2022 INSC 161

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1222 OF 2022
[arising out of SLP (CIVIL) No. 21964 of 2017]

KAMGAR SWA SADAN CO-OPERATIVE HOUSING SOCIETY LTD. ... APPELLANT

v.

MR. VIJAYKUMAR VITTHALRAO SARVADE & ORS. ... RESPONDENTS

J U D G M E N T

ABHAY S. OKA, J.

Leave granted.

1. The respondent nos.1 to 11 are the original plaintiffs. The appellant-Society is the original defendant no.1. The respondent nos.12 to 25 are the office bearers of the appellant-Society. The respondent nos. 26 to 29 are the

developers/builders. The respondent nos.30 to 38 are officials and/or the members of the High Power Committee constituted by the Government of Maharashtra. The last respondent is the Project Consultant and Architect. It is not in dispute that the respondent nos.1 to 11 (original plaintiffs) are the members of the appellant, a Co-operative Society duly registered under the Maharashtra Co-operative Societies Act, 1960 (for short "the said Act of 1960). The dispute is about the redevelopment of the buildings occupied by the members of the appellant-Society in accordance with Regulation 33(7) of the Development Control Regulations for Greater Mumbai, 1991 applicable to the Municipal Corporation of Greater Mumbai. In the Special General Body Meeting of the appellant-Society held on 12th February 2011, a resolution was passed resolving that the tender submitted by the respondent no.26 for the redevelopment of the property of the appellant-Society should be accepted. It is the case of the appellant-Society that the resolution was unanimously passed.

2. On 2nd December 2012, a Special General Body Meeting of the appellant-Society was held in which a resolution was unanimously passed appointing the respondent no.27 as the developer. The respondent no.27 is stated to be a sister concern of the respondent no.26. It is alleged that out of 240 members of the appellant-Society, 165 were present in the meeting. An agreement for development was accordingly executed on 24th December 2012 by the appellant-Society. The agreement provided for allotment of premises in the redeveloped buildings free of cost on ownership basis to all the eligible members of the appellant-Society. In addition, the respondent no.27 agreed to provide a corpus of Rs.5,00,000/- (Rupees Five Lakhs) per member to the appellant-Society. On 27th December 2012, the Jurisdictional Assistant Registrar of Co-operative Societies accorded permission to the appellant-Society to redevelop the property. On 7th January 2013, the Assistant Registrar granted further permission to the appellant-Society to redevelop the property by appointing the respondent no.27 as the developer. The said permission refers to a report submitted by the

Authorized Officer which recorded that all the 165 members of the appellant-Society who were present in the meeting held on 2nd December 2012 supported the proposal for redevelopment.

3. The respondent nos.2, 3 and 8 along with some other members of the appellant-Society filed a revision application under Section 154 of the said Act of 1960 for challenging the orders/permissions dated 27th December 2012 and 17th January 2013 issued by the Assistant Registrar of Co-operative Societies. The revisional authority allowed the revision application by the order dated 14th May 2013. The order of the revisional authority was challenged by the appellant-Society by filing a Writ Petition in the Bombay High Court. By the order dated 11th December 2013, the Bombay High Court stayed the order of the revisional authority. The said interim order of Bombay High Court was challenged by the respondent nos.2, 3 and 8 before this Court. While dismissing the Special Leave Petition, this Court directed the Bombay High Court to expeditiously decide the Writ Petition. In the pending Writ Petition, the respondent no.2 filed an interlocutory application seeking an interim order of status quo as regards the

redevelopment of the property. The High Court declined to grant any interim relief on the said application.

4. The respondent nos.1 to 11 filed the suit – subject matter of this Civil Appeal in the City Civil Court at Mumbai. The suit was filed on 20th February 2016. The respondent nos.1 to 11 contended in the suit that the resolutions passed in the Special General Body Meetings dated 12th February 2011 and 2nd December 2012 were illegal being contrary to provisions of law and the Guidelines framed by the State Government vide the Government Resolution dated 3rd January 2009. A prayer was made for a decree of declaration that the said resolutions were illegal, null and void. Another prayer was made for a declaration that the tender process conducted by the appellant-Society for appointing a developer for redeveloping its property was illegal. A prayer was also made for directing the appellant-Society to conduct a fresh tender process. Interim relief was claimed in the suit for restraining the concerned defendants from granting further permissions to the appellant-Society. The

Trial Court did not grant ad-interim relief to the respondent nos.1 to 11.

5. The present appellant-Society and some other defendants took out a Notice of Motion in the suit contending that the jurisdiction of the Civil Court was barred in view of Section 91 of the said Act of 1960 and the Co-operative Court will have exclusive jurisdiction to entertain and decide the dispute in the suit. It was also alleged that the suit was barred by limitation. The said respondents invoked Section 9A of the Code of Civil Procedure, 1908 (for short "CPC") and prayed that both the issues be decided as preliminary issues before deciding the Notice of Motion for temporary injunction. The prayer was contested by the respondent nos.1 to 11. Two preliminary issues on jurisdiction and bar of limitation were framed by the Trial Court. The learned Trial Judge after hearing the parties, held that the suit was not barred by Section 91 of the said Act of 1960 and was maintainable in Civil Court. He held that the suit was within limitation. It is this order which was subjected to a challenge by filing a Civil revision application by the

appellant-Society. The High Court dismissed the revision application. Therefore, the present appeal has been filed for challenging the orders of the Trial Court and High Court.

6. We have heard the learned counsel appearing for the parties. Mr. Shyam Divan, the learned Senior Counsel submitted that in view of the repeal of Section 9A of the CPC as applicable to the State of Maharashtra and a recent decision of this Court in the case of **Nusli Neville Wadia** v. **Ivory Properties & Ors.**[1], the issue of limitation could not be decided as a preliminary issue. The learned Senior Counsel submitted that the finding recorded by the Trial Court on the issue of limitation will have to be set aside. He submitted that issue of limitation will have to be decided after the parties adduce evidence. He would submit that in any case, the respondent nos.1 to 11 will not be entitled to the benefit of Section 14 of the Limitation Act, 1963 (for short "the Limitation Act"). He also invited our attention to additional documents placed on record along with I.A.No.22493 of 2021 and

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submitted that the buildings of the appellant-Society are in extremely dilapidated condition and a notice to that effect has been served upon the appellant-Society by the Municipal Corporation of Greater Mumbai. He submitted that except for the respondent nos.1 to 11, more than 150 members of the appellant-Society have consented to the redevelopment of the property by the respondent no.27-developer. He submitted that it is only because of the objection raised by only 11 members who are the plaintiffs that the entire redevelopment work has been stalled. The learned counsel appearing for the respondent no.27 supported the submissions of the learned Senior Counsel appearing for the appellant-Society. The learned counsel appearing for the original plaintiffs urged that the findings recorded by the Trial Court on both the issues are fully justified as the original plaintiffs will be entitled to benefit of Section 14 of the Limitation Act and the bar of Section 91 of the said Act of 1960 will not be attracted.

7. After the submissions were heard, we called upon the parties to explore a possibility of an amicable solution

considering the present status of the buildings. We also permitted the appellant-Society and the respondent no.27 to file affidavits/undertakings for placing on record their offer to the respondent nos.1 to 11 and other members of the appellant-Society. The respondent no.27 stated that initially, the offer was to allot premises admeasuring 429.88 sq. ft. of carpet area plus 20.12 sq. ft. of service slab to those eligible members of the appellant-Society who were occupying residential tenements. The respondent no.27 in view of subsequent enhancement in Floor Space Index (FSI), offered to allot residential premises admeasuring 450 sq. ft. of carpet area (excluding the service slab) to those eligible members who were occupying residential premises. The respondent no.27 offered premises admeasuring 350 sq. ft. of carpet area to those eligible members of the appellant-Society who were occupying commercial premises. The respondent no.27 also offered to pay shifting charges as well as requisite monthly amounts for acquiring temporary accommodation on rental basis. The respondent no.27 has also offered to create a substantial corpus fund for the benefit of the appellant-Society and its members. The respondent no.27 has

filed affidavits/undertakings on record containing their offer. Even the appellant-Society has filed an affidavit/undertaking reiterating the offer made by the respondent no.27. The submission of the learned counsel appearing for the original plaintiffs is that the respondent no.27 has no experience of developing properties in Mumbai. He submitted that considering the additional FSI which is now made available, the area offered by the respondent no.27 to the members of the Society should be much more than what is set out in the affidavits filed on record. In short, though the plaintiffs are accepting that redevelopment of buildings of the appellant-Society is necessary, they are not willing to accept the offer made by the appellant-Society and the respondent no.27. The respondent no.27 filed an affidavit on 17th January 2021 by which the area of residential premises offered to the members was increased to 460 sq. ft. of carpet area.

8. Firstly, we are dealing with the submissions on the merits of the impugned orders. Section 9A was introduced by the Code of Civil Procedure (Maharashtra Amendment) Act, 1977 which

provided that if at the hearing of an application for grant of interim relief in a suit, an objection is raised by a defendant to the jurisdiction of the Court to entertain the suit, the Court shall proceed to determine at a hearing of such application, the issue of jurisdiction as a preliminary issue before granting or setting aside the order granting interim relief. Under Section 3 of the Code of Civil Procedure (Maharashtra Amendment) Ordinance, 2018, Section 9A was deleted. But it was provided that an issue of jurisdiction already framed by invoking Section 9A will be treated as an issue framed under Order XIV of CPC. The said Ordinance was replaced by an Act. The Act repealing Section 9A underwent an amendment by the Code of Civil Procedure (Maharashtra Amendment) (Amendment) Act, 2018 by which Section 3 of the earlier repealing Act was substituted with effect from 27th June 2018 which provided that if on the date of deletion of Section 9A, an issue under Section 9A has already been framed, the same shall be decided as if Section 9A was not deleted. The amendments referred above clearly envisage that if the Court had ordered to decide an issue as a preliminary issue before the date of deletion of Section 9A, the

same shall be decided by the Court as a preliminary issue. In the present case, the issue was decided prior to 27th June 2018 when Section 9A was repealed.

9. In the case of **Nusli Wadia (**supra), this Court held that the expression "jurisdiction of the Court to entertain such suit" used in Section 9A by holding that under Section 9A, the issue of jurisdiction to entertain the suit has to be decided without recording evidence. In paragraphs 49,50,54,56,88 and 89 of the aforesaid decision, this Court held thus:

> **"49.** Since the expression used in Section 9-A as incorporated in Maharashtra, is "jurisdiction to entertain" that is in a narrower sense and its purport cannot be taken to be comprehensive as laid down in *Foreshore Coop. Housing Society Ltd.* (supra).
>
> **50.** When we consider what colour expression "jurisdiction" has in Section 9-A, it is clearly in the context of power to entertain, jurisdiction takes colour from accompanying word "entertain" i.e. the court should have jurisdiction to receive a case for consideration or to try it. In case there is no jurisdiction, court has no competence to give the relief, but if it has, it cannot give such relief for the reason that claim is time-barred by limitation or is barred by the principle of

res judicata or by bar created under any other law for the time being in force. When a case is barred by res judicata or limitation, it is not that the court has no power to entertain it, but it is not possible to grant the relief. Due to expiry of limitation to file a suit, extinguishment of right to property is provided under Section 27 of the Limitation Act. When court dismisses a suit on the ground of limitation, right to property is lost, to hold so the court must have jurisdiction to entertain it. The court is enjoined with a duty under Section 3 of the Limitation Act to take into consideration the bar of limitation by itself. The expression "bar to file a suit under any other law for the time being in force" includes the one created by the Limitation Act. It cannot be said to be included in the expression "jurisdiction to entertain" suit used in Section 9-A. The court has to receive a case for consideration and entertain it, to look into the facts constituting limitation or bar created by any other law to give relief, it has to decide the question on merits; then it has the power to dismiss the same on the ground of limitation or such other bar created by any other law. Thus, the meaning to be given to jurisdiction to entertain in Section 9-A is a narrow one as to maintainability, the competence of the court to receive the suit for adjudication is only covered under the provisions. The word "entertain" cannot be said to be the inability to grant relief on merits, but the same relates to receiving a suit to initiate the very process for granting relief."

(underline supplied)

"54. What is intended by Section 9-A of the Code of Civil Procedure, 1908 (CPC) is the defect of jurisdiction. It may be *inter alia* territorial or concerning the subject-matter. The defect of jurisdiction may be due to provisions of the law. In *Raghunath Das* v. *Gokal Chand* AIR 1958 SC 827, the execution of award of the decree was dismissed by the Court on the ground that decree was a nullity. The Court had no jurisdiction to pass a decree of the partition of agricultural land. It held that defect of the jurisdiction in the court that passed decree became attached to decree itself as dismissal of the suit was on account of the defect of jurisdiction. Thus, in our considered opinion, it is only the maintainability of the suit before the court which is covered within the purview of Section 9-A CPC as amended in Maharashtra.

(underline supplied)

"56. Within the ken of provisions of Section 9-A, CPC jurisdiction of the court to entertain the suit has to be decided without recording of evidence. Recording of evidence is not contemplated even at the stage of framing issue under Order 14 Rule 2 much less it can be allowed at the stage of grant of injunction, it would be the grossest misuse of the provisions of the law to permit the parties to adduce the evidence, to prove facts with respect to a preliminary issue of jurisdiction to entertain a suit. In case it is purely a question of law, it can be decided within the purview of Section 9-A CPC as applicable in Maharashtra. The scope of Section 9-A is not broader than Order 14 Rule 2(2) CPC. The

scope is a somewhat limited one. Two full-fledged trials by leading evidence are not contemplated in CPC, one of the preliminary issue and another on other issues. Until and unless the question is purely of law, it cannot be decided as a preliminary issue. In our opinion, a mixed question of law and fact cannot be decided as a preliminary issue, either under Section 9-A or under Order 14 Rule 2 CPC. Before or after its amendment of CPC concerning both provisions, the position is the same."

"**88.** Given the discussion above, we are of the considered opinion that the jurisdiction to entertain has different connotation from the jurisdictional error committed in exercise thereof. There is a difference between the existence of jurisdiction and the exercise of jurisdiction. The expression "jurisdiction" has been used in CPC at several places in different contexts and takes colour from the context in which it has been used. The existence of jurisdiction is reflected by the fact of amenability of the judgment to attack in the collateral proceedings. If the court has an inherent lack of jurisdiction, its decision is open to attack as a nullity. While deciding the issues of the bar created by the law of limitation, res judicata, the court must have jurisdiction to decide these issues. Under the provisions of Section 9-A and Order 14 Rule 2, it is open to decide preliminary issues if it is purely a question of law not a mixed question of law and fact by recording evidence. The decision in *Foreshore Coop. Housing Society Ltd.* (supra) cannot be said to

be laying down the law correctly. We have considered the decisions referred to therein, they are in different contexts. The decision of the Full Bench of the High Court of Bombay in *Meher Singh* (supra) holding that under Section 9-A the issue to try a suit/jurisdiction can be decided by recording evidence if required and by proper adjudication, is overruled. We hold that the decision in *Kamalakar Eknath Salunkhe* (supra) has been correctly decided and cannot be said to be per *in curiam*, as held in *Foreshore Coop. Housing Society Ltd.* (supra)."

(underline supplied)

"89. Section 2 of the Maharashtra Second Amendment Act, 2018 which provides that where consideration of preliminary issue framed under Section 9-A is pending on the date of commencement of the CPC, the said issue shall be decided and disposed of by the court under Section 9-A as if the provision under Section 9-A has not been deleted, does not change the legal scenario as to what can be decided as a preliminary issue under Section 9-A CPC, as applicable in Maharashtra. The saving created by the provision of Section 2 where consideration of preliminary issue framed under Section 9-A is pending on the date of commencement of the Code of Civil Procedure (Maharashtra Amendment) Act, 2018, can be decided only if it comes within the parameters as found by us on the interpretation of Section 9-A. We reiterate that no issue can be decided only

> under the guise of the provision that it has been framed under Section 9-A and was pending consideration on the date of commencement of the (Maharashtra Amendment) Act, 2018. The reference is answered accordingly."

10. In the facts of the case, the appellant-Society and certain other defendants led evidence on the preliminary issue by filing an affidavit in lieu of examination-in-chief of one Mr. Sanjay Rajaram Mohite. The original defendant nos.16 and 17 were examined as witnesses. Thus, in this case, for deciding the issue of limitation evidence was required to be recorded. Hence, it was not open for the Trial Court to examine and decide the issue of the bar of limitation by invoking Section 9A of CPC.

11. By filing the present suit in February 2016, the original plaintiffs have questioned the resolutions dated 12th February 2011 and 2nd December 2012 passed in Special General Meetings of the appellant-Society. The plaintiffs also challenged the tender process conducted by the appellant-Society way back in the year 2011. The plaintiffs were aware of both the

resolutions at all relevant times as some of them were present in the meetings. Some of them filed aforesaid revision application in the year 2013 for challenging the permissions granted on the basis of the said resolutions. The revision application preferred by the respondent nos.2, 3 and 8 was allowed on 14th May 2013. The said order was stayed by the High Court on 11th December 2013. The Special Leave Petition preferred by the respondent nos.2, 3 and 8 against the order of stay was dismissed by this Court on 7th March 2014.

12. The respondent nos.1 to 11 waited till February 2016 to file the suit. The said respondents relied upon Section 14 of the Limitation Act to bring their suit within limitation. From the bare facts pleaded in the plaint, *prima facie,* there is a serious doubt whether the benefit of Section 14 can be granted to the respondent nos.1 to 11. However, the issue can be finally decided based on the evidence adduced by the parties.

13. Thus, in normal course, by setting aside findings of the Trial Court and the High Court on the issue of limitation, this

Court would have directed the Trial Court to decide the issue of limitation along with the other issues. The learned Senior Counsel appearing for the appellant-Society has fairly stated that this Court need not go into the question of maintainability of the suit.

14. Now, we will deal with the offer made by the appellant-Society as well as by the respondent no.27 and the response of the respondent nos.1 to 11 to the said offer. Mr. Shripal Babulal Jain, the managing partner of the respondent no.27 has filed an affidavit/undertaking on 17th January 2021. Paragraphs 4 to 10 of the said affidavit reads thus:-

> "**4.** The correct facts in this regard as under:
>
> i) FSI as per Old policy (DCR – 1991) u/s 33(7) + 33(24): FSI.
>
> ii) FSI as per New Policy (DCPR - 2034) u/s 33(7) with 80% incentive on rehab area: 4.31 FSI.
>
> Here it may also be noted that:
> Incentive FSI as per old Policy (DCR-1991) was 50% u/s 33(7) plus u/s 33(24) parking FSI by providing public parking which would be roughly 25% of the Rehab built-up area. Thus, total

incentive on rehab area would be around 75%.

Incentive FSI as per New Policy (DCPR -2034) u/s 33(7) is 80% however parking FSI would not be available as it is restricted upto 4 FSI.

A copy of the Architect certificate is annexed hereto and marked as Annexure A/1 (Page no.9 to -). A copy of the relevant portion of DCR 1991 is annexed hereto and marked as Annexure-A/2 (Page No.10 to 13). A copy of the relevant portion of DPCR 2034 is annexed hereto and marked as Annexure-A/3 (page no.14 to 20). A copy of the relevant portion of policy and circular dated 8.7.2021 is annexed hereto and marked as Annexure-A/4 (Page No.21 to 31).

5. The size of new premises: (Residential)

Existing Area occupied by members: 115 to 180 sq. ft.

Eligible as per Old Policy (DCR 1991): 405 sq. ft. carpet area

Offered earlier: 429.88 sq.ft
Eligible as per new policy (DCPR 2034): 425.25 sq. ft. carpet area.

Revised offer by Development: 450 sq.ft.

6. I would also like to point out the following further facts and additional burden to be borne by the developer :

i) The construction cost has increased upto approx. 50% as compared to in the year 2013 when the development agreement was undertaken.

ii) Rs.10.60 crores approx. additional cost towards the addl. 20.12 sq.ft. carpet area to 225 Residential members. Total 4527 sq.ft. and construction cost at Rs.23450/- per sq.mt. (cost with all premiums). Additional premium on additional construction is required to be paid to Municipal Corporation - MCGM.

iii) Rs.15 crores appx. towards GST charges on construction cost which cannot be adjusted against sales revenue. (As from 1st April 2019 Input Tax Credit is not allowed for Developers) GST is also addl. burden as this was not contemplated in the year 2013.

iv) There is 450.59 sq.mts. set back on plot and thus only 3142.41 sq.mts. area remains resulting into planning constraints and high density on plot for rehab and sale area leading to increasing in height of rehab building and thereby construction cost.

v) It also requires to be noted that Developer has also to bear the following additional costs over and above the rehab unit cost:

a) Each member is being paid Rs.5 lakh over and above the rehabilitation

unit, out of which Rs.1.25 lakh is already paid in 2013.

(Total corpus fund Rs.12.30 crores of which Total of Rs.3.07 crores is already paid)

b) 2000 sq.ft. fitness centre and gymnasium furnished with fitness equipment's is to be provided by the developer to the Society.

c) 215 sq.ft. carpet area of Air conditioned Society office, is to be provided.

d) Security cabin and common toilets are also to be provided.

e) 3 flats of 450 sq.ft. carpet area as against 3 rooms of Society and godown of equivalent carpet area in lieu of existing godown.

f) A deity place in new rehabilitation building.

vi) An amount of approximately Rs.20 crores is already invested by the firm since 2013, resulting into cost of investment and interest costs.

vii) As against which the Society is enjoying the fixed deposit of amounts paid/deposited and interest therein since 2013.

viii) It is also required to be considered that the rehabilitation building is to be

constructed in the front side facing the Mahadeo Palav Marg on North side and the sale component building on the rear side on south side.

ix) The interest of the Society is also well protected, as Developer has already provided a Security deposit of Rs.5 crores at the time of tender. And as per New DCPR 2034 vide circular dated 05.03.2021 of Maharashtra Government, a Developer is bound to give Security Deposit / Bank Guarantee of 10% of Rehab Construction cost i.e. approx.12,282 sq. mtr. x 30,250 construction cost as per Ready Recknor of Mumbai for 2021-22 total of Rs.37,20,00,000/- x 10% i.e. Rs.3,72,00,000/-.

7. I say that as per the revised proposal as stated in Undertaking dated 7.1.2022, the occupiers are already getting more area than what is agreed in the development agreement and also more than what they are eligible as per the new Policy of DCPR 2034.

8. I say that as per the calculations and deliberations undertaken by the partners of the firm, if the area of the rehab unit is increased from the revised proposal of 450 sq.ft. carpet area to residential members and 300 sq.ft. carpet area to non-residential members, as stated in the Undertaking dated: 7th January 2022, the project would not be financially feasible.

> **9.** I say that as per Affidavit dated 7.1.2022 filed on behalf of the Society more than 60% members having already given the consent for new proposal of the Developer. The objections by Vijaykumar VitthalRao Sarvade and other 11 members is not bonafide.
>
> **10.** I state that MHADA has also issued NOC to respondent no.27 on 3.11.2021. A copy of the NOC issued by MHADA to Res.27 is annexed hereto and marked as Annexure – A/5 (Page No.32 to 38)."

15. Mr. Sanjay Rajaram Mohite, Chairman of the appellant-Society on behalf of appellant-Society has also filed an affidavit/undertaking annexing thereto a copy of the revised proposal dated 9th December 2021 submitted by the respondent no.27. He has stated that the said revised proposal was forwarded to the members of the appellant-Society and 153 occupiers/members out of total 240 occupiers/members have already consented to the said proposal in writing. He has given undertaking on behalf of the Society that the revised proposal will remain binding on the appellant-Society. He has reiterated that the buildings of the Society are in very dangerous

condition and may collapse any time. Undertaking of Mr. Shripal Babulal Jain, the managing partner of respondent no.27 in terms of what is stated in the affidavit referred above, is also placed on record along with IA no.4249 of 2022.

16. In the undertaking of the respondent no.27 given to this Court, the details of the amenities and other benefits agreed to be extended to the eligible members of the appellant-Society have been specifically set out:

> "**2.** The main points of the proposals given by the deponent – Respondent No. 27 (Developer) are as under:-
>
> **i) The size of new premises:-**
> A. Residential premises;
> As per old policy of DCR 1991, Developer was bound to provide 300 sq.ft. plus 35% fungible area i.e. 405 sq.ft. carpet area to each residential eligible member.
>
> Under the Development Agreement executed with Society, the Respondent no.27 (Developer) has agreed to provide 429.88 sq.ft. carpet area plus 20.12 sq.ft as service slab to each Residential member of the Society.
>
> In comparison to above two, as Developer, we have now proposed to provide 450 sq.ft. carpet area excluding service slab, to all

existing eligible Members/Occupants of residential premises, against their existing carpet area of approx. 115 sq.ft. to 180 sq.ft.

B. Non-residential premises:

So far as Non-Residential users are concerned, as per DCPR 2034 they are eligible for the same carpet area which is occupied by them. However, we propose to provide them 300 sq.ft. carpet area against their existing occupation of 242.08 sq.ft. of carpet area.

A table showing the existing area occupied by the Respondent Nos.: 1 to 11 – Original Plaintiffs and the proposed area to be given against the same is forming part of the proposal dated : 9.12.2021 as Annexure-V.

ii) Transit Rent/Shifting/Brokerage for Temporary alternate accommodation:

A. For residential members:

- It is proposed to give transit rent of Rs.15,000/- per month for first two years of alternative accommodation and thereafter Rs.16,500/- per month with increase therein at 10% every year till possession of permanent alternate rehab residential premises is offered.

- It is proposed to give one time shifting charges of Rs. 10,000/- for to and fro.

- It is proposed to give Rs. 30,000/- towards brokerage.

B. Transit Rent/Shifting/Brokerage for Temporary alternate accommodation for Non-residential – Commercial use members.

- It is proposed to give Transit Rent of Rs.25,000/- per month with increase therein at 10% every year till the possession of permanent alternate rehab shop is offered.

- It is proposed to give one time shifting charges of Rs. 10,000/- for to and fro.

- It is proposed to give Rs.50,000/- towards brokerage.

iii) Period for completion of redevelopment project:

It is proposed to complete the redevelopment project in stipulated time of five years as per MHADA circular dated 5.11.2020. The said period of five years shall commence from the date on which the vacant possession of entire property is made available to the developer, so as to enable starting of actual redevelopment on site. Further, the time period as regards obtaining of necessary permissions, and/or stay from any Court, Tribunal or Authority and/or any natural calamity and/or Force Majeure events, and/or things beyond control of the Developer shall stand excluded.

iv) Corpus Fund :

(All members - Residential/Non- residential):

The society being owner of property, we propose to provide Rs.5,00,000 (Rupees Five Lakhs) for each member i.e., total Rs.12,30,00,000/- (Rupees Twelve Crores Thirty Lakhs) to the Society as Corpus Fund. Against that we have already paid Rs.3,07,50,000 (Rupees Three Crore Seven Lakhs Fifty Thousand) to the Society, being Rs.1,25,000/- (One Lakh Twenty-Five Thousand) for each member of Society, in 2013 on execution of Development agreement and the balance we have to pay later.

v) Performance guarantee/Security Deposit/Bank Guarantee:

As per New DCPR 2034 vide circular dated 05.03.2021 of Maharashtra Government, a Developer is bound to give Security Deposit/Bank Guarantee of 10% of Rehab Construction cost i.e., approx. 12,282 sq.mtr. x 30,250 construction cost as per Ready Recknor of Mumbai for 2021-22 total of Rs.37,20,00,000/- x 10% i.e. Rs. 3,72,00,000/-. We have already paid Rs.5,00,00,000/- (Rupees Five Crores) as an additional security deposit to Society in 2013 on execution of Development agreement.

vi) Project Management Consultant

We propose to give Rs.3,00,00,000/- (Rupees Three Crores) to society, out of which Rs.1,50,00,000/- (Rupees One Crore Fifty Lakhs) we have already paid to the Society in 2013 and the balance we have to pay later.

vii) Parking and height of premises

We will fulfill all compliance of New DCPR 2034 and as per planning constraint."

17. The learned Senior Counsel for the appellant-Society has submitted that all the pending proceedings should be disposed of so that the work of development can progress. The respondent no.27 has stated that the work of development will be completed as per the no-objection certificate issued by Mumbai Building Repairs and Reconstruction Board on 3rd November 2021.

18. After perusing the affidavits and undertakings, this Court suggested to the respondent no.27 whether the area of the premises admeasuring 450 sq.ft. (carpet) offered to the members occupying residential premises and the area of premises admeasuring 300 sq.ft. (carpet) offered to the members in possession of non-residential premises can be increased. In response to that, an affidavit has been filed by the respondent no.27 stating that instead of premises admeasuring 450 sq.ft (carpet area), premises having an area of

460 sq.ft. (carpet area) can be offered to those eligible members who are occupying residential tenements. A copy of the certificate issued by the Architect of the appellant-Society recording that now FSI has been increased from 4.00 to 4.31 has been placed on record. Thus, respondent no.27 has given a revised offer to allot residential premises admeasuring 460 sq.ft. of carpet area though as per old and new policy, the entitlement of those who are holding residential premises was to an area of 405 sq.ft and 425.25 sq.ft respectively.

19. The proposal of the respondent no.27 takes care of payment of reasonable monthly rent to the members for acquiring temporary alternate accommodation. It also provides for payment of a reasonable amount towards brokerage which is required to be paid for acquiring such accommodation. A provision has been made to pay a sum of Rs.10,000/- as one-time shifting charges to each member. The respondent no.27 has agreed to create a corpus fund for the benefit of the appellant-Society by contributing Rs.5,00,000/- (Rupees Five Lakhs) per member. Out of the total corpus fund of

Rs.12,30,00,000/- (Rupees Twelve crores thirty lakhs) agreed to be created, the respondent no.27 has already paid a sum Rs.3,07,50,000/- (Rupees Three Crore Seven Lakhs Fifty Thousand) to the appellant-Society. Apart from the above provisions, a performance guarantee has been given by the respondent no.27.

20. According to us, adequate safeguards have been provided to the members of the appellant-Society in the affidavit and undertaking filed by the respondent no.27. In addition, the appellant-Society has undertaken to abide by the terms and conditions proposed by the respondent no.27. Moreover, a direction can be issued to the appellant-Society to incorporate the same terms and conditions as agreed by the respondent no.27 in the event the appellant-Society is required to engage another developer in place of the respondent no.27.

21. The response of the respondent nos.1 to 11 to the aforesaid proposal is two-fold. Firstly, the stand is that considering the recent enhancement in FSI, the area offered should be more. Secondly, the development work should be entrusted to another

builder as the respondent no.27 does not have adequate experience. In the plaint, one of the prayers is that the appellant-Society should be directed to conduct a fresh tender process for appointing a developer.

22. As noted earlier, this Court would have normally sent back the matter to the Trial Court to decide the issue of limitation. However, we cannot ignore the serious situation created as a result of the pendency of various proceedings from the year 2013. Photographs produced along with IA no.11896 of 2018 show the very poor condition of the buildings of the Society. As stated in I.A. No.22493 of 2021 filed by the appellant-Society, 236 members of the appellant-Society are occupying structures in buildings that are in dilapidated condition. Apart from photographs of the structures annexed to the said application, a copy of the notice dated 12th July 2019 issued by the Municipal Corporation to the appellant-Society has been annexed. The notice refers to the structural audit carried out by the Corporation in the year 2015-2016 which showed that the buildings were falling in the C2-A category meaning thereby

that the buildings are required to be vacated for carrying out immediate major repairs. The notice records that there must be further deterioration of the structures as repairs were not carried out. Therefore, the Municipal Corporation called upon the appellant-Society to get a structural audit of the buildings done within two months. The Society was also called upon to submit undertakings of the occupants that they will continue to stay in the buildings at their own risk knowing fully well the probable danger of collapse. It is apparent that the buildings are in a dilapidated condition and the members of the appellant-Society are risking their own lives by occupying the same. Looking to the manner in which proceedings are being contested, the suit may not be disposed of in near future. Moreover, there are bound to be further appeals. In the meanwhile, if something goes wrong with the buildings, a large number of families of the members will be on the streets. Going by the prayers in the plaint, even the respondent nos.1 to 11-the plaintiffs want redevelopment of the property, but on their own terms and through another developer. Moreover, a large majority of members of the appellant-Society have accepted the

proposal to appoint the respondent no.27 as the developer. They have also accepted the proposal submitted by the respondent no.27 to this Court.

23. Though a decision to redevelop the buildings was taken way back in the year 2011 by the appellant-Society and though an agreement was executed on 27th December 2012 appointing a developer, no progress has been made in the development work as a handful of members of the appellant-Society out of 236 members are opposing the project of development undertaken through the respondent no.27. The suit filed by the respondent nos.1 to 11 of 2016 is not likely to be disposed of in near future. The issues in the suit including the issue of limitation will have to be decided after parties are allowed to adduce evidence. The enormous delay in disposal of the suit and appeals arising therefrom will cause prejudice and harm to the members of the appellant-Society as they will have to continue to stay in tenements in the buildings which are in very bad shape. This is not a usual dispute where the members are not *ad idem* on the issue of redevelopment. In this case,

practically all the members of the appellant-Society want redevelopment by demolishing old buildings. Here is a case where a large number of members of the appellant-Society continue to occupy dilapidated buildings by risking their lives. Their families are being exposed to imminent danger. Therefore, this Court cannot countenance a situation that will delay the development work for an inordinately long time due to the objection by a handful of members. The majority of members are supporting the redevelopment by the respondent no.27 on the terms offered by the said respondent. Therefore, in view of the peculiar facts of the case and for protecting families of more than 200 members of the appellant-Society, we are satisfied that this is a fit case to exercise the plenary jurisdiction of this Court under Article 142 of the Constitution of India to do complete justice between the parties by giving quietus to the pending disputes. It is in the larger interests of more than 200 members of the appellant-Society including the respondent nos.1 to 11 that the disputes are put to an end and the work of redevelopment starts at the earliest.

24. To give finality and quietus to the controversy in the larger interests of members of the appellant-Society, considering the objection of the respondent nos.1 to 11 to the area offered by the respondent no.27, we propose to direct the respondent no.27 to provide residential tenements having a carpet area of 475 sq. ft. (exclusive of service slab) to the eligible members occupying residential premises. The respondent no.27 has already agreed to increase the area from 450 sq.ft to 460 sq.ft. In our view, this marginal increase in the area of the premises to be allotted to members having residential tenements is necessary as FSI has been substantially increased.

25. The undertakings of the respondent no.27 sufficiently take care of the apprehensions expressed by the respondent nos.1 to 11. The respondent no.27 has agreed to complete the project within five years from the date on which it receives possession of the buildings proposed to be redeveloped. To secure the interest of the members, the respondent no.27 can be directed to pay a transit rent for the period of five years in advance to all

the members at the time of entering into individual agreements with all the members. The requirement of executing such individual agreements with members has been noted in the resolution dated 2nd December 2012 passed in the Special General Meeting of the appellant-Society. Time of two months can be granted to the members to vacate their respective tenements and hand over possession thereof the appellant-Society from the date on which they receive transit rent for five years as well as shifting and brokerage charges as provided in the undertaking of the respondent no.27. Moreover, the appellant-Society be directed to ensure that the successor of the respondent no.27 shall be bound by all the undertakings, in the event, the appellant-Society is required to replace the developers.

26. Unless all the pending cases are disposed of, quietus cannot be given to the dispute. Hence, by exercising the powers under Article 142 of the Constitution of India, the suit filed by the respondent nos.1 to 11 will have to be disposed of and the criminal complaint filed by them needs to be quashed. The

respondent nos.30 to 38 are various authorities/officers. In view of this Order, they shall not entertain any complaints made by the respondent nos.1 to 11 in connection with the redevelopment project. In the event, the respondent no.27 or the appellant-Society commit any breach of the undertakings given to this Court or any breach of directions of this Court, the respondent nos.1 to 11 can always move the Court for appropriate relief for enforcement of the undertakings and directions issued by this Court. If the respondent nos.1 to 11 commit any breach of the directions contained in this Order, the appellant and/or the respondent no.27 can adopt appropriate proceedings for the enforcement of the directions.

27. We, therefore, dispose of this appeal by passing the following order:

(i) We take on record the undertakings of the respondent no.27 given through Mr. Shripal Babulal Jain, its managing partner which is of 7th January 2021 as well as the assurances contained in his affidavit dated 17th January 2021 and Undertaking of

the appellant-Society in affidavit dated 7th January 2022 of Mr. Sanjay Rajaram Mohite;

(ii) The undertakings of the appellant-Society and the respondent no.27 are taken on record as aforesaid with a modification that the area of residential premises to be provided to all eligible members of the appellant-Society occupying residential premises shall be 475 sq.ft. of carpet area (exclusive of service slab);

(iii) In the event, the appellant-Society is required to replace the present developer, while entering into a development agreement with the new developer, a clause shall be added therein incorporating an undertaking of the new developer that he shall abide by the directions contained in this Order.

(iv) The respondent no.27 shall offer transit rent for the period of five years, shifting charges and brokerage as mentioned in paragraph 2(ii) (A and B) of its undertaking quoted in paragraph 16 above to all the eligible members within maximum period of two

months from today. At the time of payment of the said amounts to the members, the respondent no.27 and the appellant-Society shall enter into agreements with individual members for allotment of premises in the new buildings free of cost. Within a maximum period of two months from the receipt of the aforesaid amounts, the respondent nos.1 to 11 shall hand over the vacant possession of the premises in their respective possession to the appellant-Society and/or the respondent no.27;

(v) The entire project shall be completed by the respondent no.27 as expeditiously as possible. The outer limit for completion of the project shall be five years from the date on which the respondent no.27 is placed in possession of all the tenements in the buildings proposed to be demolished. The possession of the premises in reconstructed building shall be handed over to the eligible members within the said outer limit of five years;

(vi) Long Cause Suit no.575 of 2016 filed by the respondent nos.1 to 11 in the City Civil Court at Mumbai shall stand disposed of in view of this Order;

(vii) Complaint No.1501270/Misc./2017 filed by the respondent nos.1 to 11 pending before the Court of the learned 15th Metropolitan Magistrate, Mazgaon, Mumbai shall stand quashed;

(viii) If the appellant-Society or the respondent no.27 or directions issued by this Order or undertakings given by them, the respondent nos.1 to 11 are free to initiate appropriate proceedings in accordance with law for enforcing the directions issued by this Court including the undertakings. Similarly, on the failure of the respondent nos.1 to 11 or any of them to abide by the directions issued in terms of this Order, the appellant-Society and/or the respondent no.27 are free to initiate appropriate proceedings in accordance with law.

28. The Civil Appeal stand disposed of with the above directions. All the pending applications, if any, also stand disposed of.

.....J
(AJAY RASTOGI)

.....J
(ABHAY S. OKA)

New Delhi;
February 08, 2022.