

Vardhman Developers Ltd. Vs. Borla Co-operative Housing Society Ltd. and Others

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Court : Mumbai

Decided On : Oct-22-2013

Judge : R.D. Dhanuka

Appeal No. : Notice of Motion No. 1081 of 2010 IN Suit No. 1442 of 2009

Appellant : Vardhman Developers Ltd.

Respondent : Borla Co-operative Housing Society Ltd. and Others

Advocate for Pet/Ap. : Mr. Mehta

Judgement :

P.C.

By this motion, the applicants (some of the original defendants) seek rejection of the plaint under Order VII rule 11(d) of the Code of Civil Procedure, 1908. Plaintiffs have filed a suit inter alia praying for declaration that the development agreement dated 21st October, 2007 executed by and between the plaintiffs and defendant no.1 is binding on all the defendants, their servants, agents and any persons claiming through them including all the members of the defendant no.1 society. Plaintiffs have also prayed for order and decree against defendant nos. 2 to 72 to execute their consent for redevelopment in favour of the plaintiffs in terms of the development agreement.

2. This motion has been filed by the applicants on the ground that though in the plaint and in particular paragraph 17, it is averred by the plaintiffs that in view of the urgency in the matter, notice under section 164 of the Maharashtra Cooperative Societies Act, 1960 (hereinafter referred to as the Said Act) has not been given to defendant no.1 and that the same be dispensed with, plaintiffs have not applied for dispensing with the said notice. It is submitted that though the plaintiffs have sought reliefs against defendant no.1 society, notice under section 164 of the said Act has not been issued. It is submitted that the notice under section 164 of the said Act is mandatory and cannot be waived and/or dispensed with and this suit is barred under section 164 of the said Act and is liable to be rejected under Order VII rule 11(d) of the Code of Civil Procedure, 1908. Mr. Mehta, the learned counsel for the applicants invited my attention to prayer clause (a) by which the plaintiff seeks declaration that the development agreement entered into between plaintiffs and defendant no.1 is binding on all the defendants including members of defendant no.1. It is submitted that thus prayer (a) in the plaint is barred for want of mandatory notice under section 164 not issued by the plaintiffs before filing of suit. Mr. Mehta, learned counsel placed reliance on the judgment of this court in the case of Suprabhat Coop. Housing Society Ltd. Vs. Span Builders, 2002 (3) Mh. L.J. 837 and in particular paragraphs 7, 8, 9, 10, 12 and 13 in support of his submission that the suit is not maintainable if no notice under section 164 of the said Act was served upon the society and the suit is thus liable to be rejected for want of notice under section 164 of the said Act. The relevant paragraphs read thus :

7. Section 164 provides that no suit shall be instituted against a society, or any of its office bearers in respect of any act touching the business of the society, until after the expiration of two months after the stipulated notice has been delivered. The notice is to specify the cause of action and the other particulars which are set out in Section 164. The plaint is to then contain a statement that a notice was so delivered.

8. The expression "touching the business of the society", which is employed in Section 164 has also been used in Section 91 of the Act. Section 91, it would be material to note, falls in Chapter IX of the Act which is entitled "Statement of

Disputes". Section 91 provides that notwithstanding anything contained in any other law for the time being in force any dispute touching the constitution, elections of the committee or its officers other than elections of committees of specified societies including its officers conduct of general meetings, management or business of a society shall be referred by any of the parties to the dispute to a Cooperative Court if the parties thereto are one or the other of the parties specified in Clauses (a) to (e) of the section. The expression "touching the business of the society" came up for consideration before the Supreme Court in *Deccan Merchants v. Dalichand* reported in *The Supreme Court* held that in the context of Section 91, the expression "touching the business of the society" would not mean the affairs of a society because election of office-bearers, conduct of general meetings and management of a society could be treated as affairs of a society. Therefore, the Court was of the view that the word "business" has been used in a narrower sense and it means the actual trading, commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its byelaws. In the present case, the Court is concerned with the construction to be placed upon the meaning of the expression "touching the business of the society" not in the context of Section 91 but in Section 164. Nevertheless, the principle which has been laid down by the Supreme Court must illuminate the interpretation to be placed by this Court on the expression "touching the business of the society". In that context, it would be necessary to advert to the following observations of the Supreme Court in *Deccan Merchants* (supra):

"The question arises whether the dispute touching the assets of a society would be a dispute touching the business of the society. This would depend on the nature of the society and the rules and byelaws governing it. Ordinarily, if a society owns buildings and lets out parts of buildings which it does not require for its own purpose it cannot be said the letting out of those parts is a part of the business of the society. But it may be that it is the business of a society to construct and buy houses and let them out to its members. In that case letting out property may be part of its business. In this case, the society is a cooperative bank and ordinarily a cooperative bank cannot be said to be engaged in business when it lets out properties owned by it. Therefore, it seems to us that the present dispute between a tenant of a member of the bank in a building which has subsequently been

acquired by the bank cannot be said to be a dispute touching the business of the Bank, and the appeal should fail on this short ground."

9. The basic principle which has been formulated by the Supreme Court is that whether a particular dispute touches the business of the society would depend upon the nature of the society and the rules and byelaws governing it. In the case before the Supreme Court, the society was a Cooperative Bank. The Supreme Court held that ordinarily, a Cooperative Bank cannot be said to be engaged in a transaction which touches the business of the Society when it lets out properties owned by it. Therefore, a dispute between a tenant of a member of the Bank in a building which had subsequently been acquired by the Bank was held not to touch the business of the Bank. The Supreme Court in the observation which has been extracted above, however, also considers a case where it is the business of a society to construct and buy houses and let them out to its members. The Supreme Court held that in such a case letting out of property is the business of the society. The distinction between the two types of cases has to be borne in mind. The distinction is premised in the nature of the society as evidenced by its objects and bye laws.

10. In the present case, the first applicant is a Cooperative Housing Society and has been registered as such under the Act. A housing society is defined by Section 2(16) to mean a society, the object of which is to provide its members with open plots for housing, dwelling houses or flats; or if open plots, the dwelling houses or flats are already acquired, to provide its members common amenities and services. The first applicant is a cooperative housing society and falls within the sub-classification of a Tenant Co-partnership Housing Society within the meaning of Rule 10 of the Rules. The objects of the first applicant inter alia include to buy or take on lease the plot bearing No.C39 of Sector 12, Kharghar, admeasuring 7252 Sq. metres and to construct flats thereon for allotment to the members of the society for their authorised use. The construction contract which was entered into with the respondents was clearly in pursuance of the basic object of the applicants. The contractual relationship which was entered into between the applicants and the respondents was thus in furtherance of and towards implementing the basic object of the applicants as a Tenant Co-partnership

Housing Society. The dispute which has arisen between the parties is in the performance of the contract which was thus entered into.

Therefore, having regard to the principle incorporated in Section 164 of the Act, the suit which has been instituted by the respondents is clearly one which touches the business of the society. The suit was in the circumstances, clearly not maintainable since it is an admitted position that no notice under Section 164 of the Act was served.

12. In the facts and circumstances, the view which has been taken by the learned Trial Judge is manifestly incorrect. The learned Trial Judge has thus, committed a material irregularity in the exercise of his jurisdiction, which would warrant the interference of this Court under Section 115 of the Code of Civil Procedure, 1908.

13. The impugned order of the learned Trial Judge dated 17th October 2001 is quashed and set aside. The application filed by the applicants, Exh18 in Special Civil Suit No. 28 of 2001 shall in the circumstances, stand allowed. In pursuance of the provisions contained in Order 7, Rule 1 I(d) of the Code of Civil Procedure, 1908 , the plaint is liable to and is accordingly rejected for want of notice under Section 164 of the Maharashtra Cooperative Societies Act, 1960. It is needless to add that it would be open to the respondents to institute a fresh suit after due notice as required under Section 164 of the Maharashtra Cooperative Societies Act, 1960. The Civil Revision Application is accordingly allowed.

Parties to act on a copy of this order duly authenticated by the Sheristedar/P.S. of this Court.

3. Mr. Mehta placed reliance on the judgment of this court in the case of C.F. Marconi Vs. Madhav Cooperative Housing Society Ltd. 1985 (2) Bom. C.R. 357 and in particular paragraphs 4 and 7 in support of his submission that notice under section 164 of the said Act was mandatory. It is submitted that the resolution of the society by which the society had agreed to enter into agreement for redevelopment with the plaintiff was in respect of the act touching the business of the society and thus notice was mandatory. Paragraph 4 and 7 read thus:

4. This suit was resisted by the defendant on various grounds. One of the grounds is that the suit is not tenable in the absence of a notice under section 164 of the Act. This point was heard as a preliminary point. The learned Judge of the City Civil Court, Bombay, accepted this contention and the suit was dismissed.

7. It was next urged by Shri Dalvi that the contention about the necessity of the notice under section 164 of the Act should be deemed to have been waived by the defendant and that it would not be open for the defendant to urge for it. The suit in question was filed on May 11, 1963. The plaintiff filed a notice of motion in that suit claiming certain temporary reliefs. That notice of motion was opposed by the society by raising a number of contentions. However, the plea of non-maintainability of the suit on account of the absence of the notice under section 164 of the Act has been taken. But such a plea was specifically taken when the defendant filed a written statement to the suit. The argument of Shri Dalvi is that an omission to take plea in the notice of motion proceedings should be held to be a conduct suggesting that the plaintiff gave up that plea. We are not able to accept this contention for a simple reason that pleas for the suit are to be raised in the written statement. In the present case the concerned plea about the necessity of the notice has been so taken. An omission to raise it in the interlocutory matter would be irrelevant.

4. Mr. Mehta also placed reliance on the judgment delivered by the learned Single Judge in the case of Homi Nariman Bhiwandiwalla Versus Zoroastrian Cooperative Credit Bank Ltd and another 2001(3) Bom. C.R. 352 in support of his submission that notice under section 164 of the said Act was mandatory and the suit is not maintainable for want of notice. Reliance is placed on paragraph 16 of the said judgment which reads as under:

16. Issue No. 13, 15 and 21: Defendant No. 2 is a trust and in case of a trust which is not a legal entity, all the trustees should be joined if a legal action is initiated against a trust. This view is taken by a Division Bench of the Gujarat High Court, reported in *Atmaram Ranchhodbhai v. Gulamhusein Gulam Mohiyaddin*, MANU/GJ/0112/1973 :AIR1973 Guj113 . Same view is also taken by this Court in a decision reported in *Venkatesh Iyer v. Bombay Hospital Trust and others*,

MANU/MH/0198/1998 :1998(2)BomCR798 The suit is also not maintainable for want of notice under section 164 of the Maharashtra Cooperative Societies Act. The notice is mandatory which is clear from the provisions of section 164 of the M.C.S. Act. This is laid down by the Division of this Court in the judgment reported in Mohan Meakin Ltd. v. The Pravara Sahakari Sakhar Karkhana Ltd., , and in head note (b) the Court has held thus :

"Held, that the defendant was a society which was carrying on the business of manufacturing Alcoholic products viz. Whisky and that being the business of the society it was clear that the provisions of section 164 of the Maharashtra Cooperative Societies Act were attracted. One of the objects of the society in addition to manufacture of sugar was the manufacture of complementary products and in that behalf to erect the necessary machinery. The alcoholic products manufactured out of molasses by the defendant cooperative society was a complementary product and the said business fairly and squarely fell within the ambit of the Byelaws of the society. The provisions of the Maharashtra Cooperative Societies Act, and in particular section 164 of the said Act must apply and in the absence of statutory notice under section 164 the suit was not maintainable."

Head Note (C) of the above judgment also mentions the same position. Thus the suit is not maintainable in the absence of notice and notice given after filing of the suit by the plaintiff makes no difference in the situation as the suit as filed was not maintainable and the defect is not curable by giving notice on presentation of the plaint. Issues No. 13, 15 and 21 are therefore answered accordingly.

5. Mr. Mehta placed reliance on the judgment of the Single Judge of this court in the case of Gurudev Developers Vs. Kurla Konkan Niwas Coop. Hsg. Society, 2000(3) Mh. LJ 131 and relevant paragraph on page 140 which reads thus:

In my view, the observations made in the aforesaid judgments make it clear that the suit filed by the plaintiff would not be maintainable on the ground that the requisite notice as required under section 164 of the Maharashtra Cooperative Societies Act has not been served. Counsel has further submitted that even if the suit is said to be maintainable yet no relief can be granted to the plaintiff in the suit

as the agreement dated 18th Jan. 1985 is merely a development agreement and the same cannot be specifically performed. Learned Counsel has relied on a judgment given in Notice of Motion No. 2716 of 1987 in Suit No. 2673 of 1987.

6. Mr. Mehta submits that even if the society has entered into an agreement with the developer for redevelopment of the property of the society, dispute arising out of such resolution passed by the society was touching the business of the society and under section 164 of the said Act notice was mandatory and the suit deserves to be set aside for want of notice.

7. Mr. Kamdar, learned senior counsel appearing on behalf of the plaintiffs on the other hand submits that if the society is constituted for construction of buildings and for providing flats, any dispute arising out of such decision taken by the society would amount to touching the business of the society and notice under section 164 in such event would be mandatory. It is submitted that once the building is constructed and society seeks to redevelop the property of the society in the capacity as owner, dispute arising out of such resolution would not amount to business of the society. Mr. Kamdar submits that the object clause of the society must provide for redevelopment as business which in this case is absent. It is submitted that in any event, only society can raise such objection that the suit is liable to be dismissed for want of notice and no third party. It is submitted that there is no dispute between the plaintiff and defendant no. 1 society. The society is ready and willing to comply with their part of obligation. The dispute is however, raised by some of the members of the society who are applicants in this notice of motion.

8. Mr. Kamdar placed reliance on the judgment of this court in the case of DishaConstruction Versus Jaysen S. Mastakar and Others delivered by the learned Single Judge of this court on 16th September, 2013 in Notice of Motion No. 859 of 2013 in Suit No. 397 of 2013 and in particular paragraph 27 which read thus :

27. Mr. Chinoy the Learned Senior Advocate appearing for the Plaintiff has at the outset correctly submitted that as held in a plethora of judgements passed by this Court, the present Suit filed by the Developer is maintainable. In fact the Honble

Supreme Court has in the case of Margaret Almeida v/s Bombay Catholic Cooperative Housing Soc. Ltd.¹, followed by a Division Bench of this Court in Mohinder Kaur Kochar v/s Mayfair Housing Pvt. Ltd.², has held that the suit between a developer and the society or its members cannot be a dispute which can be adjudicated by the Co-Operative Court under Section 91 of the Maharashtra Cooperative Housing Societies Act 1960 (MCS Act). Mr. Chinoy has at the outset also relied on the decision of the Learned Single Judge (Coram: Dr. D.Y. Chandrachud, J.) dated 7th March, 2011, in Vardhman Developers Ltd. vs. Thailambal Coop. Hsg. Socy. Ltd. in Notice of Motion No. 3274 of 2010 in Suit No. 2725 of 2010 in support of his submission that the process of re-development of the Society by the Developer does not constitute the business of the Society within the meaning of Section 91 of the MCS Act and in view thereof no notice under Section 164 of the MCS Act is required.

9. The learned Single Judge of this court has referred to the earlier judgment of the learned Single Judge delivered on 7th March, 2011 in the case of Vardhaman Developers Ltd. Vs. Thailambal Co-op. Hsg. Socy. Ltd., and held that no notice under section 164 of the said Act would be required in respect of the redevelopment of the society by the developer.

10. Mr. Kamdar also placed reliance on the judgment of the learned Single Judge of this court delivered on 26th August, 2013 in the case of M/s. Akash Pruthvi Lifestyle Vs. Akash Coop. Hsg. Soc. Ltd and another in Notice of Motion (L) No. 1518 of 2013 and in particular paragraph 15 which reads as under :

15. The submission made on behalf of Defendant No.2 that this Court has no jurisdiction to entertain and try the above Suit and that it is only the Cooperative Court which has jurisdiction to try the present Suit, cannot be accepted. The Hon'ble Supreme Court in the case of Margaret Almeida vs. Bombay Catholic Cooperative Housing Soc. Ltd.¹, (which is also followed by a Division Bench of this Court in Mohinder Kaur Kochar vs. Mayfair Housing Pvt. Ltd.²) has held that the suit between a developer and the society or its members cannot be a dispute which can be adjudicated by the Cooperative Court under Section 91 of the Act. Again in the case of Vardhman Developers Limited vs. Thailambal Coop. Hsg.

Socy. Ltd. and others, a Learned Single Judge of this Court (Coram: Dr. D.Y. Chandrachud, J.) has, whilst rejecting the contention that in view of the provisions of Section 91 of the Act this Court would not have jurisdiction to entertain and try the suit filed by the developer, held that Section 91 of the Act brings within its purview disputes touching inter alia the constitution, management or business of a Society. The process of redevelopment of the Society by the developer does not constitute the business of the Society within the meaning of Section 91 of the Act. Section 91 of the Act is therefore not attracted. In view thereof, the submission advanced on behalf of Defendant No.2 that this Court has no jurisdiction to entertain and try the present Suit is rejected.

11. The learned Single Judge has followed the judgment of the Supreme Court in the case of Margaret Almedia Vs. Bombay Catholic Co-operative Housing Soc. Ltd. 2012 (5) SCC 642 holding that the suit between the developer and the society or its members cannot be a dispute which can be adjudicated by the Cooperative Court under section 91 of the Maharashtra Cooperative Societies Act. This court followed the said judgment and the earlier judgment of this court in the case of Vardhaman Developers Limited and held that the process of redevelopment of that society by the developer does not constitute the business of the society within the meaning of section 91 of the Act.

12. Mr. Kamdar also placed reliance on the judgment of the learned Single Judge of this court in the case of Gurudev Developers Vs. Kurla Konkan Niwas Chs Ltd. 2013(3) Mh. L.J. 178 and in particular paragraph 20 holding that the plaintiff developer had not given notice under section 164 of the said Act. The said developer had to construct society building which was not business of the society. It is held that notice under section 164 was thus not required to be issued and the suit was thus maintainable without such notice.

13. Mr. Kamdar, the learned senior counsel placed reliance on the judgment of the Division Bench of this court delivered on 1st August, 2012 in the case of Mohinder Kaur Kochhar Vs. Mayfair Housing Pvt. Ltd. And others in Appeal (L) No. 474 of 2012 and in particular paragraphs 9, 11, 12, 13, 14, 15 to 19 which read thus :

9. Very recently, by judgment dated 30 January, 2012 in Civil Appeal Nos. 1175-1177 of 2012 (Margret Almeida and Ors., Etc. Etc. v. the Bombay Catholic Co-operative Housing Society Ltd. and Ors. Etc. Etc.), the Supreme Court has interpreted the provisions of Sections 91 and 163 of the Act, and has held that, for a suit to be maintainable under Section 91, and to be barred by Section 163 of the Act, both the following tests must be satisfied:-

(a) the subject-matter of the suit must be covered by the opening words of sub-section (1) of Section 91 and if at all the dispute must fall in any of the following categories:-

(1) Constitution of the Society

(2) Elections of the Committee or its officers

(3) General Meetings

(4) Management of the Society or

(5) Business of the Society.

The second test is that the dispute must have arisen between the parties, who shall belong to one or the other categories specified under clauses (a) to (e) of sub-section (1) (hereinafter referred to as enumerated persons). Hence, it can be seen from the scheme of Section 91 that to confer exclusive jurisdiction on the Co-operative Court, the dispute must satisfy two requirements, i.e., the subject-matter of the dispute as well as the parties to the same must be those specified hereinabove. In other words, if either of the abovementioned two requirements is not satisfied, then the dispute cannot be adjudicated by the Co-operative Court. If it is found in a given case that the subject-matter of dispute is not covered by Section 91, an enquiry into the question whether the parties to the dispute fall under any of the categories enumerated under that section would become irrelevant.

11. Without prejudice to the above submission, it is also submitted that, in any view of the matter, the dispute arising from implementation of the Redevelopment

Agreement cannot be considered as a dispute arising from the business of respondent No. 4-Society. In support of the said contention, strong reliance is placed on the decision of learned Single Judge of this Court dated 7 March, 2011 in Vardhaman Developers Limited v. Thailambal Cooperative Housing Society Ltd. and Ors. (Notice of Motion No. 3274 of 2010 in Suit No. 2725 of 2010) as confirmed by the judgment dated 26 April, 2011 of Division Bench of this Court in Appeal No. 277 of 2011.

12. The learned counsel for the appellant (defendant No.1), however, relied on the following decisions in support of the contention that redevelopment is also a part of the business of the Society:- (a) Suprabhat Co-operative Housing Society Ltd. and Anr. v. Span Builders and Anr., 2002 (6) Bom. C.R. 257, and (b) C.F. Marconi v. Madhav Cooperative Housing Society Ltd., 1985 (2) Bom. C.R. 357.

13. As far as the position in Marconi's case (supra) is concerned, the object of the Society was as under:-

a) to engage in the business of real estate observing principles of co-operation for the benefit of its members and in the particular purchase and sale of land and/or buildings and owning, buying, selling, hiring, letting, sub-letting, exchanging, mortgaging, accepting mortgage, renting, leasing, sub-leasing, surrendering, accepting surrender, accepting lease, tenancy or sub-tenancy and constructing, reconstructing, altering or demolishing buildings, through its own agency or through licensed contractors and purchasing, holding in stock or selling materials incidental to construction, repair, overhaul or maintenance of land and building; to fix and collect rents;

It is, therefore, clear that the Co-operative Society in the said case was engaged in the business of real estate and, therefore, by the very nature of its business, it was engaged in the activities of purchase, sale of flats and/or buildings, constructing, reconstructing, altering or demolishing buildings, through its own agency or through licensed contractors and even purchasing, holding in stock and selling materials incidental to construction, repair, etc.

14. On the other hand, even according to defendant No.1, the objects of respondent No.4- Society are as per the Model Bye- laws for Cooperative Housing Societies. Byelaw No. 5 reads as under:-

5. The objects of the society shall be as under: *(a) to obtain conveyance from the owner/Promoter (Builder), in accordance with the provisions of the Ownership Flats Act and the Rules made there-under, of the right, title and interest, in the land with building / buildings thereon, the details of which are as hereunder: The building / buildings known / numbered as constructed on the plot / plots Nos. of admeasuring sq. metres, more particularly described in the application for registration of the Society;

OR

(APPLICABLE FOR PLOT PURCHASED TYPE SOCIETY)

*(a) to buy or take on lease a plot or plot nos. of admeasuring sq. metres and to construct flats thereon for allotment to the members of the society for their authorised use. OR To purchase a building or buildings known as constructed on the plot / plots nos. of admeasuring sq. metres for allotment of flats therein to the members of the society for their authorised use.

(b) To manage, maintain and administer the property of the society;

(c) To raise funds for achieving the objects of the society;

(d) To undertake and provide for, on its own account or jointly with a co-operative institution, social cultural or re-creative activities;

(e) To do all things, necessary or expedient for the attainment of the objects of the society, specified in these bye-laws. *Struck whichever is not applicable

15. It is thus clear that respondent No. 4, by the very nature of its object, had purchased land and got the flats constructed in accordance with the provisions of the Ownership Flats Act and the Rules made there-under. The object of the society was not to engage in the business of real estate and demolition of

buildings, as it was in Marconi's case (supra). When the Society was formed in or about year 1965, it had purchased land and got the flats constructed and allotted the same to its members. After more than 40 years, when respondent No.4-Society has undertaken the project of redevelopment of its property, it cannot be said that respondent No.4-Society has engaged in the business of re-development, i.e., as has specifically been held by this Court in the decision dated 7 March, 2011 in Vardhaman Developers Limited v. Thailambal Co-operative Housing Society Ltd. and Ors., wherein the learned Single Judge observed as under:-

Section 91 (of the Act) brings within its purview disputes touching inter-alia the constitution, management or business of a society. Now in the present case, the process of re-development of the Society by the Developer does not constitute the business of the society within the meaning of Section 91. The demolition of the existing building and the reconstruction of the building of the society is not the business of the society. Section 91 is therefore not attracted.

16. The judgment dated 26 April, 2011 in Appeal No. 277 of 2011 clearly expresses the agreement with the learned Single Judge as regards the reasoning and conclusion of the learned Single Judge.

17. At this stage, we must deal with the submission of the learned counsel for the appellant in respect of the decision of the learned Single Judge of this Court in Suprabhat Co- operative Housing Society Ltd. (supra). In that case, the object of the Society was, inter alia, to buy or take on lease the specified plot and to construct flats thereon for allotment to the members of the Society for their authorised use. The Court, therefore, held that the construction contract, which was entered into with the respondents, was clearly in pursuance of the basic object of the Society. The construction contract was in furtherance of and towards implementing the basic object of the Co-operative Society as tenant Co-partnership Housing Society; and the dispute, which had arisen between the parties, was in pursuance of the contract which was further entered into. The Court, therefore, held that the suit, which was instituted by the respondent-contractors, was one which touched the business of the Society, and the suit was

not maintainable, as notice under Section 164 of the Act was not served.

18. In the present case, as also pointed hereinabove, respondent No. 4-Society was formed in or about year 1965, and, therefore, the re-development work undertaken after 40 years cannot be treated as a part of the business of respondent No.4-Society. The dispute regarding development of property of a housing society may touch the business of the society broadly in two categories. Firstly in the kind of cases contemplated under the judgment of C.F. Marconi (supra), where the object of the society was to engage in the business of real estate, purchase properties and redevelop the purchased properties. Second type of cases where a housing society undertakes activity of initial construction of the building where the members would reside. In the case at hand, admittedly the object of the society is not like the one in the case of C.F. Marconi (supra) i.e. the business engaging in real estate. Thus we are not concerned with the first category. 19. When a cooperative housing society initially constructs the buildings for its members, it is not a redevelopment, but the initial development of the property. The initial construction of the property for a cooperative housing society is one of its prime objects. The two activities namely, initial construction of a building and its re-development are different activities. By passage of time, as the building becomes older, the Housing Society may take a decision to repair or redevelop the property. Such activity is totally different from initial development of the building. The dispute arising from such redevelopment, which becomes necessary by passage of time, is not business of the society. Such activity cannot be considered as 'touching the business' of the society. The dispute involving members, developers, managing committee in respect of re-development of the property which becomes necessary in view of passage of time, is not relatable to the business of the society. The initial development of the cooperative housing society of constructing the building may be business of the society, but the subsequent redevelopment is not.

14. Learned senior counsel submits that this court has dealt with the judgments referred to and relied upon by Mr. Mehta appearing for the applicants in the said judgment of the Division Bench and has categorically held that if the society has undertaken the project of redevelopment of the suit property, it cannot be said that

the said society is engaged in the business of redevelopment. The Division Bench of this court in the said judgment has followed the judgment of the Supreme Court in the case of Margret Almeida and Ors. Etc Vs. Bombay Catholic Cooperative Housing Society Ltd. and Ors while interpreting section 91 of the Maharashtra Cooperative Societies Act and held that the same principles also apply to section 164 of the said Act and held that the project of redevelopment would not amount to society engaging in the business of such redevelopment.

15. Mr. Kamdar, the learned senior counsel also placed reliance on the judgment of the learned Single Judge of this court in the case of HarshaCoop. Housing Society Ltd. And Ors. Vs. Kishandas Rajpal and Ors in Writ petition No.10285 of 2009 in support of his submission that the redevelopment project would not amount to business of the society and no notice under section 164 is maintainable. Mr. Kamdar, learned senior counsel also placed reliance on the judgment of the learned Single Judge delivered on 7th March, 2011 in the case of Vardhaman Developers Limited Vs. Thailambal Co-op. Hsg. Soc. Ltd. And Ors., in Notice of Motion No. 3274 of 2010 and more particularly in paragraph 6 thereof by which it has been held by this court that the demolition of the existing building and reconstruction of the building of the society is not business of the society. Section 91 of the said Act is thus not attracted. For the same reasons, no notice under section 164 is required. Paragraph 6 of the said judgment read as under :

6. There is no merit in the contention based on Section 91 of the Maharashtra Cooperative Societies Act 1960. Section 91 brings within its purview disputes touching inter-alia the constitution, management or business of a society. Now in the present case. the process of redevelopment of the Society by the Developer does not constitute the business of the society within the meaning of Section 91. The demolition of the existing building and the reconstruction of the building of the society is not the business of the society. Section 91 is therefore not attracted. For the same reason, no notice under Section 164 is required. The contention based on the guidelines of the State Government dated 3 January 2009 is without any substance. The Development Agreement in this case was entered into on 27 August 2008 much prior to the enforcement of the guidelines. The contention that the Director of the Plaintiff had no authority is belied by the copy of the Board

Resolution dated 15 May 2010 which has been placed on record. The Resolution authorised the Director in question to represent and sign documents, returns, statements and other writings on behalf of the Company to be submitted inter-alia before any Court of law. Similarly there is no merit in the contention of the objectors that the Power of Attorney in favour of the nominee of the Plaintiff has not been registered. The Development Agreement admittedly has been registered. The Power of Attorney executed by the Society was similarly registered and stamp duty in excess of Rs.19 lacs was paid. The contention based on the Consent Affidavits is similarly devoid of substance. It has been stated on behalf of the Plaintiff that the Developer had forwarded the stamp paper to the Cooperative Society. The Consent Affidavits were executed, notarized and remitted back to the Developer. Significantly there is no dispute about the fact that the Consent Affidavits have been duly executed. There being no dispute about the fact that the Consent Affidavits have been signed and executed by the objecting Defendants, the objection is lacking in substance. The contention that there is an arbitration clause in the Development Agreement between the Society and the Developer, over looks the basic factual position that there is no dispute between the Society and the Developer. It is the objectors who are objecting to the enforcement of the development Agreement. A suit for obtaining necessary reliefs is therefore maintainable. For these reasons I am of the view that the objections which are raised on behalf of Defendant Nos. 5 to 6, however technical, are devoid of any material substance.

16. Mr. Kamdar, learned senior counsel also distinguished the judgment cited by Mr. Mehta on the ground that in each of such case relied upon by Mr. Mehta, the dispute was arising out of initial construction of buildings and flats of the society which was as per objects for formation of such society and not arising out of any redevelopment project. In all these matters the suit was dismissed on the ground that notice under section 164 of the Maharashtra Cooperative Societies Act was not issued when there was dispute regarding the initial construction of the building and flats by the society having arisen which was object of the said society and was not the case of redevelopment.

17. Mr. Madon, learned senior counsel appearing on behalf of the first defendant society submits that the society is supporting the plaintiff and is formal party to the suit. The society is not opposing prayer clause (a) of the plaint. Learned senior counsel submits that the resolution passed by the society is not challenged by the applicants. Mr. Madon, placed reliance on the judgment of the Division Bench of this court in the case of GirishMulchand Mehta and another Versus Mahesh S. Mehta and another, 2010(2)Mh. L.J. 657. It is submitted by learned senior counsel that once the resolution is passed by defendant no. 1 society by which the society has approved the terms and conditions of the development agreement between Plaintiffs and defendant no.1, merely because development agreement is not acceptable to the applicants, who are in minority, the same cannot be the basis for not abiding by the decision of the overwhelming majority of the general body of the society. It is submitted that the person once become member of the cooperative society, he loses his individuality with the Society and he has no independent rights except those given to him by the statute and byelaws. Learned senior counsel submits that the society has not opposed the suit on the ground of want of notice under section 164 and would abide by the resolution passed by the society. The applicants thus have no locus independently to take out this notice of motion and seeks dismissal of the suit on the ground that the suit against the society is not maintainable for want of notice under section 164 of the said Act. Paragraph 16 of the said judgment in the case of Girish Mehta (supra) reads thus :

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 loses his individuality with the Society and he has no independent rights except those given to him by the statute and Byelaws. 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 Ors. v. State of Punjab* reported in MANU/SC/0392/1985 :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. Chheoki Employees Cooperative Society Ltd.* reported in MANU/SC/0332/1997 :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 proprietary 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 proprietary rights of the Appellants does not take the matter any further. For, the proprietary rights of the Appellants in the flats in their possession would be subservient to the authority of the General Body of the Society. More-so, 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.

18. Mr. Madon, learned senior counsel submits that in any event prayer clause (a) in the plaint is irrelevant. The issue of jurisdiction has to be decided based on the averments in the plaint. It is submitted that the society in this case is a formal party.

19. In rejoinder, Mr. Mehta, the learned counsel for the applicant submits that whether the party is formal or not, section 164 of the said Act applies and since there is no compliance of the said provisions, the suit deserves to be dismissed.

20. It is not in dispute that the resolution passed by the society to enter into redevelopment agreement with the plaintiff, is not challenged by the applicants. The consent terms filed by and between the plaintiff and defendant no. 1 in Arbitration Petition by which resolution of the society by which development agreement was terminated, has been withdrawn and those consent terms or resolution of the society has not been challenged by the applicants in any court of law. Defendant no. 1 is not opposing the claim on the ground that the notice under section 164 is not issued by the plaintiff before filing the said suit.

21. On perusal of the judgment of the Division Bench of this court in the case of Girish Mehta (supra), it is clear that once the person becomes member of the cooperative society, he loses his individuality in the society and has no independent rights except those given to him by the statute and byelaws. 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. In my view,

since society has no objection about the maintainability of the suit for want of notice under section 164 of the said Act, and in view of the fact that no such notice is required under section 164 for filing suit against the members of the society, the applicants have no independent locus to seek dismissal of the suit on the ground of want of notice under section 164 of the said Act.

22. The question arises for consideration of this court is whether the resolution passed by defendant no.1 society to confer development rights in favour of the plaintiff for redevelopment of the property of the first defendant, would amount to business of defendant no. 1 society and any dispute arising out of such resolution would require compliance of notice under section 164 of the Maharashtra Cooperative Housing Societies Act, 1960.

23. It is not in dispute that in the object clause of the society for which society was formed, redevelopment of the property of the society was not the object or business of the society. In my view, the members of the society having agreed in the general body meeting to get the property redeveloped for the benefit of its members, through plaintiff, would not amount to business of the society and notice U/s. 164 of the Maharashtra Cooperative Societies Act, 1960 would not be mandatory before filing any such suit by the plaintiffs.

24. All the judgments referred to and relied upon by the applicants are clearly distinguishable in the facts of this case. All such judgments are referred in the subsequent judgments which are relied upon by Mr. Kamdar, learned senior counsel appearing for the plaintiff and Mr. Madon, learned senior counsel appearing for defendant no. 1. On perusal of the judgments relied upon by Mr. Mehta, it is clear that in each of such judgment, the dispute had arisen out of resolution passed by the societies for initial construction of the buildings and flats and not arising out of redevelopment of such properties. The Division Bench of this court in the case of Mohinder Kaur (supra) has followed the judgment of the Supreme Court in the case of Margaret Almeida (supra) by which it was held that since the dispute was not touching the business of the society, in view of the project of redevelopment, the dispute was not maintainable under section 91 of the Maharashtra Cooperative Societies Act. The Division Bench of this court has also

referred to the judgment of the learned Single Judge in the case of Vardhaman (supra) which has been upheld by the Division Bench in Appeal No. 277 of 2011. After considering the judgment of the Supreme Court and earlier judgments of this court including the judgment referred to and relied upon by Mr. Mehta, the learned counsel for the applicants, the Division Bench of this court has held that the society had undertaken the project of redevelopment of its property and it cannot be said that the respondent society was engaged in the business of redevelopment. The Division Bench had considered the model byelaws of cooperative housing societies. It is held by the Division Bench that when the cooperative housing society initially constructs a building for its members, it is not redevelopment but is initial development of the property. Initial construction of the property in the cooperative housing society is one of its prime objects. It is held that the initial construction of building and its redevelopment are different activities. The dispute arisen from such redevelopment which becomes necessary by passage of time, is not business of the society and cannot be considered as touching the business of the society. The said activity cannot be considered as touching the business of the society. The dispute involving members, developers, managing committee in respect of the redevelopment of the property which becomes necessary in view of the passage of time is not relatable to the business of the society. I am respectfully bound by the judgment of the Division Bench of this court which is directly applicable to the facts of this case. Mr. Mehta, learned counsel for the applicant did not dispute that the agreement entered into between the plaintiff and defendant no. 1 society was for redevelopment of the property. It is not in dispute that the resolutions passed by the society are not challenged by the applicants in any court of law.

25. In my view, since the agreement entered into between the plaintiff and defendant No. 1 is for redevelopment which is not the object for which the society was formed, and thus would not be business of the society. Any such dispute arising between plaintiff and defendant no. 1 arising out of redevelopment would not be arising out of the business of the society and thus section 164 of the Maharashtra Cooperative Housing Societies Act, 1960 would not be applicable to the suit filed by the plaintiff. Merely because it is stated in the plaint that in view of the urgency, the plaintiff did not issue notice under section 164 or seeks

dispensation thereof, would be irrelevant in view of the fact that no such notice is required. I am not inclined to accept the submission made by Mr. Mehta that once it is the case of the plaintiffs themselves that notice was required under section 164, plaintiffs cannot be allowed to plead that no such notice is required. The requirement of notice is under section 164 of the Act. The court has to consider whether the said section is applicable at all in the facts of this case. Even if, such reference is made in the plaint, it would not make it mandatory for the plaintiffs to issue notice since it is not required at all.

26. For the aforesaid reasons, in my view there is no substance in any of the submissions made by Mr. Mehta, learned counsel for the applicants and the Notice of Motion thus deserves to be dismissed.

27. I, therefore, pass the following order :

Notice of motion is dismissed.

There shall be no order as to costs.

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