

Re-development of housing societies : Are recent judgments and Guidelines enough for smooth ride?

*Redevelopment: A
Cooperative movement
.....?*

*.....or a
commercial call ?*

*“Co-operative Movement is a Socio-Economic and Moral Movement. It is to fulfill the Constitutional Goal (Article 43) that it is encouraged by the State. It is not a profit making activity **nor is it a tool for power politics**. Its true role cannot be forgotten or else commerce will displace service.”* Justice Dharmadikari of Bombay High Court emphasized while delivering a landmark judgment in M/s. Acknur Constructions Pvt. Ltd.v/s Fardoon Apartment Co-op. Hsg.Soc. Ltd. & others, pertaining to redevelopment of housing societies. The Court observed that any activity of redevelopment of housing society should not compromise the rights of members and must **safeguard the existence of the Society**. The Court further observed that the Development Agreement entered into between the Society and the Developer is not binding on the dissenting minority and in case the dissenting members fails to abide by the resolutions passed at the meetings than the Society only will have to take appropriate action against those members.

The judgment has raised a hue and cry among developers community since in most redevelopment projects one word is always missing i.e. “Co-operation” (by all members) and the learned Judge has given this the highest importance.

The developer community *felt* a big relief when, within a few days, a Division Bench of Bombay High Court held that redevelopment of a property is the commercial wisdom of General Body of the Society and it is not open to the Court to sit over the said wisdom of the General Body. Merely because some members in minority disapprove the decision, it cannot be the basis of the decision of the general body unless it is shown that the decision was the product of fraud or misrepresentation or was opposed to some statutory prohibition.

Assuming that the Double Bench has finally decided that

The process of doing a society redevelopment deal and the Guidelines issued by Government needs thorough revision.

redevelopment of a society is a commercial wisdom of a society, yet understanding of both the judgments along with recent guidelines (issued on 3rd January 2009) on Redevelopment of Societies by Maharashtra Government is quite relevant for hassle free redevelopment projects. The Single Bench judgment emphasized cooperative nature of society's deal, transparency, importance of parity among members, process in case of dissent, importance of safety of Society in case of redevelopment and the rights of the Developer and the Society. The Double Bench on the other hand upheld the rule of supremacy of majority in society's affairs in case proper processes are followed up. The Guidelines have clearly spelt the process of calling meeting for redevelopment and business of such meetings, process of selection of developer, appointment of an Authorized Officer, terms of development agreement and so on.

Further, in light of various observations made by learned Judges in both the cases the Guidelines for redevelopment of Society buildings and process of doing a society re-development deal needs thorough revision.

1. Transparency in signing Development agreement :

In most of redevelopment projects, the Society passes resolution in favor of a developer and set out key commercial terms of development agreement. The managing committee thereafter negotiates development agreement with the Developer and signs the agreement on behalf of the Society. Justice Dharmadikari in his judgment raised certain questions on the practice of incorporating clauses providing rights in the property to the Developer in the so called "Development agreement". The judge observed "*Very often, the clauses in the Agreement between the Society and the Builder/Developer are such that all rights of the Society in the land including the benefits attached to the same in the form of F.S.I., etc. are surrendered to the builder/developer. Thus, the Society not only loses the existing*

structure and building completely but is divested of its right and title in the land itself. It is also deprived of the benefits attached to the immovable property that is the land. If all such arrangements are accepted at their face value, then, the existence of the co-operative housing society itself is threatened.”

Giving away

*“Development rights” or
“Rights in property”?*

The market practice of adding such clauses as giving away absolute right and authority to consume F.S.I. in development agreement creates rights in the property itself in favor of developer. **Such clauses are not contemplated in development agreements** since in case of development agreement developer acts as agent of the society, purchase TDR in society’s name, obtains permissions in society’s name and enters into society’s premises as a licensee for development of property in and lieu of these he gets his consideration by way of selling designated portion in the developed area. The society in such case always remains owner of its property signs agreement with new flat purchaser (though a developer keeps POA with him to sign the agreement on behalf of society).

Guidelines should cover aspects of TDR/FSI and other rights attached to the land

Commenting on the recent Guidelines, the Judge said “A *perusal thereof indicates that several vital aspects are lost sight of and the Rights of the members are not given serious consideration. The Directives do not deal with the aspect of TDR/FSI and other rights attached to the land and how they have to be dealt with*”. The Judge observed that in case the Society desires to give rights in the property to the Developer by way of Development Agreement than nature of such rights should be adequately disclosed.

Guidelines should provide for discussions by General body on agreed development agreement between developer and managing committee...

However, the Guidelines do not provide for approval of draft development agreement at general meeting and hence in case managing committee creates such rights in favor of the Developer **than the entire development agreement will be vulnerable to such clauses**. Getting draft development agreement approved in the general meeting may not be sufficient since all the members may not be reading fine prints of the agreement and understand its implications.

2. Discrimination and Underhand dealing:

Any allegation of discrimination and underhand dealing may delay the entire process.

Apart from transparency in development agreement, one of major obstacle that can come in redevelopment process is the allegation of discrimination among members and underhand dealings particularly by the managing committee. Justice Dharmadikari held that the allegations of discrimination among members, underhand dealings should be probed further and in depth, before grant of any relief. The key to success of any redevelopment project is the speed in which transaction can be made. However, the Single Bench Judge held that the Court has no jurisdiction to go into the controversy about the legality and validity of the Meetings. Utmost care is required to see that meetings are conducted with the correct processes. Any lacuna in process may halt the entire redevelopment process. Guidelines should address efficient ways of handling these issues.

3. Supremacy of Society's resolution and rule of majority

Aspects of discrimination and individual interest in redevelopment are not covered under Double Bench judgment.....

....and Collective interest may sometime be fatal to individual interest. Guidelines

The Division Bench held “*Merely because some members in minority disapprove of the decision, that cannot be the basis to negate the decision of the General Body, unless it is shown that the decision was the product of fraud or misrepresentation or was opposed to some statutory prohibition.*” Unfortunately, the Division Bench judgment is silent on discrimination and interests of individual member concerned. It is submitted that though as per Division Bench Judgment and the new guidelines the rule of supremacy of General body is unquestionable, yet valid objections of minority should not be ruled out and there should be a mechanism where their *objections are adequately and expeditiously resolved*. For example, what happen if majority approves lesser frontage (but similar area) in developed area to a shop-owner who is occupying ground-floor in the Society building? Certainly, such situation may not be in his individual interest though the project per se may be of great benefit for the majority. *The issue of conflict between collective interest and individual interest should be clearly addressed in the Guidelines else*

should clearly address this issue.

minority will always feel oppressed in such redevelopment work and in all probability the pace of development will suffer.

4. Process in case dissenting member does not vacate:

Only Society has right to enforce its resolution against dissenting member.....

Justice Dharmadikari held that developer cannot initiate process of evicting dissenting member with the help of development agreement as the agreement never establishes privity of contract with the individual member or a dissenting member and hence for getting peaceful possession of the society's property, the Court rightly held that the society has to take appropriate action against the dissenting member. The Government has not provided any efficient mechanism for peaceful possession of society's property to developer in case resolutions are passed in the manner envisaged in the Guidelines. The process of getting possession through cooperative court may be tedious and could be against the interest of project.

...but the process of getting possession through cooperative courts can be tedious.

5. Protection to Society in case of default:

Perception of safety can itself be a key point of litigation by dissenting members

Justice Dharmadikari in his Judgment held that the *penalty and termination clauses in a development agreement are not enough protection to society members* in case the construction does not proceed or for some reason is halted or stopped. Further, many times, a development agreement doesn't provide for termination of the agreement since such clauses discomforts a Developer and hence the only remedy left with the Society is to go for prolong litigation of termination of the agreement and/or wait for getting penalty for delay in handing over of new structure. In these circumstances, the Judge held that there is no certainty of the permanent alternate accommodation and the existence of the society itself is at stake. Recent guidelines has provided some more protections like time bound completion of redevelopment project, bank guarantee of 20% price of the project and non transferability of the development rights. Looking to the enormous need of redevelopment in the city, a

regulatory body should be created to oversee effective execution of redevelopment projects and quick remedy of society's and member's grievances. *Further, the safety of society in redevelopment process needs to be reconsidered in the Guidelines else the perception of safety can itself be a key point of litigation by dissenting members.*

To sum up, the recent Guideline for redevelopment of housing societies has tried to provide transparency in the process of redevelopment. However, apart from above mentioned issues raised by the Learned Judges, following issues needs to be dealt as soon as possible for more efficient redevelopment:

- a) Members should be allowed to cast their vote through one of their family member as proxy, since many of times they may not be able to remain present;
- b) Formation of an agency for registration and grade developers since in all society redevelopment and SRA projects the existence of the society itself is at stake and it may get trap into a developer's taller claims;
- c) Provide for mechanism for quick action and appointment of a new developer in case of non performance of a developer;
- d) Provide for blacklisting of developer in case he developer fails to execute project in time.

Above all, clarification is required on the applicability of Guidelines (wholly or partly) in cases where a society has only passed resolution for appointment of developer (prior to January 2009) and the further steps could not have taken place due to any reason including recent slump in the market and ongoing renegotiation of commercial terms between the Society and the Developer.