SHEPHALI

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L) NO. 834 OF 2015

IN

SUIT NO. 435 OF 2015

M/S. MAYA DEVELOPERS,
a Partnership Firm, registered under the Indian Partnership Act, 1932 having its registered office at C-109, Ghatkopar Industrial Estate, L.B.S. Marg, Ghatkopar (West), Mumbai – 400 080 ... **Applicants**
Plaintiffs

AND

NOTICE OF MOTION (L) NO. 971 OF 2015

Mr. Rajkumar L. Nagda,
of Mumbai Indian Inhabitant residing at Room No. 24, Azad Cooperative Housing Society Limited, 831, Netaji Subhash Road, Mulund (West), Mumbai – 400 080. ... **Applicant**
Defendant No.10

In the matter between:-

M/S. MAYA DEVELOPERS,
a Partnership Firm, registered under the Indian Partnership Act, 1932 having its registered office at C-109, Ghatkopar Industrial Estate, L.B.S. Marg, Ghatkopar (West), Mumbai – 400 080 ... **Plaintiffs**

versus

1. **Neelam R. Thakkar**,
of Mumbai Indian Inhabitant, residing at Room No. 6, Azad Cooperative Housing Society Limited, 831, Netaji Subhash Road, Mulund (West), Mumbai – 400 080

2. **Smt. Lilabai J. Chedda**,

3. **Mr. Praful J. Chedda**,
Nos. 2 & 3 both of Mumbai Indian Inhabitant residing at Room No. 7, Azad Cooperative Housing Society Limited, 831, Netaji Subhash Road, Mulund (West), Mumbai – 400 080.

4. **Mrs. Saraswati S. Chande**,

5. **Mr. Sadan Kumar Chande**,
Nos. 4 & 5 both of Mumbai Indian Inhabitant residing at Room No. 11, Azad Cooperative Housing Society Limited, 831, Netaji Subhash Road, Mulund (West), Mumbai – 400 080.

6. **Mr. Jayantilal V. Mehta**,
of Mumbai Indian Inhabitant residing at Flat No. 801, O Wing, Vardhaman Nagar, Dr. R.P. Road, Mulund (West), Mumbai – 400 080.

7. **Smt. Dakshaben D. Gandhi Wd/o. Dharmendra Gandhi**,

8. **Shishir D. Gandhi S/o. Dharmendra Gandhi**,

9. **Mittal D. Gandhi S/o. Dharmendra Gandhi**,
Nos. 7 to 9 all of Mumbai Indian Inhabitant residing at A/32, Sanghvi Building, Dr. R.P. Road, Mulund (West), Mumbai – 400 080.

10. **Mr. Rajkumar L. Nagda**,
of Mumbai Indian Inhabitant residing at Room No. 24, Azad Cooperative Housing Society Limited, 831, Netaji Subhash Road, Mulund (West), Mumbai – 400 080.

11. **Beena H. Thakkar**,
of Mumbai Indian Inhabitant residing at Room No. 27, Azad Cooperative Housing Society Limited, 831, Netaji Subhash Road, Mulund (West), Mumbai – 400 080.

12. **Mrs. Divyaben J. Mehta**,

13. **Jignesh J. Mehta**,
Nos. 12 & 13 both of Mumbai Indian Inhabitant residing at Room No. 30, Azad Cooperative Housing Society Limited, 831, Netaji Subhash Road, Mulund (West), Mumbai – 400 080.

14. **Mr. Chatrabhuj P. Thakkar**,
of Mumbai Indian Inhabitant residing at Room No. 9, 2nd Floor, Azad Cooperative Housing Society Limited, 831, Netaji Subhash Road, Mulund (West), Mumbai – 400 080.

15. **Mr. Jamnadas P. Thakkar**,
of Mumbai Indian Inhabitant, residing at B Wing, Mayur Pankh, N.S. Road, Mulund (West), Mumbai – 400 080

16. **Mrudula K. Dave Wd/o. Kapil Dave**,
of Mumbai Indian Inhabitant, residing at Plot No. 119/106B, Near Arya Samaj Mandir, Hindustan Chowk, Mulund Colony, Mulund (West), Mumbai – 400082

17. **Maitri M. Mehta D/o. Kapil Dave**,
of Mumbai, Indian Inhabitant, residing at

134/1, Hindustan Chowk, New Gurudwara Road, Mulund Colony, Mulund (West), Mumbai – 400 082.

18. **Pavitri A. Modi D/o. Kapil Dave**, of Mumbai Indian Inhabitant, residing at Chaudhary Niwas, Dr. Ambedkar Road, Mulund (West), Mumbai – 400 080

19. **Maulik K. Dave S/o. Kapil Dave**, of Mumbai Indian Inhabitant, residing at Plot No. 119/106B, Near Arya Samaj Mandir, Hindustan Chowk, Mulund Colony, Mulund (West), Mumbai – 400082

20. **Mr. Ketan M. Parmar**, of Mumbai Indian Inhabitant, residing at Room No. 7, Shiv Shankar Estate, Zaver Road, Mulund (West), Mumbai - 400080

21. **The Azad Cooperative Hsg Society Ltd.,** a Society registered under Section 10 of the Bombay Act, VII of 1925 and is deemed to be registered under the Maharashtra Cooperative Societies Act, 1960 having its registered office at Azad Bhavan, 831, Netaji Subhash Road, Mulund (West), Mumbai – 400 080. … **Defendants**

APPEARANCES

FOR THE PLAINTIFFS	**Mr. Chetan Kapadia,** *with Mr. Ashish Kamath, Ms. Savita Srivastav, Sharan, and Ms. Urgita Badheka, i/b M/s. S.K. Srivastav & Co.*
FOR DEFENDANTS NOS. 1 TO 10, 12, 13 & 20	**Mr. Rajendra Pai,** *with Mr. A.R. Pai, i/b Ms. Neuty N. Thakkar.*

FOR DEFENDANT NO. 14	**Mr. K.V. Sharafuddin.**
FOR DEFENDANT NO. 21	**Mr. Prashant Chande,** *i/b Mr. Kalpesh J. Nansi.*

CORAM : G.S.Patel, J.

JUDGMENT RESERVED ON : 7th October 2015

JUDGMENT PRONOUNCED ON : 13th July 2016

JUDGMENT:

1. The Plaintiffs ("**Maya Developers**") are a firm of developers. They are the applicants in Notice of Motion (L) No. 834 of 2015. In this Notice of Motion, they seek interim reliefs in relation to the re-development of a building known as "Azad Bhavan", owned by the 21st Defendant, the Azad Co-operative Housing Society Ltd ("**the Society**"). This building is at 831, Netaji Subhash Road, Mulund (W), Mumbai 400 080. It stands on Plot No. 831, S.No. 1,000, CTS Nos. 876, 876/1-13 of Village Mulund (W), Taluka Kurla. The plot is about 1237.10 sq.mts. Azad Bhavan is a ground plus two floor structure. It has a total of 36 rooms. Of these, 33 are of 220 sq.ft. carpet area; three have a carpet area of 320 sq.ft. A list of the members of the Society is annexed to the Plaint.

2. Defendant No.10 is the Applicant in the companion Notice of Motion No. 971 of 2015. That principally raises a jurisdictional issue under Section 9A of the Code of Civil Procedure, 1908 ("**CPC**"), in addition to other reliefs. I will take that up first.

3. I have heard Mr. Kapadia for the Plaintiffs and Mr. Pai for Defendants Nos. 1 to 10, 12, 13 and 20 at very great length. They have taken me through the material on record. I have considered their arguments and submissions, and also the material on record.

THE 10TH DEFENDANT'S MOTION

4. In this Notice of Motion, the 10th Defendant raises a plea that the suit is barred and that this Court lacks the necessary jurisdiction to hear it. This is taken under Section 9A of the CPC. The remaining reliefs relate to the re-development of Azad Bhavan: to restrain the Plaintiffs from acting on it, to direct them to produce the original Development Agreement and one of the annexures to it and for the appointment of a third party to prepare a feasibility report.

5. I have considered the jurisdictional issue separately. As to the other issues in the 10th Defendant's Notice of Motion, I have dealt with these while considering the Plaintiffs' Notice of Motion.

THE PRELIMINARY ISSUE AS TO JURISDICTION:

6. Before I take up the issue of law that is raised as a jurisdictional bar, a brief summary of the factual background is necessary. Some time in 2009, the Society commenced the exercise of undertaking re-development. It resolved to proceed with a re-

development and it appointed a Project Management Consultant ("**PMC**"), an architect and an Advocate. The Municipal Corporation of Greater Mumbai made a site visit report. The process took nearly three years. On 26th February 2012, at a General Body meeting of the Society (which has 36 members), 32 members voted; 31 were in favour of the re-development, one was against. The Society members executed affidavits and looked at the terms of the Development Agreement. Maya Developers offered an additional area (at a stated price) over and above the already increased area on re-development. Plans were approved and lots drawn for allocation of flats. The necessary no-objections were put in place. All that remained was for the members to deliver possession. About two and a half years later, a few members objected. Many of these had earlier participated, voted and were part of the majority that favoured the re-development and the agreement with Maya Developers. They also participated in the meeting that approved the terms and conditions. Some of them moved the Cooperative Court, but failed to get relief. They then moved the City Civil Court, with similar results.

7. I have deliberately put this as broadly as possible, shorn of all details, at this stage, because these are not essential to the preliminary issue. I will return to the factual aspect and consider the details while addressing the rival applications on merits.

8. The preliminary issue is that this Court lacks jurisdiction in view of Section 91 of the Maharashtra Co-operative Societies Act, 1960 ("**MCSA**"). It reads thus:[1]

> **91. Disputes.—**
>
> (1) 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 the 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, or by a federal society to which the society is affiliated, or by a creditor of the society, to the co-operative Court if both the parties thereto are one or other of the following:-
>
> (a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society or the official Assignee of a de-registered society.
>
> (b) a member, past member of a person claiming through a member, past member of a deceased member of society, or a

1 The struck out portions of the extract, not relevant for our purposes, were deleted by the Maharashtra Co-operative Societies (Amendment) Act, 2013, with effect from 13th August 2013. The bold and italicized portions were added or substituted by the Section 16 of the Maharashtra Cooperative Societies (Second Amendment) Act, 1969, with effect from 25th March 1969.

society which is a member of the society ***or a person who claims to be a member of the society***;

(c) ***a person other than a member of the society with whom the society has any transactions in respect of which any restrictions or regulations have been imposed, made or prescribed under sections 43, 44 or 45, and any person claiming through such person***;

(d) ***a surety of a member, past member or deceased member, or surety of a person other than a member with whom the society has any transactions in respect of which restrictions have been prescribed under section 45, whether such surety or person is or is not a member of the society***;

(e) any other society, or the Liquidator of such a society or-de-registered society or the official Assignee of such a de-registered society.

Provided that, an industrial dispute as defined in clause (k) of section 2 of the Industrial Disputes Act, 1947, or rejection of nomination paper at the election to a committee of any society [~~other than a notified society under section 73-1C or a society specified by or under section 73-G~~], or refusal of admission to membership by a society to any person qualified therefore or any proceeding for the recovery of the amount as arrear of land revenue on a certificate granted by the Registrar under sub

section (1) or (2) of section 101 or sub -section (1) of section 137 or the recovery proceeding of the Registrar or any officer sub ordinate to him or an officer of society notified by the State Government, who is empowered by the Registrar under sub-section (J) of section 156, or any orders, decisions, awards and actions of the Registrar against which an appeal under section 152 or 152 A and revision under section 154 of the Act have been provided shall not be deemed to be a dispute for the purposes of this section.

(2) [*Sub-section (2) deleted by Mah. 27 of 1969, s. 16(b).*]

(3) **Save as other wise provided under sub-section (2) to section 93, no Court shall have jurisdiction to entertain any suit or other proceedings in respect of any dispute referred to in sub-section (1)**.

Explanation 1.—A dispute between the Liquidator of a society or an official Assignee of a de-registered society and the members (including past members, or nominees, heirs or legal representative or deceased members) of the same society shall not be referred to the co-operative Court under the provisions of sub-section (1).

Explanation 2.—For the purposes of this sub-section, a dispute shall include—

(i) a claim by or against a society for any debt or demand due to it from a member or due from it to a member, past member or the nominee, heir or legal representative of a deceased member, or servant for

employee whether such a debt or demand be admitted or not;

(ii) a claim by a surety for any sum or demand due to him from the principal borrower in respect of a loan by a society and recovered from the surety owing to the default of the principal borrower, whether such a sum or demand be admitted or not;

(iii) a claim by a society for any loss caused to it by a member, past member or deceased member, by any officer, past officer or deceased officer, by any agent, past agent or deceased agent, or by any servant, past servant, past servant or deceased servant, or by its committee, past or present, whether such loss be admitted or not;

(iv) a refusal or failure by a member, past member or a nominee, heir or legal representative of a deceased member, to deliver possession to a society of land or any other asset resumed by it for breach of condition as the assignment.

9. The question, briefly stated, is whether a dispute about a Development Agreement or the re-development of a cooperative housing society is a 'dispute touching the ... business of a society' within the meaning of Section 91(1) of the MCSA. For the section to apply, two conditions must co-exist: the subject matter of the *lis* must be covered by Section 91(1); and, second, the parties to the *lis* must fall within that Section. Mr. Pai would have it that every Development Agreement is, *ex hypothesi*, "the business" of a

housing society. Mr. Kapadia disputes this; and, in his submission, Maya Developers does not fall within any of the categories (a) to (e) of Section 91(1). It is not enough, in his submission, that only one criterion be met; both must be satisfied, failing which the jurisdictional bar does not arise.

10. Mr. Pai also references Sections 163 and 164 of the MCSA. The former says, *inter alia*, that no civil or revenue court shall have any jurisdiction in respect of, *inter alia*, 'any dispute required to be referred to the Cooperative Court for decision'.[2] Section 163 requires a notice in suits:

> **164. NOTICE NECESSARY IN SUITS**
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> **No suit shall be instituted against a society**, or any of its officers, **in respect of any act touching the business of the society**, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left.

11. Mr. Pai's submission is that Section 164 too speaks of the 'business' of a society. It is, however, free of the restraints of Section 91, and is in more absolute terms. It is mandatory in respect of any action against the society; and this being a suit against the 21st Defendant, a society, the action is not maintainable without such notice. I will deal with this argument straight away, for it seems

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2 Section 164(1)(b) of the MCSA.

to me that it is incorrectly placed: first, this is not, strictly speaking, a suit against the society; no relief is sought against the Society. The Society supports the Plaintiff. Second, to argue that because Section 164 also uses the phrase 'business of the society', therefore the use of the same expression in Section 91 must be freed of its requirements in that Section is wholly incorrect. That would render the restrictions in Section 91 otiose. No statute can or should be read like this.

12. The next limb of Mr. Pai's submission is more intricately constructed. He says that the definition of a 'housing society' in Section 2(16) of the MCSA yields an important clue as to what is meant by the 'business' of such a society.

> 2(16) "housing society " means 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;

Therefore, he submits, anything that relates to the provision of housing, be it by way of development, re-development or otherwise, is part of the 'business' of a housing society.

13. At a General Body meeting on 27th March 2011, the Society adopted the Model Bye-Laws of 2009.[3] Chapter XVIII deals with Redressal of Complaints. Bye-Law 175 says that members provides for various avenues or forums for redressal of members' complaints

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3 Notice of Motion paperbook, *pp.* 28–29.

and disputes. Clause (A) identifies the disputes that are to be dealt with by the Registrar. Clause (B) similarly identifies disputes that lie within the jurisdiction of the Cooperative Court. Sub-clauses (c), (e) and (g)[4] clearly say that issues regarding repairs (including major repairs, internal repairs, leakages); allotment of flats; and the appointment of a 'developer/contractor, architect' are all to be decided by the cooperative court. A re-development project necessarily falls within these clauses: after, for every re-development, there must be a developer, a contractor and an architect; there arises the question of allotment of flats to members in the redeveloped building; and re-development itself is nothing but a form of repair, intended, as the definition of a housing society tells us, to provide members with flats.

14. If there was any doubt about this, it is put beyond the pale, Mr. Pai submits, by Bye-Law 176 in Chapter XIX:[5]

> **XIX. Regarding redevelopment of the buildings of the Co-operative Housing Societies:—**
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> 176) As regards vacant spaces of the ownership of the Co-operative Housing Societies as well as re-development of the buildings, **the Government of Maharashtra has issued Government Resolution No. CHS 2007/ M. No. 554/14- 5, dated 3rd Jan. 2009 under Section 79A of the Maharashtra Co-operative Societies Act, 1960**. The redevelopment of the vacant space/buildings shall be made as per the provisions of the said Resolution.

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4 Notice of Motion paperbook, *p.* 90.

5 Notice of Motion paperbook, *p.* 91.

(*Emphasis added*)

15. I must note that during arguments, Mr. Pai referenced the 2009 bye-laws, as these were the ones that were formally adopted by the Society. I note for the record that the Model Bye-Laws of 2013 and 2014 are different. The equivalent provision in 2014 revision is Bye-Law 174.[6]

> **XX — Regarding redevelopment of buildings the Co-operative Housing Societies**
>
> 174.
>
> a. Redevelopments of the Property / Building of the Society including vacant spaces shall be done strictly in accordance and confirmation with the Directions issued by the Government of Maharashtra vide Government Resolution no. CHS 2007/M.No. 554/14-S dated 03 January 2009, under section 79A of the Maharashtra Cooperative Societies Act 1960 (as amended from time to time).
>
> b. If the development Agreement is not executed with the developer in that case, the Society after cancelling the same resolution, the Society may appoint a new developer from the short list of approved developer, and if it is not possible, fresh procedure can be initiated.
>
> The Representative of the Registrar must be invited for the aforesaid General Body Meeting and his attendance is compulsory.

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6 Available at https://sahakarayukta.maharashtra.gov.in; PDF at http://bit.ly/29M7LXi.

c. In case of increase of membership on account of redevelopment the Society shall increase the Authorised Share Capital and amend the bye laws accordingly and the list of new members

16. Mr. Pai did not, in fairness, rely on the 2014 Bye-Laws. I note these only because his argument is based not so much on the precise form of the Bye-Law but for its reference to Section 79A of the MCSA and the Government Directive No. CHS 20007/M.No.554 /14-5 dated 3rd January 2009 ("**the 2009 Directive**"). Mr. Pai's submission is that this GR sets out a detailed road-map or framework for re-development. There can be no deviation from it. It has the effect of substantive law. If the Society acts in breach of the 2009 Directive, the fact that a majority approved of this is irrelevant. Section 72, which says that the final authority of every society vests in the general body of its members in a general meeting summoned in the prescribed manner must yield to the State Government directive embodied in the 2009 Directive. If this is so, then a deviation from the 2009 Directive prescription is a dispute within the meaning of Section 91 and it is one that can only be decided by the Cooperative Court.

17. Section 79A reads:

79A. GOVERNMENT'S POWER TO GIVE DIRECTIONS IN THE PUBLIC INTEREST, ETC.

(1) If the State Government, on receipt of a report from the Registrar or otherwise, is satisfied that in the public interest or for the purposes of securing proper implementation of co-operative production and other

development programmes approved or undertaken by Government, or to secure the proper management of the business of the society generally, or for preventing the affairs of the society being conducted in a manner detrimental to the interests of the members, or of the depositors or the creditors thereof, it is necessary to issue directions to any class of societies generally or to any society or societies in particular, the State Government may issue directions to them from time to time, and all societies or the societies concerned, as the case may be, shall be bound to comply with such directions.

(2) The State Government may modify or cancel any directions issued under sub-section (1), and in modifying or cancelling such directions may impose such conditions as it may deem fit.

(3) Where the Registrar is satisfied that any person was responsible for complying with any directions or modified directions issued to a society under subsections (1) and (2) and he has failed, without any good reason or justification, to comply with the directions, the Registrar may by order—

(a) if the person is a member of the committee of the society, remove the member from the committee and appoint any other person as a member of the committee for the remainder of the term of his office and declare him to be disqualified to be such member for a period of six years from the date of the order ;

(b) if the person is an employee of the society, direct the committee to remove such

person from employment of the society forthwith, and if any member or members of the committee, without any good reason or justification, fail to comply with this order, remove the members, appoint other persons as members and declare them disqualified as provided in clause (a) above :

Provided that, before making any order under this sub-section, the Registrar shall give a reasonable opportunity of being heard to the person or persons concerned and consult the federal society to which the society is affiliated.

Any order made by the Registrar under this section shall be final.

18. Mr. Pai urges me to read Section 91 with Section 45:

45. RESTRICTIONS ON OTHER TRANSACTIONS WITH NON MEMBERS

Save as is provided in this Act, the transactions of a society with persons other than members, shall be subject to such restrictions, if any, as may be prescribed.

(*Emphasis added*)

19. According to Mr. Pai, Section 45 stands apart from preceding Sections such as Sections 43 and 44, ones that deal with borrowings and loans. Section 45 has a direct bridge to Section 79A. The former makes mandatory any directives issued under the latter. The 2009 Directive being a directive under Section 79A, it becomes

mandatory and assumes a binding character because of the provisions of Section 45. No longer can it be said, Mr. Pai says, that the 2009 Directive is merely advisory or in the form of recommendations. Therefore, he argues, that when the 2009 Directive issued under Section 79A sets out binding conditions regarding re-development, and these become mandatory because of Section 45, then all work of re-development is, *a fortiori*, 'the business of the society' for the purposes of Section 91.

20. Put in this fashion, the argument is not without its attractions. However — and I am sure that Mr. Pai will agree with me on this — attractions, generally speaking, can also be deceptive and dangerous. It seems to me that this case holds precisely such hazards. The edifice of Mr. Pai's argument has several constituent elements; each must be carefully parsed. The first and foremost, and possibly the most deceptively perilous, is this: that, as a result of this stringing together of Section 79A, Section 45 and Section 91, the restrictions in the last of these, Section 91, are entirely abandoned. Section 91(1)(c) directly references non-members and Sections 43, 44 and 45. It does not reference Section 79A at all. A non-member governed or affected by any directive under Section 79A is not included in Section 91(1)(c). The purpose and ambit of Section 79A and Section 45 are entirely distinct. They operate in different fields. Section 79A is a broad-based State power to be used in the public interest. The wording of that Section is an important clue as to its purpose and ambit. Any direction under that Section — and the direction may or may not be a 'restriction' — is for the avowed purposes (1) of securing proper implementation of co-operative production and other development programmes approved or

undertaken by Government; or (2) of securing the proper management of the business of the society generally; or (3) for preventing the affairs of the society being conducted in a manner detrimental to the interests of the members, or of the depositors or the creditors thereof. This is generally worded, and the 2009 Directive, as we shall see, falls squarely within the third of these. Important is the difference in wording between the second and third of these parts: the second part speaks of the 'business of the society generally'; the third does not. Therefore, if the 2009 Directive under Section 79A is held to fall within the third part, meant to prevent the affairs of the society being conducted in a manner detrimental to its members' interests, then no question arises of dragging Section 91 into it.

21. Moreover, Section 45 restrictions are specific to individual transactions, or types of transactions. An example of one such restriction may, for instance, be that any contract by the Society if approved or signed by the managing committee must receive general body approval or ratification within a specified period; or, perhaps, that a certain type of transaction needs to be approved by something more than a simple majority. This is very different from a directive under Section 79A, one that is primarily driven by a public interest or for any of the three purposes I have outlined earlier.

22. I believe Mr. Kapadia is correct in saying that the restriction in Section 45 must be specifically under that Section. What Mr. Pai attempts is to drag a directive issued under Section 79A into Section 45 by some process of a deeming fiction. This, Mr. Kapadia submits, and I think correctly, is impermissible. Had the Government wanted

to impose the 2009 Directive as a transactional 'restriction' under Section 45, nothing prevented it from doing so. It chose not to. It chose the Section 79A route. It is not open to a Court, he says, again correctly, to reverse course or change tack and to do that which the State Government expressly did not.

23. Section 45 fell for interpretation before a Division Bench of this Court in *Dharamchand Premchand v Kopargaon Taluka Kapus Ginning & Pressing Society Ltd., Kopargaon & Anr.*[7] There, too, there arose a question of Section 45 read with Section 91. The Court held that the word 'prescribed' in Section 45 must be read with its definition in Section 2(21) as 'prescribed by the Rules'. This therefore requires the State Government to issue Rules; a very different thing from issuing a directive under Section 79A. The Court accepted the last of three interpretations of Section 45, and held that the Section only references those transactions in respect of which restrictions are placed under Section 45. Where there are no such restrictions, Section 91(1)(c) will not apply. The Court also considered a situation where there are no such restrictions; it held that not all transactions with non-members were intended to be brought within the sweep of Section 91(1)(c). Thus, if there are *no* restrictions under Section 45, that section does not operate and then neither does Section 91(1)(c). In the case before the Division Bench, there were in fact no restrictions, and the dispute with a non-member was held not to be covered by Section 91(1)(c). This decision is on all fours with the present case; and it is, in any case,

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7 AIR 1967 Bom 124.

binding on me unless Mr. Pai can show that it has been over-ruled or is no longer good law.

24. What Mr. Pai attempts is a submission that *Dharamchand Premchand* is a decision rendered prior to the 1969 amendment to Section 91 and has therefore no application. This is incorrect. The pre-amendment provision of Section 91(1)(c) read:

> (c) a person other than a member of the society who has been granted a loan by the society, or with whom the society has or had transactions under the provisions of Section 45, and any person claiming through such a person.

After amendment, the Section now reads:

> a person other than a member of the society with whom the society has any transactions in respect of which any restrictions or regulations have been imposed, made or prescribed under sections 43, 44 or 45, and any person claiming through such person;

25. Qualitatively, the change makes no difference as regards restrictions under Section 45. Both before and after amendment, Section 91(1)(c) operated to bar civil jurisdiction even in disputes with non-members where there was a Section 45 restriction. The 1969 amendment included restrictions and regulations under Sections 43 and 44. In any case, the Statement of Objects and Reasons of the 1969 amendment does not support Mr. Pai's interpretation either. The explanation in the S.O.R. to Clause 16 of the amendment that effected a substitution of Section 91(1)(c) reads.

> *Clause 16.*—Section 91 is proposed to be amended *inter alia* to make it clear that the Registrar holds power in respect of disputes relating to transactions by non-members **only in respect of which any restrictions or regulations have been imposed, made or prescribed under Sections 43, 44 or 45**.

26. Far from assisting Mr. Pai, this is actually against him. In any case, Dharamchand Premchand has since been followed in *Quarry Workers Cooperative Society Ltd v Comunidade of Curtorim*,[8] and *Rupchand Rajaram Shah v Janata Consumers Cooperative Society Ltd.*,[9] both decisions *after* the 1969 amendment.

27. A Division Bench of the Gujarat High Court of PN Bhagwati CJ and DA Desai J (as they then were) took the identical view in relation to the parallel provisions of the Gujarat Cooperative Societies Act, 1961 in *Rasiklal Patel & Ors. v Kailasgauri Ramanlal Mehta & Ors.*[10] Mr. Pai's submission that the provisions of this Act are not *in pari materia* also does not lend itself to acceptance.

28. There is yet more that weighs against Mr. Pai. AM Khanwilkar J (as he then was) took the same view but without reference to *Dharamchand Premchand*, in *Shree Vrideshwar Sahakari Sakhar Karkhana Ltd v International Tyres & Ors.*[11] He found that Section 91(1)(c) was not attracted because no restrictions imposed under Section 45 were shown. Other single judges have taken the

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8 AIR 1970 Goa, Daman and Diu 32.

9 AIR 1988 Bom 193.

10 1971 Guj LR 355.

11 2003 105 (2) Bom. L. R. 62.

same view as well on a plain interpretation of the sections.[12] It can hardly be suggested that all these decisions are either not binding or are somehow no longer good law. The decisions of this Court all bind me; and, in any case, I am in respectful agreement with all of them.

29. Mr. Pai's submission is that, by necessary implication, Section 79A and all directives issued under it, must be imported into Section 91(1)(c), even though that section references only Sections 43, 44 and 45 but not Section 79A. What Mr. Pai says is this: in short, no matter what section is invoked to impose a restriction, if it pertains to an outsider it must mean a restriction under Section 45, whether the restriction mentions it or not, and whether Section 91(1)(c) mentions it or not. Thus, it is irrelevant that the 2009 Directive was issued under Section 79A. It must be treated as one under Section 45, and must, therefore, be imported into Section 91. That, as I have already noted, is incorrect because the two Sections operate differently and, in any case, nothing prevented the Government from issuing the 2009 Directive under Section 45 if that was permissible or tenable. I do not think it is remotely possible to accept any such argument. Apart from the distinction between the two sections that I have already considered, when interpreting a statute, one must have regard not only to what is said, but also to what is omitted. In matters of statutory interpretation, words cannot

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12 *Shri Shaukatali Mohammed Idris Khan v The Maratha Mandir Cooperative Bank Ltd & Ors.*, Writ Petition No. 2427 of 2005, decided on 18th August 2005, per SA Bobde J, as he then was; *Usha Sunder Premises Cooperative Society Ltd v Mr. Nilang Desai & Ors.*, Notice of Motion No. 2716 of 2011 in Suit No. 2240 of 2011, decided on 29th April 2014, per Mrs. RS Dalvi J.

be imported into a provision that is plain and unambiguous. Statutory language is a determinant of legislative intent; that intent cannot be judicially evolved by introducing words into a provision that is otherwise clear.[13] It is also a well-established principle of statutory interpretation that a Court must presume that the legislature has been precise, careful and deliberate in its choice of language. Where a statute prescribes a condition at one place but not at another in the same provision, or where, though faced with a plenitude of reference choices, the legislature referenced certain provisions but not others, then the only possible interpretation must be that it was the legislative intent to so enact the provision; and to exclude from the ambit of the provision in question those portions that were not so referenced. It would, in my view, be entirely incorrect to presume (let alone to hold) that the conspicuous omission of a reference to another statutory provision was merely inadvertent.[14] Yet that is precisely the frame and implication of Mr. Pai's submission; and this is why it cannot be accepted.

30. This brings us to the point that is much pressed by Mr. Pai, though it is, in my view, one that has been discussed threadbare by various decisions. This relates to the interpretation of what is meant by 'business of the society' in Sections 91 and 164 of the MCSA. Mr. Pai places the entirety of his case on four decisions, two of this Court and two of the Supreme Court, viz.,

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13 *Ansal Properties & Industries Ltd. v State of Haryana*, (2009) 3 SCC 553.

14 *Mohd. Shahabuddin Vs State of Bihar and Ors.*, (2010) 4 SCC 653.

(a) The Division Bench decision in *C. F. Marconi v Madhav Co-operative Housing Society Ltd.*;[15]

(b) The decision of a learned single Judge of this Court[16] in *Supraprabhat Co-operative Housing Society Ltd & Anr. v Span Builders & Anr.*;[17]

(c) The Supreme Court decision in *Anita Enterprises & Anr. v Belfer Co-operative Housing Society Ltd.*;[18] and

(d) The Supreme Court decision in *Bhanushali Co-operative Housing Society Ltd v Mangilal & Ors.*[19]

31. The first of these, *Marconi*, was a case where the society purchased the property with two buildings standing on it for the express purpose of demolishing these and for constructing a new building for allotment of flats in it to its members. The acquisition of the property was expressly for the avowed purpose of demolishing the existing structures and constructing a new building. This was not a case where a building that existed, and in which members already held flats, was taken up for reconstruction. The purpose in *Marconi* was the primary purpose, not an incidental purpose. It was in this context that the Division Bench held that the agreement for reconstruction was one that was part of the 'business of the society'.

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15 1985 (2) Bom. C. R. 357.

16 Dr. D. Y. Chandrachud J, as he then was.

17 2002 (2) Bom. C. R. 257.

18 (2008) 1 SCC 285.

19 2015 (8) SCALE 209.

As we shall see, this distinction is all-important. *Supraprabhat* is very similar in that the society that was formed was of allottees of CIDCO plots, and the ostensible and primary purpose of the society was to facilitate the construction on those plots. The construction contract was, the Court held, "clearly in pursuance of the basic object" of the Society; and the dispute related to that very contract.

32. I am unable to see how the decisions in *Anita Enterprises* or *Bhanushali CHSL* assist Mr. Pai. In the former, *Anita Enterprises*, the dispute was whether the transfer made by a member in favour of a transferee or a tenant creating a tenancy was an infraction of the governing statute. The question of jurisdiction was whether it was the Cooperative Court that had the jurisdiction under Section 91 or whether the Society had to first move a civil court of competent jurisdiction for declaration that there did not exist a landlord-tenant relationship and, therefore, the purported induction by the member of a tenant was invalid. The Court held that the dispute undoubtedly touched the business of the society. That business involved purchasing plots and constructing flats or houses thereon for allotment, and there was a one-year moratorium on parting with possession. It was, therefore, part of the business of the society to see that the allotted flat remained in the possession of a member; and, should any non-member intend to take a transfer of any kind, to ensure that he or she obtained the society's permission. This has no parallel whatever to the present case, and there is no principle enunciated here that Mr. Pai can successfully apply to the present case. *Bhanushali*, on the other hand, coming up to the Supreme Court from Madhya Pradesh under that State's Cooperative Societies Act, was about a dispute between a housing society and

the vendors of some land. The society sued for specific performance. The Supreme Court held that the agreement and the dispute were part of the business of the society. It said that purchasing land for use in the manner set out in the society's objects was one of the facets of the business that the society was to undertake. It was *directly linked* to the object of developing the land for allotment of housing sites to members. In other words, it was not an ancillary or incidental activity. There was a clear and discernible nexus between the land purchase and the object of providing house sites. Again, this does not assist Mr. Pai.

33. *Marconi*, *Supraprabhat* and *Bhanushali* all make a vital distinction: they refer to the *primary* object of the society when they interpret the expression 'business of the society'. Each one of them also refers to and follows the decision in *Deccan Merchants Coop. Bank Ltd v Dalichand Jugraj Jain*,[20] its ratio now undoubtedly the *locus classicus* on the issue. This must, I think, serve as our starting point.

34. In *Deccan Merchants*, the appellant cooperative bank was a mortgagee; the respondent was the mortgagor. The property in question was a building at Shaikh Memon Street in Mumbai (then Bombay). The original owner leased the ground floor of the building to the firm, M/s. Dalichand Jugraj Jain. The agreement mentioned that the property had been mortgaged to the DM bank, one established as a cooperative society under the Central legislation, the Cooperative Societies Act, 1912, and thus one deemed to be

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20 (1969) 1 SCR 887 : AIR 1969 SC 1320 : (1970) 40 Comp Cas 187

registered under the MCSA. There was an arbitration between the bank and the original owner that culminated in a consent award. The original owner was directed to make payment of Rs. 6 lakhs to the bank, in instalments. Till then, the property continued as security for the bank's claim. The original owner defaulted. The award was put into execution, and the bank obtained an order of sale in that execution. The property found no buyers. The Collector therefore ordered a transfer under Section 100 of the MCSA to the bank, subject to some conditions. The Revenue Inspector drew up a list of tenants and gave this to the bank. Physical possession was also handed over to the bank. Then the bank wrote to the firm, M/s Dalichand Jugraj Jain, claiming the firm to be in unauthorised possession and occupation of the ground floor premises of the building. The bank demanded possession. The firm challenged the transfer to the bank and denied that its possession was unauthorised. The bank invoked the jurisdiction of the District Deputy Registrar and sought that the matter be referred to his arbitration. In those proceedings, it was said that the original owner continued to retain possession of part of the property; and that other parts were with the firm or other tenants. The original owner was a member of the bank, and the bank claimed it was entitled to vacant possession of the entire property. The bank claimed that the dispute was covered by Sections 91 to 96 of the MCSA and could be referred for decision under Section 93 to the Registrar or his nominee. The Assistant Registrar held that the dispute was covered by Section 91(1) of the MCSA. The nominee summoned the parties. The firm filed a Writ Petition in this Court challenging the jurisdiction and saying that the dispute did not fall within 91(1): it was not one that touched the business of the bank, and the firm did not claim through the bank.

There were several directions and findings of this Court on that Writ Petition, but the most important of these is the finding that the expression 'touching the business of the society' was to be widely construed, and included any matter that related to or concerned or affected the business of the society; in other words, that the dispute need not directly arise out of the business of the society, but it was sufficient if the dispute referenced or had relation to or a concern with the society's business. The Supreme Court therefore had two questions before it: the first relating to the interpretation of the expression, and the second relating to the standing of the parties, viz., an interpretation of the expression 'a person claiming through a member'. Paragraphs 16 to 18 of the decision (from the SCC reprint) read:

> 16. The principal questions which arise on the interpretation of Section 91 are two: **(1) what is the meaning of the expression "touching the business of the society?" and (2) what is the meaning of the expression "a person claiming through a member" which occurs in Section 91(1)(b)**?
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> 17. The answer depends on the words used in the Act. Although number of cases have been cited to us on similar expressions contained in various other acts, both Indian and English, in the first instance, it is advisable to restrict the enquiry to the terms of the enactment itself, because the legislatures have been changing the words and expanding the scope of references to arbitrators or to the Registrars step by step. The sentence, namely, "notwithstanding anything contained in any other law for the time being in force" clearly ousts the jurisdiction of civil courts if the dispute falls; squarely within the ambit of Section 91(1). **Five**

kinds of disputes are mentioned in sub-section (1); first, disputes touching the constitution of a society; secondly, disputes touching election of the office-bearers of a society; thirdly, disputes touching the conduct of general meetings of a society; fourthly, disputes touching the management of a society; and fifthly, disputes touching the business of a society. **It is clear that the word *"business"* in this context *does not mean affairs of a society*** because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. **In this sub-section the word "business" has been used in a narrower sense and it means the actual trading or 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 bye-laws.**

18. The question arises **whether the dispute touching the assets of a society would be a dispute touching the business of a society. This would depend on the nature of the society and the rules and bye-laws governing it. Ordinarily, if a society owns buildings and lets only parts of buildings which it does not require for its own purpose it cannot be said that 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.

35. We are not here concerned with the second question, for our case falls under Section 91(1)(c). As to the first question, however, the Supreme Court also said that it is difficult to subscribe to the proposition that everything a society does (or is necessarily required to do for the purpose of carrying out its objects) can be said to be 'part of its business'. The word 'touching' is wide in import, the Supreme Court said, but it is doubtful if the word 'affects' could or should also be used in defining the scope of 'touching'.[21] The Supreme Court also found that the jurisdictional ouster of civil courts required the satisfaction of both conditions: first, that it was a dispute touching the business of a society; and second, that the dispute was between parties covered in the sub-clauses of Section 91(1) — in that case, Section 91(1)(b). Both must be satisfied. This, then, is what Mr. Pai faces: he must conquer both challenges to succeed in his jurisdictional challenge.

36. The distinction between 'directly arising from' and 'primary object' is important, as we shall see. Neither *Deccan Merchants* nor any of the binding decisions that follow (nor indeed, the views of the Madras, Bombay and Kerala High Courts of which the *Deccan Merchants* Court approved) say that 'touching the business of the society' must mean 'directly touching the business of the society'. But, at the same time, the dispute must, it has been held be one that is not ancillary or incidental. As the Supreme Court said in *Deccan*

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21 This was also the view in *Warna Sahakari Sakhar Karkhana Ltd v Vithalrao Anand Rao Deshmukh*, (1969) UJ (SC) 105 (69) 517.

Merchants, 'business' does not equate to 'affairs': every affair that a society handles is not its 'business' for the section. That word has been narrowly used, as the Supreme Court said, to mean "the actual trading or 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 bye-laws". This is clear from the illustration in paragraph 18 of *Deccan Merchants*:

> "Ordinarily, if a society owns buildings and lets only parts of buildings which it does not require for its own purpose it cannot be said that letting out of those parts is a part of the business of the society."

Therefore, the letting out must be its main or primary purpose, the reason for which it is established.

37. The controversy did not, it seems, rest with *Deccan Merchants*. The years that followed saw a considerable amount of case law; it is not necessary to discuss all of it; there is no departure from the *Deccan Merchants* ratio.[22] Of the ones cited by Mr. Kapadia — and the list has been all but encyclopaedic — I need only to refer to the ones closest to the case at hand. *Vardhaman Developers Ltd v Thailambal Co-operative Housing Society Ltd & Ors.* ("*Vardhaman*

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22 *The Cooperative Central Bank Ltd & Ors. v The Additional Industrial Tribunal, Andhra Pradesh & Ors.*, (1969) 2 SCC 43; *M/s Sabharwal Brothers & Anr. v Smt. Guna Amrit Thandani*, (1973) 3 SCC 750; *Kalawati Ramchand Malani v Shankar Rao Patil & Ors.*, [1974] Mh. L. J. 908; *Belganda Sahakari Sakhar Karkhana Ltd, Bhoras v Keshav Rajaram Patil*, [1994] Mh. L. J. 1756; *Goa Central Cooperative Consumers v Bhagwant Narayan Tendulkar & Ors.*, (1998) 4 SCC 527; *Rameshchandra Ramkishan Sarda v Shri Shankarrao Chavan PVC Pipe Utpadak Sanstha Maryadit*, [2009] (4) Mh. L. J. 796.

I")[23] was a dispute about a re-development agreement. Here, too, the jurisdictional issue was raised under Sections 91 and 164 of the MCSA. There was also a reference to the 2009 Directive, quickly despatched because the agreement was of 2008. On the principal point, however, the learned single Judge held that the demolition of the existing building and reconstruction of a building in its place was not the business of the society.

38. In *Margaret Almeida & Ors. v Bombay Catholic Cooperative Housing Society Ltd. & Ors.*,[24] the Supreme Court considered the impact of Section 91(1)(c) as well. It held that if the legislature intended the cooperative court to have jurisdiction in all disputes irrespective of the nature of the dispute between the various classes of persons enumerated in Section 91 and non-member third parties who acquire any interest in the property of the enumerated persons, the legislature could have clearly indicated this in Section 91 itself. I believe this is the fullest possible answer to Mr. Pai's submissions today, and I cannot comprehend that issues that are no longer *res integra* continue to be agitated over and over again.

39. I should also have thought that it would be difficult to find a closer parallel than *Vardhaman I*, but there is one. In *Mohinder Kaur Kochar v Mayfair Housing Pvt Ltd*,[25] a Division Bench of this Court referred to *Vardhaman I*, *Supraprabhat*, *Marconi* and *Margaret Almeida*, in a case that also pertained to a re-development

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23 Judgment dated 7th March 2011 in Notice of Motion No. 3274 of 2010; per Dr. D. Y. Chandrachud J, as he then was.

24 (2012) 5 SCC 642.

25 2012 (6) Bom. C. R. 194.

agreement. In explicit terms, the Division Bench of this Court said in paragraph 19 that:

> "The initial development of the Co-operative Housing Society of constructing the building may be the business of the society, but the subsequent re-development is not."

40. The matter should really end at this, for *Mayfair Housing* binds me; and unless Mr. Pai shows, which he cannot, that the decision was rendered *per incuriam*, then I do not see how I can possibly accept his arguments. I understand Mr. Pai to say, however, that Mayfair Housing must at least be distinguished because it does not consider the 2009 Directive; that GR is 'deemed to have the force of law'; it is 'deemed to be a restriction under Section 45'; and therefore *Mayfair Housing* is not good law; and, by necessary extension, neither is the Supreme Court's decision in *Margaret Almeida*, for the same reasons. I can countenance no such argument. I believe this to be going several steps too far. Mr. Pai adds that *Margaret Almedia* was not a re-development case; I do not see what difference that makes. The submission on Section 45 is unsustainable; and I have no manner of doubt that the 2009 Directive is merely advisory.

41. Vardhaman Developers founds themselves in yet another litigation, this one resulting in a decision of 22nd October 2012 of R. D. Dhanuka J in *Vardhaman Developers Ltd v Borla Co-operative Housing Society Ltd & Ors.* ("*Vardhaman II*")[26] Here, as in

26 Notice of Motion No. 1081 of 2010 in Suit No. 1442 of 2009.

Vardhaman I, the Court held that if a society does not object, no member can; and on the issue of jurisdiction, the Court followed the consistent line that we see from *Deccan Merchants*. Two other re-development-related cases followed: *Shri Nandkishore R. Patil & Anr. v M/s Rite Developers & Ors.*[27] and *M/s. Akash Pruthvi Lifestyle v Akash Co-operative Housing Society Ltd. & Anr.*[28] Both are to the same effect.[29]

42. Mr. Kapadia is correct, too, in saying that there is nothing to show that any activity or business of re-development was done by the 21st Defendant society. Further, the defence is taken not by the society — which it was in most of the previous cases — but by a handful of disgruntled members. I believe Mr. Pai's final argument, that the 2009 Directive read with Section 79A and Section 45 deals a 'fatal blow to all previous judgments' is a submission that only needs to be stated to be rejected.

43. There is no substance to the objection. The 10th Defendant's objection to jurisdiction fails. This Court has jurisdiction to entertain the suit.

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27 Appeal (L) No. 92 of 2013, decided on 21st February 2013.

28 Notice of Motion (L) No. 1518 of 2013, decided on 26th August 2013.

29 *Calvin Properties & Housing v Green Fields Cooperative Housing & Ors.*, 2014 (2) Bom. C. R. 398, per R. D. Dhanuka J, also follows in the same vein, though that involved an issue under the Arbitration & Conciliation Act, 1996 as well.

MAYA DEVELOPERS' MOTION

44. This Motion is directed against the owners or occupants of 10 of these rooms, viz., Rooms Nos. 6, 7, 11, 17, 20, 24, 27, 30, 32 and 35. It seeks the appointment of a Receiver of these rooms; delivery of vacant possession to the Plaintiffs; an order against Defendants Nos. 1 to 20 to deliver such possession to the Plaintiffs; and a restraint against those defendants from impeding the performance of a Development Agreement between the Society and Maya Developers. Prayers (d) and (e) of the Motion are, respectively, for a restraint against Defendants Nos.1 to 20 from addressing any correspondence to the municipal or other authorities and for what is effectively a decree of Rs.25 lakhs a month as damages. In fairness, Mr. Kapadia for the Plaintiffs does not press these. The Society supports the Plaintiffs.

45. The following tabulation shows the other individual Defendants against their respective rooms:

Sr No.	Defendant No.	Room No.
1.	Defendant No. 1	Room 6
2.	Defendants Nos. 2 and 3	Room 7
3.	Defendants Nos. 4 and 5	Room 11
4.	Defendant No. 6	Room 17
5.	Defendants Nos. 7 to 9	Room 20
6.	Defendant No. 10	Room 24
7.	Defendant No. 11	Room 27
8.	Defendants Nos. 12 and 13	Room 30

9.	Defendant Nos. 14 and 15	Room 32
10.	Defendant Nos. 16 to 20	Room 35

There is no real dispute about this linkage, though in some cases there may be some internal conflict as to which defendant has the primary claim over a particular room. That is not the issue that falls for determination.

46. As to Defendant No.11, Beena Thakkar, and Defendant No.15, Jamnadas Thakkar, I will have something more to say a little later in this judgment. For the present, it is enough to note that both were among those who engaged Ms. Neuty Thakkar and Mr. Rajendra Pai to represent them. Beena Thakkar in fact filed a principal Affidavit in Reply on behalf of Defendants Nos. 1 to 10, 12, 13, 15 and 20. She was also the plaintiff in a previous proceeding in the City Civil Court, of which, too, more later. Both she and Jamnadas Thakkar have since sought to go their own way. I will refer to a series of orders I made during the hearing of this Notice of Motion, being compelled then to comment on their conduct in Court and as the matter went on. There is also before me a separate affidavit filed by Beena Thakkar. As I will presently point out, Mr. Pai and his attorney have gone out of their way to communicate orders to Defendants Nos. 11 and 15. In addition, Mr. Pai has very fairly presented the salient points in Defendant No.11's separate affidavit when she, despite several notices, chose to remain away. I say this at the beginning to make it clear that there is no question of Defendants Nos. 11 and 15 not having been afforded a more than ample opportunity of being heard, or of their case not being considered on merits. If they have chosen to stay away, it is only

because they have chosen to do so, despite several opportunities to canvas their submissions either in person or through any Advocate of their choosing. I will have occasion to comment on their conduct and to observe that the time has come when parties such as these must be dealt with in a far stricter manner than we are accustomed to doing. In no other jurisdiction with which we share a jurisprudential background would such conduct be tolerated.

47. It may be useful first to take a quick glance at the state of the record in this Notice of Motion.

Sr No	Date	Doc	Pages	
			From	To
1.	16.03.2015	Notice of Motion and Affidavit in Support	1	12
2.	26.03.2015	Affidavit in Reply by Defendants Nos. 1 to 13, 15 and 20.	13	301
3.	13.04.2015	Affidavit in Reply by Defendant No. 14 (apparently opposing Defendant No. 15 and supporting the Plaintiff).	302	306
4.	13.04.2015	Affidavit in Reply by the 21st Defendant (the Society)	307	378
5.	13.04.2015	Plaintiffs' Affidavit in Rejoinder	379	398
6.	13.04.2015	Affidavit of Plaintiff in rely to the 10th Defendant's Notice of Motion (*mistakenly filed in this Notice of Motion*)	399	412
7.	27.04.2015	Affidavit of Defendants Nos. 11 and 15 (with some additional annexures beyond the last page)	413	597

48. There are, in addition, several compilations: from the Plaintiffs (in two volumes), from the Society, and from the contesting Defendants.

49. Azad Bhavan was built in 1947. It is a ground plus two floor structure, with 36 tenements, of which 33 are 220 sq ft carpet area, and three are 320 sq ft in carpet area. The total plot size is 1237 sq.mts. A list of occupants is attached to the Plaint.[30]

50. On 4th July 2009, at a General Body Meeting, the Society's members agreed to a re-development of the building. Incidentally, the minutes show the attendance of Defendant No.11, Beena Thakker.[31] On 27th September 2009, the General Body, by consent, did away with the requirement of issuing advertisements. Instead, members were invited to bring proposals.[32] Maya Developers submitted its proposal on 11th September 2009.[33] One of its partners is related to a Managing committee member. On 15th November 2009, there was a meeting of the managing committee. It referred to the Annual General Meeting of 25th October 2009. There were five persons present in whose presence proposals were received. The name of the member introducing the developer was also noted.[34] Another managing committee meeting followed on 22nd November 2009. Twelve offers in sealed covers were noted to have been received. These were noted and it was decided to conduct

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30 Plaint, *p.* 65.

31 Notice of Motion paperbook, *p.* 335.

32 Notice of Motion paperbook, *p.* 341.

33 Notice of Motion paperbook, *p.* 181.

34 Notice of Motion paperbook, *p.* 345.

a scrutiny and investigation.[35] On 2nd January 2010, the managing committee invited five of the 12 bidders.[36] The record indicates that only two of the five were responsive.[37]

51. On 7th March 2010, it was decided that three developers would be called for discussions.[38] A general body meeting followed a year later on 28th March 2011 to appoint a Project Management Consultant ("PMC"). This was also the meeting at which the Society adopted the Model Bye-Laws.[39] On 27th July 2010, the Society appointed an Advocate to advise it during re-development.[40] At a General Body Meeting on 3rd April 2011, the matter of appointment of an architect and a PMC was taken up.[41] On 15th April 2011, the Society appointed a PMC and an architect.[42] The PMC's report followed on 10th July 2011.[43] Following this, the Society invited bids.[44] A Special General Meeting was held on 31st July 2011. There were three bidders, including Maya Developers.[45] On 18th September 2011, Maya Developers made a revised offer.[46]

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35 Notice of Motion paperbook, *p.* 347.
36 Notice of Motion paperbook, *p.* 349.
37 Notice of Motion paperbook, *p.* 351.
38 Notice of Motion paperbook, *p.* 353.
39 Notice of Motion paperbook, *p.* 28.
40 Plaint, *p.* 67.
41 Notice of Motion paperbook, *p.* 357.
42 Plaint, *pp.* 68–69.
43 Plaint, *p.* 70.
44 Plaint, paragraph 12, *p.* 13.
45 Notice of Motion paperbook, *p.* 369.
46 Notice of Motion paperbook, *p.* 350.

The PMC recommended this to the managing committee on 4th October 2011.[47]

52. On 26th February 2012, at a General Body meeting at which the Registrar was present, Maya Developers were appointed as the agency for re-development of Azad Bhavan. Of the 36 members of the society, 31 attended; 30 votes were cast; 26 were in favour, representing about 90% of the membership; four members did not vote. Defendant No.11 was present, too, and her protest is noted.[48] The attendance sheet of that day shows this too.[49] Members were given a choice of agreeing or disapproving of the re-development, and there was standard form of in-principle consent to the re-development.[50] Moreover, it seems that the General Body was given the choice of developer as well. There were three choices, and the members could select any of these, or none.[51] A feasibility report was also available.[52] The minutes of this meeting are revealing.[53] Clearly, the members were given a plenitude of choice. Voting was supervised by an authority and it was transparent. One vote was cast by email, and one by a video link.

53. The commercial offer by Maya Developers was that it would pay to each member transit accommodation rent of Rs.14,000 per

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47 Notice of Motion paperbook, *p.* 364.
48 Notice of Motion paperbook, *p.* 372.
49 Plaintiffs' compilation, *p.* 95.
50 Plaintiffs' compilation, *p.* 97.
51 Plaintiffs' compilation, *p.* 98.
52 Notice of Motion paperbook, *p.* 295.
53 Notice of Motion paperbook, *p.* 266; also at *p.* 371, and Plaint, *p.* 71.

month (for the smaller 220 sq.ft. flats), and Rs.18,000 per month (for the larger 320 sq.ft. flats). In the redeveloped building, each member with a 220 sq.ft. flat would get a flat of 485 sq.ft. carpet area, an increase of about 45.36%; and those in 320 sq.ft. flats would get flats of about 620 sq.ft. in carpet area, an increase of 51.61%.[54] This was the proposal the General Body accepted and approved by majority.

54. On 1st March 2012, the NOC of the Registrar was obtained,[55] and on 14th April 2012, a Letter of Intent was issued to Maya Developers.[56] Following this, a majority of the members signed irrevocable letters of consent. Many of the Defendants, too, signed such letters of consent. The status of the Defendants is tabulated below. It must be remembered that this is *not* the total membership of the Society; the table is restricted to the Defendants, who are a part of the total membership.

Defendant No	Room No	Irrevocable Consent Plaint Pg No / Comment or Status
Defendant No. 1	06	78
Defendants No. 2, and 3	07	81
Defendants No. 4 and 5	11	84
Defendant No. 6	17	**NOT SIGNED**
Defendants No. 7 to 9	20	87 (signed by predecessor, Dharmendra Gandhi)
Defendant No. 10	24	**NOT SIGNED**
Defendant No. 11	27	**NOT SIGNED**

54 Plaint, *p.* 76.

55 Plaint, *p.* 74.

56 Plaint, *p.* 95.

Defendants No. 12 and 13	30	90
Defendants No. 14 and **15**	32	Defendant No. 14 signed the consent (at Plaint, *p.* 93). His brother is in occupation) Defendant No. 15 is the father of Defendant No. 11
Defendants No. 16 to 20	35	The original owner was one Kapil Dev. His heirs are Defendants Nos. 16 to 19, and they sold the flat to Defendant No. 20 before the Development Agreement.

55. On 29th July 2012, there was another General Body meeting, attended by 29 members. Paragraph 4 shows that all agreed on the re-development.[57] On 29th September 2012, a notice was issued calling a Special General Meeting on 14th October 2012 to discuss the terms and conditions of the Development Agreement.[58] Defendants Nos. 4 and 5 did not attend this meeting, but agreed to be bound by the decisions taken at it.[59] The Minutes show that the Development Agreement was discussed. Each member was clearly informed of what he or she stood to receive.[60] Defendant No. 11 attended. The record shows that she asked a question about the corpus fund and a refundable deposit.[61]

56. Then comes the Development Agreement of 9th November 2012.[62] Maya Developers' proposals of 2009, 2011 and 2012 are all mentioned. The Agreement says that fungible FSI is to be used in

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57 Defendant No.21's Compilation, *p.* 1.

58 Defendant No.21's Compilation, *p.* 5.

59 Defendant No.21's Compilation, *p.* 8.

60 Defendant No.21's Compilation, *p.* 16.

61 Defendant No.21's Compilation, *p.* 17.

62 Plaintiffs' Compilation, *p.* 161; Plaint, *p.* 99.

re-development.[63] In addition, there is a further area of 2000 sq.ft. that would be made available to the Society.[64] In Clause 20, the members agreed to vacate.[65]

57. There then followed yet another General Body Meeting on 24th February 2013, at which the plans were discussed, clarified and approved.[66] The members then actually signed off on the actual floor plans.[67] Between April and May 2014, Maya Developers obtained the requisite NOCs from the Traffic Police[68] and the Fire Brigade.[69] The Society then convened yet another General Body Meeting on 29th June 2014 to finalize the plans.[70] The minutes are on record, as is the attendance sheet. Defendants Nos. 11 and 15 were present. There was a poll regarding the allotment of flats. Issues regarding individual agreements were finalized, and clarifications given about the additional area. Defendant No. 6 tried to raise fresh disputes, but found no support.

58. It is at this point that the disputes began. On 12th July 2014, after this proposal had been five years in the making, various members sent a letter to the Society demanding documents.[71] This was, in all this time, the first such requisition. The Society complied

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63 Plaint, *p.* 107.
64 Plaint, *p.* 115, clause 14.
65 Plaint, *p.* 117.
66 Defendant No.21's Compilation, *p.* 21.
67 Plaintiffs' Compilation, *pp.* 332–339.
68 Plaint, *p.* 149.
69 Plaint, *p.* 152.
70 Defendant No.21's Compilation, *p.* 23 onward.
71 Defendant No.21's Compilation, *p.* 32.

on 29th July 2014.[72] At this point, some of the disgruntled members approached Advocates, and on 25th July 2014, these Advocates (M/s Patil Gangarkar & Co) sent a notice to the Society on behalf of several defendants, including Defendants Nos. 11 and 15. On 5th August 2014, the Society responded and offered that members could collect copies of the Development Agreement and earmarked floor plans from the Society's office.[73]

59. On 10th August 2014, 10 of the 36 vacated and handed over possession.

60. In the meantime, on 27th August 2014, Maya Developers received its IOD for the proposed construction.[74]

61. On 8th September 2014, the Defendants' present Advocate sent a notice to Maya Developers (including on behalf of Defendants Nos. 11 and 15). Sub-paragraph (h) of this letter has a long litany of complaints; it does not, however, specifically allege breach of the 2009 Directive. All the grievances relate to an alleged want of information, an alleged lack of transparency and so on, all matters that are demonstrably incorrect and at a great remove from what is argued before me today.[75] I note, too, that there is no grievance that a worthier developers was sidelined to favour Maya Builders. Again, the allegations are in generalities.

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72 Defendant No.21's Compilation, *p.* 34.

73 Defendant No.21's Compilation, *p.* 40.

74 Plaint, *p.* 160.

75 Plaint, *p.* 169.

62. Further letters followed personally from Defendant No.11,[76] and Defendant No.1.[77]

63. On 10th September 2014, another three members vacated.

64. On 31st August 2014, Maya Developers' advocates wrote to Defendants Nos. 6, 10, 11 and 16, asking why they had not vacated.[78]

65. We then have a structural audit report of 3rd December 2014 that clearly states that the building was in a very poor condition.[79] Some of the Defendants obtained their own report of 18th December 2014 from one Bhoomi Consultants. Even this shows extensive distress and broadly corroborates the findings of structural failure, though the conclusions and recommendations differ.[80] On 24th December 2014, the Municipal Corporation of Greater Mumbai issued a notice under Section 354 of the Mumbai Municipal Corporation Act.[81]

66. On 15th January 2015, Defendants Nos. 1, 2, 4, 7, 11, 12, 15 and 20 challenged the re-development proposal in the Cooperative Court.[82] Defendant No.11, Beena Thakker, was the first applicant. They moved an interim application and sought ad-interim relief.

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76 Plaint, *p.* 201.
77 Plaint, *p.* 206.
78 Plaint, *p.* 179.
79 Plaint, *p.* 203.
80 Notice of Motion paperbook, *p.* 507.
81 Plaint, *p.* 233.
82 Notice of Motion paperbook, *p.* 187; Plaintiffs' Compilation, *p.* 502.

This was refused on 27th January 2015 by the Cooperative Court, finding no urgency.[83] On 7th March 2015, the same Defendants filed L.C. Suit No. 637 of 2015 in the City Civil Court. Again, the 11th Defendant was the first plaintiff and led the charge.[84] Again, ad-interim reliefs were sought and refused.[85] The order summarizes the objections taken by the plaintiffs in that suit.[86] Importantly, the argument regarding Section 79A of the MCSA seems to have been canvassed there as well.[87] I must also note that the City Civil Court's record seems to indicate that it was only now, and all of a sudden, that these complaining defendants suddenly perceived a so-called 'lack of transparency', even though, as the foregoing narrative shows, every member had been involved in the entire process at every stage.[88] The order also specifically notes that the MCGM had issued a notice,[89] and, further, that each member had received an advance of Rs.50,000.[90] These defendants have filed an appeal.

67. Maya Developers says that it has already spent nearly Rs.4 crores on this project.[91]

68. The summary of all this is that of the 36 members of the Society, fully 26 accepted the Development Agreement in the first

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83 Plaint, *p.* 284; Plaintiffs' Compilation, *p.* 535.
84 Plaint, *p.* 273.
85 Plaint, *p.* 285.
86 Plaint, *p.* 277.
87 Plaint, *pp.* 279–280.
88 Plaint, *p.* 281.
89 Plaint, *p.* 281.
90 Plaint, *p.* 282.
91 Plaint, *p.* 272.

instance. Of the remaining 10, six later accepted it; and this leaves only four disputants. Also, Defendant No.14 has given the flat to Defendant No. 15; Defendant No.14 supports the re-development. His licensee, Defendant No. 15, opposes it.

69. Mr. Kapadia's submission is that this has been 'played by the book' — everything that needed to be done was done, and it was done in the best manner possible. Perfection in such affairs (or, for that matter, in anything) though devoutly to be wished for is never realistic. One must adjust to situations, and so long as there is no fraud, concealment, wilful default or any hint of underhand dealings, there is no reason to stop this development. Most of all, he reminds me, we cannot lose sight of the fact that of the 36 members, fully 32 have accepted it and are in favour. There are those who have vacated their apartments; there is no reason they should be made to suffer or, as he puts it, 'held to ransom' because of the entirely imaginary grievances of less than a handful. None of these grievances are rooted in fact. None of the contesting Defendants were cut out or excluded from any part of the process. The fullest disclosure was made at every stage, to the extent that the Society and its members were given the choice not once, but multiple times, of choosing another developer or doing the re-development on its own. This, Mr. Kapadia says, is the third and perhaps fourth round of attempts by a handful to halt the development for their personal gain at the cost of other members: these very same Defendants objected; their objections were met; they moved the Cooperative Court; they did not succeed; they then moved the City Civil Court, also without success; and now they oppose the present application.

70. Mr. Pai's opposition to Maya Developers' Motion is essentially founded on an interpretation of the 2009 Directive. He says that it has been breached from start to finish; its provisions are mandatory and binding, and the slightest deviation from it invalidates the entire exercise. Specifically, he says there was no detailed feasibility report and no transparency, and the selection of the developer was not just haphazard but was contrived to benefit Maya Developers, one of whose partners is a relative of a managing committee member. The terms of the Development Agreement are *per se* unlawful; its execution was 'suppression'; there is the deliberate and crucial omission of an all-important annexure, the one titled Annexure 'F' to the Development Agreement, and the Development Agreement was not furnished till as late as 29th July 2014.

71. Generally speaking, Mr. Pai argues, there is no decided case about the effect or nature of the 2009 Directive. It has, in his submission, statutory force, and it is not merely recommendatory. If that be so, then a breach invalidates all actions; and, further, no part of it can be 'waived', and there is also no question of 'substantial compliance'. Alternatively, some parts may be mandatory and some procedural or directory; but a non-compliance with the mandatory provisions are sufficient to invalidate the entire Development Agreement. The decisions cited, he says, do not cover such a situation and they lead to one conclusion: that brute majority is entitled to ignore entirely the provisions of the circular. Every one of the judgments that does not consider this is, he says, *per incuriam*. Lastly, the question of 'irrevocable consent' is, he says, a chimera: the requirement is informed consent, otherwise the purpose is lost.

Any consent obtained that is not *informed* consent is meaningless and non-est.

72. The heart of this entire argument is the 2009 Directive issued under Section 79A of the MCSA. This is a closely printed five-page document. I have in this record two different versions of it: one in the present Notice of Motion,[92] and the other in the contesting Defendants Motion.[93] The latter seems to be more accurate. For convenience, the whole of it is appended to this judgment.

73. I will now consider the relevant portions of this Directive. It opens with these words:

> Whereas, buildings of Co-operative Housing Societies in the State of Maharashtra are being redeveloped on a large scale. **A number of complaints were received from members against managements of Co-operative Societies in which redevelopment is taking place.** In respect of most of the Co-operative Housing societies, nature of complaints relating to redevelopment is as under:-
>
> **1. Not taking the members in confidence in the process of redevelopment.**
>
> **2. There is no transparency in tender process.**
>
> **3. Appointing contractors arbitrarily.**

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92 Notice of Motion paperbook, *p.* 461.

93 Notice of Motion (L) No.971 of 2015, *p.* 30.

4. To work by violating provisions of Co-operative Act, Rules and Bye-Laws.

5. No orderliness in the work of Architect and Project Consultant.

6. Not planning Redevelopment Project Report.

7. Not adopting proper procedure in finalizing tenders.

8. There is no similarity in agreements with Developers.

Whereas **there is no concrete *policy*** in respect of all above points of complaint and therefore Co-operation Commissioner and Registrar, Co-operative Societies, Maharashtra State, Pune had appointed a Study Group under the Chairmanship of Joint Registrar, Co- operative Societies (CIDCO) to study the complaints received at various levels and for consultations with all constituents working in the relevant fields. The said Study Group has expressed the opinion that it is essential to frame regulations for redevelopment of buildings of Co-operative Housing Societies after consultation with all the constituents in the field of Co-operative Housing.

Therefore the Government is issuing following directive under Section 79A of the Maharashtra Co-operative Societies Act, 1960

(*Emphasis added*)

74. This itself makes it clear that, notwithstanding the use of words like 'regulation', what the 2009 Directive seeks to set in place are a set of guidelines. This is also apparent from the fact that the Government chose to issue these under Section 79A rather than some other section of the Act. What is set out is a broad policy; and this stands to reason, for not every single provision of this Directive lends itself to strict compliance. Clauses 1, 2, 5, 7, 8 and 10 all use the word 'should', not 'must' or 'shall'. Clause 11 in terms says that the Development Agreement 'should' contain some conditions and provisions but these are specifically *subject to the terms and conditions approved by the General Body Meeting of the Society*. This Directive must be read as a whole, and not in the manner Mr. Pai suggests by plucking out one clause here and another there. Read thus, it is clear that the whole of the 2009 Directive is recommendatory, not obligatory. If it were otherwise, and to be read as Mr. Pai would have me do, it would undermine the authority of the society in general meeting, and the fundamental democratic underpinnings of cooperative societies. When Mr. Pai asks that is it possible that a majority can decide the fate of all, the answer must be an unequivocal yes; that is the basis of the entire edifice of the MCSA, subject to specific statutory exceptions. It is impossible to accept his submission that the 2009 Directive in mandatory. It is, as Mr. Kapadia says, a broad road map, and was brought into existence to provide guidance when there were far too many problems in re-development of societies. Material compliance is more than sufficient; and it in no way undermines or detracts from the overall authority of the general body of a society's members. It is sufficient if participation, notice and disclosure are ensured. Where majority

decisions are consistent with material compliance with the provisions of the Directive, that is surely enough.

75. Further, Mr. Pai submits, relying on the Supreme Court decision in *Tata Chemicals Ltd. v Commissioner of Customs*,[94] there is no question of subjective satisfaction; the power to be exercised must be exercised in accordance with law or not at all. Therefore, any 'consent' does not regularise an illegal use of power. This argument is, I am afraid, wholly misconceived. There is no question of 'use' of power in any manner. The 2009 Directive confers no power. It only provides guidance.

76. It is also not enough to state the position in generalities. Mr. Pai accepts (though Defendants Nos. 11 and 15 do not) that the building is in fact dilapidated. There is no dispute about the need for re-development; the only question is by whom and on what terms. The principle of what the majority wants, and whether the opposition comes from the Society, assumes signal significance at this stage. The reason is that Mr. Pai's clients have enumerated in a tabulation tendered a list of their grievances about various things that were apparently left to be done, or not done in strict compliance with the 2009 Directive. The difficulty with this is that it is today not the Society that complains that anything was kept from it. There is no such complaint from a vast majority of the Society's members. There is, even in this tabulation, not enough to justify a wholesale abandonment of a process that has been so long in the making and enjoys the support of the Society and a majority of its members.

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94 2015 (6) SCALE 419.

There is little purpose served in saying that a particular report was 'unrealistic', or that the PMC ought to have worked in a particular fashion and not in some other. What I must see is whether the General Body was, at every relevant stage, given the fullest of disclosure and the widest of choice, or whether matters were so engineered to favour Maya Developers. I note that nowhere do I find in Mr. Pai's presentation any categorical statement that a particular developer, though better qualified or offering better terms, was omitted in favour of Maya Developers. All that is said is this: that, perhaps, had things been done somewhat differently, there might possibly have been some other, possibly better, though still unknown, result. This is hardly an argument that commends itself. It cannot find support either in demanding a slavish adherence to what is clearly a set of guidelines and nothing more. It is far too late in the day now for these Defendants to argue that the PMC report — and there was one — is the essence of informed consent. We must bear in mind that every member was entitled to introduce a developer. The opposing Defendants attended general body meetings. It is difficult to understand how they can now say that they did not understand what their rights are. It is also important to note that members' signatures were obtained on plans: there were four kinds of flats. Those who got 480 sq.ft. plans signed behind one set of plans; those who got flats of more than 480 sq.ft. signed another. A third was signed by those who took flats of 620 sq.ft; and there is a fourth plan for those who got flats of over 620 sq.ft. area.

77. It is true that Annexure 'F' to the Development Agreement is missing. This was because at the time of the Development Agreement, the additional area requirements, and Annexure F

pertains to flat sizes, had not been finalized. The proposal from Maya Developers went through three iterations. The 2009 proposal was of two sizes of flats; these were slightly reduced in 2011, and hen changed again in 2012. Then the additional 2000 sq.ft to the society proposed. This additional area was for the Society to allot or allocate between its members. On 29th September 2012, the Society pasted a notice on its board saying that a 5% discount would be given on purchase of additional area by the Society (for buying an additional 100–150 sq.ft.). The notice called for written intimation by 14th October 2012, i.e., at the General Body Meeting to be held on that day. This deadline was extended to the General Body Meeting of 7th December 2012. Rates were finalized; the 5% discount was to apply to the rate of Rs.12,600/-. The Society's members confirmed the layout in February 2013. Moreover, the Society had not till then decided whether to allot the new premises by drawing lots or going by flat/serial number. I do not see how even this is of assistance to Mr. Pai. The issue remains of what it is that the majority did, for the contesting Defendants were not the only ones to have faced this situation. This is a question that remains almost entirely unanswered.

78. Mr. Pai then, on 28th September 2015, formulated his 'questions', presenting these as ones to be referred to the Hon'ble the Chief Justice under Rule 28 of the Bombay High Court (Original Side) Rules, 1980. The first of these is whether the 2009 Directive has statutory force and is, therefore, mandatory. Mr. Pai says the following judgments support this propositions:

(a) *Mont Blanc Co-operative Housing Society Ltd v The State of Maharashtra*;[95]

(b) *Vinod Subashrao Shinde v The State of Maharashtra*;[96]

(c) *Yavatmal District Cooperative Bank Ltd v Vinod & Ors.*;[97]

(d) *Matru Ashish Co-operative Housing Society Ltd v The State of Maharashtra*;[98]

(e) *The New India Co-operative Housing Society Ltd v The State of Maharashtra*;[99]

79. Mr. Pai's second 'question', one that follows from the first, is whether it must be held that the following decisions are *per incuriam* or not good law:

(a) *Harsha Co-operative Housing Society Ltd v Kishandas S.R. & Ors.*;[100]

(b) *M/s Akash Pruthvi Lifestyle v Akash Co-operative Housing Society Ltd & Anr.*;[101]

(c) *Mohinder Kaur v Mayfair Housing Pvt. Ltd. & Ors.*;[102]

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95 2007 (4) Mh. L. J. 595.

96 2007 (5) All M R 540.

97 SLP (C) No. 10691-10696 decided on 11th August 2008.

98 2012 (1) Mh. L. J. 126.

99 2013 (3) Mh. L. J. 666.

100 Writ Petition No. 10285 of 2009, decided on 8th March 2010.

101 Notice of Motion (L) No. 1518 of 2013 in Suit (L) No. 66 of 2013, decided on 26th August 2013.

102 2012 (6) Bom. C. R. 194;

(d) *Shri Nandakishore R. Patil & Anr. v M/s Rite Developers & Ors.*;[103]

80. The third 'question' is whether any directive under Section 79A prevails over the majority of members under Section 72 of the MCSA; and the last question is as to the meaning of substantial compliance, and what guidelines, if any, are required to be prescribed to explain which of the provisions of the 2009 Directive are mandatory and which are recommendations.

81. I am unprepared to accept, first of all, that I am at all required to make any such submission under Rule 28 to the Hon'ble the Chief Justice. No such issue arises. The five decisions Mr. Pai cites in support of the first question do not assist him. The reason is simple. Mr. Pai's submission is, correctly put, not whether *this particular directive* of 2009 is mandatory, but whether *all* directives under Section 79A are *ipso facto* mandatory. That simply cannot be. None of the five judgments deal with the 2009 Directive that concerns us here: *Mont Blanc* and *Matru Ashish* dealt with a circular pertaining to non-occupancy charges; *Yavatmal District Coop Bank* came up from the decision in *Vinod Subhashrao Shinde*; both dealt with a recruitment process directive; and *New India CHSL* was in relation to a directive or circular that placed an absolute cap on transfer fees. None of these decisions is an authority for the proposition that every single directive under Section 79A is automatically mandatory.

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103 Appeal (L) No. 92 of 2013, decided on 21st February 2013.

82. The ones Mr. Pai seeks to displace as being *per incuriam* (or something of the sort) are, on the other hand, squarely applicable. They all bind me. In *Harsha CHSL*, Mrs. Dalvi J was directly concerned with the 2009 Directive. She held that reliance on this was misplaced, and that using it to displace a democratically taken decision by the majority violated fundamental principles of the MCSA. In *Akash Pruthvi*, Kathawalla J, too, had to deal with the same argument. In paragraph 19 of his decision, he rejected the argument *inter alia* on the fact that the complaining defendant had attended almost every single meeting in which the issue of re-development was taken up. There, too, as here, there were consent letters. Kathawalla J followed the decisions of this Court in *Girish Mulchand Mehta & Ors. v Mahesh H. Mehta & Ors.*,[104] on which Mr. Kapadia, too, relies, for the proposition that a decision by the majority of members binds the minority unless it is shown that the re-development scheme is sanctioned by fraud, misrepresentation or collusion. This was also the view in *Godi Griha Sanstha Ltd. v Jerry Thomas Cherian & Ors.*[105] Thus, the 2009 Directive was clearly not mandatory. In *Mayfair Housing*, the Division Bench considered the provisions of the Model Bye-Laws and the primary object of the society to arrive at its conclusion that re-development was not to engage in the business of real estate and demolition of buildings. In *Rite Developers*, again the overwhelming majority supported re-development. This decision closely followed *Mayfair Housing*. I am unable to see why I should disagree with any of these decisions; and there is absolutely no question of holding that any of them are *per*

104 2010 (1) Bom. C. R. 31.

105 2011 (2) Bom. C. R. 421.

incuriam. The law in that regard is well-settled.[106] Mr. Pai's submission does not fit within the frame of what it takes to hold that a decision is rendered *per incuriam*, or to have a refer any questions to the Hon'ble the Chief Justice for reference to a larger Bench.

83. Mr. Pai's third and fourth questions answer themselves; as to the question of whether the majority view prevails, this is answered in *Harsha CHSL* in clear terms. Therefore, there is no call to proceed to the fourth question at all.

84. Mr. Kapadia presented me with a chart that summarized the conduct of the contesting Defendants. It makes for startling reading. It lists 14 separate items or matters done through the process: (1) approval of the PMC and appointment of the architect (31st July 2011); (2) Special General Meeting to appoint a developer (26th February 2012); (3) attendance at the Special General Meeting; (4) approval to the re-development; (5) approval of the choice of Maya Developers; (6) Consent letters (14th April 2012); (7) Update on re-development (29th July 2012); (8) approval of Development Agreement and Power of Attorney with a detailed discussion (14th October 2012); (9) Explanation to members of plan options (24th February 2013); (10) attendance; (11) approval of plans; (12) allotment of rooms (29th June 2014); (13) whether consented; and (14) whether received corpus. Defendants No. 1 to 3, for instance, tick all 14 boxes; Defendants No. 4 and 5 are tick-marked in 13 of the 14 parameters; Defendant No. 6, 7–9, and 12–13 meet 11 of the 14;

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106 *Foreshore Co-operative Housing Society Ltd v Praveen D. Desai*, (2015) 6 SCC 412.

Defendant No. 10 meets 7 of the 14; and Defendant No. 14 meets eight of the 14 requirements. Even Defendant No. 11, Beena Thakker, the most vocal opponent, attended the Special General Meeting, was present at the time of the approval of the Development Agreement, when the plans were explained and when the rooms were allotted.

85. Apart from the decision in *Girish Mulchand Mehta*[107] in regard to the majority principle, Mr. Kapadia cites *Supreme Mega Construction LLP v Symphony Co-operative Housing Society Ltd & Ors.*[108] In paragraph 7 of this decision, Mr. Justice Gupte in terms held that substantial compliance with the very same 2009 Directive under Section 79A was sufficient. An earlier decision, that of R. D. Dhanuka J in *Bharat Infrastructure & Engineering Pvt. Ltd. v Park Darshan Co-operative Housing Society Ltd & Ors.*[109] puts the controversy beyond the pale. In paragraph 19, the Court expressly negatived the submission that this very 2009 Directive does not bind the third party, viz., Maya Developers; they cannot be read into the agreement between the society and the developer. While this was in the context of an arbitration clause, it nonetheless tells us that this Directive is not of the kind of mandatory nature that Mr. Pai makes it out to be. Further, *Bharat Infrastructure* in the very next paragraph reaffirms the principle that the General Body is the supreme authority, and that the view of the majority will bind.

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107 As also *Shailaja S. Godbole & Ors. v Disha Constructions & Ors.*, 2014 (1) Bom. C. R. 385; and *K & M Sheltors Pvt Ltd v Mrs. Poonam V. Punjabi & Ors.*, 2015 (1) Bom. C. R. 696.

108 Notice of Motion (L) No. 2056 of 2014, decided on 12th March 2015.

109 Arbitration Petition No. 199 of 2013, decided on 18th March 2013; MANU/MH/0252/2013.

86. There are two final decisions to which I must turn. They came within 10 days of each other from two different Division Benches of this Court. Both bind me. Mr. Pai cannot escape the effect of either. The first is that of Kanade & Colabawalla JJ in *Dr. Ranajit S. Mukherjee v The State of Maharashtra & Anr.*[110] The challenge was to an order dated 1st November 2014 passed by the State Government granting a no-objection to the re-development of the society building. I will reproduce paragraphs 12 to 16 of this judgment (from the Manupatra report):

> 12. We have perused the papers and proceedings in the present Writ Petition and heard the counsel at great length. **We find considerable force in the argument of Mr. Kamat that the present Petition is not a bonafide one.** It is important to note that at the Special General Meeting held on 23rd October 2011, the Memorandum of Understanding received from Respondent No. 3 was discussed. The reason why the 2nd Respondent Society decided to engage the services of Respondent No. 3 was because Respondent No. 3 had agreed to get a conveyance of the land in favour of the Society on which the said building stood. Only once the conveyance was obtained by Respondent No. 3 in favour of Respondent No. 2 that the work of re-development was to be entrusted to Respondent No. 3. **At this meeting, the Petitioner was very much present and did not raise any objection for entering into the said Memorandum of Understanding with Respondent No. 3. At the said meeting, the Petitioner never once attributed any malafide in the decision making process of the 2nd Respondent Society in engaging**

110 2015 (4) Bom. C. R. 489.

the services of Respondent No. 3 or that the procedure followed by Respondent No. 2 was in violation of the circular dated 3rd January, 2009. In fact, at the said meeting, the Petitioner reiterated that the re-development work ought to be given to Respondent No. 3 only after the conveyance was obtained as envisaged in the MOU. Respondent No. 3 fulfilled its obligation under the Memorandum of Understanding by obtaining a conveyance in favour of Respondent No. 2 and paying the stamp duty and registration charges thereon. We, therefore, find that the Petitioner not having objected to the Memorandum of Understanding dated 24th October 2011, under which Respondent No. 3 was to get conveyance of the land in favour of the Society and in turn the Society was to grant re-development rights to Respondent No. 3, cannot now today assail the Development Agreement dated 28th October, 2014 or the NOC dated 1st November 2014 issued by Respondent No. 1. The Development Agreement has been executed only as a consequence and in furtherance of the MOU dated 24th October 2011. The Petitioner not having objected to the execution of the said MOU at any time, he today cannot assail the Development Agreement dated 28th October 2014.

13. We find that under the Memorandum of Understanding, Respondent No. 3 Developer fulfilled its obligation to get the conveyance in favour of the Society and it is because of this that the 2nd Respondent Society has entered into the Development Agreement dated 28th October, 2014. **Not having objected to the MOU being entered into with Respondent No. 3, the Petitioner now cannot contend that the re-development entrusted to Respondent No. 3 is in violation of the circular dated 3rd January,**

2009. Respondent No. 3, after fulfilling its obligations under the MOU by getting a conveyance in favour of the 2nd Respondent Society, cannot be sought to be ousted in this fashion at the instance of one disgruntled member. **This is more so when the Petitioner did not raise any objection at the time of entering into the MOU with Respondent No. 3** and in fact stated that the re-development should be entrusted to Respondent No. 3 only after he obtains a conveyance of the land in favour of Respondent No. 2 Society. We must also mention that even in the Petition, the Petitioner has categorically stated that he is not in principle opposed to re-development of the said building. The case in the Petition is that, some vested interests in the Society are bent on entrusting the work for re-development to their favoured developers. We find this argument wholly without merit. **As stated earlier, when the Society had decided to enter into the Memorandum of Understanding dated 24th October, 2011 with Respondent No. 3, all the members of the 2nd Respondent Society agreed to the same. The Petitioner was very much present at the said meeting and never objected to the said MOU being entered into with Respondent No. 3, and in fact stated that the re-development should be entrusted to Respondent No. 3 only after it obtains a conveyance of the land in favour of Respondent No. 2 Society.** This, Respondent No. 3 has admittedly done. We therefore find no merit in this argument.

14. There is yet another reason why we have come to the conclusion that the present Petition is not bonafide and are therefore not inclined to exercise our equitable jurisdiction under Article 226 of the Constitution of India. In this regard, it is important to note the contents of the letter written by the Petitioner to Respondent No.

2 on 12th November, 2014. On perusing the said letter it is clear that the real grievance of the Petitioner appears to be that his demands are not taken care of, which is why there is opposition to the re-development. On perusing of the said letter it is clear that the Petitioner wants to use his premises for a commercial purpose for which there is opposition and therefore the present Petition. The relevant portion of the said letter reads as under:-

... ...

15. This letter very eloquently sets out the motive behind the present Petition. **Even in this letter there is no allegation that Respondent No. 3 is being favoured or that there has been any violation of the circular dated 3rd January, 2009.** In this letter, the grievance of the Petitioner is that his demands are not met, and therefore he is unable to consent to re-development unless his needs are met. It would follow that if the 2nd Respondent Society and Respondent No. 3 Developer were to fulfill the personal requirements of the Petitioner, he would have no problem, either with the Development Agreement dated 28th October, 2014 or the NOC granted by Respondent No. 1 dated 1st November, 2014.

16. We, therefore, find that the present Petition is certainly not a bonafide one and ought not to be entertained at the instance of one disgruntled member whose alleged demands are not being satisfied. We cannot permit one member of a society to hold all the others to ransom in such a fashion. We, therefore, have no hesitation in dismissing the Writ Petition.

(*Emphasis added*)

87. It seems to me that the present case is very close to this one; the difference being only perhaps that there are more disgruntled elements before me than there were before the Division Bench. That should make no difference at all. As the tabulation tendered by Mr. Kapadia shows, the majority of them have accepted the entire proposal; some have accepted the whole of it. How they can oppose it now, and on these ground, defies logic, common sense and the very purpose of the MCSA. If every single member is entitled to ventilate every single grievance and to hold the society to ransom, no society will ever progress. It is not a question of the majority dominating the minority, or of this being somehow egregious; what is shocking is the manner in which a small minority has attempted to hold the majority to ransom. That is intolerable.

88. *Ravee B. Botalje & Ors. v Shree Krishan Sai Development Corporation & Ors.*,[111] puts it even more emphatically. Here, a Division Bench of Mohit S. Shah CJ and A.K. Menon J was again dealing with a re-development agreement. Here is what the Division Bench said:

> 2. The high degree of saline corrosion in Mumbai shortens the life of buildings. Thousands of buildings require either entire reconstruction or extensive repairs which the occupants belonging to low income group or middle class families cannot afford. The only way out is redevelopment with higher FSI provided under the Development Control Regulations for Greater Mumbai, 1991. This requires involvement of a developer to be

111 Appeal (L) No. 480 of 2015, decided on 10th July 2015; MANU/MH/1392/2015

selected by the co-operative housing society who will develop the building and provide new rehabilitation flats of equal or larger area to occupants in the old building free of cost and recover his costs and profit from construction of additional flats which the developer can sell on his own. The solution appears to be both simple and a win-win situation for the occupants as well as the developer.

3. **But the facts of this case, as several other cases in this Court, explain why many of the old or dilapidated buildings in the city of Mumbai continue to be in the same condition. A co-operative housing society and an overwhelming majority of members of the co-operative housing society agreeing for redevelopment and vacating their flats for that purpose, are held to ransom because a small minority of members do not allow the redevelopment process to commence.** Under a typical redevelopment agreement, all the members of the co-operative housing society are to get, on ownership basis, flats in the new building, which many a time are larger than their respective flats in the old building and are also to get rent for the period during which the new building is to be constructed. **However, either to extract additional benefits/amounts or for extraneous consideration, at the instance of a rival developer, the members in minority litigate and continue to litigate for several years, if not decades, stalling the redevelopment project and causing unbearable and irreparable hardship to the majority members and the developer.**

4. **In one case after another, this Court has been passing orders directing such recalcitrant members to act according to the resolutions of the co-operative**

housing society passed either unanimously or with majority of 70% of the members. Such recalcitrant members, however, know that even after holding a large number of members of the co-operative society and the developer to ransom for years, if not decades, they have nothing to lose because they will still be getting flats in the new building with the same area, amenities and facilities which the other members are going to get under the Development Agreement. Hence, whatever additional benefits/amounts, if any, they may succeed in extracting from the developer would only be a bonus and there will be nothing to lose, if they ultimately lose in the litigation.

5. In the present case also, the co-operative society of 20 members unanimously passed resolutions in 2009 and 2010 resolving to go for redevelopment as the building had developed cracks in the slabs, beams and columns and the structure was deteriorating. A Development Agreement was entered into between the co-operative housing society and the developer on 21 September 2010 which provides that each member will get a self-contained flat admeasuring usable 575 sq. ft. carpet area in the new building (as against the flat admeasuring 387 sq. ft. in the old building), rent for the period of construction of the new building at Rs.28,000/- per month and Corpus Fund of Rs.7 lakhs as compensation for loss of his fixtures, fittings, etc. in the old building due to demolition and to meet additional burden of property tax and increased maintenance after construction of the new building, apart from the developer executing a Bank Guarantee of a Nationalized Bank in favour of the co-operative housing society for Rs.1.25 crores. 18 out of 20 members vacated their flats in November 2013 after the developer obtained building permission from the

Municipal Corporation in August 2013 for redevelopment of the society building. Substantial walls of the 18 flats in the old building have been demolished. The developer is paying almost Rs.60 lakhs per annum to the 18 members towards rent for temporary accommodation during the construction of the new building. The developer has by now spent about Rs.2 crores, but the two appellants/petitioners do not hand over the possession of the two flats in their occupation to the developer or to the society and do not thus allow the project of redevelopment to take off at all.

6. **The appeal is directed against the judgment and order of the learned Single Judge wherein finding is given that the two appellants are blackmailing the developer to extract the maximum possible benefits form them and their conduct completely lacks bona fides and smacks of mala fides.** In para 2.23 of the judgment (internal page 13), the learned Single Judge has reproduced the photocopy of the handwritten paper on which the two appellants had made their exorbitant demands from the developer to get a larger flat area and exorbitant amount (in the handwriting of appellant no.1 herein). Refusal by the developer to meet those demands has resulted into this litigation.

... ...

20. **We are in respectful agreement with the above observations of the learned Single Judge that the appellants having initially agreed to participate in the redevelopment project entrusted by the Society to the developer, the appellants are now estopped from raising the contentions which are inconsistent with or which would be destructive of the resolutions of the Co-operative Housing Society, particularly when 18**

out of 20 members have already vacated their flats and substantive portions of internal walls of their flats have been demolished and the developer has already spent Rs.2 crores and continues to spend Rs.60 lakhs towards payment of rent to 18 members of the Society. It would not now be possible to restore status quo ante.

31. We were inclined to saddle the petitioners with costs quantified at Rs.5 lakhs and to permit the developer to deduct Rs.2.5 lakhs from the amount payable to each petitioner under the Development Agreement dated 21 September 2010. However, when the judgment is being pronounced, learned counsel for the petitioners under instructions of both the petitioners, who are present in Court, undertakes and states that both the petitioners will hand over peaceful and vacant possession of the two flats in possession of the respective petitioners to the Court Receiver within one week from today in compliance with the directions given by the learned Single Judge in the judgment dated 8 May 2015.

89. The result of this discussion is that Maya Developers' Motion must succeed, though with some moulding of relief. There is no question that the majority has approved the Development Agreement and acted under it. So, too, have many of the dissenters who are Defendants today. The 2009 Directive having been held not to be mandatory, and given the finding of substantial compliance, there is no substance to the grievances raised. As has been repeatedly observed, a handful cannot hold to ransom the interests of the majority in a cooperative society. Most important of all, and this perhaps distinguishes this case and puts it on a higher pedestal than most of the other cases cited before me, it is *not* the Society

that is at loggerheads with the developer. The Society actually supports the developer. This makes it infinitely worse for the Defendants, for they are now clearly on their own; even their own Society does not share their views. Finally, there is the matter of the contesting Defendants not being able to point out that Maya Developers has been wrongly favoured over a developer who made a better offer. As I have noted, everything is couched in generalities and placed in the realm of possibilities: a case of letting the best become the enemy of the good.

90. The remaining prayers in the 10th Defendant's Motion must, in consequence, be rejected; and they are.

CONDUCT OF DEFENDANTS NOS. 11 AND 15

91. I have left this to the last because it is the most painful part of this matter. The conduct of these two Defendants sorely tried my patience and defied all comprehension. It turned the entire hearing, till then conducted by Mr. Kapadia and Mr. Pai with great restraint, into an ordeal. Their conduct bordered on contempt; the only reason I did not move against them in that jurisdiction, possibly a mistake, given that on at least one occasion it was sufficient to constitute contempt in the face of the Court, was that I am as a rule slow to invoke that jurisdiction. I have noted that Defendant No.11 took the lead in other litigations. She filed the principal Affidavit in Reply in Maya Developers' Motion too. She then filed a further Affidavit along with Defendant No. 15, one that violates every single rule and ought never to have been taken on record — filled with

outsize boldface fonts and strong language; very akin to shouting, and this was more or less their conduct in Court, too, the last time they appeared. They make in this Affidavit several grievances. The ones by Defendant No. 15 are best ignored. He has a dispute with his licensor as to who is entitled to Room No. 32, and he has chosen to use this matter as a vehicle for that separate issue. Defendant No. 11 is someone whose purpose I cannot comprehend at all. She acts not in the interests of the Society or the other members, and there is no sign that this is her intention. She makes no attempt to explain her own conduct in attending meetings and in raising grievances at a very late stage. She complains about all manner of past events — the appointment of the PMC, the choice of developer, that a video recording of a meeting supervised by the Deputy Registrar was not faultless, and so on; and she does so to allege that the entire Development Agreement is a ploy to bring Maya Developers into the frame. But how this is against the interests of the Society or its members is unclear. She has produced a structural audit report of one Bhoomi Consultants. As I have noted, that report, too, shows massive structural distress, though why this consultant then arrives at wholly different recommendations is unclear. In any case, given the Section 354 notice from the MCGM, such reports, commonly made available in this city for the asking, are of little purpose. There must be more to demonstrate that the proponents' report is unsound or unreliable. Of this, there is no *prima facie* evidence. Indeed, it is common ground, which even Mr. Pai does not dispute, that the building is dilapidated. In fact, the entire argument from these two Defendants is self-defeating, for it is not even their case that the building does not require re-development; they only allege that it could possibly and perhaps have been in some possibly better

manner with perhaps some other developer for some unstated additional benefit.

92. On 30th March 2015, Defendants Nos. 11, 15 and 20 sought time to separate from the other Defendants and to engage their own Advocates. I gave time till 6th April 2015. On that day, I noted that they appeared and asked for four weeks to engage advocates. I declined. They said they could not engage lawyers because some holidays intervened. I stood the matter over to 16th April 2015. By that date, the 10th Defendant had filed his Notice of Motion and raised the preliminary issue. The Motion was adjourned to 5th May 2015. On 8th June 2015, it was adjourned to 17th June 2015. On that day, Defendants Nos. 11 and 15 appeared. They complained of not having a full set of Affidavits. Despite all the time since their first request, they had still not engaged Advocates. Mr. Kapadia agreed to furnish them a full set. I stood the matter over to 22nd June 2015.

93. That day, I took up the matter at 3:00 pm on 22nd June 2015. Both Defendants Nos. 11 and 15 appeared. I have noted what happened in my order of that day. This is what I said:

> 7. This afternoon the matter is listed at 3.00 p.m. for final disposal of both the Notices of Motions. Predictably and as they have persistently done in the past, Ms. Beena Thakkar and Mr. Jamnadas Thakkar, appearing in person, have once again applied for yet another adjournment, this time for "at least four months". In doing so, they have conducted themselves in an extremely aggressive and unbecoming manner. They claim that they need four months' time to prepare themselves. The earlier excuse of needing time to

engage Advocates is no longer made. They claim that they have "only just" received "over 1000 pages" on 18th June 2015, as if to suggest that all these papers are new and alien to them. What they conveniently overlook is that they have had a copy of the plaint and the Notices of Motion since March and April 2015. They also overlook the fact that it was Ms. Beena Thakkar, Defendant No. 11, who affirmed the first affidavit in reply to Mr. Kapadia's Notice of Motion not only for herself but for very many other defendants.

8. That is not all. The record indicates that there have been previous proceedings in the Cooperative Court and in the City Civil Court. In the former, Ms. Beena Thakkar was an applicant. In the latter she was a plaintiff. Defendants Nos. 11 and 15 are, thus, intimately familiar with the record and the documents. They are no strangers to any of it.

9. I have made it very clear to them that I will not adjourn the matter for four months and that I intend to proceed with the hearing. I have at the same time made it abundantly clear that I will hear each of them fully after I have heard Mr. Kapadia and Mr. Pai.

10. **I note for the record that both Ms. Beena Thakkar and Mr. Jamnadas Thakkar have conducted themselves in a manner that borders on or perhaps even constitutes contempt. I have allowed this to pass since they are parties in person. Yet I must express my dismay or disapproval of their conduct in Court, their raised voices and their choice of language. No person, simply because he is a party appearing in person, is entitled to conduct himself in such a fashion. Ms. Beena Thakkar and Mr. Jamnadas Thakkar have since both left the Court. This is nothing**

but an attempt to intimidate or force me into granting them a long adjournment.

11. I intend to do nothing of the kind. I must also record my appreciation of the fact that Mr. Pai, who appears for several other Defendants, all of whom are undoubtedly similarly placed, has not sought any such adjournment and is ready to proceed today.

12. This order is set out before I proceed with the hearing, so that there is no misunderstanding or miscommunication about what transpired in Court this afternoon.

13. I am also making it clear that Ms. Beena Thakkar and Mr. Jamnadas Thakkar are welcome to make their submissions at any time before judgment is pronounced, and that they will be afforded the fullest opportunity of presenting and placing their case. As it is, they have filed an affidavit or affidavits. I intend to consider these on merits, and it is yet open to both Ms. Beena Thakkar and Mr. Jamnadas Thakker to avail themselves of this open opportunity, good till the time of pronouncement of judgment. **If, despite this, they choose not to participate in the proceedings, they do so at their own risk. At the same time I am making it clear that I will not adjourn the hearing of this matter.**

14. After this order was dictated in open Court, I have heard Mr. Kapadia and Mr. Pai for some time. The matter is part-heard and is posted to 24th June 2015 at 3:00 pm for further arguments.

94. On 25th June 2015, while the hearing on the preliminary issue was under way, I once again *inter alia* noted that Defendants Nos. 11

and 15 were at liberty to make their submissions on the next date. Then on 3rd July 2015, I passed an order that reads thus:

> 1. I have today indicated to Mr. Kapadia and Mr. Pai that I am holding in favour of the Plaintiffs on the preliminary issue. They have agreed that the judgment in this behalf should be rendered along with the judgment on the main Notice of Motion itself.
>
> 2. List the Notice of Motion for hearing on 22nd July 2015 at 3.00 p.m. If the hearing is not complete on that day, the matter will continue on the next day, 23rd July 2015.
>
> 3. I must, in this matter, make some special provision in regard to Defendants Nos. 11 and 15. As I have previously noted, these two parties, although once represented by Mr. Pai's Attorneys, later sought to appear in person. I permitted this. In my order dated 22nd June 2015, I made a note of their conduct in Court and how they left the Court on their own although I had made it clear several times earlier that I would not grant an adjournment. I also noted that they made a completely unreasonable and unacceptable request for an adjournment of at least four months. This was on the basis that they had "only just" received a substantial compilation. What these two parties overlooked, perhaps deliberately, was that nothing in this compilation could have been new to them, as they have been appearing in this matter throughout. The compilation was directed to be given to them as a matter of convenience and as a courtesy. It was not a licence to them to abuse that courtesy or the process of this Court. Mr. Kapadia is not wrong in pointing out that these two persons have also not only been parties

in this suit, but have actually been the Applicants before the Cooperative Court and the Plaintiffs in prior proceedings in the Bombay City Civil Court. Having said all this, I am yet prepared to give the Defendants Nos. 11 and 15 the fullest opportunity of being heard, either in person, or through properly appointed advocates. I must note that if these two Defendants now seek to engage new Advocates, (a) they must formally discharge Mr. Pai's attorneys and obtain a no-objection; and (b) I will not countenance an adjournment on the ground that the new advocates have only just been engaged. The two parties are under no obligation or compulsion to engage any Advocates, and while it is true that technically they could not appear in person without a formal discharge of M/s N.N. Thakkar & Co., in whose favour they had earlier signed a vakalatnama, I am still willing to make that much allowance for them if they choose to represent themselves.

4. Mr. Pai, learned Advocate for Defendants Nos. 1 to 10, 12, 13, 14 and 20, very kindly agrees that his Attorneys will communicate this order, along with an ordinary copy of it, to Defendants Nos. 11 and 15. If Defendants Nos. 11 and 15 wish to file any further affidavit or compilation, they must do so on or before 13th July 2015. No filings will be accepted after that date. Defendants Nos. 11 and 15 are also at liberty to remain present on the next scheduled date of hearing of this matter on 22nd July 2015 and thereafter till the arguments are over and to make their submissions.

5. In order to ensure that there is no misunderstanding, Mr. Pai's Attorneys are at liberty to communicate an ordinary copy of this order to Defendants Nos. 11 and 15.

> 6. I am recording these special provisions and allowances to the two parties in person lest it be urged in later proceedings that these two Defendants were not afforded the fullest liberty of being heard. At the cost of repetition, if Defendants Nos. 11 and 15 continue to absent themselves from the hearings, they do so at their own risk, and not because they have been stopped or prevented by the Court from doing so.

95. I then noted on 22nd July 2015 that Defendants Nos. 11 and 15 refused to accept the communications from Mr. Pai's attorney. I once again reserved liberty. The hearings spilled over the Diwali vacation. Arguments finally concluded on 28th September 2015. On that day, I held the matter over to 7th October 2015 specifically to allow Defendants Nos. 11 and 15 to make their submission. They did not. There is a handwritten letter on file of 29th August 2015 in which Defendants Nos. 11 and 15 make a grievance about not being heard and about their request for a four-month adjournment not having 'materialized' — this despite nearly six months having passed from April 2015 to October 2015 when repeated opportunities were given to them to appear. On 7th October 2015, I noted that Defendants Nos. 11 and 15 continued to stay away, but, in the meantime, had sent a handwritten letter on 29th August (wrongly typed in the order as September) 2015 to the Hon'ble the Chief Justice and myself in which they acknowledged having seen the order or 28th September 2015 when it was uploaded. I also noted on 7th October 2015 that they continued to be absent.

96. Despite this, I consciously delayed this judgment somewhat, though the entirety of the delay is not attributable to this. I must

only observe that this obstreperous and reprehensible conduct merits the strongest censure; I have chosen to let it pass without direct action though that was certainly justified in view of their conduct. It is, in my view, simply impossible for Defendants Nos. 11 and 15 to ever say they were denied a fair opportunity of being heard. If they chose to stay away, they have themselves to blame for the consequences. I ensured time and again that they were given liberty to come to court and make their submissions. I imposed on Mr. Pai and Ms Thakkar to send them a notice, not something they were obliged to do. I do not believe any court could have done more.

CONCLUSION AND ORDER

97. The preliminary issue is decided against Defendant No. 10. Notice of Motion (L) No. 971 of 2015 is dismissed. The Plaintiffs' Notice of Motion (L) No. 834 of 2015 is made absolute in terms of prayers clauses (b) and (c). Defendants Nos. 1 to 20 are directed to deliver vacant possession of the suit Rooms Nos. 6, 7, 11, 17, 20, 24, 27, 30, 32 and 35 to the 21st Defendant within four weeks from today; and the 21st Defendant shall then deliver that vacant possession of those rooms to the Plaintiffs within one week thereafter. In default of compliance, there will also be an order in terms of prayer clause (a) appointing the Court Receiver of the suit rooms mentioned above, with power to take vacant possession thereof with necessary police assistance and to deliver that possession to the Plaintiffs.

98. At Mr. Pai's request, the operation of this order is stayed for a period of three weeks from the date the order is uploaded.

99. Finally, it only remains to apologize to Mr. Kapadia, Mr. Pai and their clients. This judgment has been unconscionably delayed. I offer no excuses, though, as I have said, part of that delay was deliberate, to accommodate Defendants Nos. 11 and 15, possibly a mistake. I thank them for their patience, and, of course, for their very able assistance in a difficult matter both at the time of hearing and thereafter in the writing of this judgment.

(G.S. PATEL, J.)

Directive under Section 79(A) of Maharashtra Co-operative Societies Act 1960 to all the Co-operative Housing Societies in the State of Maharashtra.

Regarding Redevelopment of Buildings of Co-operative Housing Societies.

GOVERNMENT OF MAHARASHTRA
No. CHS 2007/CR554/14-C
Co-operation, Marketing and Textiles Department

Date: 3rd January 2009

Whereas, buildings of Co-operative Housing Societies in the State of Maharashtra are being redeveloped on a large scale. A number of complaints were received from members against managements of Co-operative Societies in which redevelopment is taking place. In respect of most of the Co-operative Housing societies, nature of complaints relating to redevelopment is as under:-

1. Not taking the members in confidence in the process of redevelopment.
2. There is no transparency in tender process.
3. Appointing contractors arbitrarily.
4. To work by violating provisions of Co-operative Act, Rules and Bye-Laws.
5. No orderliness in the work of Architect and Project Consultant.
6. Not planning Redevelopment Project Report.
7. Not adopting proper procedure in finalizing tenders.
8. There is no similarity in agreements with Developers.

Whereas there is no concrete policy in respect of all above points of complaint and therefore Co-operation Commissioner and Registrar, Co-operative Societies, Maharashtra State, Pune had appointed a Study Group under the Chairmanship of Joint Registrar, Co-operative Societies (CIDCO) to study the complaints received at various levels and for consultations with all constituents working in the relevant fields. The said Study Group has expressed the opinion that it is essential to frame regulations for redevelopment of buildings of Co-operative Housing Societies after consultation with all the constituents in the field of Co-operative Housing.

Therefore the Government is issuing following directive under Section 79(A) of Maharashtra Co-operative Societies Act, 1960.

The following directive be termed as "Directive for Redevelopment of Building of Co-operative Housing Society".

1. Requisition for convening Special General Body Meeting for Redevelopment of Society's Building:-

Not less that ¼ members of the Society the building of which is to be redeveloped should submit a requisition to Secretary on the Managing Committee elected as per provisions of Bye-Laws and lawfully formed along with their scheme and suggestions for redevelopment of the Society's building for convening Special General Body Meeting to finalise the policy on redevelopment of the building.

2. Convening Special General Body Meeting :-

On receipt of an application as per Directive No. 1 above, Managing Committee

preparing project report for redevelopment work of the building and one expert person from among them will be selected in the Special General Body Meeting.

Following business will be transacted in the said Special General Body Meeting:-

1. To take preliminary decision by taking into consideration demand of the members for redevelopment of society's building and suggestions received in respect of the same.

2. To select expert and experienced Architect / Project Management Consultant on the panel of the Government / Local Authority for work of redevelopment of the building and to finalise items of work to be done by them and terms and conditions of work.

3. To submit outline of the programme for redevelopment of the building.

3. To accept written suggestions from members relating to redevelopment of the building:-

Members of the Society will be entitled to submit in writing to the committee eight days prior to the meeting their realistic scheme, Suggestions and recommendations for redevelopment of the building in the name of experienced and expert Architect / Project Management Consultant known to them. However, that Architect / Project Management Consultant should submit a letter that he is desirous of doing work of redevelopment.

4. Decisions to be taken in the Special General Body Meeting:-

Quorum for the Special General Body Meeting convened for redevelopment of building of the Co-operative Housing Society will be ¾ of the total members of the society. If quorum is not formed, meeting will be adjourned for eight days and if there is no quorum for the adjourned meeting, it will be deemed that members are not interested in redevelopment of the building and meeting will be cancelled.

On formation of quorum for the meeting, Suggestions, recommendations and objections from all the members with regard to redevelopment of the society's building will be taken into consideration and opinions expressed by all the members will be recorded in the minutes book with names of concerned members. Therefore a preliminary decision will be taken whether to redevelop society's building or not. Such decision must be taken with majority vote of more than ¾ of the members. On preliminary resolution about doing the work of redevelopment getting passed, following business will be transacted in the meeting.

a) To selected expert and experienced Architect / Project Management Consultant from the panel of the Government / Local Authority for work of redevelopment of the building and to finalise items of work to be done by him and terms and conditions for the same.

b) To submit an outline of the programme for redevelopment of building.

5. Providing minutes of Meeting to all members:-

Secretary of the Society should prepare minutes of Special General Body Meeting as above within ten days and a copy thereof should be furnished to all members and acknowledgement therefore be kept on record of the Society. Also one copy

Project Management Consultant incorporating therein terms and conditions approved in Special General Body Meeting.

7. Work to be done in the initial stage by Architect / Project management consultant:-

a) To survey Society's building and land.
b) To obtain information about conveyance of land to the society.
c) To take into consideration prevailing policy of the Government and the regulations applicable from time to time depending on ownership of the land (MHADA/SRA/Municipal Corporation) and to obtain information about FSI and TDR, which would be available in relation to building and land of the society.
d) To take into consideration suggestions and recommendations from the members for redevelopment of the building as also the residential area to be made available to the members, commercial area, vacant area, garden, parking, building specifications etc. and to prepare a realistic project report.
e) Architect / Project Management Consultant should prepare the project report within two months of date of his appointment and to submit the same to committee of the society.

8. Action to be taken on receipt of redevelopment Project Report:-

a) On receipt of Redevelopment Project Report as above, Secretary of the society will convene a joint meeting to approve the Project Report with majority vote by taking into consideration suggestions received from Committee Members and Architect / Project Management Consultant. Notice in that behalf will be published on the Notice Board of the Society mentioning time venue etc. of the meeting. It should be mentioned in the notice that a copy of the Project Report is available in the society's office for members to see and the notice should be served on all the members that they should submit their suggestions eight days prior to the next Committee Meeting and acknowledgement of such notice should be kept on record of the Society.

b) Seven days prior to joint meeting, suggestions received from the members will be forwarded by Society's Secretary to the Architect / Project Management Consultant for his Information.

c) There will be a detailed discussion in the Joint meeting on the suggestions / recommendations from members and opinion thereon of the Architect / Project Management Consultant and project report will be approved with necessary changes. Thereafter draft of tender from will be prepared and date of next joint meeting will be fixed for discussion on draft tender form and finalising the same. While preparing draft tender form, in order to get competitive quotations from renowned experts and experienced developers, either carpet area or corpus fund fixed (not to be changed) and by finalising other technical matters, the Architect / Project Management Consultant will invite tenders. Society's members will be entitled to furnish information about it to the reputed and experienced developers known to them.

9. Preparing List of Bids Received:-

a) On the Last day for receiving quotations, Secretary of the Society will prepare a list of offers received and display the same on the notice board of the society.

b) After 15 days of the last day for receiving quotations, Secretary of the society

up before Special General Meeting and concerned bidders will be informed about it immediately.

10. Selection of Developers:-

a) Office of the Registrar to appoint Athorised officer for attending General Body Meeting:-
An application with list of the members should be sent within eight days to the registrar for appointment of Athorised officer to attend the Special General Meeting of the Society for selecting a Developer out of those selected by committee of the Society with the help of the consultant, by taking into consideration his experience, merit, financial capacity, technical capacity and competitive rate etc.

b) Convening Special General Body Meeting for finalising tender:-
After appointment of authorized officer, with his prior permission Secretary of the Society will fix the time and venue convene Special General Body Meeting for appointment of Developer and Agenda of this meeting will be sent to all the members 14 days prior to the meeting by hand delivery and by registered post and keep acknowledgement thereof on record of the Society. Also, office of the Registrar will make arrangement to keep his authorized representative present for the meeting. Also arrangement will be made for video shooting of the meeting at the cost of the Society. Any person other than formal members will not be entitled to attend this meeting. Therefore members will be required to present at the venue of the meeting with their Identity Cards. At the time of submitting redevelopment proposal to the concerned authority for sanctioning, selection of Developer and other work should have been done in the presence of authorized officer from Registrar's office.

c) If there is no quorum for Special General Body Meeting:-
If the quorum of ¾ members out of total members is not formed for Special General Body Meeting, the meeting will be adjourned for eight days. If quorum does not get formed for adjourned meeting, it will be deemed that the members have no interest in redevelopment of the building and the meeting will be cancelled and thereafter the said subject will not be taken up before the Special General Body Meeting for approval.

d) In the Special General Body Meeting to be convened for selection of Developer, authorized representative from the office of the Registrar will be present and observe proceedings of the meeting. Also, on concerned representatives and authorized officer remaining present at the venue and at the time of meeting and on quorum of ¾ members getting formed, following business will be transacted in the meeting.

i) Providing comparative information in respect of tenders selected for presentation (for redevelopment work).
ii) Presentation by bidders one by one.
iii) To select Developer for redevelopment of the building, to finalise terms and conditions and finalise the tender.
iv) To obtain consent from the selected Developer.
v) Give information about further work. It will be essential to take written approval by ¾ majority vote of the members present for the meeting for selection of Developer. If the selected Developer of his representative does not remain present for the meeting, further action will be taken by presuming that they have given their consent for the project.

(1) The period for completing redevelopment project of the Society will not exceed more than two years and in exceptional cases, it will not exceed three years.

(2) Developer will give a Bank Guarantee for amount equal to 20% of the project cost.

(3) During the period of redevelopment, the Developer will make available to the members alternative accommodation in the same area as far as possible or arrange to pay monthly rent and deposit as acceptable to members or make available transit camp accommodation.

(4) The said agreement will be registered under Registration Act, 1908.

(5) On completion of redevelopment project, new members will be admitted in the Society only with approval of General Body Meeting of the Society.

(6) Carpet area to be allotted should be clearly mentioned in the agreement.

(7) Development right vested in the Developer will be non-transferable.

(8) Members will vacate their respective premises only after all legal approvals are received for redevelopment of the building.

(9) Rights of those who are in possession of the flats will remain unaffected.

(10) If any dispute arises in the work of redevelopment, provision should be made in the agreement to resolve the same as per provisions of Section 91 of the Act.

(11) After receipt of Occupation Certificate, flats in the redeveloped building should as far as possible be allotted as per present conditions floor-wise and if it becomes necessary to allot flats by drawing lots, on completion of construction, Developer should make arrangement drawing lots, and at that time flats should be allotted in the presence of Registrar's representative and this process be recorded by video shooting.

(12) Any Committee member or Office Bearer of the Society should not be the Developer or relative of the Developer.

(13) Building plans sanctioned by the Municipal Corporation / Competent Authority should be put up before the General Body Meeting for information and if any member wants copies of approved documents, he should submit application for the same to the Society and it will be binding on the Committee to furnish the information by charging necessary fee.

By order and in the name of the Governor of Maharashtra

(Dr. Sudhirkumar Goyal)
Principal Secretary
(Co-operation and Marketing)

Copy to:

1) Co-operation Commissioner and Registrar,
   Co-operative Societies, Maharashtra State, Pune.
2) Divisional Joint Registrars, Co-operative Societies (All).
3) District Deputy Registrars, Co-operative Societies (All).
4) Select File (14-C).