



Diksha Rane/ADN

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

**APPEAL NO.42 OF 2024**

**IN**

**INTERIM APPLICATION (L) NO. 18441 OF 2021**

**WITH**

**INTERIM APPLICATION (L) NO. 22423 OF 2021**

**IN**

**APPEAL NO.42 OF 2024**

**AVENUES SEASONS PROPERTIES LLP .APPLICANT/APPELLANT  
VS.**

**NISSA HOOSAIN NENSEY & ORS. .RESPONDENTS**

**WITH**

**APPEAL NO.43 OF 2024**

**IN**

**INTERIM APPLICATION (L) NO. 18438 OF 2021**

**WITH**

**INTERIM APPLICATION (L) NO. 22422 OF 2021**

**IN**

**APPEAL NO.43 OF 2024**

**AVENUES SEASONS PROPERTIES LLP .APPLICANT/APPELLANT  
VS.**

**RAKEYSH OMPRAKASH MEHTA & ORS. .RESPONDENTS**

**WITH**

**APPEAL NO. 44 OF 2024**

**IN**

**ARBITRATION PETITION NO.1 OF 2023**

**AVENUES SEASONS PROPERTIES LLP .APPLICANT/APPELLANT  
VS.**

**PALI HILL NEPTUNE CO-OPERATIVE  
HOUSING SOCIETY LTD. & ORS. ..RESPONDENTS**

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Mr. Virendra Tulzapurkar, Senior Advocate with Mr. Sean Wassoodew,  
Mr. Rupesh Mandhare, Ms. Ashna Shah for the appellants.

Mr. Mandar Soman with Ms. Vijaya S. Ingule for respondent no. 2 in  
APP/42/2024 and for respondent no.3 in APP/43/2024 and for  
respondent no.1 in APP/44/2024.

Mr. J. P. Sen, Senior Advocate with Mr. Parag Khandhar, Ms. Pranita Saboo, Ms. Nidhi Chauhan i/b. DSK Legal for respondent.

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**Coram : A. S. Chandurkar & Rajesh S. Patil, JJ.**  
**Date on which the arguments were heard : 31<sup>st</sup> July 2024.**  
**Date on which the judgment is pronounced : 22<sup>nd</sup> October 2024.**

**JUDGMENT (PER : Rajesh S. Patil, J.)**

**1.** The present three appeals are filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short “Arbitration Act”), by the original defendant no.5/developer, thereby challenging the impugned common judgment and order dated 23<sup>rd</sup> September 2021 passed by the Single Judge of this Court, thereby dismissing the two Section 8 Interim Applications filed by the original defendant no.5/developer, in two suits, and dismissing defendant no.5’s Section 9 Arbitration Petition.

**FACTS**

**2.** The respondent no.1 in Appeal No. 42 of 2024 and the respondent no.1 in Appeal No. 43 of 2024, are the original plaintiff who have filed their respective Civil Suit in the Original Side of this Court being Suit (L) No. 17585 of 2021 and Suit (L) No. 17583 of 2021, thereby seeking two major reliefs (i) a declaration that their bungalow No.1 and bungalow No.2, respectively are separate and

independent bungalows along with exclusive open space, and (ii) that the resolution passed by the Housing Society are illegal, non-est and void. The facts narrated in both the Civil Suits are identical.

**3.** The parties are hereinafter referred to as per their nomenclature in the civil suits.

**4.** In both the Civil Suits, the plaintiffs also preferred an Interim Application seeking to stay the various resolutions passed by the Co-operative Housing Society and also not to take any steps to vacate the plaintiffs during the pendency of this suit, from the suit bungalow no.1 and suit bungalow no.2.

**5.** The original defendant no.5/deveoper in both the Civil Suits preferred interim application under Section 8 of the Arbitration Act thereby seeking a relief that pending the hearing and final disposal of the suit, in view of Clause 23 of the Development Agreement, the plaint be returned, to be presented before the proper Court and so also, refer the present suit and all disputes and contentions raised therein to Arbitration. The defendant no.5/developer in both the Civil Suits also preferred an Arbitration Petition, under Section 9 of the Arbitration Act, thereby seeking interim measures before the arbitration proceedings are commenced. The interim application

preferred by the plaintiff in both the Civil Suits and the interim application preferred by the defendant no.5/developer in both the Civil Suits filed under Section 8 of the Arbitration Act, so also, Arbitration Petition preferred by the defendant no.5/developer were clubbed together, and heard. By his judgment and order dated 23<sup>rd</sup> September 2021 the Single Judge of this Court, dismissed the Interim Application preferred by the defendant no.5/developer under Section 8 and the Arbitration Petition filed under Section 9 by the defendant no.5/developer, so far as against the plaintiff was dismissed. The Interim Applications preferred by the plaintiffs in their respective Civil Suits were deferred for hearing after parties have completed pleadings.

**6.** Being aggrieved by the judgment and order dated 23<sup>rd</sup> September 2021, the defendant no.5/developer has preferred the present three appeals under Section 37 of the Arbitration Act.

### **SUBMISSIONS**

**7.** Mr. Virendra Tulzapurkar, the learned Senior Advocate appeared on behalf of the appellant/developer (original defendant no.5) and made his submissions.

(i) He submitted that as per Section 8 of the Arbitration Act, a

party claiming through and under is included in the definition of a “party” as per the amendment of 2015 to the Arbitration Act.

(ii) By signing the Development Agreement, it was the mutual intention of the Society as well as the Developer to bind the signatories as well as the non- signatories, being the dissenting members of the society.

(iii) The finding in the impugned judgment that, the Respondent No. 1 do not fall within the meaning of the party, as defined under Section 8 of the Arbitration Act is perverse in as much as once an individual becomes a member of a cooperative society then such member loses his individuality and gets merged with the cooperative society and becomes a party claiming through and under as laid down in Section 8 of the Arbitration Act.

(iv) He submitted that the impugned judgment and order, essentially watered down a line of judgments delivered under Section 9 of the Arbitration Act, whereby party claiming through and under, could have been joined as a party to a petition under Section 9 of the Arbitration Act, in as much as once it is held that the dispute is Non-Arbitrable, by virtue of a single member of the society not signing the Development Agreement then, in such an event no dissenting

member can ever be joined as a party to an Arbitration Petition, even under Section 9 of the Arbitration Act, the dispute being Non-Arbitrable.

(v) By amendment to Section 8 (1) of the Arbitration Act the relevant “party” that is entitled to apply seeking reference to arbitration has been clarified/amplified to include persons claiming “through or under” such a party to the arbitration agreement.

(vi) In present case, the respondent no. 1 (original plaintiffs) are members of the Society, who have actively participated in redevelopment process and voted in favour of redevelopment and have proposed resolutions dated 6<sup>th</sup> February 2019 approving the development, 17<sup>th</sup> March 2019, approving the tender and resolution dated 22<sup>nd</sup> June 2019 approving the appellant as the Developer. Hence, at a later stage they could not oppose redevelopment.

(vii) The well settled principles of law that a member’s identity is lost to the society and to the discipline of the majority opinion prevailing.

(viii) The reasoning of the impugned judgment is wholly consistent. On one hand, it lays down that the settled law is that it is not open for a dissenting member to obstruct or challenge the DA or say that

he has not signed the agreement but at the same time has ignored the said well settled law and dismissed the Section 9 petition on the specious reasoning that a Section 8 application had been filed.

(ix) Based on the aforementioned artificial distinction, the Learned Single Judge has come to the erroneous conclusion that merely by reason of the fact that in addition to the society, some of the individual members had signed the Development Agreement, whereas others had not, the long line of judgments following *Girish Mulchand Mehta* became inapplicable.

(x) The individual members have signed the Development Agreement in pursuance of Clause 9.2 of the Development Agreement and by reason of circular dated 30<sup>th</sup> March 2017, wherein it has been set out that in the event the members sign the Development Agreement, then the stamp duty on the areas agreed to be provided by the Developers to the Society members free of cost would be Rs. 100/-, provided such members have signed the Development Agreement.

(xi) The word “existing members” occurring in the arbitration clause was sufficient to include within its compass the society and all its members and not merely those who had signed the Development

Agreement.

(xii) In *Sarthak Developers vs. Bank of India Amrut Tara Cooperative Housing Society Ltd.*<sup>1</sup>, a Division Bench of this Court had held in paragraph 14,

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

The Learned Single Judge failed to appreciate that the Respondent No. 1 were therefore bound by the Development Agreement entered into with the Appellant including the arbitration clause therein.

(xiii) The Supreme Court in the case of *Cheran Properties Ltd. v. Kasturi & Sons Ltd.*<sup>2</sup> held that the requirement, in Section 7, that an arbitration agreement be in writing, did not exclude the possibility of binding third parties who may not be signatories to an agreement

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<sup>1</sup> Appeal (L) No 310 of 2012 in Arbitration Petition 1385 of 2010.

<sup>2</sup>(2018) 16 SCC 413 at page 434

between two contracting entities. The Supreme Court in that case further held that the evolving body of academic literature as well as adjudicatory trends indicated that in certain situations, an arbitration agreement between two or more parties would operate to bind other parties as well.

(xiv) He also relied upon the findings of the Supreme Court in the judgment of *Mahanagar Telephone Nigam Ltd. v. Canara Bank and Ors.*<sup>3</sup>.

(xv) In rejoinder argument, Mr. Tulzapurkar submitted the judgment referred by the original plaintiff cannot be considered as good law in view of ratio laid down in the judgments referred by appellant and in the judgment passed by Division Bench of this Court in *Adityaraj Builders vs. State of Maharashtra*<sup>4</sup> and judgment passed by the learned Single Judge in Commercial Arbitration Appeal (L) No.21070 of 2023 (*Shankar Desai vs. Gauri Associates*).

(xvi) He submitted that the appeals should be allowed and the impugned judgment and order dated 23<sup>rd</sup> September 2021 passed by the Single Judge of this Court should be quashed and set aside.

**8.** Mr. Mandar Soman appeared on behalf of the respondent – society and made his submissions. He submitted that entire society is

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3 2019 SCC OnLine SC 995

4 (2023) SCC OnLine Bom. 540

in favour of the redevelopment and only because of the plaintiffs the redevelopment cannot happen. He submitted that the plaintiffs are minority members of the society, because of whom the entire redevelopment has stuck. He submitted that the plaintiffs would be bound by the Development Agreement. He submitted that the impugned judgment and order dated 23<sup>rd</sup> September 2021 should be quashed and set aside.

**9.** Mr. J. P. Sen, the learned Senior Advocate made his submissions on behalf of the respondent.

(i) He submitted that on 8<sup>th</sup> March 2020, Special General Body Meeting was held when 18 of the existing members present passed the resolutions approving the same and authorizing the society's Managing Committee to finalize, settle, sign and execute the same for and on behalf of the society. In view of the aforesaid, the Section 8 Application filed against non-signatories to an arbitration agreement is not maintainable and is correctly rejected in the impugned order for reasons stated therein.

(ii) In support of his submissions, he relied upon the following decisions:

(a) *Vardhaman Developers Limited vs. Andheri Krupa Prasad Co-*

*operative Housing Society Ltd.*<sup>5</sup>;

(b) *Wadhwa Estate Developers (India) Pvt. Ltd. Vs. Omprakash Raheja and others*<sup>6</sup>;

(c) *Vardhaman Developers Ltd. vs. Thailambal Co-op. Housing Soc. Ltd. & ors.*<sup>7</sup>;

(d) *Harnish Gada vs. Vardhaman Developers Ltd. & Ors.*<sup>8</sup>;

(e) *Mukesh Nanji Gala vs. Heritage Enterprises, 2014*<sup>9</sup>;

(f) *Shankar Vithoba Desai & ors. vs. Gauri Associates & ors.*<sup>10</sup>;

(g) *Ketan Champaklal Divecha vs. DGS Township Pvt. Ltd. & anr.*<sup>11</sup>

(iii) He submitted that the appellant has assailed the impugned order *inter alia* on the basis that the learned Single Judge has relied upon Section 8 of the Arbitration Act as it stood prior to its amendment with effect from 23<sup>rd</sup> October 2015. More particularly, the appellant has sought to rely upon the addition of the words “*or any person claiming through or under him*”. He submitted that Section 8 amended or otherwise, does not in any manner affect the argument sought to be raised by the original plaintiffs as the original plaintiffs are neither claiming through nor under the society or appellant/developer (who are parties to the Development Agreement).

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5 N.M. (L) No.248/2014 (Corm : S. J. Kathawalla, J.)

6 N.M. No.1259/2013.

7 N.M.No.3274/2010 in Suit No.2725/2010 (Corm : Dr. D. Y. Chandrachud, J.)

8 Appeal No.227/2-11 in NOM/3274/2010 in Suit No.2725/2010 with NOM/1282/2011 ((Corm : Mohit S. Shah and D. G. Karnik, JJ.)

9 SCC OnLine Bom 1817

10 Comm. Arbitration Application (L) No.21070/2023.

11 2024 SCC OnLine Bom 1.

(iv) In support of the aforesaid submission, reliance is placed on the decisions of this Court in *Supreme Mega Construction LLP vs. Symphony Co-operative Housing Society Ltd. & Ors.*<sup>12</sup> and *Shankar Vithoba Desai* (supra).

(v) He submitted that on perusal of prayers sought in the Plaint it can be seen that the same cannot be granted by an Arbitral Tribunal.

(vi) The Development Agreement consisting of Arbitration Agreement is restrictive and limited to the extent of disputes stated therein. In the event, an arbitrator is appointed, such arbitrator being a creature of the Arbitration Agreement would not be able to grant reliefs which *ex-facie* fall outside the scope and ambit of the Arbitration Agreement.

(vii) The appellant relied upon the case of *Girish Mulchand Mehta vs. Mahesh Mehta*<sup>13</sup> and the judgments following this line cited by the appellants are concerned, the said decisions are wholly inapplicable to the facts and circumstances of this case.

(viii) During the course of arguments on the appeal, the appellant has placed reliance on Clause 9.2 of the Development

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12 2014 SCC OnLine Bom 4624

13 2009 SCC OnLine Bo 1986)

Agreement to content that it was not necessary for the original plaintiffs to sign the Development Agreement except for claiming the benefit of exemption under the Stamp Act.

(ix) In respect of the aforesaid submission, firstly, it is submitted that the appellant did not raise this argument before the learned Single Judge and therefore, cannot now raise an argument not previously raised. Secondly and in any event, the fact remains that the original plaintiffs are not signatories to the Development Agreement which agreement contains the arbitration clause the appellant seek to bind the original plaintiff (*to which the original plaintiff are not signatories*).

(x) He submitted that the appeals be dismissed with costs.

**ANALYSIS AND CONCLUSION :-**

**10.** We have heard the learned counsel for all the parties and have gone through the documents on record.

**11.** The present appeals are filed under Section 37 of the Arbitration Act by the original defendant no.5/developer, challenging the dismissal of his applications filed under Section 8 of the Arbitration Act, which sought that the issue raised in the suits filed by the plaintiffs be referred to arbitration as per the “Dispute Resolution

Clause” as mentioned in the Development Agreement, which is signed by the Co-operative Housing Society of the first part, along with 18 of its members of the second part and by the developer of the third party.

**12.** It is the case of the developer that since the Housing Society has signed the Development Agreement, all the members of the Housing society are bound by the clauses mentioned in the Development Agreement and since there is a specific “Dispute Resolution Clause” which mentions about in case of any dispute arising the same be referred to arbitration, hence the suit as filed by the plaintiff’s should have to be referred to arbitration. So also, in the meantime, the reliefs as prayed in Section 9 Arbitration Petition should be granted.

**13.** The original plaintiffs have pleaded in the plaint that their structures are individual bungalows with open space around the bungalows, and they also have separate gate for road access. The building in which the members are residing has a separate gate for access to the public road. It is further their case that they have not signed the Development Agreement, unlike other members of the Housing Society.

**14.** We have gone through the Development Agreement. In the Preamble of the Development Agreement, the party of the First Part is the society and thereafter, a list of the members have been mentioned who are described as party of Second Part. The developer is described as party of Third Part. The names of the plaintiffs in both the suits are not mentioned in the Development Agreement. So also, the Development Agreement, apart from the society has been signed by all other members and admittedly, there is no signatures of both the plaintiffs. All the members have also inserted their initial on each and every page of the Development Agreement. Whereas the plaintiffs have admittedly not signed on each and every page of the Development Agreement neither their names are mentioned in the Development Agreement. In this background, it has to be seen whether the plaintiffs would be bound by the clauses of the Development Agreement.

**15.** This is a case where not only the society but also each and every member of the society has signed the Development Agreement and hence, they would be bound by the terms and conditions of the Development Agreement. The plaintiffs have admittedly not signed the Development Agreement and have in fact raised their grievance. The plaintiffs have mentioned that earlier there was some other

developer who had promised the plaintiffs to redevelop the entire property along with the building, and after redevelopment the plaintiffs would receive individual bungalows. However, the said Development Agreement was not fruitful. As regards the present developer, the plaintiffs agreed that the property can be redeveloped but on the same terms as promised to them by the earlier developer. However, the society has not agreed to such demands of the plaintiffs and has passed certain resolutions to that effect. The plaintiffs have dispute with the society in this regard therefore, the plaintiffs have filed two separate Civil Suits against the society and the developer in this Court. The interim applications have been filed by the plaintiffs in both the suits and the same are pending for hearing.

**16.** Section 7(4) (a) of the Arbitration Act mentions that the Development Agreement must be signed by the parties. Section 8 of the Arbitration Act has been amended in the year 2016, by which Section 8 has been further clarified. In our view, it would have been a total different case if any of the member who has signed the Development Agreement, or society who has signed the Development Agreement would have filed the suits against the developer, and in such a suit the developer could have preferred an application under Section 8 of the Arbitration Act, for referring the dispute to

arbitration.

**17.** The learned Single Judge while dismissing the developer's applications under Section 8 and the Arbitration Petition of the developer under Section 9 has held that he has not foreclosed the arguments of the developer that the plaintiffs have lost their identity to the society and to the discipline of the majority opinion prevailing. Those contentions of the developer are kept open.

**18.** Certain relevant authorities cited before us are discussed hereinbelow:-

(i) In the judgment of *Andheri Krupa Prasad CHS Ltd.* (supra), the learned Single Judge of this Court held that in the absence of the Development Agreement being individually signed by the members of a Society, the members who have not signed the agreement cannot be relegated to arbitration. Paragraph 7 of the said judgment reads thus:-

“7. Even in the present case, there is no arbitration agreement in writing duly signed by the Plaintiffs and the Applicants who have moved the Notice of Motion. The Development Agreement is signed by the Plaintiffs-Developer and the Defendant No.1 Society and not by the individual members of the Society. Faced with the above judgments cited by the Learned Senior Advocate appearing for the Plaintiffs, Mr. Abdi contended that though as in the present case, in the cases cited by the Plaintiffs, the description of the Society also included its members, no argument was raised by the Defendants therein that in view of such description of the Society which includes members, the arbitration clause contained therein would be binding on the Plaintiffs as well as

the Applicants/Defendants and therefore the said issue needs to be decided in the present case. In my view, though the Society is described/defined in the Development Agreement as including its members, the fact remains that the said Agreement is between the Society as a whole i.e. representing all its members and the Plaintiffs-Developer. The arbitration clause/agreement contained in the Development Agreement can therefore be invoked only in the event of any dispute or difference arising between the parties to the said Development Agreement viz. the Society and the Plaintiffs- Developer as set out in clause 55 of the Development Agreement. The said arbitration clause cannot be invoked by 17 of the 74 members of the Society in their capacity as members of the Society against the Plaintiffs on the ground that in the Development Agreement the expression 'Society' means and includes the members of the Society and their heirs, etc. I therefore do not accept the submissions advanced on behalf of the Applicants that they are entitled to invoke the arbitration agreement entered into by and between the Plaintiffs and the Defendant No.1 Society."

(ii) In *Harnish Gada* (supra), the Division Bench of this Court while dealing with the appeal arising out of the judgment of the learned Single Judge of this Court in *Andheri Krupa Prasad Co-operative Housing Society Ltd.* held that they are in agreement with the reasoning and conclusion of the learned Single Judge. The Division Bench held that the learned Single Judge had dealt with the contentions raised by defendant nos.5 and 6 in paragraph 6 of the impugned order. The contentions raised by defendant nos. 5 and 6 before the learned Single Judge are also raised before them and they did not find any merit in the contentions.

(iii) In *Wadhwa Estate Developers (India) Pvt. Ltd.* (supra), the learned Single Judge of this Court held that in the absence of

dissenting members, having signed the Development Agreement, there is no arbitration agreement between the parties. Paragraph 43 of the said judgment reads as under :-

“43. The dissenting members have also contended that the matter be referred to arbitration. The dissenting members i.e. Defendant Nos. 1 to 3 have neither signed the Development Agreement nor the Supplemental Agreement. In fact, the cause of action in the present Suit has arisen due to the failure of Defendant Nos. 1 to 3 to sign the Development Agreement and the Supplemental Agreement. Hence there is no arbitration between the Plaintiff and Defendant Nos. 1 to 3. This being so, the present Suit is maintainable and cannot be referred to arbitration. Such contention is taken by the dissenting members only to delay the matter and grant of reliefs as prayed for in the above Notice of Motion. Such a contention has also been rejected by a Learned Single Judge of this court (Dr. D.Y. Chandrachud, J.) in para II (b) of the decision in Vardhman Developers (supra).”

(iv) In *Thailambal Co-op. Housing Soc. Ltd.* (supra), the learned Single Judge of this Court has held that a suit filed by the individual member is maintainable as there was no dispute between the society and the developer as contemplated under the arbitration clause contained in the Development Agreement. Paragraph 6 of the judgment reads as under:-

“6. There is no merit in the contention based on Section 91 of the Maharashtra Cooperative Societies Act 1960. Section 91 brings within its purview disputes touching *inter alia* the constitution, management or business of a society. Now in the present case, the process of redevelopment of the Society by the Developer does not constitute the business of the society within the meaning of Section 91. The demolition of the existing building and the reconstruction of the building of the society is not the business of the society. Section 91 is therefore not attracted. For the same reason, no notice under Section 164 is required. The contention based on the guidelines of the State

Government dated 3 January 2009 is without any substance. The Development Agreement in this case was entered into on 27 August 2008 much prior to the enforcement of the guidelines. The contention that the Director of the Plaintiff had no authority is belied by the copy of the Board Resolution dated 15 May 2010 which has been placed on record. The Resolution authorised the Director in question to represent and sign documents, returns, statements and other writings on behalf of the Company to be submitted interalia before any Court of law. Similarly there is no merit in the contention of the objectors that the Power of Attorney in favour of the nominee of the Plaintiff has not been registered. The Development Agreement admittedly has been registered. The Power of Attorney executed by the Society was similarly registered and stamp duty in excess of Rs.19 lacs was paid. The contention based on the Consent Affidavits is similarly devoid of substance. It has been stated on behalf of the Plaintiff that the Developer had forwarded the stamp paper to the Cooperative Society. The Consent Affidavits were executed, notarized and remitted back to the Developer. Significantly there is no dispute about the fact that the Consent Affidavits have been duly executed. There being no dispute about the fact that the Consent Affidavits have been signed and executed by the objecting Defendants, the objection is lacking in substance. The contention that there is an arbitration clause in the Development Agreement between the Society and the Developer, over looks the basic factual position that there is no dispute between the Society and the Developer. It is the objectors who are objecting to the enforcement of the Development Agreement. A suit for obtaining necessary reliefs is therefore maintainable. For these reasons I am of the view that the objections which are raised on behalf of Defendant Nos. 5 to 6, however technical, are devoid of any material substance."

(v) In *Mukesh Nanji Gala* (supra), the learned Single Judge of this Court held that only party to arbitration agreement can challenge an arbitral award.

(vi) In *Shankar Vithoba Desai* (supra), the learned Single Judge of this Court held that arbitration cannot be invoked by individual members or group of members of the society for resolving the disputes emanating from the conduct of the developer, even if such

disputes arise out of the import of the Development Agreement. This is for the simple reason that individual members are not parties to the arbitration agreement contained in the Development Agreement. In paragraph 10 it has been held that it being an admitted position that individual members are not signatories to the arbitration agreement, fundamental requirement under Section 7 of the Arbitration Act, that the arbitration agreement has to be in writing among parties to the arbitration proceedings has also not being met.

**19.** Therefore, according to us, even this judgment supports the contention of the original plaintiff.

**20.** In *Ketan Champaklal Divecha* (supra), the learned Single Judge of this Court has held that an individual member does not have the capacity to invoke arbitration under the Development Agreement.

Paragraph 15 of the said judgment reads as under :-

15. The aforesaid clause has to be read in the backdrop of the settled position of law that when a Co-operative Housing Society enters into a development agreement with a developer, the will of the majority members prevails. The individual desire or identity of the member is subsumed within the will of the Co-operative Housing Society, which collectively represents the aspirations and the cause of its members. There is substance in the contention raised on behalf of the respondents, by placing reliance on the judgment of the Supreme Court in the case of *Daman Singh v. State of Punjab* (supra), wherein it is specifically laid down that the Society alone can act and speak for an individual member and that the member loses his individuality qua the Society, having no independent rights. Clause 35.2, quoted herein above, clearly encapsulates the said status of a member of a cooperative housing society and thereby indicates that even if clause 35.1 uses the plural

'parties', the same has to be interpreted as referring to the society and members on the one hand and the developer on the other. Clause 35.2 cannot be relegated to being merely a mechanism because the very invocation of arbitration and appointment of a sole arbitrator is governed by the said clause. For a valid invocation of arbitration, in the facts and circumstances of the present case, notice will have to be issued by the society along with its member or members on the one hand or the developer on the other. An individual member simply does not have the capacity to invoke arbitration under clause 35.2 of the development agreement. Once this conclusion is reached, it becomes clear that the arbitration clause in the development agreement signifies an arbitration agreement for resolution of disputes between the society with its members on the one hand and the developer on the other. The society espouses the cause of its own members, which in turn, as per settled law, is based on the will of the majority members of the Society.

**21.** The citation referred by the appellant of *Girish Mehta* (supra) lays down preposition of law that interim measures of protection may be granted against the Third Parties who are not parties to the Arbitration Agreement in a Petition under Section 9. However, it does not extend its ratio to hold that arbitration proceedings can be commenced against Third Parties who are not parties to the Arbitration Agreement. *Adityaraj Builders* (supra) reaffirms the said preposition of law laid down in *Girish Mehta* (supra). Even in *Adityaraj Builders* (supra), the Court was not dealing with an application filed under Section 8 of the Arbitration Act and it instead dealing with Writ Petition raising question of law with respect to stamping under Maharashtra Stamp Act. Hence, according to us, the ratio laid down in these two judgments does not in any event help the appellant.

**22.** In *Cheran Properties Limited* (supra), the Supreme Court was dealing with “Group of companies doctrine”. In the said proceedings, the parent agreement envisaged the allotment of equity shares with the intent that company would take over the business, assets and liabilities and under the agreement the company was entitled to transfer shareholding. The Court held that it would not be open to the appellant to contend that while it was bound by all other terms of the agreement, it would not be bound by the Arbitration Agreement contained in the very same agreement. Since, the facts in this judgment are quite different than the present proceedings, the ratio of the judgment would not be applicable to the present proceedings.

**23.** In *Mahanagar Telephone Nigam Limited* (supra), again the concept of doctrine of “group of companies” was involved. It dealt with impleadment of the subsidiary company. Hence, the ratio laid down in the said judgment cannot be applicable to the present proceedings as the present proceedings dealt with the individual persons (owners of bungalows).

**24.** In *Sarthak Developers* (supra), the Arbitration Petition was filed under Section 9 by the developer against the society and its members seeking appointment of Receiver. The minority members

lodged a complaint with Registry of Co-operative Court. The Development Agreement was executed by the developer with the society. 142 members out of 160 members executed the tri-partite agreement with the developer for redevelopment. 143 members had already vacated their flats. The condition of the building was bad in shape and required urgent repairs or redevelopment. The society was in a position to carry out repairs, hence, the option of redevelopment was accepted. In proceedings under Section 11 (6) an Arbitrator had already been appointed by an order dated 29<sup>th</sup> June 2012. For these aforesaid reasons an order was passed appointing a receiver. The facts in these case are not at all identical to the present proceedings since *Sarthak Developers* (supra) the Arbitration Petition was under Section 9 and Arbitrator was already appointed under Section 11 by an order dated 29<sup>th</sup> June 2012. Therefore, the ratio laid in the said judgment could not be applied to the present proceedings.

**25.** Therefore, sum and substance of all these judgments is that either developer or the society, who has signed Development Agreement can invoke the arbitration agreement in case of dispute.

**26.** In the background of these facts, we are of the view that at this stage where a party who is not mentioned in the Development

Agreement and who has not signed the contract, can not be referred to arbitration.

**27.** While these arbitration appeals filed by the developer under Section 37 of the Arbitration Act are pending before the Division Bench of this Court, this Court by its order dated 23<sup>rd</sup> February 2024 has clarified that the developer will be free to redevelop the property belonging to the society (other than two bungalows) by submitting the necessary plans to the society for their approval and thereafter, to the Planning Authority. It was also clarified that rights of the original plaintiffs are not to be touched in respect of their two bungalows until the disposal of these appeals.

**28.** In view of the above findings, we pass following order:

**ORDER**

(i) Appeal No.42 of 2024, Appeal No.43 of 2024 and Appeal No.44 of 2024 are hereby dismissed.

(ii) The clarification made by Coordinate Bench of this Court on 23<sup>rd</sup> February 2024 in the present appeals is hereby continued till the disposal of the two suits filed by the plaintiffs.

(iii) The hearing of the Suit (L) No. 17587 of 2021 and Suit (L) No. 17583 of 2021 is hereby expedited and the learned Single Judge is

requested to make an endeavor to dispose of the suits within a period of one year from today, subject to parties co-operating in this regard.

**29.** The Interim Applications are also disposed of.

[ RAJESH S. PATIL, J. ]

[ A.S. CHANDURKAR, J. ]