(2014) 12 BOM CK 0225

BOMBAY HIGH COURT

Case No: Notice of Motion No. 961 of 2013 in Suit No. 262 of 2012

Vaidehi Akash Housing Pvt. Ltd.		APPELLANT
	Vs	
New D.N. Nagar Co-op. Housing Society Union Ltd. and Others		RESPONDENT

Date of Decision: Dec. 1, 2014

Acts Referred:

- Maharashtra Co-operative Societies Act, 1960 - Section 78, 78(1), 79A, 9, 91 - Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 - Section 10, 2(c), 3, 4, 8

Citation: (2015) 3 ABR 270

Hon'ble Judges: S.C. Gupte, J.

Bench: Single Bench

Advocate: Anil Anturkar, Senior Advocate, R.S.C. Naidu i/b. Amol Joshi, Navroze Seervai, Senior Advocate i/b. R.S. Ghadge in NMS Virag Tulzapurkar, Senior Advocate, Nikhil Sakhardande, Simil Purohit, Dhawal Mehta, Denzil Arambhan, Anooja Menon, Vedangi Tulzapurkar i/b. Wadia Ghandy and Co. Rustomjee Realty Pvt. Ltd., Prakash Punjabi, Piyush Raheja, Mukesh Naynak i/b. R.V.J. Associates Siddharth Murarka, Ram Kotwal i/b. L.C.S.M., J.P. Sen, Senior Advocate, Sarosh Bharucha, Bhavna Singh i/b. Mulla and Mulla and Craigie Blunt and Caroe, Babita J. Malik i/b. Anil Agrawal, P.G. Lad, P. Kumar Jain i/b. Prakash Panjabi and Co., Yadunath Chaudhari, Rahul Chitnis, Prerna Lalchandani i/b. Omkar Kulkarni, Renuka Lele, Party-in-Person in NMS, Soma Singh, Chirag Shah i/b. J.J. Shah and Ashish Kamat i/b. Nitin Mulye, for the Respondent

Judgement

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S.C. Gupte, J.�These Notices of Motion, and the respective suits in which they have been taken out, concern the development of a large property in the suburb of Andheri in Mumbai. The property belongs to a co-operative society of residents and consists of 8 buildings housing nearly 480 families together with the appurtenant land. The chief contest is in respect of (i) the development rights claimed by two rival

developers in respect of this property, (ii) the rights of the original member residents occupying tenements within the property of being rehabilitated, and (iii) the respective rights of new purchasers with whom agreements have been entered into by the developers at various stages during the course of the development of the property. Each of these different stakeholders have filed their own suits or adopted proceedings, seeking inter alia interim reliefs concerning their respective rights. All these interlocutory applications are heard together. The main order, dealing with their respective submissions, is being passed in Notice of Motion No. 961 of 2013 in Suit No. 262 of 2012, filed by M/s. Vaidehi Akash Housing Pvt. Ltd. (the erstwhile developer, whose agreement has been terminated by the society), against the society, the new developer with whom the society has been dealing and some others. Based on the order, the other Motions are being disposed of. Short facts of the case:

1.1 The suit plot, bearing Survey No. 106 at New D.N. Nagar, Andheri (West), Mumbai 400058, admeasuring in the aggregate about 20, 218 sq. mtrs. is owned by MHADA. MHADA has erected 8 buildings of 3 wings each, each wing comprising of 20 tenements. The buildings in the suit plot thus contain 480 tenements, each admeasuring about 211.37 sq. ft. (carpet). The occupants of each building, i.e. 60 members each, have formed their respective co-operative societies, save and except building No. 4 (Sakalp Sagar), the occupants of each wing of which have organized and formed themselves into their own separate co-operative societies. There are, thus, in all 10 registered co-operative societies in respect of the 8 buildings on the suit plot. These 10 societies, in turn, have established an apex or federal society called "New D.N. Nagar Cooperative Housing Society Ltd.", who is Defendant No. 1 in the suit. (Defendant No. 1 is hereinafter referred to as the ''Federal Society'' or simply ''Society''.) MHADA has executed lease deeds in favour of the 10 societies in respect of the respective plots and sale deeds in respect of the respective buildings. In or about July, 2005, the 10 societies amalgamated with the Federal Society, who now claims to be the lessee of the suit plot and owner of the 8 buildings therein.

1.2 The buildings have become dilapidated and are beyond repairs (though some of the resident members contest this position). The suit plot, however, has a development potential. Under DCR 33(5) of the Development Control Regulations for Greater Mumbai, applicable to low cost housing under schemes devised by MHADA, the development, earlier permissible up to 1.2 FSI, now can consume up to 2.5 FSI on the gross plot area.

1.3 The Society was desirous of exploiting this development potential and reconstructing new buildings to house the existing member occupants and also providing for allotment of free sale areas to new flat purchasers. In 2005, the Society discussed various redevelopment proposals. In April, 2005, bids/offers were invited in sealed covers for redevelopment of the suit property. Various developers including the Plaintiff submitted their bids. (The Plaintiff, Vaidehi Akash Housing Pvt.

Ltd., is hereinafter referred to as ''Vaidehi''.)

1.4 On 7 August, 2005, Vaidehi''s bid was accepted by the Society. On 31 December, 2005, a development agreement was executed between the individual societies, the Federal society (Defendant No. 1) and Vaidehi. (For convenience of reference, this agreement will hereinafter be referred to as the ''Society Development Agreement''). This agreement envisaged redevelopment of the suit plot by utilizing the plot FSI together with TDR FSI (i.e. FSI available by virtue of transfer of development rights permissible under the relevant DCR) and additional FSI permissible for redevelopment under DCR 33(5). Under the agreement, the members of the Society were each to be given a flat admeasuring 540 sq. ft. plus 100 sq. ft. (non FSI area) as permanent alternative accommodation free of cost. In addition, Vaidehi agreed to give corpus fund, deposit for transit accommodation rent, shifting expenses etc. to the Society and its members.

1.5 On or about 16 January, 2006, a proposal for redevelopment of the suit property by utilizing 2.5 FSI was submitted by Vaidehi (through the Project Management Consultant) to MHADA. On 28 February, 2006, a letter of acceptance was issued by MHADA, directing inter aha payment of Rs. 9 crores as a premium. On 16 May, 2006, this premium was paid by Vaidehi. On 1 July, 2006, MHADA granted its permission for construction of built up area of 48524.76 sq. mtrs. on the suit property (on the basis of 2.4 FSI). This built up area had a rehab component of 12523.12 sq. mtrs. (i.e. residential area for rehousing the members of Defendant No. 1) and 36001.64 sq. mtrs. of free sale component (i.e. 10114.70 sq. mtrs. of commercial area and 25886.94 sq. mtrs. of residential area, for sale to third party purchasers). On 17 July, 2006, plans submitted by Vaidehi to the Municipal Corporation were sanctioned and an IOD was issued for construction up to 1.2 FSI.

1.6 According to Vaidehi, the redevelopment project, however, could not proceed further as proposed, because of several impediments including refusal of the Municipal Corporation to issue an IOD beyond 1.2 FSI due to the CRZ notification, restriction of the area to be allotted to each member towards the Rehab component under the amended DCR, cases filed by members in Court, etc. In between, there was an enormous increase in the cost of the project. In the premises, Vaidehi decided to involve investors and other developers to finance the project.

1.7 On or about 4 April, 2007, Vaidehi entered into an agreement with Defendant No. 2 (i.e. Rustomjee Realty Pvt. Ltd., hereinafter referred to as ''Rustomjee'') agreeing to assign the rights to exploit the FSI of about 2,53,500 sq. ft. to the latter from out of the total FSI of 5,22,320.52 sq. ft. (equivalent to 48524.76 sq. mtrs.) available on the suit plot at or for an agreed consideration of Rs. 112 crores. The balance F.S.I. of 2,68,820.52 sq. ft. was retained by Vaidehi for construction of the rehab portion to be allotted to the members of the Society. (For convenience of reference, this agreement will hereinafter be referred to as the ''Rustomjee Agreement''.) Under this agreement, Rustomjee agreed to construct and allot a

saleable area of 57,050 sq. ft. carpet to Vaidehi, comprising of 20000 sq. ft. of commercial area and 37,050 sq. ft. of residential area.

1.8 On or about 28 March, 2008, Vaidehi commenced construction of rehab buildings on the suit property for rehousing the members of the Society. Vaidehi claims to have demolished all 8 buildings and constructed 6 rehab buildings of ground and four floors and 2 rehab buildings upto plinth, between March, 2008 and January, 2010. It is Vaidehi''s case that Vaidehi incurred aggregate costs of over Rs. 200 crores towards the project.

1.9 On or about 17 January, 2010, a Special General Body resolution was passed by the members empowering the Society to execute a confirmation agreement and a supplementary agreement with Rustomjee. In pursuance of this resolution a tripartite confirmation agreement was executed between Vaidehi, Society and Rustomjee on 3 February, 2010 confirming inter alia the terms and conditions of the Rustomjee Agreement. Further to this confirmation agreement, on 9 February, 2010 Vaidehi executed a writing in favour of Rustomjee that Vaidehi was not interested in any additional F.S.I. that may become available in respect of the suit plot in future and that the same could be exploited by Rustomjee, under the Rustomjee Agreement as confirmed by the Society.

1.10 On or about 10 February, 2010, a Tripartite Supplementary Agreement was executed between Vaidehi, Society and Rustomjee, by which the Society granted unto Rustomjee the right and entitlement to exploit full development potential of the suit plot by utilization of such FSI and/or TDR as may be permissible in law, i.e. without any restriction of 2.4 FSI. The agreement inter alia provided for payment of consideration of Rs. 5500 per sq. ft. of FSI in excess of 2.4 FSI in the manner stipulated therein.

1.11 Soon after the execution of these agreements, disputes arose between the parties which were followed by separate notices published in newspapers by Rustomjee, Vaidehi and some of the members of the Managing Committee of the Society asserting their respective rights and affirming or questioning the agreements referred to above, as the case may be. Correspondence also ensued between their respective advocates.

1.12 On or about 16 April, 2010, the Society terminated the Society Development Agreement with Vaidehi, after purportedly passing a Managing Committee resolution in that behalf.

1.13 Pursuant to a Notice of Special General Body of the Society dated 17 April, 2010 called for the purpose, a Special General Body resolution was passed on 25 April, 2010 ratifying and confirming the termination of the Society Development Agreement with Vaidehi. (This resolution is one of the subject matters of contest between the parties and will be discussed later.)

1.14 On or about 29 January, 2011, an agreement was executed between the Society and Rustomjee providing for construction of the rehab portion at the cost of Rustomjee. The agreement inter alia provided for sale of 57,050 sq. ft. of F.S.I. by Rustomjee in the market and reimbursement of its costs for construction of the rehab portion from out of the sale proceeds by Rustomjee.

1.15 Rustomjee was thus seized of the construction of both the free sale portion and the rehab portion of the redevelopment project. Rustomjee claims to have paid a sum of Rs. 70 crores to/under the instructions of Vaidehi and further incurred a sum of Rs. 47.94 crores towards obtaining approvals and permissions for and construction of the rehabilitation buildings for rehousing the 480 members of the Society. Rustomjee also claims to have spent for temporary alternative accommodation of the 480 families. Rustomjee claims to have expended more than Rs. 160 crores towards all these costs. It claims to be incurring an expense of Rs. 8.64 crores per annum as and by way of rent for the temporary alternative accommodation of the 480 families.

2. Proceedings between the parties under the Co-operative Societies Act and some of the orders passed, which are relevant in the context of these Notices of Motion:

2.1 Proceedings were initiated against the Society and its Managing Committee under Section 78(1) of the Maharashtra Co-operative Societies Act, 1960 and other provisions. The earlier Managing Committee of the Society was superseded and an administrator was appointed. The matter was carried in appeal and revision. Finally, by an order dated 23 June, 2008 passed in a writ petition, Writ Petition No. 1570 of 2008, the then Managing Committee was allowed to continue and manage only the day to day and routine affairs of the Society subject to certain directions. These directions included (i) convening of a general body of the Society, (ii) framing and passing of new bye-laws and adoption of Model Bye-laws including election rules, and (iii) initiation of a fresh election process after approval of these bye-laws. All contentions of the parties concerning the redevelopment were kept open.

2.2 The process of new elections in pursuance of the directions referred to above was duly completed during the pendency of the above mentioned Writ Petition and the newly elected Managing Committee of the Society was duly constituted. By his order dated 11 November, 2008, a Learned single Judge of this Court accordingly permitted the Petitioners to withdraw the Writ Petition, observing inter alia that once the election has been duly conducted and the newly elected Managing Committee duly constituted, the order passed by the appropriate authority under Section 78 of the Act stood worked out by itself.

2.3 The order of the Learned single Judge dated 11 November, 2008 was carried in appeal before a Division Bench of this Court. By its order dated 7 September, 2009, the Appellate Bench set aside the order and remitted the petition back to the Learned single Judge for de novo consideration and decision in accordance with law.

The Appellate Court inter alia observed whilst setting aside the order that if the interim order, pursuant to which the elections were held by the Managing Committee (which was removed from office by the order impugned in the petition), is not confirmed at the final hearing and the petition is (simply) withdrawn, then the order passed under Section 78 of the Act removing the Managing Committee would remain in the field and may render the election held in the interregnum invalid. The Court held that the learned single Judge should have, if the Petitioners wanted to withdraw the petition, either vacated the interim order or should have made an appropriate order in relation to the interim order. It was in the light of these observations that the order was set aside and a fresh decision was directed to be taken in accordance with the said observations.

2.4 Finally by consent of the parties, the Writ Petition was disposed of on 13 October, 2010 by directing the Deputy Registrar of Cooperative Societies, MHADA, to appoint an administrator to hold elections for the Managing Committee of the Society and the existing Managing Committee to hand over the charge to the new Managing Committee upon it being so elected. This Court further directed by consent of the parties that the impugned orders of the Co-operative Authorities under Section 78(1) and other provisions of the Act would not survive in view of the order passed on the Writ Petition.

3. Contentions of the Plaintiff (''Vaidehi''):

3.1 Having noted the brief facts and relevant orders of Courts in the proceedings under the Co-operative Societies Act, Vaidehi''s submissions in the Notice of Motion may now be noted briefly. In his opening address, Mr. Anturkar, learned Senior Counsel appearing for Vaidehi, only made the following submissions:

(i) The actions of the Society in terminating the Society Development Agreement with Vaidehi and executing confirmation and supplementary agreements with Rustomjee, were in violation of the orders of the Court noted above;

(ii) The termination of the Society Development Agreement was without the authority of law, since there was neither a resolution of the Managing Committee nor of the General Body of the Society authorizing such termination;

(iii) Vaidehi was entitled to specific performance of the Society Development Agreement, particularly having regard to the fact that Vaidehi as a promoter under the Maharashtra Ownership Flats Act ("MOFA") had entered into agreements for sale of flats with third party flat purchasers, who had no privities with the new developer, Rustomjee, and who could look to Vaidehi alone for compliance of their respective agreements as well as of the provisions of MOFA.

3.2 Of course, in his rejoinder, Vaidehi''s Counsel advanced submissions in detail on various other aspects of the matter, particularly dealing with the submissions of the Defendants. These will be considered in the order below in the context of the

Defendants'' submissions.

4. Submissions of Defendant No. 1 (''Society''):

4.1 The principal submissions advanced by Mr. Seervai, learned Senior Counsel appearing for the Society, were these:

(i) Vaidehi has not made out any prima facie case of its readiness and willingness to perform its obligations under the Society Development Agreement.

(ii) Various breaches of the Society Development Agreement by Vaidehi were pointed out by the Society. (These will be taken up and discussed in the light of the answers by Vaidehi in the order below.)

(iii) The termination of the Society Development Agreement by the Society was legal and proper.

(iv) The considerations of balance of convenience and irreparable injury were against Vaidehi and in favour of the Society.

4.2 In addition to these submissions, which were specifically advanced against the Plaintiff''s case, the learned Counsel for the Society made detailed submissions in connection with the cases set up by the various categories of third parties as well as members of the Society opposing the redevelopment of the suit plot through Rustomjee. These will be discussed later in this order.

5. Submissions of Defendant No. 2 (''Rustomjee''):

5.1 Principal submissions of Mr. Tulzapurkar, learned Senior Counsel appearing for Rustomjee, were these:

(i) Vaidehi committed several breaches of the Society Development Agreement and was not entitled to specific performance of that agreement. (The breaches are dealt with in the order below.)

(ii) Rustomjee duly performed all its obligations under the Rustomjee Agreement, but Vaidehi failed to perform its obligations thereunder.

(iii) Rustomjee is entitled to develop the free sale component by virtue of the Rustomjee Agreement as confirmed by the confirmation Agreement (to which all three, namely, Vaidehi, the Society and Rustomjee, were parties).

(iv) The considerations of balance of convenience/irreparable injury were clearly in favour of Rustomjee and the Society.

5.2 Rustomjee''s Counsel also made submissions on the respective case set up by the third party purchasers and the disgruntled members opposing the redevelopment. These will be separately discussed below.

6. Submissions of some of the members of the Society opposing the present Redevelopment Scheme:

6.1 Some of the members of the Society have filed their own suit, Suit No. 674 of 2013. They have been joined in the suit by some ''occupiers'' of tenements in the Society''s buildings, who have also surrendered their respective flats (occupied by them) by entering into individual agreements with Vaidehi for permanent alternative accommodations. These Plaintiffs basically challenge the various notices of General Body Meetings, Resolutions passed therein and agreements entered into with Rustomjee on the basis thereof as well as the NOC of MHADA to redevelopment by Rustomjee and the IOD and CC issued by the Municipal Corporation to the redevelopment. In other words, every aspect of the redevelopment scheme being implemented by Rustomjee is challenged as illegal, null and void.

6.2 The jurisdiction of this Court, having regard to the reliefs sought in these Plaintiffs'' suit, is challenged by both the Society and Rustomjee. These preliminary objections are dealt with by learned Counsel for these members/occupiers. It is submitted that the challenge to the resolutions of a cooperative society and redevelopment agreements executed in pursuance thereof fell very much within the jurisdiction of the Civil Court.

6.3 Learned Counsel for the members/occupiers relied on several provisions of the Cooperative Societies Act and the circular issued by the State Government under Section 79A of the Act as also the bye-laws of the Society and submitted that actions taken on the basis thereof were contrary to these provisions/directions/bye-laws etc. and thus, illegal. Learned Counsel also argued that the directions/actions were in breach of the provisions of DCR 33(5) applicable in this case. Learned Counsel also contended that there was non compliance by the Society and Rustomjee with the offer letter of MHADA as well as the booklet and directives of MHADA. Learned Counsel also relied on certain provisions of the Society Development Agreement, in particular Clause 52 thereof and contended that the agreement did not permit sale of F.S.I. above 2.4 to any third party and that even otherwise, the Rustomjee Agreement was bad in law and unenforceable. Learned Counsel also contended that the Confirmation Agreement of 3 February, 2010 and the Supplementary Agreement of 10 February, 2010 were illegal, null and void. Learned Counsel produced several charts to claim that the use of various components of the FSI proposed by Rustomjee was illegal and unauthorized. It is submitted that certain FSI generated on roads/public amenities/open spaces in the layout belongs to members of the society in their individual capacity as the owners/occupiers of their respective tenements; that FSI is not available to the society and through it to Rustomjee on the suit property. It is submitted that Rustomjee is liable to pay for the use of the pro-rata/additional FSI and fungible FSI thereon on the suit property. It is submitted that there have been several illegal and unjustified changes in the areas of rehab portion/plot and the free sale portion/plot in various documents/agreements

rendering the same illegal and void. A large scale usurpation of areas and violation of FSI norms by Rustomjee are claimed so far as the redevelopment project is concerned. These concern the loading factor to arrive at the built up area, the fungible FSI usable in the project, parking spaces etc.

7. Submissions of various sets of flat purchasers who claim to have purchased premises in the proposed free sale buildings from Vaidehi:

7.1 Various flat purchasers have either filed their own suits or have intervened in the different suits and have been claiming diverse reliefs against Vaidehi, the Society and Rustomjee. These purchasers claim through Vaidehi under diverse agreements/arrangements entered into with the latter. There are purchasers who hold (i) allotment letters issued by Vaidehi, (ii) unregistered agreements and receipts for payment towards them issued by Vaidehi, (iii) registered agreements and allotment letters, (iv) registered agreements and (v) unregistered agreements with Vaidehi, for different premises in the buildings to be constructed as part of the redevelopment project and available as free sale component of the project.

7.2 Counsel appearing for different sets of these purchasers/allottees have made diverse submissions. Broadly it is contended that many of these purchasers/allottees have entered into agreements with Vaidehi during the period Vaidehi was entitled to enter into agreements for sale with third parties for the free sale component of the redevelopment project under the Society Development Agreement and the latter agreement was very much valid and subsisting. It is submitted that these agreements/allotments are binding on both Vaidehi and the Society in terms of the Society Development Agreement as well as the provisions of MOFA. It is submitted that the Rustomjee Agreement inasmuch as the same is in breach of the provisions of the Society Development Agreement and MOFA is illegal, null and void. The purchasers/allottees also contend that the termination of the Society Development Agreement by the Society was unlawful and at any rate, could not affect the rights of the third party purchasers/allottees. It is submitted that the Society is also a co-promoter of the redevelopment project and a ''promoter'' within the meaning of MOFA and even if the Society Development Agreement is validity terminated, the Society is bound to fulfill its responsibility as a promoter towards the purchasers/allottees and cannot enter into any agreement with Rustomjee contrary to its obligations towards the purchasers/allottees.

8. These contentions of various stakeholders are considered below under particular topics relevant for their respective cases.

9. Breaches of the Society Development Agreement by Vaidehi:

9.1 Under the Society Development Agreement, it was the obligation of Vaidehi to utilize the FSI of the suit property as well as the FSI of MHADA layout area by utilizing TDR/FSI/MHADA FSI and construct a new building consisting of ground podium/stilt 1 and 2 parking and 2 to 17 upper floors. The total FSI to be utilized for

redevelopment was reckoned at 5,27,696.23 sq. ft. An area of about 2,59,250 sq. ft. carpet (FSI area) and 48, 000 sq. ft. in the form of niches, flower beds, dry balconies, etc. (non - FSI area) was to be constructed and provided by Vaidehi free of all costs to the Society for rehousing of its members. Each individual member was to get one flat of 540 sq. ft. carpet area comprising of two bedrooms, hall, kitchen with two baths/toilets plus 100 sq. ft. of dry balcony, flower bed area etc. The entire construction was to be completed and possession of flats to be handed over not later than 36 months from the date of the execution of the Society Development Agreement. None of these commitments has been fulfilled by Vaidehi. Non-completion of the construction of rehab building is sought to be explained by Vaidehi on various grounds. Vaidehi claims to have constructed 6 rehab buildings upto 4 floors and 2 rehab buildings upto plinth from out of 8 wings of stilt & 1 to 5 upper floors in accordance with the plans got sanctioned by Vaidehi from the Municipal Corporation for the rehab portion. It is submitted by learned Counsel for Vaidehi that one of the reasons for non-completion was that the Society itself could not fulfill its obligations under the Society Development Agreement. For example, there was delay in starting construction due to all members of the Society not handing over their respective tenements in time. Then there were consumer complaints by some members; there was some difficulty with the then existing rules of MHADA relating to tenements to be allotted to the members/occupants; there was cancellation of NOC by MHADA; even Municipal Corporation issued a stop work notice; and finally, though the construction was made as per IOD (except for building No. 4C), the construction was illegally demolished by the Society and Rustomjee.

9.2 It is a matter of fact that all 8 buildings of the Society have been demolished. Vaidehi was bound to construct the rehab building in accordance with the sanctioned plans. The MHADA related and CRZ issues had to be handled by Vaidehi. It could not hold the Society responsible for these impediments. There is no substance in Vaidehi''s submissions regarding MHADA area restriction. There was no impediment in granting additional area to the members/occupiers. Vaidehi had to take effective steps to deal with CRZ issues, as was successfully done by Rustomjee in its turn. Even otherwise, Vaidehi has not explained why Vaidehi could not construct upto 1.2 FSI, which was admittedly permissible. The commencement certificate granted by MCGM was admittedly upto plinth for building No. 2 and yet the building was constructed for three levels above the plinth. The stop work notice issued by MCGM was, therefore, in order and Vaidehi alone was responsible for the same. (The stop work notice was never disputed or challenged by Vaidehi.) It is claimed by Counsel for Vaidehi that Vaidehi could have applied for regularization of the illegal construction and there was no need or imperative for the Society to demolish the construction. Any construction carried out beyond approvals or sanctions and in violation of law, is very much a breach of both contract (which required the construction to be in accordance with sanctioned plans) and law, and

when such breach is alleged it is no answer that there could have been a regularization of such illegal construction. Besides, regularization, if any, would be a matter of discretion for the planning authority and could not be claimed as of right. Secondly, admittedly no steps were taken for regularization; so the matter is, at any rate, at worst merely academic and at best speculative.

9.3 Vaidehi, in consideration of the Society allowing it to exploit the free sale component of the redevelopment project, agreed to pay each of the members/flat owners/occupiers a sum of Rs. 1 lakh by way of an interest free refundable security deposit and also a sum of Rs. 8500/- per month in advance by postdated cheques to be deposited with the Society''s Solicitors. Vaidehi also agreed that in the event, the construction of the rehabilitation component was delayed beyond a period of 18 months, Vaidehi would continue to pay the said sum of Rs. 8500/- per month upto the period of 21 months plus a grace period of three months and thereafter pay penalty of Rs. 500/- per day per flat to all the members/flat owners/occupiers. In addition to these amounts, Vaidehi also agreed to pay a corpus fund of Rs. 5,27,983 per flat/member in stipulated installments. Vaidehi also agreed to furnish a bank guarantee as specified in the bid document. In terms of the stipulations of the Society Development Agreement, the bank guarantee, which was originally stipulated to be for an amount of Rs. 32 crores, was subsequently reduced to Rs. 10 crores by the parties. Vaidehi has not complied with its obligations in this behalf. Though there have been several instances of delayed payments of rent and instances of cheque bouncing in respect of these payments, it is claimed by learned Counsel for Vaidehi that the entire liability of rent for alternative temporary accommodation has been discharged by Vaidehi. Learned Counsel for Vaidehi submitted that between June, 2006 and March, 2010, Vaidehi paid a total sum of Rs. 22.20 crores, which was due and payable towards the rent. Vaidehi has not paid the corpus fund. Vaidehi has not furnished any bank guarantee to the Society. The explanation of Vaidehi that under the General Body resolution of 23 November, 2008, the Society had agreed to take the bank guarantee from Vaidehi after a certificate from Fire Brigade and related documents in connection with Building Nos. 4B and C were available and resolution of Consumer Dispute Nos. 370 and 371 of 2007 pending before the Bandra Consumer Forum and execution of agreements with all members, does not explain non-furnishing of bank guarantee at any time till 16 April, 2010. Admittedly, the possession of all the existing buildings of the Society was handed over to Vaidehi for demolition and the buildings were in fact demolished and work had started on all rehab buildings and yet no bank guarantee were ever furnished.

9.4 In the premises, it must be held that Vaidehi has prima facie committed breaches of the Society Development Agreement. Two consequences would follow from such breaches. One, the society would be entitled to terminate the Agreement and two, Vaidehi could not be said to be ready and willing to perform its obligations under the Agreement.

10. Legality of the termination of the Society Development Agreement by the Society:

10.1 As observed above, the Society was clearly within its rights to terminate the Agreement on account of breaches by Vaidehi. But it is the case of Vaidehi that the termination was not legal or proper. Two reasons are cited in support. Firstly, it is contended that the Managing Committee of the Society was not within its rights to take such a decision by reason of restrictions on its powers placed under the orders of this Court passed in Writ Petition No. 1570 of 2008. Secondly, it is submitted that there is no authority for such action, since it is not backed by any valid resolution of either the Managing Committee or the General Body of the Society. These objections may now be considered.

10.2 In support of his contention that the action of the Managing Committee is in breach of the orders of this Court, learned Counsel of Vaidehi mainly relied on the order dated 23 June, 2008 passed in Writ Petition No. 1570 of 2008. The argument is that the Managing Committee (which was dissolved by the order impugned in the writ petition) was allowed to continue and manage only the day to day and routine affairs (subject to directions noted in the order) and a decision to terminate the Society Development agreement cannot be a matter of day to day or routine management.

10.3 The order of 23 June, 2008 was clearly an interim measure and was to operate pending appointment of a new Managing Committee, which was proposed to be constituted after fresh elections were held in accordance with the directions of this Court in that order itself. The decision to terminate the Society Development agreement was taken by the new Managing Committee which came into existence after the elections were held. It is futile to contend that the restrictions applicable to the earlier Managing Committee operating under the interim measure ordered by this Court were also applicable to the new Managing Committee, which came into being after the bye-laws were amended and elections were duly held for the constitution of the Committee thereafter.

10.4 Counsel for Vaidehi, however, contended that the interim order dated 23 June, 2008 stood revived when the disposal of the writ petition by order dated 11 November, 2008 was set aside by the Division Bench of this Court by its order dated 7 September, 2009. Learned Counsel relied upon the order of this Court dated 27 January, 2012 passed in contempt proceedings arising out of Writ Petition No. 1570 of 2008, to support his contention. The observation of this Court in its order dated 27 January, 2012 in the contempt proceedings about the revival of the order of 23 June, 2008 post the Division Bench order of 7 September, 2009, was in an altogether different context. In the contempt proceedings, the Deputy Registrar of Co-operative Societies insisted upon the assets, records and property being handed over to the Administrator after the passing of the Division Bench order of 7 September, 2009. This Court held in its order of 27 January, 2012 that this was not

necessary since the setting aside of the disposal order revived the writ petition and along with it the interim orders operating till its disposal. The point I have noted above is that under the very interim order of 23 June, 2008, the powers of the new Managing Committee appointed after duly holding elections were not subject to any restrictions (which were applicable to the earlier Managing Committee). If that is so, revival of that order is neither here nor there so far as the powers of the new Managing Committee are concerned.

10.5 Besides, having regard to the scope of the dispute between the parties in the writ petition and the reliefs claimed therein, it is quite clear that the writ petition did not concern the controversy between the society and Vaidehi, and it cannot possibly be suggested that the interim order of 23 June, 2008 had anything to do with the Society Development Agreement and its continuation or termination by the society.

10.6 In that view of the matter, there is no substance in Vaidehi''s contention that the orders of this Court barred the Managing Committee of the society from taking the decision of termination.

11. It is contended next by the learned Counsel for Vaidehi that there is no valid resolution of either the General Body or the Managing Committee of the Society regarding the termination of the Society Development Agreement and in the absence of such resolution/s the action of termination of the Agreement is illegal, null and void. Vaidehi also challenges the execution of the Confirmation and Supplementary Agreements by the Society in favour of Rustomjee for want of such authority.

11.1 The contention of Vaidehi in this behalf is also supplemented by the Plaintiffs in Suit No. 674 of 2013, who, as noted above, are some of the members/occupiers of tenements. These Plaintiffs inter alia challenge the various resolutions purportedly passed by the General Body of the Society in that behalf on various grounds. It is submitted that the notices dated 2 January, 2010, 17 April, 2010 and 1 January, 2011 of Special General Body Meetings were bad in law; they were without any specific or clear agenda. It is submitted that the Special General Body Meetings held in pursuance of these notices were also in breach of the State Government directive of 3 January, 2009 and also bye-law Nos. 97 and 99 of the Society. It is submitted that the Managing Committee of the Society did not disclose various material documents and facts and circumstances to the members in those notices or SGMs, thereby vitiating the whole process. It is submitted that the actions of the Society in pursuance of these notices and SGMs are illegal, null and void.

11.2 All these contentions are being considered under the present topic, since they together reflect on the Society''s authority to terminate the Society Development Agreement and also to execute the Confirmation and Supplementary Agreements in favour of Rustomjee.

11.3 At the outset, it must be noted that prima facie there is material on record to show that there was a resolution passed by the Managing Committee on 22 March, 2010 to terminate the Society Development Agreement. This resolution has been referred to by the Society in its affidavit in reply filed in Notice of Motion No. 216 of 2010 in Writ Petition No. 1570 of 2008. The resolution has also been referred to by the Society''s Advocate in his letter of termination addressed to Vaidehi. Secondly, the Managing Committee''s resolution and its action of termination of the Society Development Agreement in pursuance thereof have been ratified by the society in its Special General Body meeting held on 25 April, 2010. This Special General Body meeting was called by a notice dated 17 April, 2010 which had a specific agenda, namely, "to confirm the decision taken by the Managing committee to terminate the agreement entered into with the developer, Vaidehi Akash Housing Ltd." The General Body considered this item and confirmed the decision in its meeting of 25 April, 2010.

11.4 The General Body resolution has, however, been faulted on several grounds by Vaidehi and the Plaintiffs in Suit No. 674 of 2013. These may now be considered.

11.5 At the outset the society and Rustomjee question the maintainability of Suit No. 674 of 2013. It is submitted that challenge to the resolution of the society at the instance of individual members cannot lie before a Civil Court, since it is squarely covered by Section 91 of the Maharashtra Co-operative Societies Act and lies before the special forum created under that Act. In view, however, of the fact that this suit and the relief claimed therein involve third parties and go much beyond the jurisdiction of the special forum created under Section 91 of the Act, I have thought it fit to delve into the merits of these objections rather than throw the Plaintiffs out at the threshold on a plea of jurisdiction. Besides, the pleas raised, really speaking, reflect on the authority and power of the Court to grant some of the reliefs claimed in the suit rather than maintainability of the suit as a whole. Secondly, these pleas are also to some extent common to Vaidehi''s suit, which in any event have to be determined prima facie at this interim stage. In that view of the matter, we may proceed to consider the prima facie merits of the respective cases in this behalf.

11.6 The Plaintiffs in Suit No. 674 of 2013 challenge the decision in the SGM of 25 April, 2010 on several grounds. Firstly, it is claimed that Bye-law No. 97 and 99 of the Bye-laws of the Society require a requisition of at least 1/5th of the members of the society for an SGM and that there was no such requisition for this SGM. Secondly, it is claimed that Bye-law No. 100 requires a notice of 5 clear days for an SGM. Prima facie a meeting of Special General Body called to transact a special business by a Managing Committee of a Society cannot be faulted on the ground of want of a requisition. Merely because an SGM can be called on such a requisition does not imply that no SGM can be called otherwise that on such a requisition. The notice issued on 17 April, 2010 of SGM of 25 April, 2010 prima facie fulfills the requirement of 5 clear days'' notice. The judgments cited in this behalf by the Plaintiffs in M.I.

Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others, , Kedar Shivkumar Kale Vs. Digamber Shridhar Mhapsekar and Others, , Kaye v. Croydon Tranmways Company 1898 Chancery Division 358, Baillie v. Oriental Telephone & Electric Co. Ltd. 1915 Chancery Division 508 and Narayanlal Bansilal v. The Maneckji Petit Mfg. Co. Ltd. (1981) Bombay Law Reporter Vol. XXXIII 556 do not help the Plaintiffs in the facts of this case. In M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others, , the Court was concerned with the case of a meeting held by a Municipal Corporation governed by U.P. Municipal Corporation Act, 1959. In that case, in breach of the statutory requirement of a clear notice of the agenda, no agenda was notified for the consideration of the members of the Executive Committee in the notice of the meeting. In our case, not only was the notice issued in time, but the agenda stated in it included the specific resolutions proposed, namely, ratification of cancellation of the Society Development Agreement by the Managing Committee and taking a decision on the subject of redevelopment of the society''s property. In Kedar Shivkumar Kale Vs. Digamber Shridhar Mhapsekar and Others, , the Court was concerned with the case of removal of a chairman of a trust without following due procedure and in contravention of the principles of natural justice. The notice of the meeting did not contain any item of business concerning removal of the chairman or appointment of a new chairman. The cases of Kaye v. Croydon Transways Co. (supra) and Baillie v. Oriental Telephone & Electric Co. (supra) also dealt with sufficiency of a notice of a meeting, having regard to the general nature of the business proposed, not disclosing the special business actually transacted, and are clearly distinguishable. Even in Narayanlal Bansilal v. The Maneckji Patil Mills Ltd. (supra), there were material changes proposed in the Articles, of which the shareholders were not given any notice, and in fact the circular sent in that behalf was misleading. That decision has no bearing on our facts. Prima facie having regard to the peculiar facts of our case, some of which are noted below, the notice of 17 April, 2010 cannot be said to be vague or suffering from non-disclosure of important events or documents. For the selfsame reasons challenge to other meetings of the Society in connection with the redevelopment through Rustomjee, on the ground breach of bye-laws, has no force. All these meetings had been convened after adequate notice of the business to be transacted at the meetings; the Managing Committee had the requisite authority to convene these meetings.

11.7 It was next contended that the notice dated 17 April, 2010 and the SGM of 25 April, 2010 were illegal and void by reason of being in breach or violation of the State Government directive issued on 3 January, 2009 under Section 79A of the Co-operative Societies Act. This argument really concerns the appointment of the new developers, namely, Rustomjee and not so much the cancellation of the Society Development Agreement. The armament of the charge is that after termination of the Society Development Agreement on 16 April, 2010, there was no developer on record, and therefore, for taking decisions on the redevelopment scheme, which was nowhere near completion, the society had to follow the Government directive of

3 January, 2009. This argument is commonly advanced to challenge not only the resolutions passed in the meeting of 25 April, 2010, but even other meetings held by the Society in connection with the redevelopment of the suit property by Rustomjee.

11.8 It is submitted that there was no proper quorum for these meetings. For example it is submitted that the quorum required was 3/4 or 75 % of the total number of members (i.e. 360 in the present case) under the directive of 3 January, 2009, whereas only 231, 320 and 313 members attended the SGMs of 17 January, 2010, 25 April, 2010 and 9 January, 2011, respectively. In the first place, prima facie in the present case we are not concerned with a redevelopment process initiated after 3 January, 2009. The redevelopment process was already initiated in 2005 and an agreement was arrived at with the developer, Vaidehi, on 31 December, 1995. Further that developer, i.e. Vaidehi, had already entered into the Rustomjee Agreement with Rustomjee on 4 April, 2007. On 17 January, 2010, 25 April, 2010 and 9 January, 2011 the Society was considering transactions with Rustomjee in confirmation or supplementation of the Rustomjee Agreement. MHADA had approved FSI of 2.5 on 23 April, 2010. A supplementary agreement of 10 February, 2010 was already executed by the Society with Rustomjee for FSI over 2.4 by way of a tripartite agreement between Vaidehi, Society and Rustomjee, after executing a tripartite confirmation of the Rustomjee Agreement on 3 February, 2010. In the light of these facts, the reconstruction of the Society''s building, i.e. the rehab portion, had to be accomplished in co-operation with Rustomjee and financed from the monies available from exploitation of the additional FSI. The meeting of 17 January, 2010 gave authority to the Managing Committee of the Society to go ahead with supplementary and confirmatory agreements with Rustomjee. The meeting of 25 April, 2010 passed suitable resolutions for ratifying the termination of the Society Development Agreement and take suitable steps in connection with redevelopment through Rustomjee. The meeting of 9 January, 2011 passed a resolution to propose a draft agreement with Rustomjee after inputs from the society''s consultants. These resolutions do not in any way fall foul of the Government directive of 3 January, 2009. Besides, it is clear from the records of the case and the respective stands adopted by the various stakeholders in this Court that more than 75 % members of the society are standing by the Rustomjee Agreement, the Confirmation and Supplementary Agreements as also the Agreement between the Society and Rustomjee executed on 29 January, 2011. It is not possible or in the interest of justice to now unsettle the apple-cart on the ground of technical pleas such as this, when not only is there a serious doubt as to the applicability of the 3 January, 2009 directive but there is a broad and substantial compliance with its purpose.

11.9 After all, the purpose of the directive is to ensure transparency and adequate support to the redevelopment project on the part of the members. The procedure adopted by the Society was transparent and bona fide in light of the circumstances it found itself in. There is an overwhelming support of a large majority of its members to the resolutions adopted by the society in duly convened meetings. This

majority of members (which incidentally accounts for more than 3/4th of the members) even today stands by these resolutions. Besides, several irreversible steps have been taken by the various stakeholders in pursuance of these resolutions.

11.10 The SGMs of 17 January, 2010, 25 April, 2010 and 9 January, 2011 and the decisions taken therein as also the actions following such decisions cannot be, thus, faulted on the ground of breach of bye-laws or Government directive of 3 January, 2009. The question of the alleged breach of court orders in this behalf has already been dealt with above and answered prima facie in favour of the Society and Rustomjee.

12. Challenge to the agreement dated 4 April, 2007 between Vaidehi and Rustomee ("Rustomjee Agreement"):

12.1 Plaintiffs in Suit No. 674 of 2013 claim that the Rustomjee Agreement is illegal, null and void. They mainly rely upon some of the clauses of the Society Development Agreement, particularly Clause 36 thereof read with Clauses 17 and 27, and claim that Vaidehi was not entitled to transfer or assign the beneficial interest of it under the Society Development Agreement without prior written consent of the Society, which consent was not obtained. It is submitted that even in the reply affidavit of the society in the Plaintiffs'' Notice of Motion, the Society had admitted to the lack of right or authority in Vaidehi to transfer or assign its beneficial interest without consent of the Society, and that the Rustomjee Agreement was in material breach of the terms and conditions of the Society Development Agreement. In reply, it is urged by the Society that this particular clause, Clause 36, was for the protection of the society and absent any objection raised by the Society for breach of that clause, there is no case for illegality of the Rustomjee Agreement on account of such breach. It is submitted that the Society has not only not objected to the assignment of the free sale component by Vaidehi to Rustomjee under the Rustomjee Agreement, but it has expressly approved the same under the Confirmation Agreement, followed by the Supplementary Agreement. The Society has also passed a resolution to that effect at its Special General Body meeting followed by authority conferred by its members to execute a tripartite Confirmation and Supplementary Agreements in that behalf with Vaidehi and Rustomjee.
12.2 The particular clauses, namely, Clauses 17, 27 and 36 of the Society Development Agreement, are quoted below:

"17. The Developers shall be entitled to bring in the project his own financiers, associates, partners and bankers for the aforesaid construction and the society has consented for the same and co-operate with the Developers for the same and shall execute all the necessary documents for the Developers area.

27. The Developers shall be entitled to sell to the persons of its Choice flats/commercial area, car parking spaces and other premises being the Developers area and more, particularly described in the Annexure "G" and to receive and

appropriate the sale consideration amount receivable from such Allottees/purchasers of the office premises, flats/Commercial area and car parking spaces in the said new building on the said property without in any way being required to give any amount for the same to the Society or the Union.

36. The Developers shall be entitled to carry out the construction of the said new building on their own, either departmentally or by appointing sub-contractors. However, the Developers shall not be entitled to transfer or assign their beneficial interest under this Development Agreement to any one without obtaining prior written consent from the said Society and Union."

12.3 Vaidehi was entitled, on the basis of the above clauses, to deal with the free sale component of the project. By Rustomjee Agreement, Vaidehi agreed to sell the free sale component to Rustomjee. Prima facie the authority of Vaidehi to enter into Rustomjee Agreement for sale of the free sale component cannot be doubted. After all, the Society Development Agreement is a commercial document and has to be read as such, in its entirety and harmoniously. If individual premises forming part of the free sale component could be dealt with by Vaidehi, it is difficult to contend that the free sale component as a whole could not be dealt with by it. Vaidehi, even after the Rustomjee Agreement, is bound by all covenants of the Society Development Agreement, the essential of obligation of Vaidehi under which consists in construction of the rehab portion free of cost for the members of the Society. That obligation is not transferred to Rustomjee under the Rustomjee Agreement. The society is not concerned and is not required to assent to the manner in which the free sale component, which was to be exploited by Vaidehi in consideration of its aforesaid obligation, would be dealt with by Vaidehi.

12.4 Even otherwise, a party for whose benefit a particular contractual stipulation is made is entitled to waive the same. In our case, there is a clear waiver on the part of the Society. The Society has confirmed the Rustomjee Agreement and supplemented the same by a Supplementary Agreement in favour of Rustomjee after duly passing resolutions of its general body in duly convened Special General Body Meetings. On ratification of the Rustomjee Agreement by the Society, it hardly lies in the mouth of anyone, particularly any-one other than the two contracting parties of the Society Development Agreement, that the Rustomjee Agreement is in breach of the restrictive covenants of the Society Development Agreement.

12.5 All parties have duly acted under the Rustomjee Agreement and the confirmation and Supplementary Agreements, which followed it. Rustomjee has paid about Rs. 70 crores to Vaidehi and a substantial sum to MHADA in pursuance thereof.

12.6 For all these reasons, prima facie there is no merit in this objection.

13. Other miscellaneous challenges to the Confirmation and the Supplementary Agreements and the final Agreement of 29 January, 2011 with Rustomjee:

13.1 The Plaintiffs in Suit No. 674 of 2013 have challenged the various agreements executed by the Society in favour of Rustomjee on various other grounds as well.

13.2 It is contended by the Plaintiffs in Suit No. 674 of 2013 that the resolution of 17 January, 2010, particularly, Resolution No. 4A, as also other resolutions suffer from non-compliance with para 7.15 of MHADB''s booklet and also the offer letter of MHADB of 20 May, 2010. It is submitted that the resolution of 17 January, 2010 was also fraudulent by reason of the propose thereof not being a member of the society and having regard to the various alleged machinations on the part of the society to transfer a share certificate to his name.

13.3 MHADB directive in its booklet and offer letter is a general instruction in keeping with the State Government directive of 3 January, 2009. I have already dealt with the question of applicability of the Government directive to the dealings of the Society with Rustomjee and held that prima facie the directive does not come in the way of the various dealings of the Society with Rustomjee in the peculiar facts of our case. My observations in that behalf would apply with equal force to the objections based on the MHADB directives.

13.4 As for the membership of the proposer and allegations in connection with, these contentions can hardly sustain a challenge to the resolution which is not only affirmed by an overwhelming majority of the society, but acted upon by various stakeholders as shown above.

13.5 The Plaintiffs in Suit No. 674/2013 next contended that there has been illegal and unauthorized use of FSI in the project by Rustomjee on the basis of the chart submitted by the Plaintiffs. In the first place, this chart is based on certain assumptions which are not sustainable either in law or on facts. Firstly, the chart proceeds on the fallacious understanding that each member is personally entitled to a proportionate share in the FSI generated on roads/public amenities/open spaces in the layout of D.N. Nagar or to the fungible FSI arising in connection with the suit property. Prima facie the entire FSI/development potential in respect of the layout of the suit property as also the fungible FSI belongs to the Society. Besides, the fungible FSI, which cannot be termed as inherent or basic in connection with the suit plot, is an incidence available only if new construction is put up on the suit plot. In other words, the availability of fungible FSI is directly attributable to and arises in connection with the new construction which is being put up by Rustomjee on the suit property and not an incidence of the land plate of the suit plot. Secondly, fungible FSI is subject to payment of premium to the Municipal Corporation of Greater Mumbai. It becomes available and can be used only upon such premium being paid. There is no compulsion on the developer that can be spelt out from any of the development agreements in the present case to pay any premium at all. Thus, there is no inherent right in the society, much less in any member of the Society, to any fungible FSI. In any event, the offer of Rustomjee to make fungible FSI available to the Society for the benefit of its members by allotting an area of 640 sq. ft. carpet,

which includes not just the FSI/TDR/MHADA layout FSI, but also fungible FSI, has been duly accepted by the Society and no individual member can claim any right to any other area/FSI. After all, the agreement between the Society and Rustomjee is a commercial document, which has been worked out between the two after taking into account various considerations of the restive entitlements and commercial feasibility of the project. No individual member can take a stand alone position contrary to this agreement. Besides, the calculations in the chart cannot be founded on any legal principles or provisions and seem to be nothing but mere ipse dixit on the part of the dissenting members. Except these few disgruntled members, no other member of the Society has raised any grievance in respect of these so called FSI violations or usurpations. Lastly, all contentions of the Plaintiffs in Suit No. 674/2013 in this behalf, at the highest, reflect on the members'' right to receive compensation. If the Plaintiffs'' contentions are accepted at the hearing of the suit, an adequate monetary relief can always be granted to the Plaintiffs in respect of these claims. The entire project of redevelopment need not be held up on account of these claims.

14. Rule of majority:

14.1 This discussion brings us to the issue of the rule of majority to be followed in the actions of the society in matters including the redevelopment of the Society''s property. Shareholder members of a co-operate society are bound by a decision of the majority in such matters, until such decision is overturned by a forum of competent jurisdiction and cannot take a stand alone position in opposition to such decision.

14.2 We shall do well in this behalf to simply recall the observations of this Court in the case of Girish Mulchand Mehta and Durga Jaishankar Mehta Vs. Mahesh S. Mehta and Harini Cooperative Housing Society Ltd., , which are to the following effect:

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

of the Co-operative Society, he looses his individuality with the Society and he has no independent rights except those given to him by the statute and Bye-laws. The member has to speak through the Society or rather the Society alone can act and speaks for him qua the rights and duties of the Society as a body (see Daman Singh and Others Vs. State of Punjab and Others, . This view has been followed in the subsequent decision of the Apex Court in the case of State of U.P. and another etc. Vs. C.O.D. Chheoki Employees'' Co-op. Society Ltd. and others etc., . In this decision the Apex Court further observed that the member of Society has no independent right qua the Society and it is the Society that is entitled to represent as the corporate aggregate. The Court also observed that the stream cannot rise higher than the source. Suffice it to observe that so long as the Resolutions passed by the General Body of the respondent No. 2 Society are in force and not overturned by a forum of competent jurisdiction, the said decisions would bind the Appellants. They cannot take a stand alone position but are bound by the majority decision of the General Body. Notably, the appellants have not challenged the Resolutions passed by the General Body of the Society to redevelop the property and more so, to appoint the respondent No. 1 as the Developer to give him all the redevelopment rights. The propriety rights of the appellants herein in the portion (in respective flats) of the property of the Society cannot defeat the rights accrued to the Developer and/or absolve the Society of its obligations in relation to the subject matter of the Arbitration Agreement. The fact that the relief prayed by the respondent No. 1 in section-9 Petition and as granted by the Learned single Judge would affect the propriety rights of the appellants does not take the matter any further. For, the propriety rights of the Appellants in the flats in their possession would be subservient to the authority of the General Body of the Society. Moreso, such rights cannot be invoked against the Developer (Respondent No. 1) and in any case, cannot extricate the Society of its obligations under the Development Agreement."

14.3 The various decisions of the Society referred to above in connection with the present dispute are prima facie taken bona fide and are not oppressive to the minority or amounting to mismanagement. Members of the Society have challenged some of these decisions before co-operative courts, but have been unable to secure any reversal or even a stay thereof. Years have passed since the taking of these decisions and the follow-up actions on the basis thereof. It is too late in the day for this Court to even entertain a challenge now to these decisions, though in the facts of the case this Court has considered the merits of the various challenges in connection with these decisions and found these challenges to be prima facie unsustainable.

15. Challenges to the redevelopment by the Society and Rustomjee on the basis of third party rights created by Vaidehi in favour of various purchasers:

15.1 This brings us to an important aspect of this group of matters and which has engaged anxious attention of this Court. During the subsistence of the Society Development Agreement, and in pursuance of various rights conferred upon it thereunder with reference to disposal of the free sale component of the project, Vaidehi has created third party rights in favour of various flat purchasers and others. These flat purchasers and others themselves consist of different categories. There are those who have come in between the dates of the Society Development Agreement and the Rustomjee Agreement. During this period the entire free sale component, i.e. nearly 2,53,500 sq. ft. of real estate, was at the disposal of Vaidehi and it was free to deal with the same the way it liked. Third party rights have been created by it in favour of various parties during this period. Then there are others who have come in after the Rustomjee Agreement but before the Society Development Agreement was terminated by the Society. During this period Vaidehi had a limited right, namely, the right to deal with an area of 37050 sq. ft. for residential use and 20000 sq. ft. for commercial use. Different considerations may apply to those third parties whose rights have been created within or beyond this limitation on Vaidehi''s rights, as the case may be, for Vaidehi seems to have gone much beyond its limitation during this period and oversold its position. It purports to have created rights over an area far in excess of this limited F.S.I. available to it for disposal. Another distinction as between the various third parties is on the basis of the kinds of arrangements entered into with them by Vaidehi. There are purchasers who hold registered agreements with Vaidehi, whilst there are those who have unregistered agreements and there are others who have simply allotment letters in their favour. The rights of these various stakeholders vis-a-vis the entitlement of the Society and through it of Rustomjee to go ahead with the redevelopment project need an anxious thought. Whilst some of these third parties appear to be investors, there may certainly be those who are genuine buyers who have staked their hard-earned money to obtain premises within the project.

15.2 The flat purchasers'' main arguments are that under the Society Development Agreement, which was at any rate valid upto 16 April, 2010, Vaidehi had the authority to deal with the entire free sale component, i.e. nearly 2,53,500 sq. ft. of area; that even if such authority could be treated as having been divested by it under the Rustomjee Agreement, between 4 April, 2007 (i.e. the date of Rustomjee Agreement) and 16 April, 2010 (i.e. the date of termination of the Society Development Agreement), Vaidehi had the authority to deal with 57050 sq. ft. of area as shown above; that the agreement? entered into by Vaidehi during these periods were lawful and binding on the Society, since during these periods Vaidehi was an agent of the Society and the former''s acts within its, authority were binding on the latter; and that, at any rate, the Society itself being a ''promoter'' within the meaning of MOFA, the rights of the purchasers under MOFA were binding on the Society and the latter could not enter into any agreement with Rustomjee in breach of these rights.

15.3 The purchasers'' rights may, thus, be examined from two angles, one from the standpoint of the contract between the Society and Vaidehi (who was their vendor) and the other from the standpoint of the obligations of the Society, if any, under MOFA.

15.4 No doubt Vaidehi had been conferred with the authority to deal with the free sale component of the project by the Society under the Society Development Agreement, but the question is whether such authority was to be exercised by Vaidehi for its own sake or on its own account as an independent contractor or as an agent of the Society. Some of the important clauses of the Society Development Agreement may be noted in this behalf. These are as follows:

"5. The party of the first part i.e. the eleven individual societies and the party of the second part i.e. the new D.N. Nagar Co-operative Housing Societies Union Limited hereby agree to execute a sublease in favour of the party of the third part i.e. M/s. Vaidehi Akash Housing Private Limited in respect of the construction of the saleable part immediately after the party of the third part puts the party of the first part in their respective possession of the individual premises.

11. The Developers will be entitled to utilize the balance FSI including additional area available for construction by way of balcony, servant rooms and area in lieu of staircase, passage, lift wells, and such other area available free of F.S.I. etc., on payment of premium to BMC in the separate new building/s to be constructed on the said property and to sell the said area in the separate new building to be constructed on the said property, hereinafter referred to as the "the Developers'' area/flats" and appropriate the sale proceeds to itself.

13. The remaining flats shall being to the Developers, Hereinafter referred to as "the Developers'' area". The location of the Developers'' flats are given in Annexure-"G" and the Developers alone will be entitled to sell/allot the same and appropriate the sale proceeds to itself.

27. The Developers shall be entitled to sell to the persons of its Choice flat/commercial area, car parking spaces and other premises being the Developers area and more particularly described in the Annexure "G" and to receive and appropriate the sale consideration amount receivable from such Allottees/purchasers of the office premises, flats/Commercial area and car parking spaces in the said new building on the said property without in any way being required to give any account for the same to the Society or the Union.

28. It is expressly agreed by and between the parties hereto that only after the Occupation Certificate in respect of the said new building shall have been obtained and the Developers shall have paid to the amount becoming payable as specified in Clause 19 hereinabove and after the Developers shall have offered to put the Members herein in possession of their respective flats thereafter the Developers shall be entitled to handover vacant possession of the Developers'' flats to the

respective purchasers thereof.

30. The said Society and the Members herein hereby agree that in Developers alone shall be entitled to sell on ownership basis in their own name and in their own right the flats/commercials and other premises and the car parking spaces being the Developers'' area [which are specified in Annexure-"G"] and appropriate the sale proceeds to itself and for that purpose, the Developers shall be entitled to enter into Agreement for Sale of the Commercial premises, flats in their own name.

32. The Society on its own will not execute any Agreement and/or any writing with the prospective purchaser/s in respect of Developers area.

33. The said Society its members and union herein hereby agree and undertake with the Developers they will not to do deal with or dispose off or create any third party right, title and interest in respect of the said flats and other premises, the car parking spaces which are earmarked for sale by the Developers being the Developers'' area more particularly described in Annexure-"G".

38. It is agreed by the hereto that since the basis of this Agreement, the Developers shall have incurred several obligations [including financial obligations a herein mentioned], the said Society and the Members herein will be entitled to cancel terminate and/or rescind this Agreement for the grant of Development Rights or any other Agreement as shall be executed pursuant to this Agreement under circumstances stated herein only and no other circumstances.

41. It is further agreed that the Developers alone shall be responsible for any claim made by any third party in respect of any flats and other premises sold to the prospective purchaser/Allottee of the flat and other premises in the said new building constructed on the said property and the Developers agree to indemnify and keep indemnified and harmless the said Society and the Union herein from all costs, charges and expenses and legal fees by any third party and/or any damage caused to the prospective purchasers/Allottees.

45. This Agreement for Grant of Development Rights does not constitute a partnership and/or a joint venture between the parties hereto. Each of the parties hereto shall be liable to pay and discharge their respective liabilities and debts including their respective income-tax liabilities and each shall indemnify and keep indemnified the other there from."

15.5 The clauses quoted above, read together and in their proper perspective to be gathered from the whole agreement, clearly envisage the development and sale of the free sale component of the project by Vaidehi on their own account and as an independent contracting party, and not as agents of the Society. The contract between Vaidehi and the Society is on a principal to principal basis; it neither constitutes a partnership nor a joint venture or agency between the two. The third party purchasers with whom Vaidehi might enter into agreements for sale would

have no privities of contract with the Society and the Society would in no way be responsible for any claim made by such purchasers against Vaidehi under their respective agreements for sale.

15.6 There being no privities of contract between the Society and the third party purchasers claiming under Vaidehi, the third party purchasers cannot claim specific performance of their respective agreements for sale except through Vaidehi. They stand or fall by Vaidehi. If the rights of Vaidehi are brought to an end upon a lawful termination of the Society Development Agreement, the third party purchasers cannot lay any independent claim against the Society or anyone claiming through the Society. The agreements with third party purchasers are premised upon a valid, subsisting and enforceable agreement between their vendors, namely, Vaidehi and the owners, namely, the Society and in fact refer to the Society Development Agreement in this behalf. Admittedly, therefore, the third party purchasers had, or at any rate, ought to have, notice of the Society Development Agreement and its terms and conditions, and Vaidehi''s obligations to perform the same. If Vaidehi fails to perform these obligations, the purchasers cannot but suffer the consequences. In other words, the purchaser''s rights are subject to Vaidehi''s rights and not higher than those. Therefore, from a contractual standpoint, the third party purchasers have no case against the Society or Rustomjee, who claim through the Society.

15.7 Let us now consider if these third party purchasers have any rights under MOFA against the Society. It is submitted on their behalf that the Society is very much a ''promoter'' within the meaning of MOFA as regards their respective agreements for sale. Learned Counsel for the purchasers rely upon the definition of "promoter" contained in Section 2(c) of MOFA. The definition is in the following terms:

"promoter" means a person and includes a partnership firm or a body or association of persons, whether registered or not who constructs or causes to be constructed a block or building of flats, or apartments for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both."

It is submitted that the Society can at any rate be said to have caused the building of flats to be constructed for the purpose of selling the same, and as a person, who causes such building to be built, is as much a promoter as a person who sells premises in such building.

15.8 The Society is the owner of the property and has entered into an agreement with the developers, i.e. Vaidehi, for redevelopment of its property. The redevelopment envisages construction of the Society''s building to accommodate its members and also construction of building/s of flats/premises to be sold to outsiders. The agreement authorizes or entitles the developers to construct such

building/s and sell flats/premises therein to outsiders. Such authority or entitlement is to the developers'' account and in their own right, and as an independent contractor. If in exercise of such authority or entitlement, a building is constructed by the developers, it cannot be said that such building is caused to be constructed by the Society within the meaning of Section 2(c) of MOFA.

15.9 Any other interpretation would lead to anomalous consequences, which could never have been contemplated by MOFA. The owners of lands entering into agreements for sale or development agreements with promoters/developers would be held as being subject to all liabilities of a promoter, such as liability of disclosure of plans and specifications, outgoings etc. under Section 3 of MOFA, entering into agreements in accordance with Section 4, giving possession of flats and suffering the consequences of Section 8, forming co-operative societies of flat purchasers under Section 10, and so on. This would be plainly inconceivable.

15.10 Prima facie, thus, there is no case to treat the Society, who is merely in the position of an owner vis-a-vis the third party purchasers, as a ''promoter'' within the meaning of MOFA and foist the obligations of a promoter on the Society in relation to the purchasers.

15.11 Besides what is discussed above, there are many other difficulties in the way of many of these third party purchasers. In the first place, it now transpires from the various proceedings that their vendor, Vaidehi, has proceeded to allot an area far in excess of its entitlement, which was merely 2,53,500 sq. ft. FSI to start with and thereafter restricted to 57050 sq. ft. (i.e. after the Rustomjee Agreement). In fact, what Vaidehi appears to have dealt with is an area far in excess of even the total FSI (at the rate of 2.4) available on the entire land. Secondly, the individual transactions are evidenced only in a few cases by registered agreements with Vaidehi. Many transactions are contained in unregistered agreements or even allotment letters which are not even stamped. Many of these transactions appear to be simply financial arrangements. Each individual case of a third party purchaser would thus be subject to different considerations based on the entitlement of Vaidehi at the relevant point of time and the nature and incidents of the individual transaction. But we are dealing here with the rights of the individual purchasers vis-a-vis the Society and Rustomjee claimed through Vaidehi and not their rights qua Vaidehi. All these purchasers certainly have independent rights to claim damages against Vaidehi, peculiar to their individual cases, but they have prima facie no right to claim anything from the Society and Rustomjee, much less specific performance of their individual agreements. In the premises, the individual features of their respective cases, as noted above, have no relevance to our discussion in this group of Motions and need not be discussed any further. Even the best placed amongst them have no leg to stand on as against the Society or Rustomjee.

16. That brings us to sum up the result of the above discussion on the prima facie case on merits of individual stakeholders. Prima facie, it is clear that Vaidehi has

committed breaches of the Society Development Agreement and that the termination of the Agreement by the Society was legal and proper. Vaidehi has not made out any case of its readiness and willingness to perform its obligations under the Society Development Agreement. Vaidehi is not entitled to specific performance of the Society Development Agreement or restrain the development of the suit property by the Society or Rustomjee. The Rustomjee Agreement and its confirmation by the Society by the Confirmation and Supplementary Agreements as well as further Agreement dated 29 January, 2011 between the Society and Rustomjee are valid and proper. Members of the Society opposing the development through Rustomjee are not entitled to any interim relief either on the basis of the aforesaid agreements being in breach of the Society Development Agreement or on the basis of breach of bye-laws or contravention of the State Government circular dated 3 January, 2009 or on account of the alleged non-performance of the offer letter by MHADA or the booklet or directives of MHADA or indeed on account of any alleged FSI violation or usurpation. The decisions of the Society in connection with the present dispute are prima facie taken bona fide and none of the challenges of the members opposing redevelopment are prima facie sustainable. None of the third party purchasers, who claim through Vaidehi under their respective agreements for sale/allotment letters, have any case for specific performance of their respective agreements against the society or Rustomjee. None of these purchasers has any enforceable right under MOFA against the Society or Rustomjee.

17. Even the considerations of balance of convenience and irreparable injury clearly weigh in favour of the Society and its members, who support the redevelopment project. The fundamental basis or rather the very raison d''etre of the entire redevelopment project is the need for housing of 480 members of the Society. These members have already surrendered their tenements to enable the Society to carry out the redevelopment project first through Vaidehi and later through Rustomjee, as noted above. Since 2006, these members have been living in temporary alternative accommodations. The buildings on the suit property occupied by these members have since been demolished and a rehab building for their permanent alternative accommodation is under construction. The development of the free sale component is inextricably linked to the construction of the rehabilitation component. The cost of the construction of the rehabilitation component has to be necessarily funded from and out of the development and sale of the free sale component. Any relief granted to either of the stakeholders, namely, Vaidehi or the members opposing the redevelopment project or the third party purchasers, who claim through Vaidehi, will necessarily impact the construction of the rehabilitation component adversely and jeopardize the members'' right to their permanent alternative accommodation. The members cannot be asked to wait indefinitely for years for getting something which they are legally entitled to and which legal entitlement is not even questioned by any other stakeholders.

18. We may now dispose of the individual applications forming part of this group of Notices of Motion on the basis of the prima facie conclusions noted by this Court above.

19. Notice of Motion No. 961 of 2013 taken out by Vaidehi in their specific performance suit, the merits of which have been discussed above as the lead matter, is dismissed with no order as to costs.

20. Notice of Motion No. 1477 of 2013 is taken out by the Plaintiffs in Suit No. 674/2013. This suit, as noted above, has been filed by some members of the society/occupants of flats in the buildings of the Society, who have challenged the various resolutions of the Society, noted above, and actions of the Society on the basis of these resolutions. They seek re-starting of the entire process of the redevelopment of the property by appointing a new developer. They seek various permanent injunctions and reliefs in this behalf. The Notice of Motion inter alia seeks an interim restraint order against the Society and Rustomjee from going ahead with the redevelopment project or creating any third party rights in respect thereof. For the reasons already discussed above, there is no merit in the Notice of Motion and the same is dismissed. There shall be no order as to costs.

Learned Counsel for Rustomjee states that the statement made by the learned Counsel and recorded in the order of this Court dated 9 May, 2014 shall continue upto 12 January, 2015. Learned Counsel for Defendant No. 1 Society, on instructions from Mr. Bhushan Sarang, Secretary of the Defendant society, states that in accordance with the ad-interim orders passed in the suit so far, the Society shall continue to pay rent for the temporary alternative accommodation to Plaintiff Nos. 1 to 7, 9 to 12 and 14 to 38 through the Advocates of these Plaintiffs and deposit the rent payable to Plaintiff Nos. 8 and 13 in Court as is being done presently under the ad-interim orders passed by this Court. The rent deposited in Court shall abide by further orders that may be passed in that behalf.

21. Notice of Motion No. 1333/2011 in Suit 943/2011 - This suit seeks a specific performance of the Memorandum of Understanding executed by Vaidehi along with 37 letters of allotment. The Notice of Motion seeks a restraint order on all the Defendants including the Society and Rustomjee from creating third party rights in respect of 37 shops. For the reasons discussed above, the Notice of Motion is dismissed with no order as to costs.

22. Notices of Motion Nos. 1886/2011, 1900/2011, 1953/2011, 2002/2011 - These Notices of Motion have been taken out by the same Plaintiff, who claims to be an agreement purchaser in respect of premises from out of the sale components under Agreements for Sale entered into by Vaidehi with the Plaintiff. All these suits seek specific performance of the respective agreements for sale. The Plaintiff has sought an interim injunction in these Notices of Motion against the Defendants including the Society and Rustomjee from creating third party rights in respect of these

various premises. For reasons noted above, there is no merit in the Notices of Motion and the same are dismissed with no order as to costs.

23. Notices of Motion Nos. 2159/2011, 2160/2011, 2161/2011, 2162/2011, 2163/2011, 2164/2011, 2169/2011, 2170/2011, 1031/2011, 1185/2013, 1186/2013, 1452/2013, 1544/2013, 1545/2013, 206/2014, 207/2014, 223/2014, 417/2014, 419/2014, 429/2014, 464/2014 and Notices of Motion (Lodging) Nos. 643/2014, 644/2014, 645/2014, 648/2014, 649/2014, 650/2014, 651/2014, 652/2014, 655/2014, 722/2014, 724/2014, 728/2014, 323/2014, 766/2012, 686/2014.

These Notices of Motion are taken out by the respective Plaintiffs in these suits, who claim through Vaidehi under the Agreements for sale executed between them and Vaidehi or letters of allotment issued by Vaidehi in their favour in respect of sale of flats from the free sale component of the redevelopment project. The Motions seek appointment of Court Receiver and/or interim injunction restraining the Defendants including the Society and/or Rustomjee from creating third party rights in respect of the respective flats. For reasons noted above, the Notices of Motion are dismissed with no order as to costs.

Suit 322-2014 - Learned Counsel for Defendant No. 1 Society, on instructions of Mr. Bhushan Sarang, Secretary of the Defendant society, states that the arrears of rent as may be due in the case of Plaintiffs in this suit as also future rent from October, 2011 will be paid to these Plaintiffs. The Plaintiffs shall from time to time visit the office of Defendant No. 1 society to collect the rent payable to them from time to time as in the case of other members of Defendant No. 1 Society.