appoint petitioner as developer and to execute development agreement with petitioner.

Thus, even if respondent no.2 is not party to any arbitration agreement, the agreement between petitioner and respondent-no.1 would be binding on him and reliefs can be granted by this Court against the said respondent.

27. Petitioner has to commence redevelopment on the plot of the society after demolition of the two buildings and hand over possession of the respective flats to the members of the society under the Development Agreement. Respondent Nos. 2 to 4 cannot be permitted to obstruct the redevelopment of the building under the Development Agreement.

In my view, if the said 3 members, i.e., respondent no.2 to respondent no.4, have any claim for larger area from petitioner-Developer of the buildings or have any monetary claim, the same may be raised in the arbitration proceedings. I add respondent no.2 also because advocate for respondent no.2, on instructions from respondent no.2, has agreed to join in the arbitration proceedings to be commenced by petitioner as a party

respondent and an arbitrator has already been appointed under separate order passed in Arbitration Application No. 106 of 2017.

28. In my view, few members of respondent no.-1 society who are only three against an overwhelming 34 members, cannot be allowed to obstruct the development project agreed by majority members of the society by passing the resolution and said members having acted upon the said resolution by handing over possession of their respective flats to the society and the society in turn handing over the same to petitioner to enable petitioner to commence redevelopment.

29. In my view, balance of convenience is also in favour of petitioner and respondent no.1-society and if the reliefs as sought by petitioner are not granted, the entire redevelopment project would be at standstill and the members who have already handed over their flats and are out of possession of the flats, would not be able to be provided with possession of new flats proposed to be constructed by petitioner. Petitioner has also spent substantial amount pursuant to the Development Agreement, which fact, cannot be overlooked by this Court.

30. In my view, petitioner has also made out a strong *prima-facie* case for

grant of interim measure. I see no reason why prayer clause (a) as claimed in the petition be not granted. I find support for granting such an order from the judgment of the Division Bench of this Court in ***Nimbus Communications Ltd. Vs. BCCI*** ⁴

31. In the circumstances, the following order is passed :-

(a) Commercial Arbitration Petition allowed in terms of prayer clause (a) which reads as under :

“(a) Pending the arbitration proceedings and making of an Arbitral Award by the Arbitral Tribunal and subject to interim order and directions by the Arbitral Tribunal, this Hon'ble Court be pleased to issue a mandatory order and injunction directing the Respondent Nos. 2 to 4, their servants, agents or any person/s claiming through or under him to quit, vacate and hand over the quite, vacant and peaceful possession of their respective premise occupied by them in the respondent no.-1 society to the petitioner or to the Court Receiver, High Court, Mumbai as this Hon'ble Court deem fit and proper, and thereby to comply with the terms and conditions of the said Joint Venture Development Agreement dated 18.10.2016.”

(b) Respondent Nos. 2 to 4 are directed to vacate their respective premises within four weeks from today.

(c) If respondent Nos. 2 to 4 refuse to vacate, the Court Receiver of this Court will take physical possession of Flats of respondent Nos. 2 to 4 being being Flat No.A-15 (3rd Floor), A-11 (2nd floor) and B-32 (3rd floor) and evict respondent Nos. 2 to 4

⁴ 2012[(4) Arb. L.R. 113 (Bombay) (DB)]

and if necessary use Police assistance. The concerned Police Station shall provide all assistance.

(d) If respondent nos. 2 to 4 refuse to enter into Individual Permanent Alternate Accommodation Agreement, all amounts payable to respondent nos. 2 to 4 will be deposited with the Court Receiver and that amount will be invested from time to time in fixed deposit with a nationalized bank.

Respondent Nos.2 to 4, however, will be permitted to withdraw those amounts upon signing their respective Individual Permanent Alternate Accommodation Agreement. It is clarified that whoever signs will be permitted to withdraw.

(e) Commercial Arbitration Petition disposed.

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32. In view of the observations made above in the commercial arbitration petition No.393 of 2017 filed under Section 9 of the said Act, there is an arbitration clause between petitioner and respondent nos. 3 and 4. Petitioner has invoked arbitration as per the letter dated 17th June 2017. Mr. Shah for petitioner, on instructions, stated that petitioner has no objection if

respondent no. 2, who is not a signatory to the arbitration agreement, joins as respondent in the arbitration proceedings. Mr. Yelve for respondent no.2, on instructions from respondent no.2, who is present in Court, states that respondent no.2 is ready and willing to participate as respondent in arbitration proceedings.

33. In view of this consent, the following order is passed :

(i) Mr.Mahesh Menon, an Advocate practicing in this Court having office at : 4, Gayatri, 2nd floor, Opp. Chembur Post Office, D.K. Sandu Marg, Chembur, Mumbai 400 071; Telephone No. 22-4311 200 (100 Lines); Mobile No.9821056508/9821256508, is appointed as Sole Arbitrator to arbitrate on disputes and differences including counterclaim, if any, arising out and/or in connection with and relating to Joint Venture Development Agreement dated 18th October 2016.

(ii) Respondent Nos.2 Mr. Sudesh Sudhakar Sule be added as respondent and is permitted to participate in the arbitral proceedings.

(iii) The fees, administrative expenses, typing charges and venue expenses of the Arbitrator shall be shared equally between parties, i.e., 50% by petitioner and 50% by respondents (12.5% each) and the same will be costs in the arbitration proceedings.

(iv) Within three weeks of receiving a communication from the advocate for petitioner and/or respondents, the Arbitrator shall give in writing, directly to parties, disclosure as required under Section 11(8) read with Section 12(1) of the said Act.

(v) All rights and contentions of parties are kept open, except, questioning existence of arbitration agreement.

34. Commercial Arbitration Application accordingly disposed.

(K.R. SHRIRAM, J.)