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

COMMERCIAL ARBITRATION PETITION NO.448 OF 2018

Kamla Homes and Lifestyle Private Limited	]	
a Company incorporated and registered	]	
under the provisions of Companies Act, 1956	]	
having its registered office at	]	Petitioner.
101, 1 st floor, Mayur Towers	]	
Chandavarkar Road, Borivali (West)	]	
Mumbai 400 092	]	

V/s.

1. Pushp Kamal Co-operative Housing Society	]	
Limited,	]	
a society registered under the provisions of	]	
Maharashtra Co-operative Societies Act, 1960	]	
631/1964 and having its office at "Sameer"	]	
Final Plot No.118/B,	]	
Prabhat Colony, Road No.6, Santacruz	]	
(East), Mumbai 400 055	]	
	]	
2.Satyanarayan Agarwal	]	
residing at float No.4, Ground floor,	]	
PushpKamal CHS Ltd	]	
"Sameer"	]	
Prabhat Colony, Road No.6, Santacruz	]	Respondents.
(East), Mumbai 400 055	]	
	]	
3.Kanchan Deepak Salvi	]	
	]	
4.Dipika Deepak Salvi	]	
	]	
5. Karishma Deepak Salvi	]	
flat No.11, 2 nd floor, Pushpa Kamal CHS Ltd	]	
Sameer Building, Prabhat Colony	]	
Road No.6, Santacruz (E)	]	

Mumbai 400 055]
 and also at]
 704, Abhilash Pemkar Pada]
 Mira Road (E) Thane]

- Mr. Faran Khan a/w M. P. Vora i/by M/s Pramodkumar & Co., for the Petitioner.
- Ms. Sarika Mehra i/by L.J. Law, for respondent No.1.
- Mr. Rauraj Shah a/w Dipesh Siroya, for respondent No.2.
- Mr. Yatin N. Shah, for respondent Nos. 3 to 5.

CORAM : G. S. KULKARNI, J.

DATE : 3rd May 2019.

ORAL JUDGMENT :

1] Heard learned counsel for the parties.

2] This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "ACA"); whereby the petitioner who is appointed as a developer by respondent No.1 society (for short 'the Society') has prayed for the following interim reliefs pending the arbitral proceedings:-

"(a) that pending the commencement and culmination of the arbitral proceedings this Hon'ble Court be pleased to appoint the Court Receiver, High Court, Bombay or any other fit and proper person as Receiver of the subject premises described in Exhibit 'B' hereto with all powers under Order XL Rule 1 of the Code of Civil Procedure, including power to take physical possession of

the subject premises described in the Exhibit 'B' hereto from respondent Nos. 2 to 5, their family members and/or any person found in possession thereof, with the help of police assistance, if necessary, including by breaking open of lock and to hand over the same to the petitioner for demolition and redevelopment of the property described in Exhibit 'A' hereto;

(b) that pending the commencement and culmination of the arbitral proceedings this Hon'ble Court be pleased to grant an order and injunction restraining the respondent Nos. 2 to 5, their family members, servants, agents and any person claiming by, through and/or under them or any one or more of them from in any manner, selling, transferring, alienating, dealing with, disposing off and/or creating third party rights and/or encumbrances in respect of the subject premises described in Exhibit 'B' hereto or any part thereof and/or parting with possession thereof and/or obstructing, interfering with and/or creating hurdles in redevelopment of the property described in Exhibit 'A' hereto by the petitioner, in any manner whatsoever"

3] It is not in dispute that the respondent No.1 society has entered into development agreement dated 8th November, 2012 with the petitioner for redevelopment of the building of the society, which has about 12 members. It is also not in dispute and as can be seen at page No.175 to 184, that the condition of the building is extremely dangerous. There is an order passed by this court that the occupants more particularly, respondent No.2, and respondent Nos. 3 to 5 shall occupy the premises at their risk and

consequences.

4] It had so transpired that earlier the Society intended to appoint a developer by name M/s Laxmi Constructions. The Society did not enter into a development agreement with the said M/s Laxmi Constructions as the terms could not be finalized. It was thus only a stage of negotiation. Nonetheless M/s Laxmi Constructions approached this Court in a Suit bearing No.2457 of 2011 against society. In the said suit, M/s Laxmi Constructions could not succeed in getting any interim relief of a temporary injunction against the society. On 28.11.2011, the only order which was passed in the said suit was to the effect of learned counsel for the society made a statement that the society will not conclude any agreement with any other party qua the development of the society's premises, before expiry of a period of four weeks from the date of the service of a written notice to M/s Laxmi Construction's advocates stating their intention to do so.

5] Aggrieved by the order of learned Single Judge, not granting any temporary injunction against the society, M/s Laxmi Constructions approached the appeal court. In the said Appeal, the Division Bench of this Court refused to interfere in the order passed by the learned Single Judge. The order passed by the First Court dated 5th January 2012 on the said

appeal reads thus :-

"1] Appeal is directed against the order dated 28th November 2011 by which the learned Single Judge of this Court declined to grant ad-interim injunction as prayed by the appellant/plaintiff, but after recording statement of respondent/defendant Society that the respondent will not conclude any agreement with any other party in respect of the development of the suit property even before the expiry of a period of four weeks from the date of the service of written notice to the plaintiff's Advocate indicating to do so.

2] Since the statement recorded by the learned Single Judge takes sufficient care of the appellant's interest at the ad-interim stage, no interference is called for and the appeal is accordingly dismissed.

6] Thereafter the Society considering the urgent need to undertake re-development took steps and in its Special General Meeting held on 22nd July, 2012 decided to appoint the petitioner as its developer. The Society's advocate in compliance of the order dated 28th November, 2011 passed by the learned Single Judge of this Court in the suit filed by M/s Laxmi Constructions, issued a notice to M/s Laxmi Constructions informing of the intention of the society to appoint the petitioner as developer. A development agreement dated 8th November 2012 came to be entered between the society and the petitioner.

7] Thereafter M/s Laxmi Constructions filed Chamber Summons

No.1385 of 2012 in suit No.2457 of 2012, praying for impleadment of the present petitioner as a party defendant to the suit. The Chamber Summons came to be allowed by an order dated 22nd January 2018 passed by the learned Single Judge.

8} Admittedly, there is development agreement dated 8th November, 2012, which is entered between the petitioner and respondent No.1 society. For reasons which need not be discussed and may not be relevant in the present context the development could not progress as expected.

9} Presently, there are no issues for the petitioner to now progress the work of re-development. The society also has no objection for the petitioner to start the work expeditiously. The society has complete confidence in the petitioner to undertake the development. However, an obstruction to the redevelopment is being caused by respondent no.2 who is holding flat no.4, and respondent nos.3 to 5, who are not members of the society and claim to be legal representatives of one of the member/share holder of the society in respect of flat no.11.

10] It is quite clear that except for respondent nos.2 to 5 who are

concerned for only two flats, rest of the 10 members have no grievance of the petitioner undertaking development. These respondents are refusing to vacate the premises to enable the petitioner to commence the redevelopment work. In these circumstances, this petitioner is seeking reliefs that respondent nos.2 to 5 be prevented from obstructing the redevelopment.

11} This Court in its earlier order had called upon the members of the society to place on record as to whether they are willing for redevelopment at the hands of the petitioner-developer. Accordingly, respondent No.1 society has placed on record affidavits of all 10 members that they are agreeable to the re-development of the premises through the petitioner, as per the resolution passed in Special General Meeting.

12] On behalf of respondent No.1 society, it is contended that supplementary agreement is also being entered with the petitioner. It is also contended on behalf of the society that in view of the obstruction of respondent nos.2 to 5 who are not vacating their respective premises, redevelopment is being held up and/or stalled. Learned counsel for the society also submits that the society would completely support the case of the petitioner. It is submitted that ultimately it is in the interest of the

society that respondent nos.2 to 5 should vacate the premises so as to enable the petitioner to undertake development.

13} On the other hand, learned counsel for the respondent no.2 has vehemently opposed this petition. The only submissions is as made on behalf of respondent are firstly, that the agreement with the society has been entered in the year 2012 and by now six years having passed, there are no steps taken by the petitioner to commence the re-development.

14} Secondly, it is submitted that petitioner has not complied with the terms and conditions of the development agreement as entered with the society and therefore, there are serious apprehensions. Thirdly, it is submitted that the members of the society are not provided permanent alternate accommodation. The fourth and the most important objection is that suit filed by M/s Laxmi Constructions is pending and if M/s Laxmi Constructions succeeds then there would be two developers. The fifth submission is that there is likelihood of increase in F.S.I. and it will be prejudicial to the interest of members to accept an area under the original agreement or under the supplemental. Sixthly, it is contended that the petitioner had agreed to furnish a bank guarantee, but so far it has not been submitted to the society.

15] Learned counsel for respondent Nos. 3 to 5 has fairly submitted that the only contention as urged on behalf of respondent No.3 is that the society has not processed the claim of respondent Nos 3 to 5 to make them members of the society and hence these respondents are not ready to vacate their premises.

16] Having heard learned counsel for the parties and having perused the record, at the outset it needs to be noted that as there was no embargo, whatsoever, on the society to enter into agreement with the petitioner. There was due compliance of the obligations as cast on the society by virtue of the statement as recorded by this Court, in the order dated 28th November, 2011 in Suit No.2457 of 2011, the petitioner having taken appropriate steps by addressing a letter dated 3.4.2018 to M/s Laxmi Constructions and after expiry of four weeks entered into a development agreement with the society. M/s Laxmi Construction thereafter did not adopt any proceedings to challenge the said development agreement, and seek a restraint on the society to proceed further qua the re-development. It is not in dispute that majority of the members, that is remaining 10 members have supported the re-development at the hands of the petitioner and are awaiting commencement of the work.

17} Now coming to the objection as urged on behalf of respondent No.2, in my opinion, none of the objections are tenable. This for the reason that respondent no.2 in his capacity as member has not adopted any proceedings to challenge the collective decision of the society to enter into a development agreement with the petitioner.

18] If respondent no.2 was to be so aggrieved by the decision taken in the Special General Body Meeting of the society to enter into development agreement with the petitioner, and the said decision in any manner is not challenged and orders obtained, now at this stage against the collective will of the majority members of the society, respondent no.2 cannot raise these specious pleas in this proceeding that the development agreement is not in the larger interest of the members of the society.

19] As regards contention as urged on behalf of respondent No.2 that Suit No.2457 of 2011, filed by M/s Laxmi Constructions is pending and this would work prejudicial to the interest of the society, in my opinion is wholly untenable, as the order dated 28.11.2011 passed by this Court, was complied by the society in a manner as contemplated, and only thereafter the society entered into agreement with the petitioner in the year 2012. It is almost seven years, M/s Laxmi Constructions could not obtain any order

either against the society or the petitioner.

20} In fact from the tenor of these arguments as advanced on behalf of the respondent no.2 it is difficult to accept that these are arguments of a bonafide member. The arguments appear to be more of a rival developer in the grab of respondent no.2 if not by M/s Laxmi Constructions.

21] Minority members cannot restrain the will of the majority members. The position in law in this context is clear. A Division Bench of this Court, in **Girish Mulchand Mehta and anr vs Mahesh Mehta and anr** comprising of Mr. Justice Swatanter Kumar, Chief Justice and Mr. Justice A.M.Khanwilkar (as Their Lordships then were) in facts which were akin to the facts of the present case held that when minority members of the society were not yielding to the majority mandate of the society in its General Body Meeting to re-develop the premises and were not vacating the premises, the Court would be required to intervene and to remove the obstructing minority members. The Court, considering the position in law held that minuscule members cannot withhold benefits to the majority of the members, merely because terms and conditions of the development are not acceptable to these

members, who are in minority. In fact this was a case where identically as in the present case, two members out of 12 members were resisting the redevelopment. The Court observed that the overwhelming majority of the General Body of the society would prevail and such minority members cannot obstruct redevelopment. Mr. Justice A. M. Khanwilkar, speaking for the bench made the following observations in paragraph 16 and 18 of the decision:

"16. In the present case, it is not in dispute that the General Body of the Society which is supreme, has taken a conscious decision to redevelop the suit building. The General Body of the Society has also resolved to appoint the Respondent No. 1 as the Developer. Those decisions have not been challenged at all. The Appellants who were members of the Society at the relevant time, are bound by the said decisions. The Appellants in the dispute filed before the Cooperative Court have only challenged the Resolution dated 27/4/2008, which challenge would merely revolve around the terms and conditions of the Development Agreement. As a matter of fact, the General Body of the Society has approved the terms and conditions of the Development Agreement by overwhelming majority. Merely because the terms and conditions of the Development Agreement are not acceptable to the Appellants, who are in minuscule minority (only two out of twelve members), cannot be the basis not to abide by the decision of the overwhelming majority of the General Body of the Society. By now it is well established position that once a person becomes a member of the Cooperative Society, he loses his individuality with the Society and he has no independent rights except those given to him by the statute and Bye-laws. The member

has to speak through the Society or rather the Society alone can act and speaks for him qua the rights and duties of the Society as a body (see Daman Singh and Ors. v. State of Punjab reported in AIR 1985 SC 973). This view has been followed in the subsequent decision of the Apex Court in the case of State of U.P. v. Chheoki Employees Cooperative Society Ltd. reported in : AIR 1997 SC 1413. In this decision the Apex Court further observed that the member of Society has no independent right qua the Society and it is the Society that is entitled to represent as the corporate aggregate. The Court also observed that the stream cannot rise higher than the source. Suffice it to observe that so long as the Resolutions passed by the General Body of the Respondent No. 2 Society are in force and not overturned by a forum of competent jurisdiction, the said decisions would bind the Appellants. They cannot take a stand alone position but are bound by the majority decision of the General Body. Notably, the Appellants have not challenged the Resolutions passed by the General Body of the Society to redevelop the property and more so, to appoint the Respondent No. 1 as the Developer to give him all the redevelopment rights. The propriety rights of the Appellants herein in the portion (in respective flats) of the property of the Society cannot defeat the rights accrued to the Developer and/or absolve the Society of its obligations in relation to the subject matter of the Arbitration Agreement. The fact that the relief prayed by the Respondent No. 1 in Section 9 Petition and as granted by the Learned Single Judge would affect the propriety rights of the Appellants does not take the matter any further. For, the propriety rights of the Appellants in the flats in their possession would be subservient to the authority of the General Body of the Society. Moreso, such rights cannot be invoked against the Developer (Respondent No. 1) and in any case, cannot extricate the Society of

its obligations under the Development Agreement.

18. We have no hesitation in taking the view that since the Appellants were members of the Society and were allotted flats in question in that capacity at the relevant time are bound by the decision of the General Body of the Society, as long as the decision of the General Body is in force. As observed earlier, the Appellants have not challenged the decisions of the General Body of the Society which is supreme, in so far as redevelopment of the property in question or of appointment of the Respondent No. 1 conferring on him the development rights. The Appellants have merely challenged the Resolution which at best would raise issues regarding the stipulations in the Development Agreement. The General Body of the Society has taken a conscious decision which in this case was after due deliberation of almost over 5 years from August 2002 till the Respondent No. 1 came to be finally appointed as Developer in terms of Resolution dated 2nd March, 2008. Moreover, the General Body of the Society by overwhelming majority not only approved the appointment of Respondent No. 1 as developer but also by subsequent Resolution dated 27th April, 2008 approved the draft Development Agreement. Those terms and conditions have been finally incorporated in the registered Development Agreement executed by the Society in favour of Respondent No. 1. That decision and act of the Society would bind the Appellants unless the said Resolutions were to be quashed and set aside by a forum of competent jurisdiction. In other words, in view of the binding effect of the Resolutions on the Appellants, it would necessarily follow that the Appellants were claiming under the Society, assuming that the Appellants have subsisting proprietary rights in relation to the flats in their possession. It is noticed that as of today the Appellants have

been expelled from the basic membership of the Society. Their right to occupy the flat is associated with their continuance as member of the Society. It is a different matter that the decision of expelling the Appellants from the basic membership of the Society will be subject to the outcome of the decision of the superior authority where the appeals are stated to be pending. If the decision of the Society to expel the Appellants is to be maintained, in that case, the Appellants would have no surviving cause to pursue their remedy even before the Co-operative Court much less to obstruct the redevelopment proposal. As a matter of fact those proceedings will have to be taken to its logical end expeditiously. Even if the Appellants were to continue as members, they would be bound by the decision of the General Body whether they approve of the same or otherwise. In any case, keeping in mind that the Development Agreement does not absolutely take away the rights of the Appellants in the flats in question, as after demolition of the existing building, the Appellants would be accommodated in the newly constructed flats to be allotted to them in lieu of the existing flats, on the same terms as in the case of other members, provided the Appellants continue to remain members of the Society" .

(emphasis supplied)

22] The re-development is being undertaken by the petitioner under an agreement entered with the society. The contention as urged on behalf of respondent Nos. 2 and respondent Nos. 3 to 5 that respondent No.1 society has not entered the agreement in the larger interest of the members is thus totally untenable and cannot be accepted as a ground for these respondent not to vacate their respective premises. Respondent nos.3 to 5

in any case are not members and claim to be legal representative of a member of respondent no.1 society and contend that they are thus entitled to be the members of the society. This cannot be a ground for these respondents not to vacate the premises/flat in their occupation. Respondent nos. 3 to 5 are free to adopt appropriate proceedings to canvass their grievances.

23} In the above circumstances, the petitioner has made out a case for grant of interim relief pending the arbitral proceedings. The balance of convenience is in favour of the petitioner and in the interest of the majority members of the society.

24} It also needs to be observed that the learned counsel for petitioner at the outset submitted that respondent No.2 and respondent Nos. 3 to 5 will be provided the benefits which are being extended to the other members of the society in regard to the interim rent also in regard to the area of the permanent alternate accommodation. In any event, respondent No.2 has not raised any grievance in this regard. The petitioner accordingly would be required to granted interim relief in following terms :

ORDER

i] Learned counsel for petitioner and respondent No.1 society

state that the supplementary agreement would be entered within two weeks from today and copy of the supplementary agreement would also be furnished to all the members of the society including respondent nos.2 to 5. Statement is accepted.

ii] Learned counsel for respondent No.1 society states that the ten members of the society shall vacate their respective premises before 30th May 2019 which shall be after the execution of the supplementary agreement. Statement is accepted.

iii] Respondent No.2 and respondent Nos. 3 to 5 are directed to hand over possession of their respective flats/premises to the petitioner on or before 30th May, 2019.

iv] In the event of a failure of respondent Nos. 2 and 3 to 5 to hand over the possession of their respective flats on or before 30th May, 2019, Court Receiver, High Court, Bombay shall stand appointed as Receiver of the said flat with all powers under Order XLI Rule 1 of the Code of the Civil Procedure to take physical possession of the flats in their occupation and hand over the same to the petitioner.

v] In case the procedure in (iv) above is required to be taken recourse for Flat no.4 and 11 respectively on completion of the redevelopment of the building, the petitioner shall hand over permanent alternate accommodation to the Court Receiver who shall hand over the possession to the parties from whom possession was taken over, in respect of the said flats.

vi] The petitioner and respondent No.1 society have agreed to enter into a permanent alternate accommodation agreement with all the members of the society on or before 30th May, 2019.

vii] The Petitioner shall pay and has agreed to pay amounts to all members of the society towards interim compensation as agreed in the development agreement and/or the supplementary development agreement, by post dated cheques which shall be initially for a period of one year.

Petition is accordingly disposed of in above terms. No costs.

[G. S. KULKARNI, J]