IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION PETITION (L) NO.38696 OF 2024

Ambit Urbanspace ...Petitioner

Versus

Poddar Apartment Co-operative Housing Society Limited & Ors. ...Respondents

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Mr. Mayur Khandeparkar *a/w. Mr. Santosh Pathak a/w. Ms. Namita Natekar & Ms. Archana Karmokar i/b. M/s. Law Origin, Advocates for Petitioner.*

Mr. Amogh Singh *a/w. Mr. Nimish -Lotlikar i/b. Mr. Nimish Lotlikar, Advocates for Respondent No.1-Society.*

Mr. Ashish Kamat*, Senior Advocate a/w. Mrs. Pooja Kane, Mr. Jitendra Jain & Mr. Rohit Bamne i/b. Mr. Yogesh Adhia, Advocates for Respondent Nos.2 to 4.*

Mr. Vishal Kanade *a/w. Monil Punjabi i/b. Mr. Sandeep Mahadik & Mr. Narayan G. Samant and Duhita Desai, Advocate for Respondent Nos.5, 7 & 8.*

CORAM : SOMASEKHAR SUNDARESAN, J.

RESERVED ON : JANUARY 21, 2025.

PRONOUNCED ON : APRIL 1, 2025.

JUDGEMENT:

Context and Factual Background:

1. This is a Petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("***the Act***") filed by Ambit Urbanspace ("***Developer***"), which has executed a Development Agreement dated May 21, 2024 ("***Development***

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Agreement") with Poddar Apartment Co-operative Housing Society Limited, a Housing Society ("***Society***") to redevelop a building, seeking protective measures from this Court pending arbitration being invoked.

2. At the outset, it is worth mention that this is not a conventional case of such petitions, which now have left a long legacy of jurisprudence in this Court. The difference from the usual and typical pattern seen in Section 9 Petitions relating to redevelopment of properties in Mumbai, is stark. Learned Counsel for all the parties fairly state that they do not have a specific precedent of the specific nature involved in these proceedings.

3. This is not a case where a developer, who has a development agreement with a co-operative society, seeking to invoke the interim protective measures against recalcitrant and dissident *members* of the society, where some members assert their individual will in multiple directions, in conflict with the wider collective will of all members expressed through the actions of the society. On the contrary, in this case, the protective measures are sought against *tenants* occupying premises in the property on a standalone basis, distinct and separate from the building in question, who are not members of the Society, and out of the reach of the collective will of the Society. In fact, their premises physically stand as separate structures within the same plot of land. The landlord of the tenants

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is a member; has not initiated any proceedings for eviction in any forum; and naturally has interests that are aligned with the Developer in eviction of the tenants, invoking the jurisdiction under Section 9.

4. By the very pleadings of the Developer in this very Petition, it is evident that the tenanted premises that are in dispute for purposes of this Petition are five *enclosed* garages ("***Subject Garages***"). The Subject Garages have been *enclosed* garages even when the original landlord one Sushilabai Makhanlal Poddar ("***Vendor***") had executed a Deed of Conveyance dated May 12, 1972, conveying the premises now owned by the Society – the Petition pleads that the Vendor retained *absolute ownership of the ground floor, consisting of shops, the basement and five "enclosed garages"*, and also became a member of the Society (as pleaded in Paragraph 3.2 of the Petition). Respondent No. 2, Respondent No. 3 and Respondent No. 4, Yogendra J. Poddar, Pawan J. Poddar and Raghavendra S. Poddar, (executors of the Estate of the Vendor i.e. Late Sushilabai Makhanlal Poddar), are now the landlords of the Subject Garages ("***Landlords***").

5. The ownership of the Landlords includes all the commercial shops in the Society, two basements, all of which are tenanted, and which tenants are being housed in the redeveloped premises. However, the Subject Garages, which too are tenanted out to Respondents No. 5 to 8 ("***Tenants***") are

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proposed to be given different treatment. In *lieu* of the Subject Garages, the Tenants are proposed to be simply given open car parking spaces in the redeveloped building, and that too under an agreement to which they are not even signatories. Respondent No. 9 has been termed an illegal occupant of one of the tenanted Subject Garages by the Developer and by the Landlords in their respective pleadings.

6. In this Petition, the Developer is seeking "*eviction*" (to quote the pleadings of the Landlords in Paragraph 3 of their affidavit-in-reply) of the Tenants, and that too, claiming under an agreement not even executed by the Tenants. The Development Agreement purports to make the Tenants parties in the title clause of the agreement, but there is not even a placeholder for their signatures in the agreement. Worse, the Development Agreement was supplemented by a Supplemental Development Agreement, also dated October 21, 2024 (***"Supplemental Agreement"***), and that instrument does not even purport to depict the Tenants as a party even in the title clause.

Privity – implications under Section 9:

7. The Development Agreement is purported to be structured as an agreement among the Developer, the Society, the Landlords (termed as 'Confirming Parties'), all the members (termed as 'Members') and all the tenants including the Tenants. The Development Agreement proceeds to

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stipulate entitlements of the Landlords, the Members and the Tenants. However, the Development Agreement is neither negotiated nor signed by the Tenants. Not being members of the Society, the Tenants are out of the reach of the collective will of the Society, which is usually brought to bear in the equity jurisdiction of the Section 9 Court. Curiously, there is nothing in the form of pleadings from the Developer, the Society or the Landlords to even assert, much less confirm that the Tenants have executed the Development Agreement. On the contrary, the material on record shows a clear assertion from the Tenants that they were not even consulted about the redevelopment and they have been unaware of the terms of the redevelopment – a position not controverted and even endorsed by implication, since the assertion is that the Tenants have no right to have a say.

8. The Tenants who have no privity to the Development Agreement do not have privity to the arbitration agreement. This is precisely why the submissions of Mr. Mayur Khandeparkar, Learned Counsel on behalf of the Developer, which are entirely based on what the Development Agreement requires the Tenants to do, stand undermined. The submissions by Mr. Khandeparkar copiously cite and rely on the provisions of the Development Agreement. Unlike members of the Society, whose members are bound to

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conduct themselves in compliance with the larger collective will of the Society, the Tenants stand on a completely different footing.

9. A suggestion from the Court asking the parties if they would be willing to proceed to arbitration with the Tenants regardless (so that equities could be balanced and competing considerations could be adjusted and an arrangement could be worked out), was spurned by counsel on instructions.

10. It became evident in the course of the proceedings that the parties to the arbitration agreement have no inter-se dispute for the subject-matter of the arbitration agreement to be secured. There is also no dispute between the Developer and the Landlords – the latter supports the grant of relief against the Tenants as sought by the Developer. There is no dispute between the Society and the Landlords either. These three parties support one another in the hearing and apart from academic articulation of the possibility of claims arising against one another, through the conduct of the proceedings, there has been no invocation of arbitration by any of the three parties against either of the other two parties. Even a praecipe filed recently seeking to highlight the risk to life with the redevelopment being conducted alongside the Subject Garages did not point to any arbitration proceedings being invoked.

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11. The provisions of Section 9 of the Act and the scope of jurisdiction must be borne in mind. Under Section 9, a party to an arbitration agreement may apply to the Court to make interim measures of protection to preserve the subject-matter of the arbitration agreement. Such interim measures may also include the detention or preservation of the subject-matter of the dispute in arbitration. Any property as to which any question may arise in the arbitration could also be detained or preserved in this jurisdiction. Indeed, such other interim measure of protection as may appear to the Court to be just and convenient, may also be taken.

12. Indeed, it is now settled law that a third party whose interests would be affected by interim protective measures that may be made in exercise of the powers under Section 9 of the Act can be made a party to such a Petition. The very objective of such a course is to enable the third party whose interests would be affected, to have notice of the proceedings so that their interests could also be factored in when formulating an interim protective measure. The third party gets an opportunity of being heard, and if in the Court's discretion, the third party's interests outweigh the protection sought, the Section 9 Court, could take an appropriate decision on whether at all to grant any protective reliefs, or whether to grant such reliefs by imposing such terms and conditions as may be appropriate, to also address the interests of the third party. It is in this spirit that I tried to draw out the parties to come up

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with reasonable proposals to balance interests, but such effect came to naught.

13. A suggestion was put to the Developer, the Society and the Landlords that to adjust equities, the Landlords could earmark specific units in the redeveloped premises for being kept distinct and clear of encumbrances pending resolution of the dispute between the Landlords and the Tenants. The idea was to examine if it would be possible to make *pro tem* arrangements to secure competing interests of the parties, but this was firmly rebuffed by the Landlords, with copious written and verbal submissions on how the Landlords could never be put to terms as part of equitable terms and conditions that the Section 9 Court could impose on a Petition filed by the Developer.

14. Therefore, this Petition would need to be dealt without the assistance of any reasonable proposals forthcoming from the parties that would benefit from the grant of the reliefs sought, necessitating exercising the Court's discretion, balancing competing considerations and examining what would be appropriate in the facts and circumstances of the case.

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Usage of Subject Garages by Tenants:

15. Evidently, the Tenants are statutory protectees of the Maharashtra Rent Control Act, 1999 ("***Rent Act***"). The Landlords assert that the only use the Tenants could have put the Subject Garages to was to park an identified car and nothing else. It is equally true that the Landlords have not taken any proceedings in decades to deal with what they allege to be unauthorised and illegal usage of the Subject Garages.

16. Of course, it is argued by Mr. Ashish Kamat, Learned Senior Counsel on behalf of the Landlords that mere silence of the Landlords would not amount to acquiescence by them, or give rise to any estoppel to prevent their assertion that the usage of the Subject Garages is illegal. The Landlords now assert that the Tenants deserve no consideration beyond being given open car parking spaces in *lieu* of the enclosed Subject Garages, since their usage of the Subject Garages is different from the parking of cars. The Landlords were fully aware of the nature of usage by the Tenants. Mr. Vishal Kanade, Learned Counsel on behalf of the Tenants would assert that the Landlords have charged rent as if the Subject Garages were commercial premises, since they have demanded that the Tenants pay additional assessment tax demanded by the Municipal Corporation of Greater Mumbai.

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17. The Landlords assert that rent receipts issued by them specify the usage to which the Subject Garages could be put. I have carefully examined the rent receipts to see if this contention is borne out, and I find that the rent receipts simply provided for pre-printed options for allusion and reference to the property. The options were "Ground / Basement / Shop / Garage" and the Landlords simply struck out the three options other than "Garage". Nothing in the rent receipt would show that the exclusive use to which the Subject Garages could be put, was regulated by that instrument. It is wholly inaccurate to submit that the rent receipts "expressly mention" that the Subject Garages *"would be used for garages only".*

18. That the Subject Garages were always enclosed, and they were put to use other than to park a car, and that rent was collected on their usage with full knowledge of the nature of usage is potentially even discernible from the tenancy agreements that have been brought on record by the Landlords, without their annexures. The tenancy agreements produced in the Landlords' reply are near identical in their terms. Mr. Kamat would assert that these agreements recite a specific number of a car that would be parked in the garage. In my opinion, such a recital would not be dispositive of whether the usage for any other purpose was not envisaged and was contrary to the knowledge or desire of the Landlords. The very same agreements also make references to flooring and ceiling and their maintenance. They also

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make it clear that the rent amount would not include electricity and water supply charges. *Prima facie*, it would be rather odd to have metered electricity and water supply to a mere parking space. It cannot be ruled out that the parties knew what use it would be put to, and when their relations were not sour as it is now, they had agreed to purport that a parking for a car would be recited, but tacitly acknowledging that there would be electricity and water supply to the enclosed Subject Garages, to enable the real purpose to which they were put.

19. In any case, such assertions by each of these parties would evidently lie in the appropriate jurisdictional forum under the Rent Act. These issues involve answering mixed questions of fact and law that would need trial. That the Landlords have chosen not to assert any right arising out of allegedly unauthorised abuse of tenancy (meant to simply park a car) for two and half decades (going by the vintage of most of the tenancy agreements), would give a *prima facie* pointer to the state of mind of the parties about the nature of the use to which the Subject Garages had been consensually put.

20. The Section 9 Court cannot be called upon to declare conclusively whether the Subject Garages were put to unauthorised use. Purely to get a *prima facie* view on what transpired, the Section 9 Court could examine the contentions of the parties and see what appropriate measures, if any, may be

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adopted, and that too only in aid of a real arbitration under the arbitration agreement. That is all that I have attempted above. I am not convinced that the nature of the usage of the Subject Garages by the Tenants could be held to be without the knowledge and consent of the Landlords, for the Landlords to assert strongly that the Tenants are illegal users of the Subject Garages such that they have no better rights than open car parking spaces in the redeveloped property, and that too in terms of the Development Agreement and the Supplemental Agreement to which the Tenants are not even parties.

Tenants – Different from Members of a Society:

21. This brings me to the facet of the difference between the law governing rights of dissentient members of a co-operative society and the rights of tenants who are not members of such a society. It is noteworthy that in the instant case, the Landlords are the ones who have membership of the Society. If there were to be a hindrance to the redevelopment, causing problems under the Development Agreement, it would be because such member of the Society has been unable to engage with the Tenants in a manner that would enable a smooth conduct of the Development Agreement. Therefore, should there arise a need to make an equitable adjustment, one would need to factor in how to adjust equities for and against the Landlords, who have, *prima facie*, with full knowledge, willingly suffered the usage of the Subject Garages

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for two decades or more and have sought to simply give the Tenants open car parking spaces in *lieu* of the Subject Garages.

22. It is also noteworthy that the record shows that the access to the Subject Garages is distinct and their existence has not come in the way of the building being demolished. When the Petition was heard, the building was already demolished. It was the desire to remove the Tenants and bind them to their "entitlement" (to open car parking spaces) under an agreement they did not even execute, that appears to drive the Petition. Therefore, while Mr. Kamat is indeed right about the scope of the Section 9 jurisdiction being primarily driven by the subject matter of the contract that contains the arbitration agreement, this is a case where the agreement affecting the rights of the Tenants does not even have the Tenants as a party. The assertion by the Tenants that they have never been briefed about the redevelopment and that the Development Agreement was never even shown to them has a ring of truth to it, particularly when the pleadings of the parties does not purport to assert that the Tenants had executed it, and more so since the agreement annexed does not even show a placeholder for them to execute. *Prima facie*, it appears that the template used in approaching any and every redevelopment litigation under Section 9 has been blindly adopted here too. The Developer and the Landlords have repeatedly referred to the Tenants' "entitlement" under the Development Agreement. All it amounts to is their

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proposal as to what the Tenants should expect, rather than an agreement either executed by the Tenants or executed by anyone with authority to bind the Tenants.

23. This is precisely, why the various submissions about the obligations of the Tenants as purportedly contained in the Development Agreement, as made by the Landlords, cannot be countenanced. The Tenants never contracted any obligations under the Development Agreement. This is completely distinct from the legal position in which members of the Society are routinely placed. When the Developer contracted the Development Agreement with the Society, the members of the Society were bound by the terms contracted by the Society on their behalf. A co-operative society is a body corporate that is governed by an elected managing committee, which is the governing body. The members of the co-operative society elect such managing committee. Statutorily, what is contracted by the society cannot be deviated from by the members. It is in this context that in Section 9 proceedings, members who hold up the larger interest of the society present inequitable conduct, which can be remedied in this jurisdiction, and even then, taking care not to subvert or unduly undermine the interests of the dissenting members. Tenants who are not part of such a collective or constituents of a body corporate, and are in fact, protectees of the Rent Act, stand on a different footing. The equity principles that would apply in the

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case of members of a society who do not fall in line would not be blindly and absolutely applicable when adjusting for the interests of tenants.

24. As stated above, the Tenants are statutory protectees of the Rent Act. Indeed the tenancy agreements relied on by the Landlords refers to them as "statutory" tenants. Eviction of a tenant is subject matter of special provisions and procedures under the Rent Act. In my opinion, what is writ large on the record is an attempt to get an eviction on terms materially different from what the Tenants enjoy, by the intervening redevelopment. Mr. Khandeparkar's allusion to the reliefs sought in the Petition being a "temporary displacement" of the Tenants pending the redevelopment rings hollow since the Tenants are not being given any redeveloped premises akin to what they are currently entitled to and protected for under the Rent Act. This is a clear distinguishing feature in these proceedings as compared with the facts covered in all the case law cited. I deal with the case law later.

25. The Landlords have also vociferously submitted that the usage of the Subject Garages is illegal and a punishable offence under the Maharashtra Town Planning Act, 1966, and that there can be no estoppel against law. No detailed elaboration of this facet is warranted since the Section 9 Court cannot pronounce upon whether an offence under that law has been committed and which parties would be guilty of such an offence if there were

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one – whether it would be just the Tenants or the Tenants along with Landlords. That would be a matter of evidence and trial. That no invocation of such alleged offence has been made for over two decades would be a *prima facie* pointer to the seriousness (or the lack of it) of the issue for the limited purpose of deciding whether the Section 9 jurisdiction would come to the aid of removal of the Tenants from the Subject Garages. In this light, the invocation of Section 24 of the Indian Contract Act, 1872 too need not detain further judicial attention at stage of the matter in this jurisdiction.

26. Mr. Kamat would equally argue in the same breath that only the jurisdictional forums under the Rent Act would have jurisdiction to determine issues of tenancy. I agree with him. This is precisely why the strong assertions of violations by the Tenants ought not to detain my attention. More importantly, this is precisely why the Section 9 proceedings, in my opinion, ought not to be used as a back-door eviction proceedings, when no such proceedings have been taken during the two decades of the tenancy relationship, that too on facts within the knowledge of the Landlords.

FSI – the economic driver of this conflict:

27. The key driver of this conflict is this: the Subject Garages were constructed in 1967. Mr.Khandeparkar would explain that no floor space index ("***FSI***") benefits would arise from them. It was only in the

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Development Control Regulations of 1991 that garages were included in the FSI computation. Therefore, in the sharing of the spoils of the redevelopment among the Developer, the Society and the Landlord, they do not have an incentive to provide for any component of their negotiated inter-se entitlements to accommodate the Tenants' interests. Towards that end, they do not perceive any economic value in negotiating with the Tenants who are tenants using the Subject Garages in the same pattern for decades. They have executed the Development Agreement and the Supplemental Agreement without negotiation with the Tenants and without a bargain being struck with the protected Tenants. They are indeed entitled to advisedly adopt such an approach, but equally, such approach brings with it consequences in the law.

28. The usual approach adopted towards members of the Society cannot be used against the Tenants. This is why it was put to these parties if they would objectively come up with interim measures to balance and protect the Tenants' interests, to enable the Court to consider a "temporary displacement" as Mr. Khandeparkar puts it. However, without any such adjustment, if what is sought is granted, it would constitute a permanent displacement in the factual matrix. A measure taken under Section 9 of the Act, in my opinion, ought not to conflict with special protective provisions in ameliorative legislation such as the Rent Act.

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29. It is the Landlords' desire not to share any of the redevelopment benefit with Tenants in *lieu* of the redevelopment. Towards that end, making submissions about illegality that has been the course of conduct for decades, makes it inequitable to benefit the Landlords and the Developer by granting the reliefs sought by them. The allocation of open car parking slots to Tenants who have been using the Subject Garages, *prima facie*, with the full knowledge and consent of the Landlords, is not a proposal that was even put to the Tenants for it to be claimed as a contracted "entitlement".

30. Purely from the perspective of assessing reasonableness in conduct of the parties in order to exercise discretion under Section 9 of the Act, I have examined the correspondence between the parties. The Tenants have indicated their willingness to engage on the redevelopment when they were confronted with a demand of compliance with an agreement that was neither negotiated nor signed with them. They were informed that they would be treated differently from the other tenants (those using shops and the basement, whose structures qualify for computing FSI). It is in this context that to see how reasonable a party claiming in equity is, I put to the Developer and the Landlords if they would either earmark specific premises and keep it apart, for a resolution of the issues arising from this peculiar situation. However, that was rejected outright and therefore equity considerations in this facet of the matter failed.

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31. Mr. Kanade is right when he submits that effectively, the grant of reliefs in this Petition would efface the existing status of protected "statutory tenants" with existing usage of the Subject Garages. They would be reduced to owning mere parking spaces in a redeveloped building with no other connection to the redeveloped premises. Such ownership would hardly be of any real value and is indeed without known precedent. In my opinion, this is hardly a position of equity that can be embraced in the discharge of discretion, when such permanent consequences would be visited on the Tenants in the garb of "temporary displacement". In fact, grant of the reliefs sought would partake the character of final reliefs in eviction proceedings, and would not even be in aid of arbitration proceedings (which are non-existent), considering the alignment of interests of the Developer, the Society and the Landlords.

32. One of the reliefs sought by the Developer comes close to being reasonable despite the above analysis. Prayer clause (c) relies on Clause 12.3 of the Development Agreement to direct the Tenants and the Landlords to pay to the Developer a sum of Rs. 10,000 per day to preserve liquidated damages contracted, for the period of the stand-off from November 5, 2024 until the date of handover of the Subject Garages to the Developer. It would not be possible to grant such relief against the Tenants for obvious reasons –

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the simplest reason being the Tenants were not even offered a draft of the Development Agreement to see if they would agree to the clause stipulating liquidated damages. However, the Landlords have actively negotiated the Development Agreement, which provides that "Members / Tenants" who do not vacate when scheduled, would be liable to pay such amount of Rs. 10,000 per day. The Landlords are members of the Society. Getting the Subject Garages vacated could be said to be their responsibility. The Landlords in their capacity as members have failed to deliver vacant and peaceful possession as contracted. It would be open to the Developer to claim the liquidated damages from the Landlords. However, there is not even an invocation of arbitration until now against them. Moreover, merely because there is a liquidated damages clause, the amount cannot become payable in absolute terms, as indicated by the Supreme Court in ***Kailash Nath***[1] – that damages have been suffered would still have to be demonstrated.

33. More importantly, Clause 12.3 of the Development Agreement entitles the Developer to set off costs of litigation from the financial dues payable under the Development Agreement to the "Members / Tenants". However, Clause 7.3 envisages that only Members shall be entitled to financial payments – transit rent, brokerage, shifting charges, corpus fund etc. Clause 7.4 which sets out what would be paid to tenants, does not identify the

[1] M/s. Kailash Nath Associates Vs. Delhi Development Authority & Anr.- (2015) 1 SCR 627

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Tenants who are tenants of the Subject Garages as recipients of any payment. In these circumstances, if the Developer is desirous of setting off Rs. 10,000 per day from the amounts payable to Landlords, it is for the Developer to take such action as advised without needing assistance of this Court. On this limited (and only) facet of ostensible conflict between the Developer and the Landlords, Mr. Kamat's written submissions resist grant of any relief by this Court on the premise that interim relief cannot be in the nature of final relief.

34. Whether the Landlords, who are identified as "Confirming Parties" and not as "Members" in the Development Agreement, could also be treated as a defaulting "member" is for the Developer to take advice on. This Court's jurisdiction under Section 9 would not be necessary for enabling this measure as a temporary interim measure.

Consideration of Case Law:

35. A catena of judgements have been pressed into service by Mr. Khandeparkar and Mr. Kamat. I would necessarily have to deal with them. As stated earlier, a basic element of differentiation of these judgments is that most of them are passed in the context of members of a co-operative society (a body corporate) being bound by the actions of the collective will of the wider body of constituents of such body corporate. In these cases, equity considerations were crystal clear – those objecting to the redevelopment were

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indeed being given redeveloped premises in *lieu* of their existing premises, and typically, larger premises upon redevelopment. That apart, in every case, they would be entitled to financial entitlements as well, to enable them to make arrangements during their temporary displacement and for future entitlements to the corpus of the society. In all the precedents, it is the unreasonableness in such members' grievances, despite getting a larger entitlement, that drove the Court's discretion to make appropriate interventions.

36. The case at hand stands on a peculiarly different footing. The Tenants alone would get a downgrade upon redevelopment. They have been users of the enclosed Subject Garages with water and electricity connections and have the statutory protection as tenants. In sharp contrast, they would be thrown to a purported ownership of an open car park in the redeveloped building.

37. The Developer and the Landlords have pressed into service the judgments rendered in ***Shree Ahuja Properties***[2]; ***Rajesh Mishra***[3]; ***Calvin***

[2] *Shree Ahuja Properties Pvt. Ltd. Vs. Brij Maraj – Notice of Motion No.1318 of 2019 in Suit No.760 of 2019*

[3] *Rajesh Mishra and Mrs. Beena R. Mishra & Ors. Vs. Shree Ahuja Properties Pvt. Ltd. & Ors. - Appeal (L) No.11941 of 2021 in Notice of Motion No.1318 of 2019 along with Notice of Motion No.1518 of 2019 in Suit No.760 of 2019 with Interim Application (L) No.11946 of 2021.*

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Properties[4]; ***Choice Developers***[5]; ***Sarthak Developers***[6]; ***Heritage Lifestyles***[7]; ***Ferrum Realtors***[8]; ***Kankubai Jain***[9]; and ***Shantilal Gandhi***[10]***.***

38. Both the Developer and the Landlords emphatically endorse the rulings in ***Shree Ahuja*** and ***Rajesh Mishra***. These two decisions relate to the same litigation. ***Rajesh Mishra*** being an appellate decision, ***Shree Ahuja*** merges into it. This was a case of garages too but it is of no avail to the Developer and the Landlords simply because the Court clearly recorded that the developer had agreed to provide all garage occupants residential premises in the new redeveloped building in *lieu* of the garages, which would be of a size upgraded by 38% of the size of the garages. This was considered by the Court to be fair. Such a fact pattern is completely distinguishable with the peculiar facts of the instant case, where the Tenants get a downgrade to an open car parking slot in *lieu* of the enclosed Subject Garages from which they cannot be evicted except with due process of law under the Rent Act.

[4] *M/s. Calvin Properties and Housing Vs. Green Fields Co-operative Housing Society Limited & Ors. - Arbitration Petition No.638 of 2013.*
[5]*Choice Developers Vs. Pantnagar Pearl Co-operative Housing Society Limited & Ors. - 2022 SCC Online Bom 786.*
[6]*M/s. Sarthak Developers Vs. Bank of India Amrut/Tara Staff Co-operative Housing Society Limited & Ors. - Appeal (Lodging) No.310 of 2012 with Notice of Motion (Lodging) No.2137 of 2012 in Arbitration Petition No.1385 of 2010.*
[7] *Heritage Lifestyles and Developers Pvt. Ltd. Vs. Amar-Villa Co-Operative Housing Society Ltd. & Ors. - 2011 SCC OnLine Bom 349.*
[8]*Ferrum Realtors Private Limited Vs. Sind Maharashtra Co-operative Housing Society Limited & Ors. - Commercial Arbitration Petition (L) No.38354 of 2022.*
[9]*Kankubai Harkhlal Jain and Ors. Vs. MCGM & Ors. - Order dated 1/10/2015 passed in Writ Petition 2351 of 2015*
[10]*Shantilal Gandhi Vs. Prabhakar Balkrishna Mahanubhav – 2005 (4) Mh.L.J.507.*

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39. In ***Calvin Properties***, ***Choice Developers*** and ***Sarthak Developers***, the interests of a wide general body of *members* of a co-operative society was in conflict with the interest of a minuscule number of members of that society. Each of these members was being offered an upgrade from the pre-redevelopment position. Their conduct was therefore not tenable either in equity or in law (their own sweet will could not override the collective will of the other constituents of the co-operative society, which is a body corporate). With that framework in play, interventions were made by the Court.

40. ***Heritage Lifestyles*** and ***Ferrum Realtors*** involve an element of tenancy, but are distinguishable and indeed stand on a different footing. In ***Heritage***, the tenant indeed received a redeveloped flat and the tenancy rights were kept intact. In ***Ferrum*** too, although it was a case of a tenant of a member holding up the redevelopment, the landlord-member had an eviction decree in his favour under the Rent Act. Yet, the Learned Single Judge left open the contentions on entitlement to tenancy in respect of the flat in question and a rehabilitation unit in *lieu* of the tenanted flat.

41. In sharp contrast, in the facts of the matter at hand, far from having an eviction decree, despite continued usage of the Subject Garages for over at least twenty years, the Landlords have not even filed any proceedings alleging violation of the tenancy agreement and the allegedly unauthorised and illegal

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change of user. The Landlords have collected rent without demur or protest and indeed as indicated earlier, the allusion to a car parking objective appears incidental or even contrived, with the parties knowing what the actual usage was meant to be. Any determination of the legitimacy of use would be a mixed question of fact and law that only proceedings under the Rent Act could answer. Worse, the Tenants rights would not at all be kept intact. Their tenancy rights would be wiped out and worse, they would be downgraded from enclosed premises that they have been operating from, to an open car parking slot.

42. ***Kankubai Jain*** is a case of a Learned Division Bench of this Court dealing with a writ petition seeking a direction to the Maharashtra Housing and Area Development Authority to consider an application for change of occupancy status of a garage. In a tenanted garage, jewellery business was being carried on. The petitioners in that case were desirous of getting an alternate commercial area in *lieu* of the garage that they were using, and instead they were being given an equivalent residential area in the redeveloped premises. It is in that context that the Learned Division Bench held that a writ petition was misconceived. The Court made an observation that a "garage" had a connotation of an area for repairing of vehicles or parking of vehicles. That was not a case of a Section 9 Court presented with an inequitable position of the tenant of an enclosed garage getting nothing

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but an open parking space in the redeveloped premises. I am afraid this case is evidently distinguishable in view of the clear difference in the nature of facts involved and the nature of jurisdiction involved. Therefore, it would not be of any assistance to the Developer or the Landlords.

43. Finally, ***Shantilal Gandhi*** is a case of a landlord having obtained an eviction decree on the premise of an unauthorised change of usage and a prohibition on the change of usage from residential premises to commercial premises, under applicable law. Far from having a decree, the Landlords in the instant case have not even taken up any proceedings of any nature on the allegedly illegal change of usage. As stated earlier, the Section 9 Court cannot pronounce upon what would essentially entail a trial to answer a mixed question of fact and law under the Rent Act. It is the denuding of the very protection of the Rent Act coupled with a downgrade from the current situation that the Tenants are in, that informs my view of it being inequitable and inappropriate to exercise discretion to grant the reliefs sought by the Developer, which would also aid the Landlords, whose burden it is to comply with obligations.

Conclusion and Directions:

44. To sum up, I am not persuaded that this is a fit case of a *bona fide* invocation of Section 9 of the Act seeking interim protective measures to

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preserve the subject-matter of a dispute. A dispute is not perceptible or even ephemeral – evidently there is none. The jurisdiction under Section 9 is an equitable jurisdiction to be exercised with a fair and just discretion of the Court. In the circumstances of the case, I am not convinced that these principles have been demonstrated to warrant the Court's intervention to exercise discretion to make arrangements for removal of statutorily-protected Tenants from their premises permanently, and hand them open car parking spaces, and to label such action as "temporary displacement."

45. The Tenants are not objecting to the redevelopment. They are open to redevelopment but want their interests and rights as tenants to be respected and recognised, commensurate with their actual use. I am afraid it would not be open to the Landlords to pretend that this is not a case of a backdoor eviction or that they are victims of the allegedly illegal occupation. It would simply not be open to the Landlords to pretend that the Tenants had a right to only park vehicles when, to their knowledge, for years, the tenants have been using the Subject Garages for purposes far different from parking cars. Therefore, to try to give them an ostensible "choice" of an open parking space and to quote the larger good of the majority would not present a fit case to exercise my discretion in favour of removing the Tenants.

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46. Therefore, the Section 9 Petition is disposed of without grant of any relief as sought. It is however directed that the Developer and the Society, shall ensure the safety and the current free independent access to the Subject Garages during the course of the redevelopment. The Tenants, not being bound by the Development Agreement, which they are not even a party to, cannot be directed to comply with it. Needless to say, if the parties reach any other means of resolution of their current stand-off, they would be at liberty to agree on how to re-arrange their affairs and their *inter-se* relationship.

47. In the peculiar facts and circumstances of the case, I am persuaded not to impose costs on any party despite this being a Commercial Arbitration Petition.

48. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN J.]

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