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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
IN ITS COMMERCIAL DIVISION  
INTERIM APPLICATION (L) NO. 18441 OF 2021  
IN  
SUIT (L) NO. 17587 OF 2021**

Nissa Hoosain Nensey ...Plaintiff  
*Versus*  
Pali Hill Neptune CHSL & Ors ...Defendants  
*And*  
Avenues Seasons Properties LLP Applicant/  
Defendant No.5

**WITH  
INTERIM APPLICATION (L) NO. 17590 OF 2021**

**IN  
SUIT (L) NO. 17587 OF 2021**  
Nissa Hoosain Nensey ...Plaintiff /  
Applicant  
*Versus*  
Pali Hill Neptune CHSL & Ors ...Defendants

**WITH  
INTERIM APPLICATION (L) NO. 18438 OF 2021**

**IN  
SUIT (L) NO. 17583 OF 2021**

Rakeysh Omprakash Mehra & Anr ...Plaintiffs  
*Versus*  
Pali Hill Neptune CHSL & Ors ...Defendants  
*And*  
Avenues Seasons Properties LLP ...Applicant/  
Defendant No.5

**AND**

**INTERIM APPLICATION (L) NO. 17591 OF 2021**

**IN**

**SUIT (L) NO. 17583 OF 2021**

Rakeysh Omprakash Mehra & Anr ...Plaintiffs /  
Applicants  
*Versus*  
Pali Hill Neptune CHSL & Ors ...Defendants

**WITH**

**ARBITRATION PETITION (L) NO. 18196 OF 2021**

Avenues Seasons Properties LLP ...Petitioners  
*Versus*  
Pali Hill Neptune CHSL & Ors ...Respondents

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**Mr Snehal Shah, Senior Advocate, with Nausher Kohli, Parag Khandhar, & Prachi Garg, i/b DSK Legal, for the Plaintiffs in SL-17583/2021, & Respondents Nos. 2(2) & 2(b) in ARBPL-18196/2021.**

**Mr Nausher Kohli, with Parag Khandhar, & Prachi Garg, i/b DSK Legal, for the Plaintiff in SL 17587/2021 & for Respondent No. 3 in ARBPL No. 18196/2021.**

**Dr V Tulzapurkar, Senior Advocate, i/b Mandar Soman, for the Society in both the Suits.**

**Mr Shailesh Naidu, with Rupesh Mandhare, i/b Sean Wassoodem, for the Applicant/Defendant No. 5 in IAL-17590/2021 and IAL-17591/2021.**

**Mr Siddhesh Bhole, with Krupashree Sawant, i/b SSB Legal & Advisory, for Respondent No. 5.**

**Mr Devvrat Singh, with Sangeeta Yadav, for Respondent No. 6 in ARBPL-18196/2021.**

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**CORAM: G.S. PATEL, J**

**DATED: 23rd September 2021**

**PC:-**

1. There are five matters before me. (i) Interim Application (L) No. 17590 of 2021 and (ii) Interim Application (L) No. 17591 of 2021, both filed by the Plaintiffs in two civil suits; (iii) Interim Application (L) No. 18441 of 2021 and (iv) Interim Application (L) No. 18438 of 2021, both applications by the 5th Defendant ostensibly under Section 8 of the Arbitration and Conciliation Act 2013; and (v) a Petition under Section 9 of the Arbitration and Conciliation Act 2013 that has also been assigned to this Court.

2. If the two Section 8 applications by the 5th Defendant fail, I would then have to consider the Plaintiffs' two Interim Applications on merits. Conversely, if the two Section 8 interim applications succeed, the Plaintiffs' Interim Applications will fail, for the disputes will be sent to the arbitrator.

3. Today, I am only addressing Interim Applications at (iii) and (iv), the two Section 8 applications filed by the 5th Defendant.

1. I will be referring to the pages and documents in Suit (L) No. 17583 of 2021 (“**the Mehra suit**”). The companion Suit (L) No. 17587 of 2021 is the **Nensey suit**. The case of the Plaintiffs in both is the same. The 1st Defendant to both suits is the Pali Hill CHSL (“**the Society**”). The 5th Defendant is the developer (“**Avenues Seasons**”).

2. Having heard at some length, Mr Shah for the Plaintiffs, Mr Naidu for Avenues Seasons and Dr Tulzapurkar for the Society, I am not persuaded that the Section 8 Interim Applications by Mr Naidu can receive an order. For the reasons that follow, I have dismissed both Section 8 Interim Applications.

3. As initially cast, prayer (a) of both Section 8 Interim Applications by Avenues Seasons was not for a relief under Section 8 at all, but was mounted as a prayer more in the line of an application under Rule 283 of the Bombay High Court (Original Side) Rules, 1980 for a return of the plaint to be presented before the proper Court.<sup>1</sup> During the course of arguments, the ‘proper Court’ was clearly stated to be the Cooperative Court. Prayer (b) then asked that all disputes be referred to arbitration under Section 8. It seemed to me immediately obvious that the two prayers could not co-exist. It was one or the other. Mr Naidu agreed. He sought leave to cast one of them in the alternative. He chose to press the first prayer for the return of the plaint in the alternative to the other prayer for a reference to the arbitration. I permitted that amendment. Then, after some reflection, during the course of

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<sup>1</sup> Order VII Rule 10 of the Code of Civil Procedure, 1908 does not apply to a Chartered High Court in view of Order 49 Rule 3 of the Code.

arguments Mr Naidu said that he was not pressing, in either matter, prayer (a), the now-alternative prayer for a return of the plaint for presentation to the proper Court. He gave up that prayer. Therefore, I am not called upon to consider at the instance of any party whether the plaint is liable to be returned for presentation to the Cooperative Court, either because of the applicability of Section 91 of the Maharashtra Cooperative Societies Act 1960 or otherwise. This relieves me of a fairly considerable burden of having to examine the law on that aspect. Indeed, now that Mr Naidu has made his position clear and given up the alternative prayer (a), I *cannot* examine that issue of law. It no longer arises. It does not fall for consideration. It is not before me. Any decision that I render on that would be wholly obiter.

4. What remains, therefore, is only the question under Section 8 as to whether there is an arbitration agreement and whether the Plaintiffs must be referred to arbitration.

5. Section 8 of the Arbitration and Conciliation Act reads thus:

**“8. Power to refer parties to arbitration where there is an arbitration agreement. —**

(1) A judicial authority before which an action is brought **in a matter which is the subject of an arbitration agreement** shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

*(Emphasis added)*

6. I must put the dispute into a brief factual context. The Plaintiffs are members of the Society. But they say they do not occupy flats. Their homes are, they say, ‘bungalows’, stand-alone structures to one side of the property at Pali Hill, Bandra. Their membership is different from other flat owners. They say they are entitled to stand-alone structures with the surrounding or appurtenant marginal open spaces on three sides. In their suits, they clearly say they do not oppose re-development — provided their special rights are preserved, that is to say, they are accommodated in separate stand-alone structures with open spaces on three sides. They claim there is a covenant that runs with the land that assures them of these rights in perpetuity. At page 264 of the plaint, is a sketch plan of a previous proposal that seems to have been abandoned. I refer to this only because it shows that the Plaintiffs two structures are to one side of the property. This is also clearly seen from a block plan at page 78 at Exhibit ‘B’ (disputed by Mr Naidu and Dr Tulzapurkar), which shows what are described on the block plan itself as ‘Bungalow No. 1’ and ‘Bungalow No. 2’ at the north-eastern edge of the property. These two structures have independent or separate road access: the Plaintiffs do not have to traverse the Society’s property or land to get to their structures. There are Google map images on the succeeding pages. From page 85 at Exhibit ‘D’ are photographs that show separate structures with

pitched Mangalore-tiled roofs. The structures' gates are shown debouching directly on a public road.

7. I note this case presented by the Plaintiffs—because Avenues Seasons and the Society insist on referring to the Plaintiffs' structures as 'flats' — and, at one truly inspired moment in Mr Naidu's address, even as a mali's room or huts or something like that. Visually, the structures are anything but. Whether or not this gives the Plaintiffs the special rights, though members of the Society, is a separate question for another day.

8. The present dispute between the two sets of Plaintiffs on the one hand and the Society and Avenues Seasons on the other relates to a Development Agreement (“DA”) dated 4th November 2020. This has an arbitration clause. Hence the Section 8 Interim Applications.

9. It is presently unclear to me what precisely they mean when they say they do not 'oppose re-development'. Are they agreeable to their own structures being demolished and reconstructed, albeit as stand-alone structures with surrounding open spaces? Or are they saying that the rest of the Society may be redeveloped but their structures and open spaces should be left untouched? This conundrum is apparent from the prayers in the Mehra suit (which parallel those in the Nensey suit). The prayers read:

“(a) That this Hon'ble Court be pleased to declare that the Suit Bungalow is a separate and independent Bungalow along with exclusive open space in front and on the sides

thereof and the Plaintiffs are entitled to the same without any objection or interference from the Defendants;

(b) That this Hon'ble Court be pleased to order, declare and decree that the minutes and resolutions passed in the meetings of Defendant No. 1 held on February 6, 2019, March 17, 2019, June 1, 2019, June 9, 2019, June 22, 2019, March 8, 2020 and June 13, 2021 and/or such further or other meetings of Defendant No. 1 wherein resolutions pertaining to the impugned redevelopment have been passed and the impugned Development Agreement and Power of Attorney are illegal, non-est, null, *void ab initio* and not binding on the Plaintiffs;<sup>2</sup>

(c) In the event this Hon'ble Court does not deem it fit to grant prayer (b) above, then and in that event, this Hon'ble Court be pleased to pass an order and directing ordering and directing the Defendants to allot a "new bungalow" to the Plaintiffs in the proposed redevelopment of Defendant No. 1 Society in place and stead of the "Suit Bungalow" with all the amenities and facilities as is available to the Plaintiffs today in the proposed redevelopment of the Suit Land and these Defendants be further ordered and directed to do all deeds, acts, matters and things as may be necessary in pursuance thereof including modification/amendment of Impugned Development Agreement and Power of Attorney, as may be necessary;

(d) That in the alternative to prayer (b) and (c) above, this Hon'ble Court be pleased to order and direct Defendants to exclude the Suit Bungalow and the open area thereto in the proposed redevelopment of the Suit Land under the Impugned Development Agreement and Power

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<sup>2</sup> Prayer clause (b) might have been the subject of some controversy requiring a decision had Mr Naidu persisted with his prayer for return of the plaint. Now that he has given up that prayer this controversy does not arise.

of Attorney (*being Exhibit “ZZ” and Exhibit “AAA” hereto respectively*) and the Defendants be restrained from directly or indirectly interfering with the Plaintiffs’ exclusive possession and enjoyment of the Suit Bungalow and the open area there;”

10. Mr Shah will undoubtedly have to make the position clear when the Plaintiffs’ Interim Applications are taken up. For now, though, the only question is whether Avenues Seasons is correct in saying that the arbitration agreement in the DA binds the Plaintiffs.

11. This takes us directly to the agreement itself, a copy of which is at page 462. The first page of it is almost entirely indecipherable, thanks to the intervention of the Sub-Registrar of Assurances. His staff has somehow managed to ensure that his office’s marks and stamps are placed in precisely those locations of this agreement that any Court will need most. I would request the Prothonotary and Senior Master and the Registrar General to issue a request letter to the Sub-Registrar of Assurances to ensure that material portions of registered agreements are not obscured by his office. He must realize likely that in a given case this might lead to a considerable misunderstanding in Court. There is absolutely no reason to place stamps over the text of registered documents.

12. The society is a party of the first part. What follows is critical. There is a list of members. The list is spread over two buildings, Neptune-1 and Neptune-2. There are 22 members in all. But at serial Nos. 2, 14, 18 and 19 the spaces are blank. Even the names of members are not noted. For all the others, the names and their flats

are specifically given. Immediately after this, at page 2, the agreement says that these persons who are listed above — and obviously that can include only those who are named — are referred to as ‘Members’. Clause F.12 at page 466 says that the Society presently has 22 members who are respectively the owners of and are in possession, use, occupation and enjoyment of the old flats, old shops and old garages — “(hereinafter collectively referred to as the ‘Existing Members’)”. The table I referred to earlier had 22 spaces but only 18 names. Clause F.12 speaks of 22 members and says that they are known as the Existing Members. This is the cornerstone of Mr Naidu’s construct. He says that whether or not the Plaintiffs are named, and whether or not they have signed the document, they are included, or must be deemed to be included, because they are among those described as “Existing Members”.

13. This takes us directly to the dispute resolution clause and its provisions at clause 23 (at pages 516 and 517):

**“23. DISPUTE RESOLUTION**

23.1 In the event any dispute or difference arises between the Society (for itself and on behalf of its Existing Members) and the Developer in the matter of interpretation or in respect of this Agreement, the Power of Attorney and/or any related or incidental documents, and/or the implementation and/or interpretation of the terms, provisions and conditions hereof/thereof, a sole arbitrator shall be appointed by the Developer and the Society (for itself and for and on behalf of its Existing Members) by the expiry of thirty (30) days of the said dispute/differences, failing which, the Developer and the Society (for itself and for and on behalf of its Existing Members) shall appoint one arbitrator each, and the two

appointed arbitrators shall, before entering upon the reference, appoint a third arbitrator who shall act as the presiding arbitrator, to resolve the aforesaid disputes and differences. Such arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996, or any statutory amendment or re-enactment thereof for the time being in force. The seat of the arbitration proceedings shall be at Mumbai and the language of the proceedings shall be English. The Arbitrator/s shall have summary powers and be entitled to give interim directions and awards from time to time. The award/s of the Arbitrator/s shall be reasoned and given in writing and shall be final and binding upon the Society (**for itself, and for and on behalf of all its Existing Members**) and the Developer;

23.2 In the event of any breach or default by the Developer in observing and performing its obligations under this Agreement, the Society shall be entitled to initiate the necessary proceedings in law against the Developer, for enforcement of the Society's rights and for causing the Developer to specifically perform its obligations herein;

23.3 In the event of any breach or default by the Society in observing, performing and complying with any of its obligations under this Agreement, the Developer shall be entitled to initiate necessary proceedings in law against the Society, for enforcement of the Developer's rights and for causing the Society to specifically perform its obligations herein;

23.4 Notwithstanding the substance of any arbitration proceedings, suit or disputes between the Parties, but subject to what is stated in Clause 23.1 hereinabove, the Developer shall continue to be liable to bear and pay the Fixed Payment/Compensation referred to in Clause 6.5 hereinabove.

23.5 This Agreement shall be governed by and construed in accordance with the laws of India and shall be subject to the jurisdiction of the Courts of competent jurisdiction at Mumbai only.”

*(Emphasis added)*

14. Each of the members actually named at the beginning of the document — the 18 society members — has countersigned on each page of the agreement at its foot. These ‘Members’ (as opposed to ‘Existing Members’) have also signed the agreement itself from pages 523 to 527. The Plaintiffs in these two suits have not countersigned the agreement at all. They are not named in it. They have not initialled at the foot of it.

15. Clause 23.1 speaks of disputes or differences arising between the Society “for itself and on behalf of its Existing Members” as one group, and the developer as the opposing entity. This dispute must be in the matter of interpretation or in respect of this agreement, a power of attorney or incidental documents etc.

16. There are problems with Mr Naidu’s formulation. In contradistinction to other ‘Members’, the Plaintiffs are not signatories to this DA. On that ground alone, it is difficult to conclude that there can be said to be an agreement between the Society and the Plaintiffs or Avenues Seasons (the developer) and the Plaintiffs as contemplated by Section 7 of the Arbitration and Conciliation Act 2013, especially Section 7(3) and 7(4)(a). Section 7(3) requires an arbitration agreement to be in writing and then Section 7(4)(a) says that it is in writing if it is contained in a

document signed by parties. This would require the Plaintiffs to have been named in the document and to have signed it.

17. It might be totally

18. Mr Naidu believes that a written agreement with the signatures of the Plaintiffs is not a pre-requisite. The Plaintiffs are, he says, bound by decisions of the Society. If the Society has signed the DA, then whether or not an individual member has signed it is immaterial. His submission is based on a body of law, some of which I considered in *Chirag Infra Projects Pvt Ltd v Vijay Jwala CHSL & Anr.*<sup>3</sup> He submits, on the basis of that judgment and some of the authorities I considered there, that a person loses his identity or individuality on gaining membership of a society, and is then bound by any arbitration agreement that the society signs with a developer.<sup>4</sup> Therefore, the disputes under the arbitration agreement must be referred to arbitration. He believes that if the principle that has been invoked against non-signatories in *Girish Mulchand Mehta v Mukesh Mehta*,<sup>5</sup> and that entire line of cases can be applied in petitions under Section 9 to non-signatories, then it must logically follow that those non-signatories are bound by the arbitration agreement even for the purposes of Section 7 and consequently Section 8.

19. Prima facie, I think that is an extremely difficult proposition to accept. It is over-broad. Arbitration is a matter of contract. As a

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3 2021 SCC OnLine Bom 364 : (2021) 3 Bom CR 271.

4 *Aditya Developers v Nirmal And CHSL*, 2016 SCC OnLine Bom 100 : (2016) 3 Mah LJ 761.

5 2019 SCC OnLine Bom 1986.

fundamental starting principle, that requires volition or free will, as does any contract. It also requires consensus ad idem. An arbitration agreement is an agreement within an agreement. It survives the termination of the principal agreement in which it is embedded. It is for this reason that we say that an arbitrator is a creature of contract. Without the concurrence and consent and consensus at ad idem of parties, there is no arbitration agreement and there can be no arbitration. An arbitration agreement as required by Section 7, therefore, is an expression of the volition and consensus ad idem of the contracting parties. It is not something that can be inferred or arrived at inferentially. The Arbitration Act does not permit it. Recognizing that there may be other methods by which parties can be shown to have been ad idem, Section 7 itself contemplates contracts being arrived at in correspondence, by telex, by exchange of letters, and other means of telecommunication — anything in short that will show active volition and consensus by the parties.

20. What we have here is the exact reverse. We have two sets of Plaintiffs who say that they have never agreed to the arbitration agreement. They never signed it. They never initialled it. They are not even named on it and their entire case is nothing but a frontal assault on the arbitration agreement itself, a course of action that Mr Shah maintains can be sustained in this Court: See: *Mohinder Kaur Kochar v Mayfair Housing Pvt Ltd*;<sup>6</sup> *Maya Developers v Neelam R. Thakkar*.<sup>7</sup>

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6 2012 SCC OnLine Bom 1090 : 2013 (1) Mh LJ 389.

7 2016 SCC OnLine Bom 6947 : (2016) 6 Bom CR 629.

21. There seem to be three subtly different lines of the jurisprudence in this regard, with possibly some degree of overlap:

- (a) Whether a dispute by a member regarding re-development or a re-development agreement is a dispute covered by Section 91 of the Maharashtra Co-operative Societies Act, 1960: this is the *Mayfair Housing* and *Maya Developers* line of authority, and it says such a dispute is not hit by Section 91 because re-development is not a matter touching ‘the business of the society’ (although an initial agreement to construct or development — as opposed to re-development — would be covered by Section 91). I am not concerned with this aspect in the present order.
- (b) Whether Arbitration Act Section 9 relief can be obtained either by the society or the developer against an individual member who opposes, delays or obstructs the implementation of a development agreement between a society and a developer: this would be the *Girish Mulchand Mehta*, *Aditya Developers* and *Chirag Infra* line of authorities; and the consistent ratio is that such a member cannot obstruct the development agreement. He is bound by the decision of the society. As a direct corollary, in such cases — where the society has an agreement with the developer but members have not individually signed the development agreement — the member has no separate or independent right to assail the development agreement. His interest is represented by the society. For this reason, he cannot

separately intercede in an arbitration between the society and developer. An individual member will not be permitted to oppose the re-development. *Mayfair Housing* and *Maya Developers* would also apply (to the extent they did not allow the opposition).

- (c) Whether, in a case where not only the society but some, but not all, members have signed the development agreement, whether those who have not signed (and, as here, may not even be made party or be named) can, on the previous principle, be ‘deemed’ to be bound by the development agreement and its arbitration clause? In other words, is there a binding arbitration agreement within the meaning of Section 7 of the Arbitration Act, sufficient to sustain an application under Section 8, between a member who has not signed the development agreement and is not even named as party to it, although other members are individually named and have indeed signed it? I find no direct authority in support of this proposition. Indeed, for the reasons I have set out earlier, it seems to be very difficult to accept this proposition.

22. There is an additional aspect in this particular case: the Plaintiffs are not, in fact, opposing re-development per se at all. They have said so again and again in their plaints. What they seek is a recognition of their ‘special rights’ *by the Society of which they are members*. Subject to that acknowledgement and recognition, they are *agreeable* to the re-development. Their objection is directed against

the Development Agreement *without* an acknowledgement of their special status. That is not a challenge of the kind one say in many of the decided cases, where the dissenters said the entire development agreement was bad because it did not conform to a particular procedure or statute, and so on.

23. Mr Shah's submission that, closely read, the dispute resolution clause contemplates only a dispute between the Society on one side and Avenues Seasons on the other is *prima facie* compelling. The clause itself does not seem to include any dispute between the Society and its own members. It could not: that would be covered by Section 91 of the Cooperative Societies Act and, in any case, would need every single member to sign it. A member who had *not* signed it could not be bound by an arbitration agreement as between the Society and the member — there is simply no written and signed agreement between them.

24. Mr Naidu's argument seems to me to be circular in its reasoning: because the Society represents all members, it does not matter whether all members have signed it, and an agreement with the signatures of some members is exactly the same as an agreement with the signatures of none (or all) members. That cannot be. Therefore, either (i) the present DA covers only disputes between the Society and Avenues Seasons and not disputes between a member and the Society; or (ii) the present DA covers disputes between the Society and Avenues Seasons and also disputes between the Society and *those members who have signed the DA*. From either perspective, it cannot bind the Plaintiffs.

25. Mr Naidu's formulation results in an inconsistency: today, there is no dispute between the Society and Seasons Avenues; the dispute is between the Plaintiffs and their Society. Therefore, in arbitration, neither the Society nor Seasons Avenues could be claimants. And the Plaintiffs could not be claimants either, on Mr Naidu's own construct, because they have 'lost their individuality' and are subsumed in the identity of the Society. Therefore, on his own reasoning, there can be no reference to arbitration.

26. Mr Naidu also submits that the dispute resolution clause 23.1 itself requires a reference to the arbitration of only those disputes that arise in this DA. Mr Shah says that his disputes are at a point of time antecedent to the DA and that the challenge to the DA is only a logical extension of the challenge to the previous actions. He challenges the Society's denial of some rights that he claims were always vested in and the entitlement of the Plaintiffs. Indeed the claim to special rights, covenants or entitlements is not one with which Avenues Seasons is concerned except as a consequence of it having signed the DA. Avenues Seasons can have nothing at all to say on the question of whether or not as a matter of fact or law the Plaintiffs are entitled to the special benefits as members of the Society.

27. Mr Naidu points out that the arbitration clause refers to related documents or incidental documents and he submits that this would include any previous documents as well. I am not rendering any final finding on this. These observations and these findings are only for the purposes of Section 8 interim applications which, for the reasons I have indicated, must fail.

28. I cannot, therefore, accept Mr Naidu's submission that the Plaintiffs are bound indirectly through the Society by virtue of their membership of that society to have referred individual disputes even between them and the society to arbitration.

29. Mr Naidu submits that clause 7.9 at page 483 of the agreement contemplates such disputes. It speaks of dissenting members. It reads thus:

“7.9 It is hereby further agreed between the Society and the Developer that in the event of any of the Existing Member failing to provide the aforesaid confirmation letter and/or dismiss/falls/refuses to vacate and handover their respective Old Premises and/or Old Garages (hereinafter referred to as the said “Dissenting Member”) then the Developer shall take the required legal action as the Developer may deem fit in its sole discretion so as to get the Property vacated in order to proceed with the redevelopment as envisaged under this Agreement.”

30. But this only says that the developer — Avenues Seasons — is entitled to take the required legal action as it deems fit if there is a dispute raised by the dissenting members. This does not mean that the arbitration agreement is binding on a dissenting member or on a person who has not signed the agreement.

31. There has been a considerable amount of law cited as to whether the Plaintiffs can challenge a development agreement. But I believe a distinction must be made between cases where *only* the society has signed the DA and those where the society *and some individuals have also signed the DA and others have not*.

32. In the first class of cases, there is no possibility of an individual dissenting member seeking to strike out on his own and assail the DA as not binding on him or seek to intervene in any arbitration between the society and the developer. Here, decided law says it is not open to a dissenting member to obstruct or challenge the DA or to say he has ‘not signed’ the agreement. His identity is lost to the society, and to the discipline of the majority opinion prevailing. I see no reason to examine that aspect of the matter in Mr Naidu’s Section 8 interim application. I do not think it will be appropriate to foreclose that argument at this stage. Those contentions will have to be left open.

33. But the second class is different. When individual members *also* sign, they bind themselves as such, not just as members of — and through — the society. There is a duality at play here, both for the society in question and for the individual members. If the society represented the members fully, individual members did not need to sign the DA. Their signatures on the DA establish a contract between not only the society and the developer, but between each of them and the developer. Consequently, it simply cannot be that the society sweeps in both those who have signed and those who have not. By merely adding a definition of ‘existing members’, and purporting to include them without their signatures and names, while other members are named and have signed, there cannot be said to be a contract between the non-signatory members and the developer. This would defeat the provisions of Section 7 of the Arbitration Act.

34. The Section 8 Interim Applications are dismissed. There will be no order as to costs.

35. Status quo at site will continue until 14th October 2021.

36. All observations in this order are for the purposes of this order alone.

**PLAINTIFFS' PRINCIPAL INTERIM APPLICATIONS:**

37. In view of dismissal of the Section 8 interim applications, the Plaintiffs' Interim Applications will need to be heard.

38. The delay in filing the affidavits is condoned. All Affidavits (in reply and rejoinder) are taken on file and will be filed in the Registry with proper paging by Monday, 27th September 2021.

39. Both sides will arrange to give me compiled matter in soft copy, and compilation of authorities by 27th September 2021.

40. List the matter for hearing and final disposal on the weekly board commencing from 13th October 2021 onwards.

**ARBITRATION PETITION:**

41. Avenues Seasons invited these findings by filing these Section 8 Interim Applications. That necessitated a prima facie view of whether or not there is a binding arbitration agreement between the

Society and the Plaintiffs inter se. I have held there is not; and there is no dispute today between the Plaintiffs — independently of the Society — and Avenues Seasons, nor between the Society and the Avenues Seasons. The only dispute is between the Plaintiffs and the Society. Neither the Society nor Avenues Seasons can be permitted to now argue that despite having invited a finding on this issue, and having received an adverse finding, they — or either of them — are yet entitled to a *Girish Mulchand Mehta* order to maintain a Section 9 petition against the Plaintiffs. The two cannot co-exist. Had Avenues Seasons not filed the Section 8 Interim Applications, perhaps it could have pressed the Section 9 petition on the *Girish Mulchand Mehta* principle.

42. The result is inevitable. The section 9 Petition against Respondents Nos. 2A, 2B and 3 (the Plaintiffs in the two suits) is dismissed. It will continue only as against all other Respondents to the Section 9 Petition in the appropriate Court as per the current roster.

43. The Section 9 Arbitration Petition was assigned to me only because the two suits and their four Interim Applications were before me. Now that Section 8 interim applications are dismissed and the Section 9 Petition against the Plaintiffs is dismissed, I see no reason to add to my existing burden by continuing with the Section 9 petition against the other Respondents to that Petition.

44. Avenues Seasons is at liberty to move the appropriate Court for a hearing of its Section 9 Petition against the other Respondents.

45. All concerned will act on production of a digitally signed copy of this order.

**(G. S. PATEL, J)**