IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 29 OF 2025

Phalke Niketan Co-operative Housing Society Ltd. ...Petitioner

Versus

Adit Enterprises ...Respondent

Mr. Abhishek Matkar, *a/w Mr. Malhar Bageshwar, for the Petitioner.*

Mr. Mandar Soman, *for Respondent.*

CORAM: SOMASEKHAR SUNDARESAN, J.
RESERVED ON: September 25, 2025
PRONOUNCED ON: December 19, 2025

JUDGEMENT :

Context and Factual Background:

1. This Petition is filed under Section 9 of the Arbitration and Conciliation Act, 1996 ("***the Act***") in connection with a development agreement dated May 10, 2009 supplemented by a supplemental development agreement dated February 21, 2011 (collectively, "***Development Agreement***"), which admittedly contains an arbitration agreement.

2. The facts of the case are not quite disputed and they stand out in a stark manner. The core issue is more a question of law, which is discussed below.

3. The following summary of the factual matrix would suffice:

a) The Petitioner, Phalke Niketan Co-operative Housing Society Ltd. (“***Society***”) and the Respondent, Adit Enterprises (“***Developer***”) are parties to the Development Agreement to redevelop the property of the Society, which is essentially a building with built-up area admeasuring 1,118.51 square metres standing on land admeasuring 742.25 square metres leased from the Maharashtra Housing and Development Authority (“***MHADA***”) for 99 years since November 24, 1998;

b) The building standing on such land was sold to the Society, on November 24, 1998. The building had been constructed in 1974 under a low income group housing scheme of MHADA, with 20 tenements spread over a ground floor and four upper floors;

c) Pursuant to the Development Agreement, the building was demolished in October 2009. The construction and redevelopment is nowhere in sight;

d) Each member was to get a flat of 550 square feet and corpus contribution of Rs. 1 lakh and monthly transit rent of Rs. 10,000 per month to be escalated to Rs. 12,000 per month after the first twelve months;

e) The supplementary agreement executed on February 21, 2011 entailed a hike in the rentals to Rs. 18,000 per month, with a 10% annual escalation; carpet area being increased to 572 square feet per member; niche and flower bed area of 115 square feet; and a penalty of Rs. 1 lakh per month of delay in completion beyond the agreed 24-month deadline;

f) The redevelopment was to be completed by February 2013. The project did not at all proceed in the manner contracted, and a new intimation of disapproval ("***IOD***") was obtained on November 30, 2013. It is common ground that the Developer is in arrears on the financial payments due to the members of the Society;

g) The plans submitted by the Developer were not approved by the Municipal Corporation of Greater Mumbai ("***MCGM***") as not being compliant. In consultation with the Developer, the Society filed Writ Petition No. 2952 of 2014 seeking a direction to the MGCM to issue a commencement certificate, which came to be rejected by a Learned Division Bench of this Court, by an order dated March 3, 2015;

h) Nothing progressed thereafter – the Developer came up with revised proposals, suggesting lowering the per-member entitlement to carpet area. Such multiple proposals were spread over April 2015 and by August 2015, the Developer is said to have been in arrears of nearly 24 months' payment obligations;

i) In May 2016, the Developer issued 20 cheques, some of which were dishonoured. The Society then started asserting its rights in correspondence and in the Special General Body Meeting held on June 15, 2016, the members resolved to terminate the Development Agreement, which was communicated to the Developer on June 16, 2016;

j) The Developer proposed more amendments in August 2016 to keep the project alive and on August 19, 2016, the Society formally terminated the Development Agreement. The parties then traded correspondence with allegations and counter allegations;

k) An administrator came to be appointed by the Deputy Registrar, Co-operative Societies, MHADA vide order dated June 13, 2018, taking control over the administration of the Society out of the hands of the Managing Committee. At this stage, four members of the Society filed Suit No. 1250 of 2019 ("***Suit 1250***") against the Developer as a derivative action on behalf of all the members since the administration of the Society was no longer in their hands;

l) By an order dated September 6, 2018, a Learned Single Judge of this Court directed a poll of members to be taken to ascertain if the other members were willing to support the pursuit of Suit 1250 and appointed a Court Commissioner for this purpose. It is common ground that there was consent to proceed with Suit 1250 from the members present and voting;

m) Considering that the building had been demolished and the land was unutilised, the Learned Single Judge appointed a Court Receiver to take symbolic possession of the property by an order dated October 22, 2018;

n) In 2023, the Society came out of administration and a new Managing Committee was elected. Meanwhile Suit 1250 was transferred to the City Civil Court due to the pecuniary jurisdictional limits changing; and

o) The Society has appointed a new developer, Umang Developers LLP, to redevelop the property. Attempts made by the new Developer to access the Society's premises have been resisted by security guards deployed by the Developer.

p) The Society, now governed by the newly elected Managing Committee, has filed this Petition on behalf of the Society seeking protection from interference from the Developer in the proposal of the Society to have the property developed, since its members have been dis-housed for over one and half decades, and even the amounts due and owing to them are running into arrears.

Contentions of the Parties:

4. I have heard Mr. Abhishek Matkar, Learned Advocate on behalf of the Society and Mr. Mandar Soman, Learned Advocate on behalf of the Developer. With their assistance and their written notes on arguments, I have examined the material on record and the pleadings filed by the parties.

5. The core objection from the Developer is that the Society has abandoned, waived and given a go-by to the arbitration agreement by reason of Suit 1250. According to the Developer, the filing of the Suit by the four members, and its ratification by an overwhelming majority of the members of the Society concludes the abandonment of the arbitration agreement, and the filing of the Section 9 Petition is an afterthought after the suit got transferred to the City Civil Court.

6. According to the Society, it is the Society that is party to the arbitration agreement and waiving of the agreement is for the Society as a body corporate to decide and not by individual members of the Society. In any case, to deal with the perception of equities, the Society has convinced the four members, who are Plaintiffs in Suit 1250, to withdraw those proceedings should this Court so direct.

Analysis and Findings:

7. The core and primary objection on behalf of the Developer is that the Society has abandoned and waived the arbitration agreement by the filing of Suit 1250. The second contention is that the termination took place in 2018 and the Section 9 Petition filed in 2025 is hopelessly barred by limitation.

8. When one examines these contentions, one cannot help but notice that had any member been desirous of initiating arbitration, it would have been impossible since the privity to the arbitration agreement is between the Society and the Developer. The only recourse to the members, and that too when the Society was not under their control even in terms of its governance, was to file a suit. Four members took the initiative and filed Suit 1250. At the instance of the Learned Single Judge of this Court, a poll to examine how many members would support the suit was conducted under the supervision of a Court Commissioner. Such a meeting is not a statutory meeting of the Society under the laws governing the governance of the Society. The individual members were individually supporting the Suit 1250 and that would still not make it the Society's suit.

9. Therefore, I am not able to accept the contention that the Society would have to automatically be transposed as the Plaintiff in Suit 1250, on the Society coming out of administration. On the contrary, the Society did convene a special general meeting and resolved to terminate the Development Agreement and appoint a new developer. This is the decision of the collective body corporate that is the Society. The filing and pendency of Suit 1250 by certain members and the support for it by the remaining members, ascertained by the Court at that stage, would not make it a suit prosecuted by the Society.

10. Even when the general body of the Society takes a decision and empowers the Managing Committee, it basically enables and authorises the Managing Committee to take certain action on its behalf. The fiduciary duty of the Managing Committee to then take action based on such enabling resolution and authorisation, is solely the responsibility of the Managing Committee. This is why the law governing co-operative societies even has stringent provisions for audit of the Managing Committee's actions and decisions, with powers to even claw back, disgorge and extract indemnification of a society's damage and losses from the individual managing committee members.

11. Therefore, I am not satisfied that one can conflate the polling held at the instance of the Learned Single Judge to assess the situation when taking a preliminary view on Suit 1250, as a measure and indicator of it being the Society that prosecuted the Suit. Therefore, this is not at all a case of the Society's abandonment of the arbitration agreement. Pursuit or abandonment of the arbitration agreement, is solely the Society's prerogative. Actions of the individual members of the Society are not actions of the Managing Committee of the Society. The Managing Committee is the statutorily-charged decision making body whose actions can bind the Society in its dealings with the outside world. The Society and its members are distinct. Assets and liabilities of the Society are not assets and liabilities of the members, even when theoretically all of them are put together.

12. The decisions of the Society are not decisions of the members. The members give up their individual will to the collective will of the Society and it is not for a Court to infer from conduct what the statutorily-exercised will of the Society is and compare it with the individual positions of its members. Under Section 72 of the Maharashtra Co-operative Societies Act, 1960, the final authority of every society vests in the general body of members in a meeting to be held in accordance with the bye-laws, but also subject to the provisions

of that legislation and rules made thereunder. Under Section 73 of that legislation, the management of the society vests in the managing committee, which is meant to conduct the affairs subject to and in accordance with that legislation and subordinate law made thereunder.

13. The autonomy and sovereignty of the Society, acting through its forum for governance i.e. the Managing Committee cannot be mixed up with the autonomy and sovereignty of the members to pursue their rights. This is now subject matter of multiple decisions of this Court.

14. In ***Shankar Vithoba Desai***[1] I had occasion to consider an application to appoint an arbitrator moved by 11 members of a Society to initiate arbitration since the society in question was not initiating arbitration. It was held that an arbitration agreement in the development agreement was between the two parties – the society and the developer, and not between each of these parties and each and every member of the society.

15. When a society as a collective is formed, the individual identities of the members are subsumed and submerged into the collective identity of the society, which is to be governed in accordance

[1] *Shankar Vithoba Desai & Ors. Vs. Gauri Associates & Anr. – judgment dated July 16, 2024 in Commercial Arbitration Application No. 32 of 2025*

with law governing the society's governance. I had agreed with a near-identical case of ***Divecha***[2] which declared the law on how individual members give up their identity and desires by submitting to the collective will of the society.

16. I see no basis to deviate and differ from the corollary of the same principle in the facts of this case. The members of the Society had been supportive of the four members who filed Suit 1250. That does not mean that the Society had filed that suit. It also does not mean that when the Society, in its own sovereign and autonomous right, convenes and decides to proceed with termination of the Development Agreement and the replacement of the Developer, the Society as a collective would be precluded from taking such a decision only because four members had filed a suit and at that stage all members indicated their support for the suit.

17. Therefore, the core objection on behalf of the Developer stands repelled in my opinion. There is no basis to hold that the arbitration agreement has been abandoned. Indeed, it is common ground that the arbitration agreement exists and therefore, preservation of the subject matter of the arbitration agreement deserves to be

[2] *Ketan Champaklal Divecha vs. DGS Township Pvt. Ltd. and Anr. –* *(2024) SCC OnLine Bom 1*

considered. The Court Receiver is already in symbolic possession of the property in question and the property is *custodia legis*. The Developer ought not to trample upon such property. The existence of a Court Receiver in Suit 1250 does not adversely impact the protection considered necessary to preserve the subject matter of the arbitration agreement. This has to be considered on its own merits.

18. It is seen that the Development Agreement was initially contracted in 2009 and updated in 2011. Till date there has been nothing constructed. Even the plans necessary for getting the basic commencement certificate have not been found to be compliant. Writ Petition No. 2952 of 2014 seeking a direction to have the plans approved has been rejected by a Learned Division Bench of this Court and such rejection has attained finality. The Developer is admittedly in arrears on the enhanced rentals contracted in 2011, and for over a decade, no payments have been made. There is no sign of redevelopment and therefore, the Developer, whose entitlements are those of a licensee for the purpose of the redevelopment under the Development Agreement, cannot squat on the property forever.

19. The contention of limitation also does not merit any traction – on the contrary, the Developer has not pursued any legal proceedings

seeking to protect itself from the decision of the Society to terminate the Development Agreement. The Society terminated the Development Agreement way back in 2016, and the Society (after coming out of administration) appointed a new developer in March 2024. Till date, there is no initiation of any proceedings by the Developer controverting or seeking protection against such moves of the Society. Indeed, it is the Developer's case that certain cheques issued by the Developer had been encashed by the members of the Society after the termination of 2016, but that would not turn the needle in the Developer's favour considering the overall scale and size of default in making contracted payments due to the Society and its members. In particular, considering that at this stage, the only objective is to preserve the subject matter of arbitration agreement (whose un-abandoned existence is demonstrated as articulated above), the Society needs to be protected against the Developer's continued occupation of the Society's property.

20. I have already held that it is not the Society that is prosecuting Suit 1250. It may just be mentioned that for holding that the arbitration agreement has been abandoned, one would need to examine evidence to return a finding. The facts of the case do not lend themselves to an inference that the Society has abandoned the arbitration agreement. Even when the very party to an arbitration agreement files a suit, Courts

have held that it need not be inexorably concluded that the arbitration agreement has been abandoned.

21. For instance, the Delhi High Court (*Sanjiv Khanna J* as he then was) dealt with a case where a suit had been filed after an application under Section 45 of the Act had been filed, and ruled that it would not constitute an abandonment of the arbitration agreement. The following extracts from ***Ministry of Sound***[3] are noteworthy:

> *19. <u>Long after filing of the present application, defendant Nos. 1 and 2 also filed a civil suit against the plaintiff on 3rd July, 2008.</u> The said Suit was with the following prayers:*
>
> *"(i) a decree of permanent injunction restraining the defendants, their directors, assignees, employees, servants, agents and all other persons action on their behalf from using in any way the trade mark i.e. Ministry of Sound and its logo and also be restrained from holding any events on 5th July, 2008 or in future under the brand name of Ministry of Sound or its logo;*
>
> *(ii) a decree of damages to the tune of Rs. 21 lacs for harm caused to the goodwill and reputation of the plaintiff may be passed in favour of the plaintiff and against the defendants;*
>
> *(iii) costs of the present proceedings be awarded to the plaintiff."*
>
> *20. <u>The said suit has been withdrawn by the defendants on 23rd October, 2008 stating, inter alia, that the matter between the parties is covered by arbitration clause. I do not think by filing the civil Suit, the</u>*

[3] *Ministry of Sound International Ltd. v. Indus Renaissance Partners Entertainment (P) Ltd. – <u>2009 SCC OnLine Del 11</u>*

> ***defendants 1 and 2 have abandoned or waived their rights under the arbitration clause***. *All along, defendant Nos. 1 and 2 had been pressing for the present application and had not abandoned the same,* ***though I find that the conduct of defendant Nos. 1 and 2 in filing the civil suit is rather peculiar and not in consonance with their stand in the present suit. Defendant Nos. 1 and 2 may be guilty of trying to take contradictory stand but they did not abandon or waive their right to have the disputes resolved by arbitration. Abandonment or acquiescence or waiver is not established.*** *Defendant Nos. 1 and 2 have all along pressed this application and have not given up their rights under the arbitration clause.*
>
> ***[Emphasis Supplied]***

22. The aforesaid reasoning resonates in my judgement, even while I should hasten to add that in the proceedings at hand, unlike in ***Ministry of Sound***, the Society did not even file the suit (only its members did). Therefore, abandonment of the arbitration agreement is not at all borne out.

23. The Society is entitled to move on and pursue development when its members have been out of their homes since October 2009. The Society has made a strong *prima facie* case in its favour. The land in question belongs to MHADA and the Society is a lessee of the land. Continued dispossession of its own leasehold property with no sign of

redevelopment on the part of the Developer would cause grave and irreparable injury to the Society.

24. The Developer has made claims in correspondence on why the redevelopment could not take off as planned. It would always be open to it to make out a case for damages, if any, that it has suffered, should it be able to attribute any cause of any damage suffered by it to the actions of the Society. On the other hand, it would be totally inconvenient to keep the Society out of its own property any further – its members already having to fend for themselves and also not get any mitigation in the form of receipt of amounts due and owing to them from the Developer. Therefore, the balance of convenience too is entirely in favour of the Society.

Directions and Order:

25. In these circumstances, in my opinion, the following order deserves to be passed, to remain in effect until the expiry of eight weeks from the date on which an Arbitral Tribunal is appointed in the matter:-

a) The Developer is hereby restrained and injuncted from creating any third party rights or encumbrances of any nature whatsoever over the Society's property, which is already in symbolic possession of the Court Receiver who was appointed in Suit 1250;

b) Within a period of four weeks from today, the Developer shall hand over to the Court Receiver, who is hereby appointed in disposal of this Petition, free and vacant physical possession of the property in question, more particularly described in the captioned Petition, which possession shall abide by such directions as the Arbitral Tribunal may issue when seized of arbitral proceedings;

c) The Developer shall also hand over the original documents, including all title documents, the original Development Agreement and attendant documentation such as the Power of Attorney, to the Court Receiver within a period of four weeks from today, and the Arbitral Tribunal shall be entitled to cause the release of such documents to the Society on such terms as the Arbitral Tribunal deems necessary;

d) The Society shall be free to pursue redevelopment without prejudice to the Developer's claims, if any, to damages, and the Developer shall not obstruct, pose any hindrance, communicate to any third party, regulatory authority or any other person whatsoever, holding himself out as the developer of the property; and

e) While this Petition shall stand disposed of, the Arbitral Tribunal shall treat this Petition and any supplemental pleadings and submissions that may be made by the Society as a composite application under Section 17 of the Act. The Developer may file his own Section 17 Application, if so advised, and the Arbitral Tribunal would deal with the same on merits.

26. With the aforesaid directions, this Petition is ***disposed of.***

27. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]