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

APPEAL NO. 338 of 2009
IN
ARBITRATION PETITION LODG NO. 493 OF 2009

Girish Mulchand Mehta,
Flat No. 1/257, Harini Co-operative
Housing Society Ltd.,
R.N.Narkar Marg, Ghatkopar (E),
Bombay-400 077.

2. Durga Jaishankar Mehta,
Flat No. 3/257, Harini Co-operative
Housing Society Ltd.,
R.N.Narkar Marg, Ghatkopar(E),
Bombay 400 077. ....Appellants

v/s.

Mahesh S. Mehta,
Sole Proprietor of M/s. Suryakirti
Enterprises
having office at 196/5400,
"Suramya", Pant Nagar, Ghatkopar(e)
Mumbai 400075.

2. Harini Cooperative Housing Society
Ltd.,
10/257, R.N. Narkar Marg,
Ghatkopar (E), Bombay 400 077. ....Respondents

Ms. Rajni Iyer, Sr. Advocate, i/b. K.V.Tembe for the appellants.
Mr. D.D.Madon, Sr. Advocate i/b. K.J. Hakan for respondent no.1.
Mr. C.J. Sawant, Sr. Advocate i/b. Rahul K. Hakani for respondent no.2.

CORAM:- SWATANTER KUMAR, C.J. AND A.M.KHANWILKAR, J.

JUDGMENT RESERVED ON: November 07, 2009.

JUDGMENT PRONOUNCED ON: December 10, 2009.

JUDGMENT (PER KHANWILKAR, J):

This appeal takes exception to the Judgment dated 3rd July, 2009 in Arbitration Petition (L) No. 493/2009. The said petition was filed by the Respondent No. 1 under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' for short). The reliefs claimed in the said Petition read thus:

> "a) That during pendency of arbitral proceeding between the Petitioner and the Respondent No. 1, before the Ld. Sole Arbitrator Shri L.H. Patil, this Hon'ble Court may be pleased to appoint Court Receiver High Court Bombay or any fit and proper person as Receiver of the said property i.e. plot of land bearing city survey No. 5728 final plot No. 257 of Ghatkopar T.P.S.III, R.N.Narkar Marg, Ghatkopar (E) Mumbai-400 077 and the building known as "Harini" standing thereon with all powers under order 40 Rule 1 of the Code of Civil Procedure including power to take physical possession by physically removing the Respondent Nos. 2 and 3 and their family members occupying flat No. 1 and Flat No. 3 or anybody else found occupying any part of the Building known as "Harini" and/or any part of the said

property and to hand over vacant and peaceful possession of the said property i.e. plot of land bearing city survey No. 5728 final plot No. 257 of Ghatkopar T.P.S. III, R.N.Narkar Marg, Ghatkopar (E) Mumbai-400 077 and the building known as "Harini" standing thereon to the Petitioner for the purpose of demolition and construction of new building as provided in the said Development Agreement Exhibit "A" hereto.

b) that the ad-interim measures in term of prayer clause (a) above.

c) that for such other and further reliefs as the nature and circumstances of the case may require."

2. The Respondent No. 1 asserted that the Respondent No. 2 Society entered into a Development Agreement dated 7th May, 2008 authorising him to redevelop the building standing on piece and parcel of land admeasuring 644.60 sq. meters bearing City Survey No.5728, Final Plot No. 257 of Ghatkopar T.P.S. III, R.N. Narkar Marg, Ghatkopar (E), Mumbai 400 077. The building standing on the said plot consists of three floors comprising of 12 residential flats. Since the building was constructed in the year 1964, due to passage of time its condition had deteriorated. As a result, the members of the Society after due deliberation unanimously decided to redevelop the building. Further, to effectuate the said decision the Society appointed Respondent No. 1 to develop the said building. Pursuant to the decision of the Society, the Respondent No. 2

Society entered into registered Development Agreement with Respondent No. 1 dated 7th May, 2008 thereby granting development rights to develop the property by demolishing the existing building “Harini” standing on the said property on terms and conditions referred to in the said agreement. The Respondent No. 1 paid the stamp duty of Rs. 1,75,030/- and also registration fees of Rs. 31,440/-. The said agreement was executed by the authorised person of the Society (Respondent No. 2) and also by ten (10) members out of twelve (12) members as token of confirmation thereof in favour of Respondent No. 1. The said 10 members have also signed and executed individual undertaking-cum-affidavit thereby confirming the Development Agreement and undertaking to perform the Development Agreement. According to Respondent No. 1, consequent to the execution of the agreement, he has already spent amount of Rs. 12,00,000/-. and also Rs. 2,30,000/- per month (approximately) towards monthly compensation paid to the 10 members who have already vacated their respective flats since February 2009. It is the case of the Respondent No. 1 that he has already paid monthly compensation to the tune of Rs. 16,10,000/- and would be obliged to pay the future monthly compensation to the said 10 members. Further, the plans for redevelopment of the building have been duly approved and accepted by

the General Body of the Society and whereafter the Respondent No. 1 has taken steps to seek approval of the Competent Authority. Pursuant to the agreement, the Respondent No. 1 has purchased and loaded TDR 650 sq. Mtrs. in favour of the Respondent No. 2 Society in lieu of the Bank guarantee. The Respondent No. 1 has already paid sum of Rs.72,76,464/- (excluding stamp duty of Rs. 2,18,300/-) being purchase price of the TDR and also got the plan for construction of new building approved and sanctioned from the Mumbai Municipal Corporation. The Mumbai Municipal Corporation has also issued I.O.D. on 19/12/2008. After issuance of I.O.D., Respondent No. 1 called upon the Respondent No. 2 to hand over vacant possession of the building forthwith. However, the Respondent No. 2 Society expressed its inability to do so as the Appellants (original respondents 2 & 3) were opposed to executing any document or to vacate their respective flats to facilitate demolition of the existing building for reconstruction and redevelopment thereof. It is stated that the Respondent No. 1 has already spent aggregate sum of Rs. 12 lakhs towards non-refundable security deposit in lieu of the corpus fund and approximately Rs. 2.05 lakhs towards brokerage and also paid Rs. 7500/- towards transportation/shifting so as to provide temporary accommodation to each of the ten members who vacated their respective flats as per the

terms of the agreement. It is stated that due to resistance by the Appellants, the Society eventually initiated expulsion proceedings against the Appellant No.1 and after following necessary procedure the said Appellant No. 1 has been expelled from the primary membership of the Society by the General Body of the Society. The Respondent No. 2 Society offered vacant possession of only 10 flats to the Respondent No. 1. In so far as the two flats occupied by the Appellants, the Respondent No. 1 was informed to recover possession thereof from the concerned members who were not co-operating. The Respondent No. 1, however, insisted that possession of the entire building should be handed over to him by the Respondent No. 2 in terms of the Development Agreement executed with the Society (Respondent No.2). Since the Respondent No. 2 failed to perform their part under the Development Agreement, Respondent No. 1 issued notice raising dispute. Eventually, as per the Arbitration Agreement in terms of clause-49 of the Development Agreement, the Respondent No. 1 appointed sole Arbitrator and called upon the Respondent No. 2 Society to concur with the appointment of the said Arbitrator to avoid unnecessary cost. The Respondent No. 2 concurred with the appointment of the named sole Arbitrator and agreed for referring dispute to the sole Arbitrator. The Respondent No. 1 filed

Statement of Claim and Application under Section 17 of the Act before the sole Arbitrator who in turn has heard the said application and passed order on 25/5/2009. The sole Arbitrator directed the Society to hand over vacant and peaceful possession of the property within ten days from the date of the order failing which it would be open to the Respondent No. 1 to move this Court for appointment of the Court Receiver by invoking provisions of Section 9 of the Act. After the said order of the Arbitrator, the Respondent No. 2 Society through Advocate's notice called upon the Appellants to vacate their respective flats. It is also noticed that the Resolution of expulsion of the Appellant No. 1 from the primary membership of the Respondent No. 2 Society has been approved by the Dy. Registrar of Co-operative Societies on 6/6/2009. Later on, even the Appellant No. 2 has been expelled by the General Body of the Society in its meeting held on 21st June, 2009 and steps have been taken to seek approval of the Registrar, which decision is stated to be pending. Since the Respondent No. 1 realised that it was getting difficult to get vacant possession of the entire building and the development work was being delayed resulting in recurring avoidable cost towards monthly compensation being paid to the 10 members who have already vacated their respective flats in February 2009 as also the amount spent by the

Respondent No. 1 towards consideration under the Agreement and other expenses, had no option but to take recourse to Petition under Section 9 of the Act before this Court. Accordingly, the Respondent No. 1 filed the said Petition in June 2009, praying for reliefs which are already reproduced hitherto. In this Petition besides making the Respondent No. 2 Society party, the Respondent No. 1 also impleaded the Appellants as Respondent Nos. 2 & 3 who were occupying two flats in the said building and were causing obstruction to the development of the property.

3. As a counter blast to the abovesaid Petition filed by the Respondent No. 1 under Section 9, the Appellants filed dispute dated 25th June, 2009 before the Co-operative Court, Mumbai being Case No. AVN/CC-II/207 of 2009 praying for following reliefs:-

> "a) that it be declared that the convening and holding of the purported Special General Meeting dated 27/4/2008 of the Opponent Society and all its proceedings, including Resolutions passed therein, are illegal, bad in law, null and void ab-initio and not binding upon the Disputants.
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> b) it be declared that the purported Development Agreement dated 7.5.2008 between the Opponent Society and the Developer, being Ex-A hereto is illegal, bad in law, null and void ab-initio and not binding upon the Opponent Society nor any of its members, including the Disputants.

c) the Opponent Society, its office bearers, agents and servants be permanently restrained by an order of injunction of this Hon'ble Court from, in any manner, implementing and/or acting upon any of the purported Resolutions passed in the purported Special General Meeting held on 27/4/2008 and the purported Development agreement dated 7/5/2008 being Ex-A hereto.

d) the Opponent Society, its office bearers, agents and servants be permanently restrained by an order of injunction of the Hon'ble Court from disconnecting and/or causing the disconnection of (i) the water supply and the common electric supply to the Society's building and (ii) the electric meter fro the common lights, staircase lights, water pump etc. and the electricity meters in respect of the suit flats No. 1 & 3 in the building of the Opponent Society at 257, R.N. Narkar Marg, Ghatkopar (E), Mumbai- 400 077.

e) that pending the hearing and final disposal of this dispute, the Opponent Society, its office bearers, agents and servants be restrained by an order of injunction of this Hon'ble Court from, in any manner, implementing and/or acting upon (i) any of the purported Resolutions passed in the purported Special General Meeting held on 27/4/2008 and (ii) the purported Development agreement dated 7/5/2008 being EX-A hereto.

f) That pending the hearing and final disposal of this dispute, the Opponent Society, its office bearers, agents and servants be restrained by an order of injunction of this Hon'ble Court from disconnecting and/or causing the disconnection of (i) the water supply and the electric supply to the building and (ii) the electric meter in respect of common lights, staircase lights, water-pump and the electricity meters of the suit flats No. 1 & 3 in the building of the Opponent Society at 257, R.N. Narkar Marg, Ghatkopar (E), Mumbai-400 077.

g) for urgent Ad-Interim orders in terms of prayers (e) & (f) above.

h) for costs.

i) for such other and further reliefs as the nature and circumstances of the case may require."

4. To complete the chronology of events which is relevant for answering the controversy on hand, it may be apposite to advert to the fact that the General Body of the Society was ad-idem that the building of the Society needs to be redeveloped. That position can be discerned from the minutes of the meeting of the Managing Committee dated 10th August, 2002 wherein it was resolved to reinterview the developer for improvisation of his offer to take up the development work with clear understanding that there will be no going back on the proposal after the terms and conditions were finalized with the developer. Moreover, that would be binding on all the members. Notably, the Appellants herein at the relevant time were members of the Managing Committee and were party to the said resolution. The deliberation regarding redevelopment of the property was taken forward thereafter as can be discerned from the minutes of the subsequent meetings of the General Body of the Society dated 22/1/2005, 2/10/2005, 3/11/2005, 25/11/2005, and 17/9/2007. The minutes of the General Body dated 17/9/2007 records that the purpose of

the meeting was to discuss and seek clarification regarding draft Development Agreement with the Respondent No. 1 Developer. The final decision to appoint Respondent No. 1 as the developer was taken by the General Body of the Society in its Special General Body Meeting held on 2nd March, 2008. It is recorded in the said minutes that "M/s. Suryakirti Enterprises be our final selection as developer for demolition and reconstruction of Harini Building". This Resolution was supported by 9 members out of total 12 members of the Society. In the said meeting, the General Body also resolved to enter into Development Agreement with the Respondent No. 1 for demolition and reconstruction of Harini Building, which was to be approved by the Society. Significantly, none of the abovesaid Resolutions have been challenged by the Appellants before any Court much less the Co-operative Court. The challenge, however, is only to the Resolution passed in the Special General Meeting dated 27/4/2004 and the consequences flowing therefrom. In the said meeting the draft Development Agreement executed between the Society (Respondent No.2) and the Developer (Respondent No. 1) came to be unanimously approved by the seven members present and voted. The minutes of the meeting makes note of the fact that in addition three absent members have also consented to the

resolution. As aforesaid, the challenge of the Appellants before the Co-operative Court is only to the terms and conditions referred to in the said Development Agreement as has been executed by the authorised officer of the Respondent No. 2 Society in favour of Respondent No. 1 and registered on 7/5/2008.

5. Be that as it may, the Respondent No. 1 instituted Petition under Section 9 essentially against the Respondent No. 2 Society with whom the Respondent No. 1 had entered into Development Agreement on the assertion that the Society has failed to perform its part of the obligation under the said Agreement and it was just and convenient to grant the relief as prayed in Section 9 Petition. Since the grant of the proposed relief was to incidentally affect the Appellants herein, they were also impleaded as Respondents 2 & 3. The said Respondents were required to be impleaded also because of Rule 803E of the Bombay High Court (Original Side) Rules. The Respondent No. 2 Society, however, did not resist the relief claimed in the said Petition. In fact, the Respondent No. 2 Society took the stand that inspite of its willingness to perform its part of the obligation under the agreement, it was unable to do so because of the untenable obstruction caused by the Appellants herein (who were its

members till they came to be expelled by the General Body). The Petition, however, was mainly resisted by the Appellants. The Principal grievance of the Appellants (Original Respondents 2 & 3) was that they could not be made party in the Petition under Section 9, as they were not party to the Arbitration Agreement. The Court had no jurisdiction to pass any direction or order against the Appellants since they were not party to the Arbitration Agreement. In any case, the Court cannot order their dis-possession in exercise of power under Section 9 of the Act. The Appellants justified their obstruction mainly on the ground that they did not approve of the terms and conditions specified in the Development Agreement executed in favour of the Respondent No. 1. It was their case that the offer given by the Respondent No.1 was prejudicial to the interest of the members of the Society. In that, the Developer was not only obliged to provide bigger alternative reconstructed flats but also obliged to provide additional corpus to the Society. In the first place, the Learned Single Judge found that there was an Arbitration Agreement in the shape of clause 49 of the Development Agreement executed between the Respondent No. 1 and Respondent No. 2. Thus, it was open to the Respondent No. 1 to invoke Section 9 of the Act being party to the Arbitration Agreement. Further, Section 9 can be invoked in aid to the

main relief/claim pending before the Arbitral Tribunal. The Learned Single Judge then considered the grievance of the Appellants and found that the Resolutions passed by the overwhelming majority of members of the Society were not challenged till the filing of the Petition under Section 9. Besides, the majority decision of the General Body of the Society would not only bind the Society but also the Appellants. It is further held that essentially the relief claimed under Section 9 by the Respondent No. 1 Petition was against the Respondent No. 2 Society who was obliged to comply with the obligation under the Development Agreement without which the Respondent No. 1 would not be able to get Commencement Certificate thereby stalling the redevelopment of the building. The Learned Single Judge also noticed that it is only the two members-Appellants herein, who were causing obstruction which was resulting in delay. Moreover, it was causing serious prejudice not only to the Respondent No. 1 (Petitioner) in terms of recurring cost as the Respondent No. 1 has already acted upon the agreement and incurred substantial amount towards consideration of the agreement and other expenses, but even the remaining 10 members of the Society have already acted upon the agreement by vacating their respective flats and have shifted to transit accommodation for which they have been duly compensated by the

Respondent No.1 as per the terms of the Agreement. The Learned Single Judge also noted that the Appellants herein were not in a position to secure the amount invested and incurred including the future expenses and cost of the Respondent No. 1 in case the project was stalled at their instance. Taking over all view of the matter, the Learned Single Judge not only thought it just and convenient to appoint Court Receiver but also accepted the request of the Respondent No. 1 to allow the Court Receiver to take possession of all the flats in the said building and hand over vacant possession of the entire building to the Respondent No. 1 so as to enable the Respondent No. 1 to complete the project in terms of Development Agreement and discharge his obligation of providing duly constructed accommodation/premises to all members including Appellants herein (original Respondents 2 & 3) within the prescribed time. The Learned Single Judge also noticed that the relief sought would only require the Appellants herein to shift to another accommodation till the redevelopment of the property of the Society whereafter they would be once again accommodated in the newly constructed accommodation in lieu of their existing flats. Accordingly, the Petition was made absolute in terms of prayer clause (a).

6. It is this decision which is subject matter of challenge before us. According to the Appellants, the relief granted against them was without jurisdiction in as much as they are not party to the Arbitration Agreement. They could not have been impleaded as Respondents in the Petition. Moreover, there was no justification for passing the drastic order of dispossessing the Appellants from their respective flats and handing over those flats to the Respondent No. 1 with further liberty to demolish the existing building and to construct new building on the suit plot.

7. The Respondents on the other hand have supported the decision of the Learned Single Judge and pray that the Appeal be dismissed being devoid of merits and more so because the attitude of the Appellants is only to protract the issue on untenable grounds.

8. In the first place, the Respondent No. 1 had moved the sole Arbitrator for interim measures by invoking Section 17 of the Act. The Arbitrator opined that the sweep of Section 17 is only to pass order against a party to the Arbitration Agreement to take any interim measures of protection in respect of the subject matter of the dispute. Accordingly,

while passing directions against the Society (Respondent No.2 herein), he gave liberty to the Respondent No.1 to move the Court for appropriate order. It is not necessary for us to delve upon the issue as to whether the sole Arbitrator himself could have considered the relief claimed by the Respondent No. 1 claimant. Indeed, the view taken by the sole Arbitrator has not been assailed and has been allowed to become final. In deference to the opinion recorded by the sole Arbitrator, the Respondent No. 1 has now invoked Section-9 of the Act and has prayed for reliefs which are reproduced hitherto. The first question which arises for consideration is the sweep of Section 9 proceedings. Section-9 of the Act reads thus:

> "**9. Interim measures, etc., by Court**- A party may,before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court:-
>
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely:-
>
> (a) the preservation, interim custody or sale of any goods which are the subject-matter of arbitration agreement;
>
> (b) securing the amount in dispute in the

> arbitration;
>
> (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to the made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
>
> (d) interim injunction or the appointment of a receiver;
>
> (e) such other interim measure of protection as may appear to the Court to be just and convenient,
> and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceeding before it."

9. The purport of Section-9 has been expounded by the Apex Court in the case of **Firm Ashok Traders & anr. vs. Gurmukhdas Saluja & ors. reported in AIR 2004 SC 1433.** It considered the scheme of Section 9 of the Act. It has held that application under Section 9 is not a suit although such application results in initiation of civil proceedings. It went on to observe that the right conferred by Section 9 is on a party to an Arbitration Agreement. That Section-9 has relevance to the locus standi as an applicant. A person not party to an arbitration agreement cannot

enter the Court for protection under Section 9 of the Act. In other words, the party to an Arbitration Agreement can invoke this jurisdiction for securing relief which the Court has power to grant before, during or after arbitral proceedings by virtue of Section 9. The Apex Court further held that Section 9 has nothing to do with the relief which is sought for from the Court or the right which is sought to be canvassed in support of the relief. The Court is competent to grant reliefs to a party under Clauses (i) and (ii) of Section 9 which flow from the power vesting in Court exercisable by reference to "contemplated", "pending" or "completed" arbitral proceedings. The Court is conferred with the same power for making the specified orders as it has for the purpose before it though the venue of the proceedings in relation to which the power under Section 9 is sought to be exercised is the Arbitral Tribunal. It is thus clear that the relief sought in such application is neither in a suit nor a right arising from a contract. The Court under Section 9 only formulates interim measures so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated. Suffice it to observe that this decision is of no avail to answer the controversy on hand as to whether remedy under Section 9 can be pursued against a person who is not party to an arbitration agreement or arbitration proceedings.

10. On plain language of Section 9, it would appear that a party to an Arbitration Agreement can invoke jurisdiction of the Court under this provision for interim measures as specified therein at any stage of Arbitral proceedings but before the Arbitral Award is enforced in accordance with Section 36. The power of the Court under Section 9 of the Act is very wide and is not controlled by the provisions of the Code of Civil Procedure. Indeed, the Court has to be guided by the equitable considerations keeping in mind that the award to be passed by the Arbitral Tribunal is capable of enforcement.

11. In the present case, the relief which is sought by the Respondent No.1 and as granted by the Learned Single Judge is ascribable to the situations specified in sub-clauses (d) and (e) of Section 9(ii). Sub-clause (d) envisages interim injunction or the appointment of Receiver. Obviously, the interim measures can be for management, protection, preservation and improvement of the property which is the subject matter of the Arbitration Agreement. In addition to appointment of a Receiver, it is open to the Court to provide such interim measures of protection as may appear to it, to be just and convenient. Besides, appointing the Court

Receiver, it would be open to the Court to order removal of any person from the possession or custody of the property or commit the same to the possession, custody or management of the Receiver. It is also open to the Court to confer upon the Receiver all such powers for realization, management, protection, preservation and improvement of the property, collection of the rents and profits thereof or such other powers as the Court thinks fit. Such order, however, has to be passed on the satisfaction of the Court that it is just and convenient to do so. The language of sub-clause (e) reinforces the position that besides appointment of a Receiver, it is open to the Court to order such other interim measures of protection as may appear to the Court to be just and convenient. Section 9 makes it amply clear that the Court shall have the same power for making orders as it is for the purpose of, and in relation to, any proceedings before it. In other words, the Court while considering the request for formulating interim measures should be guided by equitable consideration on case to case basis with a view to ensure that the award passed by the Arbitral Tribunal is capable of enforcement.

12. The next question is whether order of formulating the interim measures can be passed by the Court in exercise of powers under Section

9 of the Act only against a party to an Arbitration Agreement or Arbitration Proceedings. As is noticed earlier, the jurisdiction under Section 9 can be invoked only by a party to the Arbitration Agreement. Section 9, however, does not limit the jurisdiction of the Court to pass order of interim measures only against party to an Arbitration Agreement or Arbitration Proceedings; whereas the Court is free to exercise same power for making appropriate order against the party to the Petition under Section 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to the Arbitration Agreement or Arbitration Proceedings does not affect the jurisdiction of the Court under Section 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the Arbitration Agreement.

13. The Appellants, however, place reliance on the decision of the Kerala High Court in the case of **Shoney Sanil v/s. M/s. Coastal Foundations (P) Ltd. & Ors. reported in AIR 2006 Kerala (206)**. In that case the question considered was whether the writ-petitioner, admittedly, a third party to an alleged Arbitral Agreement between the Respondents inter se, and who had in his favour a confirmed Court sale

and certificate of such sale and delivery of possession, following and arising under an independent decree, could be dispossessed, injuncted or subjected to other Court proceedings under Section 9 of the Act? The Kerala High Court held that orders under Section 9 (ii)(c) can be passed only in relation to subject matter of dispute in arbitration which may be in possession of any party since it is not the intention of the Act or any arbitration proceedings as conceived by the law of Arbitration to interfere with or interpolate third party rights. It concluded that on a plain reading of Section 9 of the Act and going by the Scheme of the said Act, there is no room to hold that by an interim measure under Section 9, the rights of third party holding possession on the basis of Court sale could be interfered with, injuncted or subjected to proceedings under Section 9 of the Act. Instead, it held that Section 9 of the Act contemplates issuance of interim measures by the Court only at the instance of party to Arbitration Agreement with regard to the subject matter of the Arbitration Agreement. The Court has, however, noted that such order can be only against the party to an Arbitration Agreement or at best against any person claiming under him. The Principle expounded in this decision is that if a third party has independent right in the subject matter of the Arbitration Agreement, Section 9 cannot be invoked to affect his rights. At the same

time, the Kerala High Court has plainly opined that it is possible to pass orders under Section 9 against a third party if such person is claiming under the party to the Arbitration Agreement. Thus understood, Section 9 can be invoked even against a third party who is not party to an arbitration agreement or arbitration proceedings, if he were to be person claiming under the party to the arbitration agreement and likely to be affected by the interim measures. The Appellants herein will have to substantiate that they were claiming independent right in respect of any portion of the subject matter of the Arbitration Agreement on their own and not claiming under the Respondent No. 2 Society who is party to the Arbitration Agreement. In absence thereof, the Court would certainly have jurisdiction to pass appropriate order by way of interim measures even against the Appellants herein, irrespective of the fact that they are not party to the Arbitration Agreement or the Arbitration Proceedings.

14. Reliance was placed on another decision of the Delhi High Court in the case of **Impex Trading GMBH v/s. Anunay Fab. Ltd. & ors. reported in 2008 (1) Arb. LR 50 Delhi.** In this case relief was sought against the bankers of the Respondent No. 1 and Petitioner respectively. The Court found as of fact that the Bankers (Respondents 2 to 4) were

regulated in their working by various articles of the UCP500. The liability of the Bank under the document was independent of any dispute as to breach of contract between the seller and the buyer. On this finding, the Court went on to hold that Petition under Section 9 of the Act against the Bankers who are not even party to the Consignment Agreement and the Arbitration Clause is not maintainable and deserves dismissal qua them. Once again that was not a case of person claiming under the party to the Arbitration Agreement, unlike in the present case where the Appellants were members of the Respondent No.2 Society and would be therefore bound by the Award against the Society. The fact that the Appellants have proprietary rights in the flats occupied by them does not mean that they were claiming such right dehors the rights of the Society in the said flats. For, the Society is the owner of the land and structure standing thereon. The flats occupied by the Appellants are part thereof and in fact, allotted to the Appellants in the capacity of members of the Society. In that sense, the Appellants are persons claiming rights in the flats situated in the property which is the subject matter of the Arbitration Agreement, under the Respondent No.2 Society who is party to the said Arbitration Agreement. Accordingly, even this decision will be of no avail to the Appellants.

15. The Appellants would then rely on the decision of the Apex Court in **Ramesh Himmatlal Shah v/s. Harsukh Jadhavji Joshi reported in AIR 1975 SC 1470** to contend that the flats in question occupied by them have been allotted to them by the Housing Society which allotment is coupled with the right to transfer their shares of the Society and interest in the said flat which is the property of the Society. In the said decision, the Apex Court has observed that the right so enjoyed by the member is the species of the property namely the right to occupy a flat of this type, which assumes significant importance and acquires under the law a stamp of transferability in furtherance of interest of commerce. It went on to observe that there is no fetter in any of the legal provisions against such a conclusion and for which reason the attachment and sale of the property of the member in execution of the decree are valid under the law. The legal position expounded by the Apex Court in the said decision will be of no avail to the case on hand. The crucial question is whether the members can be heard to say that their rights in the flats occupied by them were dehors the rights of the Society therein and that they were not claiming under the Society at all. In our considered opinion such stand of the members(Appellants herein) cannot be countenanced.

16. In the present case, it is not in dispute that the General Body of the Society which is supreme, has taken a conscious decision to redevelop the suit building. The General Body of the Society has also resolved to appoint the Respondent No.1 as the Developer. Those decisions have not been challenged at all. The Appellants who were members of the Society at the relevant time, are bound by the said decisions. The Appellants in the dispute filed before the Cooperative Court have only challenged the Resolution dated 27/4/2008, which challenge would merely revolve around the terms and conditions of the Development Agreement. As a matter of fact, the General Body of the Society has approved the terms and conditions of the Development Agreement by overwhelming majority. Merely because the terms and conditions of the Development Agreement are not acceptable to the Appellants, who are in minuscule minority (only two out of twelve members), cannot be the basis not to abide by the decision of the overwhelming majority of the General Body of the Society. By now it is well established position that once a person becomes a member of the Cooperative Society, he 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 & ors. v/s. State of Punjab reported in AIR 1985 SC 973**). This view has been followed in the subsequent decision of the Apex Court in the case of **State of U.P. v/s. Chheoki Employees Cooperative Society Ltd. reported in AIR 1997 SC 1413.** In this decision the Apex Court further observed that the member of Society has no independent right qua the Society and it is the Society that is entitled to represent as the corporate aggregate. The Court also observed that the stream cannot rise higher than the source. Suffice it to observe that so long as the Resolutions passed by the General Body of the Respondent No. 2 Society are in force and not overturned by a forum of competent jurisdiction, the said decisions would bind the Appellants. They cannot take a stand alone position but are bound by the majority decision of the General Body. Notably, the Appellants have not challenged the Resolutions passed by the General Body of the Society to redevelop the property and more so, to appoint the Respondent No.1 as the Developer to give him all the redevelopment rights. The propriety rights of the Appellants herein in the portion (in respective flats) of the property of the Society cannot defeat the rights accrued to the Developer and/or absolve the Society of its obligations in relation to the subject matter of

the Arbitration Agreement. The fact that the relief prayed by the Respondent No. 1 in Section-9 Petition and as granted by the Learned Single Judge would affect the propriety rights of the Appellants does not take the matter any further. For, the propriety rights of the Appellants in the flats in their possession would be subservient to the authority of the General Body of the Society. Moreso, such rights cannot be invoked against the Developer (Respondent No.1) and in any case, cannot extricate the Society of its obligations under the Development Agreement. Since the relief prayed by the Respondent No.1 would affect the Appellants, they were impleaded as party to the proceedings under Section 9 of the Act, which was also necessitated by virtue of Rule 803E of the Bombay High Court (Original Side) Rules. The said Rule reads thus:-

> "**R803E**. Notice of Filling Application to persons likely to be affected.--
> Upon any application by petition under the Act, the Judge in chambers shall, if he accepts the petition, direct notice thereof to be given to all persons mentioned in the petition and to such other persons as may seem to him to be likely to be affected by the proceedings, requiring all or any of such persons to show cause, within the time specified in the notice, why the relief sought in the petition should not be granted."

17. The Respondents have also placed reliance on the decision of the

Delhi High Court in the case of **Value Advisory Services v/s. ZTE Corporation & ors. in OMP. No. 65/2009 decided on 15th July, 2009.** One of the issue considered in this decision is whether in exercise of powers under Section 9 of the Act, the Court can make an order against or with respect to any party other than a party to the arbitration agreement. The Court observed that no general principle of maintainability/applicability or non-maintainability/non-applicability can be laid down. It will have to be determined by the Court in the facts of each case whether for the purpose of interim measure of protection, preservation, sale of any goods, securing the amount in dispute and order affecting the third party can be made or not. Similar view can be discerned from another decision of the Delhi High Court in the case of **Arun Kapur v/s. Vikram Kapur 2002-DLT-95-42**. The Court was considering the distinction between the scope of application under Section 9 and Section 17 of the Act. It observed that it is settled that Section 9 is attracted only if the nature of dispute is subject matter of Arbitration proceedings or agreement. It does not contemplate any such relief which does not stem from the Arbitration Proceedings or the disputes referred to in arbitration for adjudication. It observed that Section 9 is distinct from Section 17 in as much as Petition under Section

17 is moved before the Arbitrator for an order against a party to the proceedings, whereas Section 9 vests remedy to a party to arbitration proceedings to seek interim measure of protection against a person who need not be either party to the arbitration agreement or to the arbitration proceedings.

18. We have no hesitation in taking the view that since the Appellants were members of the Society and were allotted flats in question in that capacity at the relevant time are bound by the decision of the General Body of the Society, as long as the decision of the General Body is in force. As observed earlier, the Appellants have not challenged the decisions of the General Body of the Society which is supreme, in so far as redevelopment of the property in question or of appointment of the Respondent No.1 conferring on him the development rights. The Appellants have merely challenged the Resolution which at best would raise issues regarding the stipulations in the Development Agreement. The General Body of the Society has taken a conscious decision which in this case was after due deliberation of almost over 5 years from August 2002 till the Respondent No. 1 came to be finally appointed as Developer in terms of Resolution dated 2nd March, 2008. Moreover, the General

Body of the Society by overwhelming majority not only approved the appointment of Respondent No. 1 as developer but also by subsequent Resolution dated 27th April, 2008 approved the draft Development Agreement. Those terms and conditions have been finally incorporated in the registered Development Agreement executed by the Society in favour of Respondent No.1. That decision and act of the Society would bind the Appellants unless the said Resolutions were to be quashed and set aside by a forum of competent jurisdiction. In other words, in view of the binding effect of the Resolutions on the Appellants, it would necessarily follow that the Appellants were claiming under the Society, assuming that the Appellants have subsisting proprietary rights in relation to the flats in their possession. It is noticed that as of today the Appellants have been expelled from the basic membership of the Society. Their right to occupy the flat is associated with their continuance as member of the Society. It is a different matter that the decision of expelling the Appellants from the basic membership of the Society will be subject to the outcome of the decision of the superior authority where the appeals are stated to be pending. If the decision of the Society to expel the Appellants is to be maintained, in that case, the Appellants would have no surviving cause to pursue their remedy even before the Co-operative Court much less to

obstruct the redevelopment proposal. As a matter of fact those proceedings will have to be taken to its logical end expeditiously. Even if the Appellants were to continue as members, they would be bound by the decision of the General Body whether they approve of the same or otherwise. In any case, keeping in mind that the Development Agreement does not absolutely take away the rights of the Appellants in the flats in question, as after demolition of the existing building, the Appellants would be accommodated in the newly constructed flats to be allotted to them in lieu of the existing flats, on the same terms as in the case of other members, provided the Appellants continue to remain members of the Society. Under the Development Agreement, the Respondent No. 1 is obliged to complete the project within 18 months from the date of receipt of full Commencement Certificate from the Corporation. The full Commencement Certificate would be issued only upon the vacant possession of the entire building is delivered to the Respondent No.1 who in turn would demolish the same with a view to reconstruct a new building in its place. Significantly, out of twelve (12) members, ten (10) members have already acted upon the Development Agreement as well as have executed separate undertaking-cum-agreement with the Respondent No. 1 Developer. They have already vacated flats in their occupation to

facilitate demolition of the existing building and have shifted to alternative transit accommodation as back as in February 2009. The project has been stalled because of the obstruction created by the Appellants herein who are in minuscule minority. The said ten members of the Society who have already shifted their premises, they and their family members are suffering untold hardship. At the same time, the Respondent No. 1 who has already spent huge amount towards consideration of the Development Agreement and incurred other incidental expenses to effectuate the Development Agreement in addition will have to incur the recurring cost of paying monthly rent to the ten members who have already shifted to transit accommodation. The learned Single Judge has noted that the Appellants are not in a position to secure the amount invested and incurred including the future expenses and costs of the Respondent No.1 herein in case the project was to be stalled in this manner. Even before this Court the Appellants have not come forward to compensate the Respondent No.1 herein and the other ten members of the Society for the loss and damage caused to them due to avoidable delay resulting from the recalcitrant attitude of the Appellants. Considering the impact of obstruction caused by the Appellants to the redevelopment proposal, not only to the Respondent No. 1 Developer but also to the

overwhelming majority of members (10 out of 12) of the Society, the learned Single Judge of this Court opined that it is just and convenient to not only appoint the Court Receiver but to pass further orders for preservation as well as protection and improvement of the property which is subject matter of Arbitration Agreement. We have already noticed that the Court's discretion while exercising power under Section 9 of the Act is very wide. The question is whether in the fact situation of the present case it is just and convenient to appoint Court Receiver coupled with power conferred on him to take over possession of the entire building and hand over vacant and peaceful possession thereof to the Respondent No. 1 who in turn shall redevelop the property so as to provide flats to each of the members of the Society in lieu of the existing flats vacated by them as per the terms and conditions of the Development Agreement, as ordered by the learned Single Judge. For the reasons noted by the Learned Single Judge which we have reiterated in the earlier part of this decision, we find that it would be just and convenient to not only appoint Court Receiver to take over possession of the property but also pass further order of empowering the Court Receiver to hand over vacant possession of the suit building to the Respondent No. 1 to enable him to complete the redevelopment work according to the terms and conditions of the

Development Agreement.

19. Our attention was invited to the decisions of our High Court in the case of **Raja Construction Co. v/s. Sahara Cooperative Housing Society Ltd. & ors. in Notice of Motion No. 2753/2007 decided on August 31, 2007** and another decision of the Division Bench in the case of **Whiz Enterprise Private Ltd. v/s. State of Maharashtra & ors. in WP (L) No. 28/2009 decided on 30/7/2009**. We are conscious of the fact that in both these decisions the member who was in minority did not bother to challenge the decision of the General Body of the Society. Even in the present case, the Appellants have not challenged the relevant decisions of the Society to redevelop the suit property and to appoint the Respondent No.1 as the Developer. At best, the Appellants have challenged the Resolution dated 27th April, 2008 which in turn relates to the approval of the Development Agreement, which has already been executed between the Respondent No. 1 Developer and the Respondent No. 2 Society. Indeed, in those cases the relief was not on an Application under Section 9 of the Act, but for the reasons recorded hitherto the relief to be granted in this petition would nevertheless be the same.

20. It was also argued that the property was in good condition and there was no need to redevelop the existing building. In the first place, as noted earlier, the decision of the General Body of the Society to redevelop the suit property has not been challenged at all. Besides, no provision in the Cooperative Societies Act or the rules or any other legal provision has been brought to our notice which would curtail the right of the Society to redevelop the property when the General Body of the Society intends to do so. Essentially, that is the commercial wisdom of the General Body of the Society. It is not open to the Court to sit over the said wisdom of the General Body as an Appellate Authority. Merely because some members in minority disapprove of the decision, that cannot be the basis to negate the decision of the General Body, unless it is shown that the decision was the product of fraud or misrepresentation or was opposed to some statutory prohibition. That is not the grievance made before us. In the present case, the General Body took a conscious decision after due deliberations for over five years to redevelop its property. Even with regard to the appointment of the Respondent No.1 as the Developer, the record shows that it was decided by the General Body of the Society after examining the relative merits of the proposals received from the developers and interviewing them. Even the proposed development

agreement to be entered with the Developer(Respondent No.1) was approved by the General Body. The Appellants raised untenable pleas to cause obstruction and have belatedly filed proceedings in the Cooperative Court as a counter blast only to protract the redevelopment work to be carried out by the Respondent No.1 herein.

21. Accordingly, we find no infirmity in the conclusion reached by the Learned Single Judge in making the Petition absolute in terms of prayer clause (a) in the fact situation of the present case.

22. In our opinion, this Appeal is devoid of merits. The same deserves to be dismissed. At the same time, we would clarify that any observation in this decision shall not be treated as an expression of opinion one way or the other in the pending proceedings. The same will have to be proceeded on its own merits in accordance with law.

23. Hence, this Appeal is dismissed with costs.

CHIEF JUSTICE

A.M.KHANWILKAR, J