

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

NOTICE OF MOTION NO.1318 OF 2019

IN

SUIT NO.760 OF 2019

Shree Ahuja Properties Pvt. Ltd.] ... Applicant

In the matter between

Shree Ahuja Properties Pvt. Ltd.] ... Plaintiff

V/s.

1. *Brij Maraj*] ... *(Deleted)*

1(a). Sushma Puri]

1(b). Shakti Bala Capildeo]

1(c). Dr. Shashi Bala Kazim]

2. Vandana Gursahani]

3(a). Asha Nath]

3(b). Lala Ravindra Nath]

4(a). Shantilal L. Parmar]

4(b). Jitendra S. Parmar]

5. *Rajesh Mishra and Beena R. Mishra*] ... *(Deleted)*

5(a). Rajesh Keval Mishra]

5(b). Manmohan Keval Mishra]

5(c). Kavita Keval Mishra]

6. Brij Ahuja]

7. Dr. Bina Wadhawan]

8. Prabhat Ruia]

9. Poonam Prabhat Ruia]

10. Sayeda Mausuma]

11. The Bandra Trilok Co-op. Hsg. Soc. Ltd.] ... Defendants

And

Municipal Corporation of Greater Mumbai] ... Respondent

Mr. Virag Tulzapurkar, Sr. Advocate, with Mr. Nitesh Ranavat, Ms. Disha Shetty and Mr. Akash Lodha, i/by Wadia Ghandy & Co., for the Applicant-Plaintiff.

Mr. Ranjit A. Thorat, Sr. Advocate, with Mr. Pradeep J. Thorat and Mr. Aniesh S. Jadhav, for Defendant Nos.1, 2 and 3A to 3C.

Ms. Jennifer Michael, i/by Ms. Alisha Pinto, for Defendant Nos.4(a) & 4(b).

Ms. Sunita Poddar, with Ms. Daya S. Jadhav, i/by Mr. Rohan A. Waghmare, for Defendant Nos.5(a), 5(b) and 5(c).

Mr. Sandesh Patil, i/by Mr. Asif Y. Memon, for Defendant No.6.

Mr. Vineet Naik, Sr. Advocate, with Mr. Karl Tamboly and Ms. Gauri Joshi, i/by Ganesh & Co., for Defendant No.11.

Mr. S.U. Kamdar, Sr. Advocate, with Mr. Sagar Patil and Ms. Yamuna Parekh, for Defendant No.12-MCGM.

CORAM : A. K. MENON, J.

RESERVED ON : 11TH FEBRUARY, 2021.

PRONOUNCED ON : 3RD MAY, 2021.

[THROUGH VIDEO CONFERENCE]

P.C. :

1. Called for hearing and final disposal.
2. The Notice of Motion seeks (i) appointment of the Court Receiver, High Court, Bombay of flats, garages and rooms described in Exhibit-K to the plaint; (ii) the power to take possession of the said premises, if necessary with police assistance; (iii) to deliver vacant possession of the suit premises to the plaintiff for the purposes of carrying out work of demolition and; (iv) an order against defendant nos.1(a), 1(b), 1(c), (2), 3(a), 3(b), 4(a), 4(b), 5(a),

5(b), 5(c) and 6 to 10 restraining them from creating any impediment or otherwise interfering with or obstructing performance of obligations under the suit Lease and Development Agreement dated 31st August 2018. The aforesaid defendants are believed to be obstructing redevelopment project undertaken by the plaintiff at the request of defendant no.11, which is a co-operative housing society which manages the suit property. The facts as revealed from the plaint are as follows:-

3. The plaintiff is a Body Corporate engaged in the business of real estate development and was appointed by the defendant no.11 (*hereinafter referred to as "the society"*) for redevelopment of a piece and parcel of land admeasuring 3,712 sq.meters and a second piece and parcel of land admeasuring 334 sq.meters. Upon this land, stand three buildings "Trilok-A", "Trilok-B" and "part of Trilok-C". Defendants 1(a), 1(b), 1(c), (2), 3(a), 3(b), 4(a) and 4(b) are members of the society. The remaining defendants are occupants of the premises in the buildings owned and managed by the society. The defendant nos.1(a), 1(b), 1(c), (2), 3(a), 3(b), 4(a) and 4(b) are claiming as members. Defendant nos.5 to 9, both inclusive, are not members of the society but are occupying various premises in the society.

4. For the sake of convenience, the tabulated statement below will be of some assistance in understanding the capacity in which the defendants are impleaded.

Defendants, who are Members/Occupants of the Flats, but had not consented for redevelopment		
Members / Occupants	Description of Premises	Status of Possession
Defendant No.1(a) Defendant No.1(b) Defendant No.1(c)	Flat No.C-14 in Trilok-C	Member & Owner
Defendant No.2	Flat No.C-15 in Trilok-C	Member & Owner
Defendant No.3(a) Defendant No.3(b)	Flat No.C-4 in Trilok-C	Members & Owners (in joint occupation)
Defendant No.4(a) Defendant No.4(b)	Flat No.B-16 in Trilok-B + Electricity Meter Room	Members & Owners (in joint occupation)

Defendants, who are Non-Members/Occupants using Car Parking Spaces as Garages and had objected for redevelopment		
Non-Members / Occupants	Description of Premises	Status of Possession
Defendant No.5(a) Defendant No.5(b) Defendant No.5(c)	Garage No.B-12 in Trilok-B	Non-Member / Occupant
Defendant No.6	Garage Nos.B-8, B-9 & B-10 in Trilok-B	Non-Member / Occupant
Defendant No.7	Garage No.A-1 in Trilok-A	Non-Member / Occupant

Defendants are Non-Members/Occupants of the Flats and Garages, who do not object to redevelopment, but had not handed over vacant possession. <i>[These occupants have agreed for redevelopment and have executed documents, but have not vacated the premises]</i>		
Non-Members / Occupants	Description of Premises	Status of Possession
Defendant Nos.8 & 9	Flat Nos.B-26 & B-27 & Garage No.B-01 in Trilok-B	Non-Members / Occupants (in joint possession)
Defendant No.10	Flat No.B-5 in Trilok-B	Non-Members / Occupants

5. The above tables set out the particulars of the premises and the nature of the occupancy of these premises by the concerned defendants. The defendant no.11-society owns and manages three buildings viz. "Trilok-A", "Trilok-B" and "Trilok-C", constructed on a plot of land admeasuring 3,712 sq.mtrs. (*"Plot A"*) and 334 sq.mtrs. (*"Plot B"*). The structures have a lower ground or basement area and ground + 3 / 4 upper floors, housing 76 flats, 20 covered garages, 3 meter rooms, 1 transformer room and 1 small area converted to a room below the central staircase in Trilok-B. Out of 76 flats, possession of all but 7 flats have been handed over to the plaintiff for demolition and redevelopment and out of the 20 garages, all but 6 garages have been so handed over.

6. On or about 18th March 2013, the society convened a Special General Body meeting of its members with the intention of obtaining approval for redevelopment of the society's buildings by demolishing them and putting up new construction exclusively for residential purpose and exploiting the full development potential. In pursuance of this, a special general body meeting of the society was convened on 18th March 2013. Due notice is said to have been given and at-least 3/4th of the members were present. In the presence of the Deputy Registrar of Co-operative Societies nominated for the purpose, the special general body considered various offers received and which were examined by the Project Management Consultant ("the Consultant"). Five bids received were taken up for discussion and the plaintiff was unanimously selected. The society approved and appointed the plaintiff as developer. Soon after the meeting, five members, who were overseas residents, had communicated their consent to the appointment of the plaintiff. In all, 67 members consented to the appointment of the plaintiff. That represented approximately 82% of the members. The plaintiff has relied on a copy of the resolution dated 18th March 2013, which is annexed as Exhibit-D to the plaint. The society formally communicated the plaintiff's appointment vide a letter of 12th June 2013. Some delay in progressing with redevelopment arose due to certain disputes between the plaintiff and the society.

7. The society filed a suit in this court being Suit No.506 of 2017 to expedite the process of redevelopment. Consent Terms came to be arrived at

and were subject matter of the order dated 29th August 2017. Subsequently, consent terms came to be filed, which is made an order of the court on 9th July 2018. Supplementary Consent Terms were later filed modifying same terms. Pursuant thereto, the plaintiff executed a Deed of Conveyance in favour of the society on 31st August 2018, conveying the land to the society. Thus, the society is the absolute owner of the land and the structures standing thereon. In the capacity as the owner, the society executed a Lease-cum-Development Agreement and Power of Attorney also on 31st August 2018, which have been registered with the Sub-Registrar of Assurances. The plaintiff was thus required to perform the said agreements and sought vacant possession of the premises in occupation of the society's members and other non-members/occupants. It is in this background that the suit has been filed.

8. The Lease-cum-Development Agreement is now being performed. While the lease-cum-development agreement (*collectively "agreement"*) details the nature of the obligations of the parties, the plaintiff-developer has highlighted the fact that they are required to pay a sum of Rs.144/- per sq.ft. per month as inconvenience allowance, which works out to approximately Rs.60 lakhs per month. This will be payable in view of the delay arising from the defendants failing to vacate and handover the possession of the suit premises described above. In addition to such inconvenience allowance, there are other obligations of the developer, which required to be met. The agreement also provided that the developer can institute legal proceedings, if

so required and that is how the present suit has been filed. The developer is required to demolish and put up a new construction on the aforesaid Plot-A. After all the premises including flats, car parking spaces and garages are vacated, water and electricity supplies are to be disconnected. 67 persons consist of members, non-members and occupants have since vacated and handed over premises in that reference during and after September, 2017. They have been paid hardship allowance amounting to Rs.19,53,78,310/- till the date of filing of the suit. Some of these members / non-members / occupants have vacated garages in their possession and in lieu of surrendering the garages, they have agreed to accept residential area 38% over and above the carpet area of the garages. They have thus co-operated with the developer and the society.

9. Defendant nos.1(a), 1(b), 1(c), 2, 3(a), 3(b), 4(a), 4(b), 5(a), 5(b), 5(c) and 6 to 10 have not handed over vacant possession of the suit premises. Of these defendants, defendant nos.1(a), 1(b), 1(c), 2, 3(a), 3(b), 4(a) and 4(b) have not consented to the redevelopment and have not handed over flats/garages in their possession to the developer. Defendant nos.8, 9 and 10 have not objected to the redevelopment, but have not yet handed over premises in their possession and they continue to be paid hardship allowance. Defendant nos.5 to 7, who are non-members / occupants of garages B-12, B-8, B-9, B-10 and A-1, are obstructing the proposed redevelopment despite the society having executed the aforesaid agreement. Thus, defendant nos.8 to 10

are non-members/occupants, who are said to have handed over premises in their possession to the developer. They are being paid hardship allowance and were expected to execute relevant documentation after the suit was filed. The plaintiff claims to be entitled to put up a residential premises on the plot by utilizing fungible FSI, TDR and incentive FSI such that the full development potential of the land is achieved. According to the plaintiff, it has complied with the obligations set out in the consent terms dated 29th August 2017 and 9th July 2018 referred to above and is believed to have expended substantial amounts by appointing architects and consulting engineers and preparing building plans. Amended plans have also been submitted. The plaintiff claims to have received a Letter of Intent for providing public car parking, as contemplated in Regulation 33(24) of the Development Control Regulations. Intimation of Disapproval has been issued on 30th June 2017 in respect of the new building to be constructed and plans have also been sanctioned. These are annexed to the plaint. Referring to these documents, Mr. Tulzapurkar submitted that the plaintiff has also obtained permissions from the Chief Fire Officer, Mumbai Fire Brigade, Ministry of Environment and Forests and the Municipal Corporation. At the time of filing the suit, he submitted that the plaintiff is also expecting the Civil Aviation Authority to issue their permissions. The lease-cum-development agreement and power of attorney were stamped and registered and presently the defendants are bound to vacate the premises. TDR has been purchased and that has now to be utilized in the new building. Large amounts of money have already been spent apart

from the loss of interest on amounts invested in the project and they continue to spend Rs.60 lakhs towards hardship allowance. The defendant nos.1(a) to 4(b) are the only members who have refused to vacate the premises in their possession. They have been offered the same terms as all other members who have vacated the premises. Meanwhile, defendant nos.5 to 7, who are the non-members and occupants of garages, have refused to cooperate only with a view to pressurize the developer. These occupants were using their garages for commercial activities. No permission has been obtained for carrying out commercial activity in the premises. Change of user has not been permitted and these premises continued to be “covered motor garages”. Thus, defendants nos.8, 9 and 10, who are also non-members, have not objected to redevelopment, but have refused to vacate and handover their respective premises.

10. Mr. Tulzapurkar submitted that the plaintiff has offered to provide residential area by way of permanent alternate accommodation in the new building. 38% additional carpet area has been offered to all the occupants free of cost. He submitted that there is no challenge whatsoever to the development agreement or the resolution passed by the society since 2018. He submitted that the plaintiff had followed all the requirements of law including the guidelines issued pursuant to Section 79A of the Maharashtra Co-operative Societies Act, 1960. The garages have been wrongly converted to commercial shops / spaces without permission of the Municipal

Corporation. There are no plans sanctioned for utilizing the premises for commercial purposes. There is no conversion of change of user permitted either. Mr. Tulzapurkar therefore submitted that the defendants nos.1 to 10 are pressurizing the plaintiff without any justifiable reason, despite the plaintiff having made their best offers considering all commercial aspects. On balance of convenience, Mr. Tulzapurkar submitted that most of the members who have vacated are senior citizens waiting to return to their new apartments and the plaintiff is put to a burden of paying Rs.60 lakhs towards rent for the temporary alternate accommodation. It is submitted that the society supports this application. Mr. Tulzapurkar then relied upon the following judgments in support of his contentions :-

- (1) *Girish Mulchand Mehta and Anr. Vs. Mahesh S. Mehta and Anr.*¹
- (2) *National Properties, Through its Proprietor Mr. Sanjay Ghansham Jumanji Vs. Sindhi Immigrants Co-operative Housing Society Ltd. and Ors.*²
- (3) *Disha Construction Vs. Jaysen S. Mastakar and Ors.*³
- (4) *Calvin Properties and Housing Vs. Green Fields Co-operative Housing Society Ltd. and Ors.*⁴
- (5) *Ashwin L. Shah and Anr. Vs. Calvin Properties and Housing and Ors.*⁵

1 2010(2) Mh.L.J. 657

2 2019 SCC OnLine Bom 762

3 2014(2) Mh.L.J. 353

4 2013 SCC OnLine Bom 1455

5 Appeal (L) No.476 of 2013 in Arbitration Petition No.638 of 2013 (Judg. dt. 11-12-2013)

- (6) *Sarthak Developers Vs. Bank of India Amrut-Tara Staff Co-operative Housing Society Ltd. and Ors.*⁶
- (7) *Hari Om Sayaji Properties LLP Vs. Yoga Yog Co-operative Housing Society and Ors.*⁷
- (8) *Harsha Co-op. Housing Society Ltd. and Ors. Vs. Kishandas S. Rajpal and Ors.*⁸
- (9) *Maya Developers Vs. Neelam R. Thakkar and Ors.*⁹
- (10) *Kankubai Harakhlal Jain and Ors. Vs. Municipal Corporation of Greater Mumbai and Ors.*¹⁰

11. During the pendency of the suit, defendant nos.1 and 5 have passed away. Their heirs have been brought on record. The cause of action survives against such heirs. In the circumstances, Mr. Tulzapurkar submitted that the interim relief be granted as prayed for against defendant nos.1(a) to 10. During the pendency of the suit, some defendants have also settled their disputes. Accordingly, defendant nos.8 and 9 have entered into consent terms on 8th April 2019 with the plaintiff, thereby they confirmed having executed permanent alternate accommodation agreement on 30th March 2019 duly registered. Defendant no.8 had handed over possession of flat nos.26 and 27 in B Wing and garage no.GB-01 to facilitate redevelopment. Defendant no.8 has also executed the agreement of permanent alternate accommodation after receiving all amounts due under the Lease-cum-Development Agreement dated 31st August 2018. Defendant no.9, being wife of defendant no.8, had

6 *Appeal (L) No.310 of 2012 in Arbitration Petition No.1385 of 2010 (Judg. dt. 05-12-2012)*

7 *2016 SCC OnLine Bom 11877*

8 *Civil Writ Petition No.10285 of 2009 (Order dt. 08-03-2010)*

9 *(2016) 6 Bom.C.R. 629*

10 *OOCJ Writ Petition No.2351 of 2015 (Order dt. 01-10-2015)*

also confirmed the settlement. I may also mention that in the course of hearing on 15th February 2021, defendant nos.4(a) and 4(b) have also arrived at a settlement with the plaintiff by virtue of which consent terms had been arrived at and filed in this court. The suit stands disposed in terms of the consent terms as against defendant nos.4(a), 4(b), 8 and 9. The suit therefore survives as against defendant nos.1(a), 1(b), 1(c), 2, 3(a), 3(b), 5(a), 5(b), 5(c), 6, 7 and 10.

12. On behalf of the contesting defendant nos.1(a) to 1(c), Mr. Thorat has relied upon an affidavit-in-reply filed by defendant no.1 on 11th March 2019 and contended that these defendants never participated in any of the meetings held by the society to discuss the matter relating to redevelopment. According to him, the society has never given any notice of the meetings to defendant nos.1, 2, 3(a) and 3(b) of any of the meetings conducted by the society. They were never informed of the relevant meetings and therefore they could not raise objections. Mr. Thorat submitted that the defendant no.11 illegally constituted a committee and started negotiations for redevelopment with the plaintiff. The deponent of the affidavit has denied that one Mrs. Hardevi Rajpal had conveyed the suit property on 11th August 2005 to the plaintiff. It is contended that two flats in the society's building are owned by United Building Corporation, which had constructed the building. They are not members of the society. The garage in Trilok-C used by the society is not owned by the society, but owned by United Building Corporation. According

to learned counsel, the buildings are habitable since repairs were carried out from time to time and merely because these buildings were constructed in the year 1965 does not mean that the buildings are inhabitable. According to the deponent, repairs were carried out from time to time. The deponent specifically denies that he had received notice of Special General Body meeting dated 18th March 2013. According to the learned counsel, the society had not taken defendant nos.1, 2 and 3(a) into confidence before executing the Lease-cum-Development Agreement and Power of Attorney on 31st August 2018. The deponent has denied that the plaintiff has incurred any costs.

13. The deponent has expressed serious doubts about the rights of the plaintiff to carry out redevelopment. Mr. Thorat further submitted that the defendant nos.1(a) to 3(b) have expressed lack of confidence in the capacity of the plaintiff to carry out redevelopment work. He invited my attention to the order passed by this court in IA/1/2020 in Commercial Arbitration Petition No.1341 of 2019, wherein Shree Ahuja Properties and Realtors and others were respondents-judgment debtors. The said respondents were not able to pay the dues of the revenue in respect of TDS; however the plaintiff's counsel has since pointed out that the company against whom the order was passed in execution proceedings was not the present plaintiff but a different entity.

14. Mr. Thorat also relied upon an order dated 17th December 2019 passed

in Insolvency Petition No.38 of 2019, which indicates that insolvency petition had been initiated against the developer however once again in that case the company was a different entity and not the present plaintiff. Mr. Thorat further submitted that the plaintiff has not approached the court with clean hands and plaint does not disclose the true state of affairs. It is submitted that although the defendant nos.1, 2 and 3(a) were not challenging the resolution of redevelopment, there is an undertaking not to develop wing C before wings A and B.

15. Relying upon an additional affidavit dated 17th February 2020 of defendant no.1, it was contended that the plaintiff had behaved highhandedly, cut-off electricity and water supply to the flat occupied by defendant no.1; as a result of which defendant no.1 was forced to file a police complaint. It is submitted that the plaintiff has obtained a report from Global Engineering Services to demolish portion of the building without damage to the premises occupied by some of the occupants. The plaintiff has given such an undertaking to safeguard premises occupied by the defendants who have not vacated. The plaintiff was misleading the Municipal Corporation and this was pointed out by the defendant no.1 along with other defendants vide letter dated 9th January 2020 claiming to be owner of the premises when in fact it was society which was the owner. According to Mr. Thorat, the plaintiff's Advocate has circulated a letter in January, 2020 confirming that the development activity was to be carried out phase-wise and in that view of the

matter, he submits that there is no urgency for vacating the premises or Court Receiver is being appointed, however the plaintiff has illegally demolished parts of the building housing the flats occupied by defendant nos.1, 2 and 3. They have dumped debris causing inconvenience to the defendants who are occupying the premises. In conclusion, Mr. Thorat submitted that given the conduct of the plaintiff and its financial incapability, it is not possible for the plaintiff to redevelop this property. He therefore submitted that no relief be granted.

16. On behalf of defendant nos.5, 5(a), 5(b) and 5(c) (*collectively "defendant no.5"*), Ms. Poddar vehemently opposed the application. It is submitted that her clients were in occupation of garage no.B-12 in B Wing. This was commercial premises and she was not opposed to redevelopment on the condition that the plaintiff offers the said defendants commercial premises in the new building. If commercial premises were being offered, her clients will consent to such redevelopment. She has submitted that defendant no.5 was a member of the society. The father of defendant no.5 had purchased a flat with the consent of the society for running business in the name of Kewal Art Production. Ms. Poddar submitted that the defendant no.5 since deceased was represented through the heirs – present defendant nos.5(a), 5(b) and 5(c). The plaintiff has been harassing defendant no.5 by not allowing customers to load and unload goods in the premises, as a result of which police complaints have been filed. On 4th February 2019, defendant no.5 had agreed to sell the

premises as the court suggested that the plaintiff could purchase the premises, if they were unable to provide alternate commercial premises in the same locality. The defendant no.5 had agreed to the suggestion but the plaintiff has failed to co-operate. Defendant no.5 has filed affidavits dated 22nd November 2018, 22nd March 2019 and 5th April 2019 and Ms. Poddar relied on the contents thereof. Ms. Poddar's grievance is that the plaintiff had started demolishing part of the building which may damage her client's premises; therefore defendant no.5 was unable to carry on business. The said defendant's customers' cars had not been allowed in the premises and the plaintiff has engaged goondas and security agencies to threaten customers of defendant no.5. Without obtaining any permissions from the Municipal Corporation, plaintiff has carried out digging work and demolition work, thereby causing losses to defendant no.5. According to Ms. Poddar, the premises were always a commercial premises and the attempts of the plaintiff to demonstrate otherwise have failed. She has invited my attention to her client's affidavit dated 22nd November 2018, which sets out that the father of defendant no.5 was the original owner of the premises, having purchased it from one Gajanandas Ishwardas. The father of defendant no.5 later transferred the garage in the name of defendant no.5's mother Beena, who had expired in August, 2012 and that is how the names of the heirs were brought on record. According to Ms. Poddar, after the premises were transferred to the mother's name, the society has started issuing maintenance bills in the name of the mother. Outgoings were paid for by mother. The

commercial premises were purchased from one P.S. Ajwani, the resident of building A, who had a garage in building B. The garage was transferred to the name of Kewal Art Production, now belonging to the deponent's father. Accordingly, Ms. Poddar claims that her clients are owners of the commercial premises, which have been turned into a shop. The Municipal Corporation has assessed the premises as such and therefore allowed it to be used as commercial premises. The society was also expected to issue a No Objection Certificate in this respect, but did not. The defendants' father, who was member of the society, had all records in this regard and the defendants' father was also issued a certificate under the Shops and Establishment Act. The society had been demanding arrears, which have been paid.

17. According to Ms. Poddar, the original builder - United Building Corporation had issued a letter to the Mumbai Municipal Corporation offering taxes for commercial premises in B Wing. These premises were clearly commercial premises although described as a garage. It was never used as a garage, vehicle(s) was never parked within it and hence it was not necessary to establish this fact any further. According to Ms. Poddar, the plaintiff has suppressed material facts. She has invited my attention to the exhibits annexed to the 5th defendant's affidavit and contended that her clients have been using the premises for commercial purposes right from 1972. Receipts are said to have been issued by one United Building Corporation for payments made to them in respect of the flat. She sought to

rely upon these receipts. Drawing my attention to Exhibit-5 of her affidavit, it is sought to be demonstrated that the original builders – United Building Corporation, from whom defendant no.5 had purchased the property, have also confirmed that the garage is purchased on 30th November 1970. She submitted that these are the aspects which clearly establish that commercial use was permitted by all concerned. Relying on Exhibit-6 to the affidavit, she submitted that society itself has conveyed no objection to garage described therein as gala bearing no.B/G-12 on the ground floor of Trilok-B was purchased by the defendant no.5 in the name of Kewal Art Production. A pass-book issued by defendant no.11-society in the name of Kewal Art Production and in respect of garage No.B/12 has also been produced. The pass-book records various payments made by the members. Thus, there being no doubt that the defendant no.5 was a bonafide purchaser and the right of commercial use is vested in them and now upon demise of the original defendant no.5, these rights now vest in defendant nos.5(a), 5(b) and 5(c).

18. Ms. Poddar has relied upon a Rateable Value Extract issued by the Assistant Assessor & Collector dated 29th October 1975, annexed at Exhibit-10 to the affidavit, from which she sought to demonstrate that the garage mentioned therein clearly shows that it was meant to carry on work of commercial nature. For instance, three garages shown on the ground floor were shown as furniture workshop, one was room of the society; one garage was used as a tailoring shop. Thus, the fact that garages are being put to

commercial use is known to the society and was permitted by the society. Ms. Poddar therefore submitted that the plaintiff has dishonestly attempted to usurp the property by offering residential space.

19. I may observe here that Exhibit-11 to the affidavit is a notice issued under Section 53(1) of the Maharashtra Regional and Town Planning Act, 1966 for unauthorised enclosure of the stilt area with a partition wall. Upon receipt of this notice, the mother of the present defendant no.5 and on behalf of Kewal Art Production written to the Ward Officer of the Municipal Corporation seeking approval of construction plans.

20. In the affidavit-in-reply dated 22nd November 2018, Ms. Poddar submitted that the defendant no.5 had sought relief in the City Civil Court in Suit No.1265 of 2014, thereby recognizing the flat of defendant no.5 and restraining the plaintiff from taking illegal action pursuant to notice. The court had observed that the wife of defendant no.5 was in possession. All payments due to the society have been made regularly, as evident from Exhibit-14 to the affidavit. The receipts have been issued by the society in respect of garage GB-12. My attention was invited to these receipts, which are annexed to the affidavit. The defendant no.5 has been negotiating with the plaintiff but on 13th November 2017, he was forced to file a complaint. The defendant no.5 had no desire to oppose redevelopment, but he was only expecting to receive commercial space in the new construction in lieu of commercial space presently occupied.

21. Ms. Poddar also invited my attention to a further affidavit dated 22nd March 2019 to deal with a valuation report prepared by AT & TS Associates pursuant to an order passed by this court on 4th February 2019. By consent of parties, the court has appointed the said Valuer to value the premises in occupation of defendant nos.5 and 6. Valuation fees were required to be paid 50% by the plaintiff and the balance 50% by defendant nos.5 and 6. Accordingly, a report has been filed. Ms. Poddar submitted that the report is objectionable. No notice was given to her client by the concerned applicant. The Secretary of the society informed defendant no.5 on the phone that the Architect may come early in the morning and that defendant no.5 required to remain present with documents. Defendant no.5 could not then attend, but later he attended at the valuer's but has objected to the same on the basis that looking at the entire report, the report has been prepared only in support of the society. It was valuation of the garage and not of the shop. There are no buyers for the garage and the valuation is not accepted. Thus, Ms. Poddar submitted that even the society has admitted that save and except the record as available today, there is nothing to show that the premises continued to be a motor garage. According to Ms. Poddar and as set out in an additional affidavit dated 5th April 2019, the plaintiff has disconnected water supply and damaged the 5th defendant's vehicle and vehicles of his clients coming to the premises. The police have also not taken any action on the complaints filed by the defendant no.5. The plaintiff and the society had prevented the defendant no.5 from earning his livelihood and that cutting of water supplies has meant

that the use of bathroom is also to be discontinued, which has been in use for last 40 years. Defendant no.5 has refused to vacate the premises from which he was earning his livelihood. The plaintiff was bound to provide alternate premises.

22. Ms. Poddar invited my attention to the evidence led by the plaintiff in Long Cause Suit No.163 of 2017 filed in the City Civil Court at Mumbai, wherein the witness has admitted that he did not know whether notice under Section 527 of the MMC Act had been issued or whether the society had passed a resolution before filing the suit or whether any complaint had been filed in the Municipal Corporation before filing the suit. When the witness was cross-examined on behalf of defendant no.5 in this suit, the secretary was unaware of the resolution passed authorizing the society to file the suit, except to state that in 2007 a resolution was passed empowering the then secretary to prosecute the suit. The society has admitted that the father of defendant no.5 was member of the society and occupying the flat. The witness stated that the father of the defendant no.5 was carrying out commercial activities. This Ms. Poddar submitted clearly establishes commercial use of the premises. All other aspects, to which the witness has deposed in the cross-examination, supports the case of the defendant no.5. No sanctioned plan had been produced even during the hearing in that suit; a fact that was admitted in cross-examination and the issue that the plans, which were executed in the suit, were not the sanctioned plans mentioned in the plaint.

23. Referring to the further cross-examination, Ms. Poddar relied upon the society's witnesses' statement that father of defendant no.5 had purchased the garage independently but was unaware whether there was business being carried out in the garage. Plaintiff has admitted that the premises was assessed as a shop by the Municipal Corporation. It must however be noted that the same deponent has deposed that all buildings have been constructed in 1963 and 1965 and the witness was not aware that a shop had been constructed and given to the father of defendant no.5.

24. Inviting my attention to the affidavit of one Dev Ashish Gupta filed on behalf of the society, Ms. Poddar submitted that the society had admitted that the Deed of Conveyance was executed between the original owner and plaintiff only on 11th August 2005. Certain members had sought to illegally use the garage as commercial premises and that the society had instituted legal proceedings in the City Civil Court. She contended that the deponent had admitted that the buildings were constructed in the year 1962 and that the society had decided to redevelop the property by demolishing the existing building on the land and to construct a similar building for residential purpose. In the aforesaid manner, Ms. Poddar sought to establish that redevelopment and taking over possession is not justified.

25. Having heard the rival contentions at length, I am of the view that the plaintiff is entitled to relief. The affidavit on behalf of the Society records that due to delay in redevelopment process, the society filed a suit against the

plaintiff to take up the process expeditiously and that ultimately a settlement was arrived at, to which I have already referred above. Consent terms and supplementary consent terms have been executed and accordingly orders passed thereon. Thereafter, the Deed of Conveyance dated 31st August 2018 was executed by the plaintiff in favour of the society whereby the property was conveyed in favour of the society. Thus, the plaintiff executed a Conveyance in favour of the society, thereby the land was conveyed. The society thereafter executed a lease-cum-development agreement in favour of the plaintiff. Reference is made to the complaints filed by defendant nos.1 to 3 and 6 with the Deputy Registrar of Co-operative Societies. As far as defendant nos.1 and 2 are concerned, the complaint was dismissed by the Deputy Registrar of Co-operative Societies. A complaint by defendant no.3 is said to be similar to the ones filed by defendant nos.1 and 2, which has already been dismissed. As far as the complaint of defendant no.6 is concerned, the Deputy Registrar of Co-operative Societies dismissed it since defendant no.6 was not even a member of the society and hence could not invoke provisions of Maharashtra Co-operative Societies Act, 1960. The society has confirmed that out of 74 members, 67 members have accepted hardship allowance from the plaintiff and vacated their respective premises. Defendant nos.8 and 9 have also settled with the plaintiff and have vacated their respective premises. As far as defendant nos.4(a) and 4(b) are concerned, they have already settled with the plaintiff and have executed consent terms. That leaves only defendant nos.1(a), 1(b), 1(c), 2, 3(a), 3(b), 5(a), 5(b), 5(c), 6 and 7. Defendant

nos.1(a), 1(b), 1(c), 2, 3(a), 3(b), 5(a), 5(b), 5(c), 6, 7 and 10 have not vacated their respective premises. Two flats were occupied by the tenants of the original owner – United Building Corporation, but have since vacated their respective premises. Thus, the redevelopment is being obstructed by defendant nos.1(a), 1(b), 1(c), 2, 3(a), 3(b), 5(a), 5(b), 5(c), 6, 7 and 10, who are pressurizing the plaintiff and thereby pressurizing the society to agree to their demands. I propose to deal with the garages first. The three occupants of the garage being defendant nos.5, 6 and 7 are refusing to vacate apparently to extract further benefits. The society has dealt with in detail with the contentions of the replies filed by each of the defendants.

26. As far as defendant no.5 is concerned, the society has now contended that there is no merit in the contention of defendant no.5 that there is no sanctioned plan since the sanctioned plan is now submitted to the City Civil Court and it is a matter of record. The deponent has reiterated that the premises of defendant no.5 is a garage utilized for parking of vehicles and cannot be used for any other purposes. Referring to the documents relied upon by defendant no.5, it is contended that the NOC relied upon by the defendant no.5 in his affidavit-in-reply is a forged and fabricated document. The NOC does not bear any seal or rubber-stamp of the society and no such change of user could have been permitted by a simple letter and unless the society has passed a resolution in a general body meeting of the society and after obtaining permission from the Municipal Corporation. The society has

refuted the 5th defendant's contention that the members' pass-book relied upon by defendant no.5 indicates that the garage is a commercial premises. The society denies knowledge that the earlier owner was carrying out commercial activities to the knowledge of the society. The shops and establishment certificate only bears the address of the garage used by defendant no.5 and it does not establish that use of the garage for commercial purposes was allowed or that defendant no.5 was entitled in law to change the use of the premises from car parking to that of a shop. Even otherwise, issuance of a license cannot be deemed to be regularization of illegality.

27. I am of the view that without approval of the society and any application being made for change of user and an order being passed thereon by the Municipal Corporation, a garage could not have been converted for commercial use in the manner that appears to have been done. It is in this respect that I must take note of the affidavit filed on behalf of the Municipal Corporation by one Dushantkumar Ahirwar, Assistant Engineer (Building Proposal), "H" Ward, in which he has stated that having gone through the papers in the matter and pursuant to the orders passed by this court on 11th March 2020, defendant no.12-Corporation was impleaded and after the Corporation was impleaded, the deponent had checked the records of the society and the plaintiff has submitted a proposal for the subject land and it was issued a commencement certificate on 14th August 2008. It was subsequently re-validated on 14th August 2020. The latest amended plans of

the building have been enclosed in the affidavit. There are no commercial premises approved in the plan. It is therefore clear that in the new building proposed to be constructed, no commercial premises are proposed to be included. The question is whether, as far as defendant no.5 is concerned, the defendant no.5 has made out a prima facie case of legitimate commercial use of the premises and in that respect, I am afraid the 5th defendant has failed to establish his case that he was a commercial user of a shop premises situate within the property of the society. Firstly, nothing on record indicates that the original builders – United Building Corporation had constructed the garages and on structures to be used as shops. They were plain and simple motor garages. The plaintiff has shown the plan appearing at page no.893 of the plaint being annexure to the affidavit-in-rejoinder dated 12th February 2020, filed as a rejoinder to the affidavit-in-reply dated 28th March 2019 filed on behalf of defendant no.6, and that plan clearly shows that the structures in occupation of defendant nos.5, 6 and 7 are garages. The other structures alongside are also seen to be described in the plan, namely, sub-station and meter room. The reference to the root level and basement level also seen from the plan of Block-A. The contesting defendants have not been able to show anything to the contrary. The best evidence they could have produced was the permissions from the Municipal Corporation for use of the premises as shops. That is obviously not forthcoming. On the basis of the existing record therefore one has to consider whether the occupants of the garages had made out any case in opposition to the plaintiff's case and secondly in support of

their own such as to deny the plaintiff's application. In my view, the answer is clearly in the negative. In other words, the defendants occupying garages have failed to show that they were occupying commercial premises from the outset and that these premises were recognized as commercial premises from the outset. On the other hand, the society and the plaintiff have in my view demonstrated beyond reasonable doubt that now almost 90% of the occupants have consented with the redevelopment and the consent terms having been arrived at with defendant nos.4(a), 4(b), 8 and 9, these defendants have submitted to a decree. I may observe that defendant nos.5(a), 5(b) and 5(c) had filed a rejoinder in reply to the affidavit of defendant no.11-MCGM, once again seeking to reiterate that the society's contention that the NOC is false and fabricated document is incorrect and reiterating that the members' pass-book establishes that the premises is a commercial premises. In my view, whatever may be the members' pass-book record, it is the Municipal Corporation who had to permit use of the premises as commercial premises. The record produced thus far indicates that these premises were clearly motor garages and were always meant to be used as such. Commercial use was not legitimate. The records of the Municipal Corporation do not support the defendants' case of commercial use. Defendant nos.5(a) to 5(c) or defendant nos.6 and 7 in my view have not demonstrated that the garages were always meant for commercial use.

28. Defendant nos.5(a), 5(b) and 5(c), who, as I have already stated, have filed a suit in the City Civil Court. Their contention that the suit is pending is

of no consequence. The present suit arises out of a project that the society has entrusted the plaintiff with. An individual who is not even a member of the society cannot by any stretch of imagination seek to control the manner in which the society conducts its affairs. Ms. Poddar had also relied upon suit filed by defendant no.5 against the society, wherein her client has challenged the Municipal Corporation's notice requiring restoration of the structure from commercial premises to a garage. That also will not assist defendant nos.5(a) to 5(c) and in any event they are not members of the society and appear to be merely occupants, who are claiming under persons who put them in possession. Defendant nos.5(a) to 5(c) have claimed to have acquired garage under an agreement which is in respect of a garage and not a shop. The society has never accepted that it was a shop. Nothing has been shown to this court that it was shop when it was constructed. If it was used as a shop, later nothing has been shown to establish that change of user through appropriate application was filed for permissions. At all material times, the structures have been used as a garages and it is the plaintiff's case that notwithstanding that the garages are free of FSI, they are offering additional 38% area to the occupants in the free-sale components. Thus, I am unable to find any merit in the case of defendant nos.5(a) to 5(c).

29. As far as defendant no.6 is concerned, it is their contention that the father of defendant no.6 purchased three garages for use as commercial premises. Defendant no.6 has relied on several documents such as licenses under Shops and Establishment Act and NOC is said to have been issued by

the society. Certain notices from the Municipal Corporation, bills for taxes and what is described as sinking fund, certificate in the name of Ahuja Dairy Farm. The society has countered this by contending that the three structures occupied by defendant no.6 were never shops. They were always motor garages, which appear to have been illegally used for commercial purposes. As far as the NOC is concerned, it is stated to be forged being signed by one Mudkatte, who had sold his premises and prior to the date when the NOC is seen to be issued. Thus, as on the date of issuance of the so called NOC, the signatory was neither a member nor occupier of any premises in the society. Moreover, it appears that in Writ Petition filed in this court being Writ Petition No.1734 of 2008, the court observed that defendant no.6 is a garage owner. That writ petition came to be filed pursuant to a co-operative court dispute filed by some of the occupants challenging the society's decision to prevent garages from being used as shops. In the writ petition, the court held that the society could not interfere with use of the premises by defendant no.6 except by following due process of law. The court did not consider or approve the garages being described as shops. The contention that the garages have toilets within cannot justify the garages being treated as shops. Nothing on record shows that the toilets existed when they were constructed or it was intended to so exist or that it was constructed after due permission for use of the garages as shops. In my view, these are all contentions that cannot be accepted.

30. Mr. Sandesh Patil on behalf of defendant no.6 has relied upon the contents of an affidavit dated 28th March 2019 of defendant no.6, who is occupying three garages bearing nos.GB-8, GB-9 and GB-10. Reliance was placed on the affidavit and a large number of documents annexed therewith such as;

- (i) bills of water charges and municipal taxes levied on commercial basis,
- (ii) sinking fund certificate issued in respect of the shop premises – Ahuja Dairy Farm,
- (iii) a reminder from the society addressed to Ahuja Dairy Farm to pay the arrears of dues,
- (iv) letter from the society to Ahuja Dairy Farm asking the defendant no.6 to approach the Municipal Corporation and find out how the water charges were levied as they had surveyed the garages and whether they have taken into consideration garages as commercial premises and charged on commercial basis,
- (v) the NOC dated 24th June 1977 certifying that furniture workshops in the three garages have been purchased by Ahuja Dairy Farm,
- (vi) records of Metropolitan Magistrate's court recording presence of and acquitting the accused – M.C. Ahuja of

some offences under Section 52 of the MRTTP Act,

- (vii) letter dated 22nd April 1977 received from the BSES Ltd.
relating to electricity meter connection, bills for the same
came to be issued for commercial use,
- (viii) bills issued by the successor company–Adani Electricity,
- (ix) shops and establishment licenses giving postal address at
the suit garages,
- (x) earlier license issued to Kat Export International and
Anmol Real Estate Consultants – Estate Agency and,
- (xi) notice under Section 53(1) of the MRTTP Act.

31. Besides, reliance is placed on several bills issued by the society to Ahuja Dairy Farm. He therefore contends that this is all overwhelming evidence that garages were in fact commercial shops. He has also relied upon the suit filed by the society. It is therefore submitted that there is clearly a case made out of commercial use consistent over a period of time and despite change of ownership. The fact remains that Exhibit-1 to the affidavit of defendant no.6 by way of objection to the valuation report, which affidavit is dated 28th March 2019 annexes a notice issued by the Municipal Corporation under Section 351 of the MMC Act alleging change of user. The mere fact that capital value extracts described the premises as shops, commercial car parking in basement and podium cannot regularize such renewal use when it

was not permissible in the first place.

32. Mr. Patil had in support of the contentions of defendant no.6 relied upon the decision in *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) By Lrs. and Ors.*¹¹, wherein the Supreme Court was considering appropriate remedy in various classes of cases. In paragraph 21 of that judgment, while summarizing the position in relation to prohibitory injunctions, the court observed that a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issues relating to title and absent such averment in the plaint where there is no issue relating to title, the court will not investigate or examine or render a finding on the issue of title. In my view, this is of no assistance to Mr. Patil's case as it stands.

33. The Municipal Corporation has also filed a subsequent affidavit of 10th February 2021 at the hearing of this motion and in support of which Mr. Kamdar appears. The affidavit is of one Ramchandra Sampatrao Sawant, Assistant Engineer, who has deposed that the original sanctioned plan as of 1961 and the relevant record pertaining thereto is presently not traceable in the office of the Municipal Corporation. A new file has been opened which is available online and on the basis of which the earlier affidavit has been filed. The photocopy of the completion certificate issued by the Architect in 1964 is annexed to that affidavit. There is also plan available along with that certificate. There is also one plan available on the record, which is annexed as

11 (2008) 4 SCC 594

Exhibit-B. From that plan, it is evident that the structures shown therein are clearly motor vehicle garages. Reference to the meter room, alignment of the structure, basement in the scanned image at Exhibit-B, read with the building completion certificate at Exhibit-A in respect of the building B on the said suit plot of land, as appearing on the Municipal Corporation's record, clearly establish that there were motor garages and not shops at the relevant time. The affidavit goes on to state that the record of Assessment Department has been called for and the Deputy Superintendent S.S. Thakur produced the record, which indicated that the premises were garages and were converted for shop use and therefore the department had assessed the same for non-residential and commercial users. Extracts for the period 1992-96, 2004-09 and 2010, April 2010 to March, 2015 and April 2015 till date have been annexed.

34. The deponent has affirmed that he has spoken to the License Department and no license has been issued for carrying out business in these shops. The license issued to indicate number of persons working and employed in that premises and only for registration purposes. For that matter, the license itself contains a disclaimer which reads as *"This is merely a registration certificate and not license and it does not by itself bestow any legality on the structure or confer any right on the employer so far the date and time of existence of the structure in which this shop/establishment is located"*. In conclusion, the deponent states that as per records of the Municipal Corporation, as it is available, the premises is sanctioned for car

parking space and nothing else. The documents in support filed by the deponent contained Exhibit-C, which are records of the Assessment and Collection Department. Initially in March 1965, it is shown as the furniture shop, one garage is shown as tailoring shop. The building is shown as “Bandra Trilok Co-op.” The third garage is also shown under the head “house with shops”. The record of 1992-96 also refers to garages. All of these are also shown to be assessed as shops / commercial shops under capital value based assessment extracts filed along with the affidavit. The question is, will the assessment for the purpose of taxation by the Municipal Corporation be a ground of permission to run a shop as far as the society is concerned? The society being the owner of the property is undisputed. The members will be only beneficial owners. Occupants even less so. Mere right of occupancy and/or beneficial ownership will not in the facts of the case entitle the defendants to claim unilateral right to convert premises for commercial use. The society and the Municipal Corporation must also permit that in accordance with law. Unless the Municipal Corporation as a Planning Authority permits use of the premises for shops and in accordance with the provisions of the MMC Act, mere assessment of tax as a commercial unit cannot legitimate commercial use to begin with, which was not authorized in the first place. Viewed in this light, it is obvious that reliance placed on these documents by the defendants cannot help them to continue to insist and demand commercial premises in the new building to be constructed, which has been seen from the society’s resolution is intended for only residential use. Despite being non-members,

some of them being offered residential space in the new building and of the enhanced area. True, they may be carrying on commercial activities from these garages, but will that alone thwart the attempts of the society to redevelop when an overwhelming majority have voted for redevelopment and are awaiting fulfillment of that resolution? The answer is emphatically in the negative.

35. Defendant no.7 is in possession of garage no.GA-1. Defendant no.7 has not appeared at the hearing of this motion and the plaintiff has proceeded after serving the defendant no.7. An affidavit-of-service dated 26th November 2018 is stated to be on file. The defendant no.7, it is stated, has already been restrained from using the garage for commercial purpose by the City Civil Court. As far as the garages are concerned, in Writ Petition No.2351 of 2015, this court had occasion to consider commercial use of the garages. The court observed that once it is styled as a “garage”, the user cannot determine entitlement of the petitioners. The petitioners had failed to establish any legal right in seeking an alternate commercial structure as their occupancy of the garage. The term “garage” has a specific legal connotation. As reflected in the Development Control Regulations, it is an area for repairing vehicles or parking vehicles by enclosing the same. The petitioners in that case had no legal right to occupy garage and use it for commercial purpose based on a claim that being user of the commercial premises in the old building, they were entitled to claim permanent alternate commercial space in the new

building. The court also observed that no such entitlement has been established under any law.

36. In my view, garages will and must remain garages unless they are converted within the framework of the law for other uses. Their construction, existence was meant for a particular purpose. If it is not being put to use for that purpose and is intended to be used for some other purpose, a change of user has to be authorized. That authority is the Planning Authority. The Municipal Corporation in the case at hand has not issued any conversion order and in that behalf suffice it to say that absent an order for conversion of the motor vehicle garage, merely on the basis of long and unauthorized use for commercial purposes, cannot justify continuance of such use and a demand for being provided with alternate space in a structure that does not exist today and for commercial use which is presently unauthorized. The case of defendant nos.5 to 7 cannot therefore succeed. They have been offered alternate residential space to the extent of their entitlement and they cannot insist on being allotted commercial space in the new structure in which no provision is made for such space. Any such permanent alternate space would necessarily have to flow from two factors; firstly, the existence of commercial space and with the consent of the society in a new building. Both these aspects are not to be found in the case at hand. Thus, in my view, the attempt of the defendant nos.5 to 7 to secure commercial space in the new building to be constructed by obstructing redevelopment through their refusal to vacate the

premises cannot succeed.

37. That leaves me to consider the case of the flat holders. Of these flat holders, it is now only defendant nos.1(a), 1(b), 1(c), 2, 3(a) and 3(b) whom we are concerned with since defendant nos.4(a) and 4(b) had already entered into consent terms and agreed to surrender possession. There are obviously a lot of allegations and counter-allegations as between these contesting parties; however when we see through these allegations in correspondence and affidavits, to my mind it is clear that the defendants' resistance is at two levels. The first is based on suspicion that the plaintiff will not be able to complete the redevelopment owing to its own financial difficulties. In this respect, the plaintiff has submitted that large amounts of monies have already been spent. Defendant nos.1(a), 1(b), 1(c), 2, 3(a) and 3(b) are the flat holders. Defendant nos.5(a), 5(b) and 5(c) are occupying garage GB-12. Defendant nos.1(a), 1(b) and 1(c) are occupying flat No.C-14; defendant no.2 is occupying flat no.C-15 and; defendant no.3(a) and 3(b) are occupying flat no.C-4. These persons are occupying the wing which is yet to be demolished and they are concerned, as canvassed by Mr. Thorat, with the ability of the builder to complete the work. There are some reservations also expressed by them on the manner of appointment of the plaintiff and that, as we have seen, has already been subjected to the procedures to the extent required pursuant to Section 79A and hence these objections have no merit.

38. As far as defendant nos.1(a), 1(b), 1(c), 2, 3(a) and 3(b) are concerned,

there is no challenge to the resolution dated 18th March 2013 and when a party does not challenge the very basis of the plaintiff's engagement, such party can hardly be heard to say that the plaintiff has been appointed without following due process of law or is otherwise incapable. Defendant nos.1 and 2 had filed a complaint before the Deputy Registrar of Co-operative Societies, who had already rejected that complaint by order dated 3rd November 2018. There appears to be no challenge to that. Effectively, the special body resolution holds the field. The other contention taken up by them is that the buildings are not to be demolished since they are still habitable. Once the society had resolved to demolish these buildings and redevelop the property, it is not open for minority to state that the buildings should be retained and that the same should not be demolished. How dangerous or dilapidated buildings are is not the aspect for this court to presently examine. It is a decision that the society had taken considering the age of the buildings. It is obvious that the buildings are almost 50 years old. It does not appear as if the society is acting in haste or in an unreasonable manner. The allegation of Mr. Thorat's client and in his affidavit that the society did not consult with members before executing the lease deed does not appear to have any basis, as I have already stated that the proposal was approved in a special general body meeting and recorded in the lease-cum-development agreement. Consent terms have also been filed in the suit filed by the society against the plaintiff-developer, which came to be settled by filing consent terms. Supplementary consent terms have also been filed. The other contention of Mr. Thorat's client that the lease

granted by the original owner of the property Mrs. Hardevi Rajpal was still subsisting in favour of United Building Corporation also appears to be incorrect since according to the plaintiff, the lease was terminated in 1961; yet, there had been no claim by that lessor. Thus, the case of defendant nos.1(a), 1(b), 1(c), 2, 3(a) and 3(b) is clearly not convincing and does not justify denying reliefs to the plaintiff.

39. As far as the flats are concerned and as I have already observed, there is a resistance to “go with the flow”; however, the majority have decided and defendant nos.1, 2 and 3(a) to 3(c) cannot prevent redevelopment by refusing to co-operate. Consent terms are signed by and between defendant nos.4(a), 4(b), 8 and 9.

40. I now deal with some aspects canvassed on behalf of the plaintiff; firstly, that there can be no doubt that minority members cannot obstruct and prevent redevelopment supported by the majority. In this respect, Section 72 of the Maharashtra Co-operative Societies Act, 1960 is the basis. It falls under Chapter VII dealing with “management of societies” and reads as follows :-

“72. Management of Societies :

Subject to the provisions in this Act and the rules, the final authority of every society shall vest in the general body of members in general meeting, summoned in such a manner as may be specified in the bye-laws.

[Where the bye-laws of a society so provide, the

general meeting shall be attended by delegates appointed by the members, and such meeting shall be deemed to be the meeting of the general body, for the purpose of exercising all the powers of the general body].”

41. With specific reference to the applicability of Section 79A of the Maharashtra Co-operative Societies Act, 1960 and the scope of the directives issued thereunder, this court has already held that the directives issued are not mandatory but more of a recommendation. In *Harsha Co-op. Housing Society Ltd. and Ors. Vs. Kishandas S. Rajpal and Ors.*¹², a learned Single Judge of this court has while deciding Writ Petition No.10285 of 2009 held that the said co-operative society resolved to act in a particular manner to redevelop the society's property through a particular developer and by a large majority. It is not necessary to go by the procedure set out in Section 79A or under directives issued under Section 79A. Section 79A directives are only required to be followed where there is no consensus or unanimity amongst the members. However, in a more recent decision in the case of *Maya Developers Vs. Neelam R. Thakkar and Ors.*¹³, after considering a large number of cases on the subject, this court has observed that in many cases a number of complaints were received from members against the management of co-operative societies wherein redevelopment was taking place. This related to certain common aspects such as not taking the members into confidence in the process of redevelopment, lack of transparency, arbitrary appointments of

12 *Civil Writ Petition No.10285 of 2009 (Order dt. 8th March 2010)*

13 *2016 SCC OnLine Bom 6947*

contractors and lack of planning, not adopting procedures and lack of similarity in agreements. There was no contrary policy in this respect and it is in this background that the directive with which we are concerned and which is sought to be enforced upon on the plaintiff and the defendant-society gains relevance. In *Maya Developers (supra)*, this court has observed that the directives are more in the nature of a set of guidelines and the 2009 guideline in particular is more of a recommendation and it is not mandatory. Here in the facts of the present case, almost close to 90% of the members have opted for redevelopment through the plaintiff. The reasons for the others to resist are unsustainable and in a co-operative society and in the light of Section 72 of the MCS Act, it is but obvious that the will of the majority must hold.

42. This has also been recognized in *National Properties Vs. Sindhi Immigrants Co-op. Housing Society Ltd and Ors.*¹⁴. By following the decision in *Maya Developers* and *Harsha Co-op. Housing Society (supra)*, this court has observed that even if the directives apply in the case at hand, the development agreement had been executed, great amount of progress had been made towards redevelopment and once a society supports redevelopment with the consent of the majority, redevelopment must proceed in accordance with law. The same principle would govern the facts of the present case.

43. The plaintiff has secured all major permissions, as has been disclosed in

14 2019 SCC OnLine Bom 762

the plaint. The clearance from the Civil Aviation Authorities was then expected and at this stage with a large and more than healthy majority supporting the redevelopment, there is no occasion to prevent the plaintiff from doing so. Thus, non-observance of some of the recommendatory guidelines cannot render the process of redevelopment bad. As stated earlier, a large majority of members of the defendant no.11-society have supported the redevelopment by the plaintiff. This majority has resulted in the general body, which is the supreme body taking a decision to redevelop the suit property. The resolution has not been challenged. The resolution of the general body not having been challenged, it is not open to the minority members to today seek to oppose carrying out of the objectives of these resolutions.

44. In *Girish Mulchand Mehta and Anr. Vs. Mahesh S. Mehta and Anr.*¹⁵, the Division Bench was considering a situation where some members of the society sought to block the redevelopment sans any challenge to the resolution of the general body and the court in paragraph 16 observed thus :

“By now it is 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 speaks for him qua the rights and duties of the Society as a body.”

15 2010(2) Mh.L.J. 657

45. Reference is made to the *Daman Singh and Ors. Vs. State of Punjab*¹⁶ in this respect. The Division Bench also made reference to *State of U.P. Vs. Chheoki Employees Co-op. Society Ltd.*¹⁷, in which the Apex Court observed that a member of a society has no independent right qua the society and it is the society that is entitled to represent as a Corporate Aggregate. Using an appropriate phrase, the Supreme Court observed that the “stream cannot rise higher than the source”.

46. In that view of the matter, it is not open for the defendant nos.1(a) to 3(b) and defendant nos.5, 6 and 7 to obstruct the redevelopment process. That having been said, I must observe that it is only defendants 1(a), 1(b), 1(c), 2, 3(a) and 3(b) who are members or claiming through members. The others, namely, the occupants of garages, are purchasers. They are not members of the society. Their attempts at gaining membership has been challenged and they are yet non-members and merely occupants. Their rights qua the society are also to be considered on the same platform. The question therefore arises is whether a non-member / occupant is competent and entitled to question the resolution passed by the society, whose property he or she occupies and in my view the answer is clearly in the negative. The majority having willed redevelopment, it is not possible for a non-member / occupant to obstruct it.

47. In *Mont Blanc Co-operative Housing Society Ltd. Vs. State of*

16 *AIR 1985 SC 973*

17 *AIR 1997 SC 1413*

*Maharashtra*¹⁸ and *Matru Ashish Co-operative Housing Society Ltd., Mumbai Vs. State of Maharashtra*¹⁹, different Division Benches of this court have taken a view that although the State Government may in public interest and for the purpose of securing implementation of provisions of the Maharashtra Co-operative Societies Act, 1960, issue directions to any class of societies, the interest of the societies cannot be prejudiced by such directions. The power of the State Government therefore cannot be exercised in a manner such as to cause prejudice to the interest of the society, which is the paramount consideration. In the present case, a large majority have opted for redevelopment. Substantial progress has been made. The plaintiff has shown its bonafides by conveying the land, upon which the building is to be constructed to the society. Thereafter the society has executed the lease-cum-development agreement. Substantial amounts have been expended towards payment of rent, deposits, bank guarantees have been established to the value of Rs.115,46,89,716/-.

48. The plaintiff has demonstrated its willingness to perform. The members have been patiently waiting to see the commencement of redevelopment activities and they continue to wait in the hope of securing possession of the newly constructed permanent alternate accommodation. If the defendants' contentions qua the applicability of the guidelines issued under Section 79A are to be strictly enforced and that is likely to cause further prejudice to the

18 2007 (4) Mh.L.J. 595

19 2012 (1) Mh.L.J. 126

society and to the members, these guidelines certainly cannot be wielded as a sword and indeed it is not intended to be. On the other hand, the guidelines are meant to protect societies and their members against arbitrary actions of the managements or of developers, who collude with managements to deprive the society and its body of members – the corporate aggregate, to be deprived of the benefits of such redevelopment. It is in such situations that strict enforcement of the guidelines may be justified.

49. In the present case, the objections taken on behalf of defendants qua these guidelines are unsustainable given the state of readiness of the plaintiff to carry out redevelopment work. This aspect has also been considered in *Disha Construction Vs. Jaysen S. Mastakar and Ors.*²⁰, in which this court has observed that the plaintiff in that case had incurred considerable amounts for carrying out work and 27 non-co-operative members, out of a total of 120, were attempting to stall the redevelopment. The building was in a dilapidated condition and the balance of convenience is found to be clearly in favour of the plaintiff-developer and the large number of members of the society were out of their premises and awaiting the construction of their new permanent alternate accommodation for more than a year. In the present case, the agreement has been entered into in the year 2018; yet, there is no progress. The developer has apparently incurred a large sums of money towards payment of monthly rent to those who have left the building, left their apartments and the developer has also provided a bank guarantee in a sum of

²⁰ 2014 (2) Mh.L.J. 353

Rs.115,46,89,716/- to secure the interest of the society and its members. There has been no default of any substantial nature that the members or the defendant no.11 society have complained of, nor have the non-co-operative members been able to demonstrate any gross illegality, negligence or neglect on the part of the developer. The view taken by this court in *Girish Mulchand Mehta (supra)* has been followed consistently and indeed that view is binding on this court.

50. In *Sarthak Developers Vs. Bank of India Amrut-Tara Staff Co-operative Housing Society Ltd. and Ors.*²¹, a Division Bench of this court has considered the effect of dissenting minorities and observed that the dissenting minority members cannot be allowed to obstruct redevelopment when the developer has spent large sums of money and had appointed a Court Receiver considering the fact that the large majority were supporting redevelopment and had vacated their flats. The court observed that if the Court Receiver was not appointed, such majority members will be left in the lurch at the behest of a minuscule minority. It will be useful to make reference to paragraphs 16 and 17 of the judgment in *Sarthak Developers (supra)*, which are reproduced below :-

“16. The material before the court is sufficient to indicate that the appellant has a strong *prima facie* case for the appointment of a receiver, having invested valuable consideration towards and in execution of the agreement. But most significantly, the appointment of a

21 *Appeal (L) No.310 of 2012 (Order dt. 5th December 2012)*

Receiver is warranted having due regard to the fact that unless such an order were to be passed, 149 members of the society, who are supporting the redevelopment and of whom 143 have vacated their flats, would be left in the lurch at the behest of a minuscule minority.

17. *The appointment of a receiver is undoubtedly a drastic order, but the court is empowered to do so on well-established principles of it being just and convenient. There are several reasons which must weigh in favour of the appointment of a receiver. Firstly, the condition of the property in question is a matter of importance in the city of Mumbai which is affected by a high degree of saline corrosion. The buildings are admittedly dilapidated and in urgent need of repair or redevelopment. The society was not in a position to carry out repairs having regard to the fact that in August 2007, the cost of repair was estimated at Rs.1.65 crores by its structural consultant. Hence, the option of redevelopment which has been accepted in the resolution passed by the Society would have to be respected. Secondly, in the present case, an overwhelmingly large proportion of the members of the society have consented to the scheme of redevelopment and have in fact vacated their premises. The interests of those 149 members who are supporting redevelopment and of whom 143 have vacated are of paramount concern. Thirdly, unless a receiver was to be appointed, it will be open to a dissenting minority of a few members to obstruct and defeat the will of the large majority. Fourthly, each of the dissenting members is also, like all the members of*

the society, entitled to permanent alternate accommodation free of cost in the redeveloped building. An enhancement of the existing areas in occupation is envisaged in the redeveloped building. In the meantime, each of the members shall be entitled to compensation for transit accommodation as agreed with the Co-operative Society and as paid to all other members. This is not a case where a scheme of redevelopment is oppressive to the legitimate interests of a minority nor has any such submission been urged."

51. Accordingly, in this case as well, I am of the view that appointment of the Court Receiver is unavoidable and the only way for the society to comply with its obligations achieve intention of the general body of the society. Moreover, with specific reference to the demand of the garage owners, who are non-members, this court has in the case of *Hari Om Sayaji Properties LLP Vs. Yoga Yog Co-op. Housing Society and Ors.*²², held that a member are entitled to benefits of redevelopment only in respect of area which is legitimately occupied by them. Although it is not entirely in the context of the nature of user but rather on the extent of the area, in the present case, the change of user has been unauthorized. It is not legal and the Municipal Corporation's affidavits have made it clear that right from the inception, these were motor garages, they were never shops. To that extent, the demand for commercial space in the new building and the insistence of defendants concerned that they would co-operate in the matter of redevelopment only if

22 2016 SCC OnLine Bom 11877

they are provided commercial space in the new building cannot be sustained. These non-cooperative occupants thus appear to be holding the majority to ransom and a demand of this nature for providing commercial space in a building, which has been proposed to be exclusively residential, cannot be sustained. This in the face of the fact that the occupants are not being deprived of areas occupied by them, but on the other hand, they are being offered 38% additional area by way of a residential apartment, it matters not whether a residential apartment of that size is impractical. In the larger interest of the members of a society, this is the only solution that is in sight. The minority must make way for the majority. If they are to continue in as part of the society, they would also be in a position to seek membership of the society, which they presently do not enjoy. Equally, for the flat owners of defendant nos.1(a), 1(b), 1(c), 2 and 3 garage occupants, their resistance to support redevelopment is on the grounds that are specious and cannot be supported.

52. In view of the above, I pass the following order :-

- (i) The Notice of Motion is made absolute in terms of prayer clauses (a) and (b).
- (ii) In the event any of the defendants decline to handover possession upon being called upon to do so by the Court Receiver, the Receiver may seek appropriate directions from the court prior to taking forcible possession and by

seeking police assistance.

- (iii) No order as to costs.
- (iv) Notice of Motion is disposed in the above terms.

At this stage, the learned counsel on behalf of defendant nos.1 to 3, and 5(a), 5(b), 5(c) and 6 seeks stay of the order. Order is stayed for four weeks.

(A. K. MENON, J.)