AGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMM ARBITRATION PETITION (L) NO.26962 OF 2026

Empire Realty ... Petitioner

Vs.

ATUL GANESH KULKARNI

Digitally signed by ATUL GANESH KULKARNI
Date: 2026.09.07 12:00:02 +0530

1. Virani Tower Cooperative Housing Society Limited
2. Hitesh Anantrai Kar
3. Anantrai M. Kar
4. Jashiben Anantrai Kar
5. State Bank of India ... Respondents

Mr. Mayur Khandeparkar with Ms. Vishaka Bhatia for the Petitioner.

Mr. Suhas Deokar for Respondent Nos.2 to 4.

Mr. Vivek Sawant for Respondent No.5.

CORAM : AMIT BORKAR, J.

RESERVED ON : SEPTEMBER 2, 2026.

PRONOUNCED ON : SEPTEMBER 7, 2026

JUDGMENT:

1. The present Petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996, seeking urgent ad-interim and interim reliefs against Respondent Nos. 2 to 5. According to the Petitioner, Respondent Nos. 2 to 5 have failed and/or refused

to give the necessary written consents in favour of Respondent No. 1 Society, as required under the Development Agreement dated 19 May 2025. It is stated that because of their continued refusal and lack of cooperation, the redevelopment work has been obstructed and delayed. The Petitioner relies upon the resolution passed at the Special General Meeting dated 27 October 2024 and states that the Society has entered into the Development Agreement and that the majority of its members have given their written consents. According to the Petitioner, only Respondent Nos. 2 to 5 remain as non-consenting members.

2. The facts and circumstances which, according to the Petitioner, have resulted in filing the present Petition are as follows. Several meetings were held between the Petitioner and Respondent No. 1 Society for discussing and finalizing the terms and conditions of the Development Agreement and the Power of Attorney in relation to redevelopment of the subject property. After detailed discussions and negotiations, the parties agreed upon the commercial terms on which the redevelopment was to be carried out. Thereafter, the draft Development Agreement and the draft Power of Attorney were placed before the General Body of Respondent No. 1 Society. The members considered the same and approved them at the Special General Body Meeting held on 1 February 2025. Thereafter, the parties executed the Development Agreement dated 19 May 2025 for redevelopment of the subject property. The said Development Agreement was registered with the Office of the Sub-Registrar of Assurances at Borivali under Registration No. MBI-17/8394/2025. After execution of the

Development Agreement, the Petitioner received details regarding the members who had opted for additional carpet area and/or surrender of area. On the basis of these details, the Petitioner prepared tentative building plans in accordance with the Development Control and Promotion Regulations, 2034 and the other applicable statutory regulations. These plans were thereafter submitted to Respondent No. 1 Society for its consideration and approval. In terms of its obligation, Respondent No. 1 executed and registered 58 Permanent Alternate Accommodation Agreements with the Petitioner. It obtained and furnished 19 further written consents. Thus, consents in respect of 77 units out of the total 79 existing units were furnished. By giving these consents, the concerned members agreed to cooperate with the redevelopment of the subject property. They agreed to vacate their respective premises within 30 days from the date on which the Petitioner called upon them to do so, in accordance with the terms of the Development Agreement.

3. Respondent No. 1, by its letter dated 5 March 2026, informed the Petitioner that Respondent Nos. 2 to 5 had refused and/or failed to furnish their written consents, despite the efforts made by the Society for obtaining the same. Respondent No. 1 accordingly requested the Petitioner to take appropriate legal steps against the said non-consenting members in accordance with Clause 11(d) of the Development Agreement. The Petitioner states that the Development Agreement dated 19 May 2025 has been duly executed by Respondent No. 1 on behalf of its members. Out of the total 79 member units, the members of 77 units have

furnished their consents and have clearly agreed to cooperate with the redevelopment project. These members have undertaken to vacate their respective premises within 30 days from the date on which they are called upon by the Petitioner to do so, in accordance with the terms agreed between the parties. According to the Petitioner, a strong prima facie case has been made out in its favour. It is stated that the balance of convenience is clearly in favour of granting the reliefs sought in the Petition. The Petitioner submits that if the redevelopment project is allowed to remain stopped because of the conduct of a few members who are not cooperating, serious and irreparable loss, injury and prejudice will be caused to the Petitioner, Respondent No. 1 Society and the members of the 77 consenting units. Clause 29 of the Development Agreement contains an arbitration agreement which, according to the Petitioner, is valid and binding upon the parties. The said clause covers disputes arising out of the Development Agreement, the Power of Attorney and the other documents connected with the redevelopment. The Petitioner submits that the disputes raised in the present Petition arise from the said arrangements and fall within the scope of the arbitration agreement.

4. Mr. Khandeparkar, learned Advocate for the Petitioner, submitted that Respondent No.2 is the secured creditor and has taken steps under Section 13 of the Securitization Act in respect of Flat Nos.303 and 304. Relying upon the judgment in the case of Transcore vs. Union of India & Another, (2008) 1 SCC 125, he submitted that when action is taken under Section 13(4) of the said Act, the property comes under the control of the secured

creditor only for the purpose of taking and completing the steps permitted under the said Act. Relying upon the judgment in the case of Sorabjee, *K.B. Seth vs. Dwarkadas Ranchhoddas, Seth & Others, 1932 SCC OnLine PC 33*, he submitted that the Privy Council had applied the principles of equity to acquisitions relating to mortgaged property, as reflected in Section 90 of the Trusts Act, 1881. He submitted that any addition or improvement made to the mortgaged property has to be dealt with by the mortgagee in accordance with Sections 63, 72 and 76A of the Transfer of Property Act. According to him, Clause 8 of the Development Agreement requires the members to pay for the additional area which they would receive after redevelopment. This, according to him, amounts to an addition to the property., the secured creditor can put an appropriate condition in the auction terms so that the auction purchaser can pay the additional amount agreed under the Development Agreement. He submitted that another option available to the secured creditor is to pay the amount required for the additional area to the Petitioner and thereafter recover the same from the borrower. The secured creditor may adjust or set off the amount payable to the developer towards such additional area. He submitted that the rent and corpus payable in respect of the flats would have to be considered having regard to the Bank's rights after the Petitioner takes possession.

5. He submitted that the existing area of Flat Nos.303 and 304 is 414 square feet. The additional 10% area available free of cost would be 41 square feet and the compulsory purchase area would be 33 square feet. According to him, if the additional amount of

Rs.6,60,000/- is paid upfront, the effective amount would be approximately Rs.6.23 lakh, since upfront payment gives a concession and the rate works out to Rs.19,000/- per square feet. However, if a member chooses to pay for the compulsory purchase area of 33 square feet by instalments, the rate would be Rs.20,000/- per square feet, which would amount to Rs.6,60,000/-. The total final area available would be 488 square feet. The Petitioner is required to pay Rs.50/- per square feet towards the excess area. According to the calculation submitted, this would come to Rs.20,700/- per month and for two years the rent would amount to Rs.4,96,800/-. Respondent No.5 would be entitled to receive Rs.20,700/- towards one month's brokerage, which would be a one-time payment.

6. Relying upon the judgment in the case of *Ambit Urbanspace vs. Poddar Apartment Cooperative Housing Society Limited & Others, Commercial Arbitration Appeal (L) No.12585 of 2025, decided on 1 July 2025*, he submitted that this Court, in paragraph 18 of the said judgment, has held that once the resolutions of the Society are binding upon its members, it would follow that the members were claiming their rights through the Society, assuming that the members continued to have proprietary rights in the flats in their possession. He submitted that the rights of Respondent No.1 Society are downstream rights. Such rights have to be subject to and consistent with the rights of the cooperative society and its members under the provisions of the Maharashtra Cooperative Societies Act, 1960. He further submitted that the Petitioner is not challenging any action taken by Respondent No.5 under the

provisions of the RDDB Act., according to him, there is no requirement for the Petitioner to invoke Section 17 of the said Act. He submitted that handing over possession would not permanently take away or reduce the rights of Respondent No.5. It would only mean that possession is temporarily shifted, while the rights of Respondent No.5 would continue. He further submitted that if Respondent No.5, the members or the auction purchaser do not want the additional area, the Petitioner is willing to change the building plan and restrict the entitlement of Respondent Nos.2 to 5 to their original area.

7. Learned Advocate for Respondent No.5 submitted that Respondent No.5 Bank is neither a party nor a signatory to the Development Agreement dated 19 May 2025, hereinafter referred to as "the DA", or to the arbitration clause contained in Clause 29 of the DA. According to him, a Petition under Section 9 of the Act can be maintained only for the purpose of supporting a valid and existing arbitration agreement. It must be between the parties concerned in the dispute. Since there is no relationship or arbitration agreement between the Petitioner and Respondent No.5 Bank, no relief under Section 9 of the Act can be sought against the Bank or granted against it. It was submitted that the rights claimed by Respondent No.5 Bank in respect of Flat Nos. A-303 and A-304, hereinafter referred to as "the said Flats", are statutory rights. These rights arise from the mortgage created in favour of the Bank and from the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, hereinafter referred to as "the SARFAESI Act".

According to the Bank, these rights are independent of the DA and do not arise from or depend upon the DA. Any dispute between Respondent No.5 Bank and Respondent Nos.2 to 4 concerning recovery of the loan or enforcement of the security is not a dispute which can be referred to arbitration under Clause 29 of the DA. The Bank is a stranger to the said agreement. It was further submitted that Section 35 of the SARFAESI Act contains a non-obstante provision and gives the provisions of the SARFAESI Act overriding effect over anything inconsistent contained in any other law for the time being in force, including the Arbitration and Conciliation Act, 1996., according to Respondent No.5, the remedies available to the Bank under Sections 13 and 14 of the SARFAESI Act, as well as the measures taken by it, including taking physical possession of the said Flats, cannot be defeated or reduced by relying upon an arbitration agreement to which the Bank is not a party.

8. It was submitted that the Petition, to the extent it seeks vacant and peaceful possession of the said Flats from Respondent No.5 Bank, or alternatively seeks appointment of a Court Receiver for taking possession from the Bank, in substance seeks to interfere with the statutory possessory rights of the Bank under Section 14 of the SARFAESI Act. According to the Bank, such relief is being sought through a Section 9 Petition arising from an agreement to which the Bank is not a party. Such relief, according to the Bank, cannot be granted in law. The Petition deserves to be dismissed against Respondent No.5 on this ground. It was further submitted that the provisions in the DA relating to "compulsory purchase

area" were never agreed to or consented to by Respondent Nos.2 to 4. Under these provisions, the existing members are stated to have agreed to compulsorily purchase 8 to 10% additional carpet area over and above the free 10% additional RERA carpet area and are stated to be “bound and liable to make the balance payment as agreed upon”. It was submitted that Respondent Nos.2 to 4 never signed or consented to these provisions and that the DA is admittedly unsigned by them. It was separately submitted that Respondent No.5 Bank was never consulted and never agreed to or consented to the arrangement relating to the compulsory purchase area or to any additional payment sought to be imposed upon the mortgagors in respect of the said Flats. According to the Bank, it holds a prior mortgage and charge over the said Flats., any arrangement which seeks to impose an additional financial liability upon Respondent Nos.2 to 4 in respect of the mortgaged Flats, without the knowledge or written consent of the Bank as secured creditor, cannot bind the Bank or affect its security interest. The Bank submitted that it cannot be made directly or indirectly responsible for making, funding or guaranteeing any such payment, particularly when the obligation is notly binding upon the mortgagors and the Bank is a stranger to the DA and has not consented to the said arrangement.

9. Respondent No.5 Bank submitted that it has no objection in principle if the redevelopment of the said Flats is carried out. However, its charge, priority and security interest, along with all its rights and interest in the said Flats, must continue to remain protected during the period of the loan and until the entire

outstanding amount payable to the Bank is fully and finally paid. It was submitted that the Petitioner and Respondent No.1 Society should record in their books and in the relevant PAAA and allotment documents that the said Flats are mortgaged in favour of the Bank. They should specifically record the Bank's charge over the new or alternate premises which are to be allotted in place of the said Flats. It was further submitted that the Bank's charge should continue over the alternate or redeveloped premises. The charge should extend to any additional carpet area, car parking, rent, shifting charges, corpus, hardship compensation or any other monetary or non-monetary compensation or benefit which becomes payable to Respondent Nos.2 to 4 under any PAAA or otherwise in connection with the redevelopment. According to the Bank, such benefits should remain subject to the Bank's charge to the same extent and with the same priority as the Bank's present charge over the said Flats.

10. It was submitted that the Bank is in physical possession of the said Flats pursuant to the measures taken under Section 14 of the SARFAESI Act., when the new or alternate premises are constructed and allotted in place of the said Flats, possession of such premises should be handed over by the Petitioner or Respondent No.1 Society to the Bank and not to Respondent Nos.2 to 4. The Bank should be permitted to continue to retain such possession as secured creditor until the outstanding dues of Respondent Nos.2 to 4 are fully paid. Similarly, any rent, shifting charges, corpus, displacement or hardship compensation, or any other monetary benefit payable in relation to the said Flats under

the DA or PAAA should be paid or credited directly to the Bank, to the extent of the outstanding dues payable by Respondent Nos.2 to 4. It was further submitted that if the Bank hands over possession of the said Flats only for the limited purpose of demolition and construction, such handing over should not amount to release, reduction or weakening of the Bank's security interest. The Petitioner or developer should hold the said Flats or the site only as a custodian for carrying out the redevelopment. Such possession should not be treated as giving the Petitioner any other right over the Bank's security. The Bank submitted that it should at all times have the right to assign or transfer its rights, title and interest in the said Flats or in the alternate premises. It should have the right to create any further charge or encumbrance over such rights, including its right to receive possession of the premises. According to the Bank, it should be able to exercise these rights without obtaining any further consent from the Petitioner or Respondent No.1 Society.

11. It was further submitted that any order passed in the present proceedings should not affect or prejudice the independent rights and remedies of the Bank under the SARFAESI Act. The Bank should remain free to continue or complete the enforcement measures initiated, or to initiate further measures, under Sections 13 and 14 of the SARFAESI Act. According to the Bank, these rights are independent of the present proceedings and are expressly reserved by it. Learned Advocate for Respondent No.5 Bank further submitted that Sections 34 and 35 of the SARFAESI Act override the rights claimed by the Petitioner. He submitted that

there is no agreement or intention to arbitrate between the Petitioner and Respondent No.5., according to him, the present Petition is not maintainable against Respondent No.5 in the absence of an arbitration clause between the Petitioner and the Bank. He submitted that the question as to whether the additional area is to be taken or not is a matter between the concerned member and the Society. He further submitted that the rights of the Bank as mortgagee must be protected and that any benefits payable in respect of the mortgaged flats should be paid to the Bank. He submitted that no additional liability for payment towards the extra area can be imposed upon the secured creditor.

12. Mr. Deokar, learned Advocate for Respondent Nos.2 to 4, submitted that the rent and brokerage charges payable in respect of the flats should be paid to Respondent Nos.2 to 4. He accepted that the present possession of the flats is with Respondent No.5 Bank.

REASONS AND FINDINGS:

13. I have considered the submissions made by Mr. Khandeparkar, learned Advocate for the Petitioner, the learned Advocate appearing for Respondent No.5 Bank and Mr. Deokar, learned Advocate for Respondent Nos.2 to 4. I have considered the Development Agreement dated 19 May 2025 and the position regarding Flat Nos.303 and 304. It is not in dispute that Respondent No.5 Bank is in possession of these flats pursuant to the measures taken under the SARFAESI Act. I have considered the judgments relied upon by all the parties., the question before the

Court is not only whether the Bank's security will be lost because of the redevelopment. The question is how the rights of the Bank as secured creditor are to be protected when the present mortgaged flats are demolished and new flats are constructed in their place.

14. At the outset, there is no dispute that the Development Agreement contains an arbitration clause. It is not disputed that Respondent No.5 Bank has not signed the Development Agreement., the submission of the Bank that it cannot be compelled to arbitrate with the Petitioner cannot be rejected. At the same time, the Petitioner is not asking this Court to decide any dispute between the Bank and Respondent Nos.2 to 4 about the loan amount or enforcement of the mortgage. The rights of the Bank under the SARFAESI Act are separate and independent. Both these matters have to be looked at separately. The arbitration agreement may apply to disputes between the Petitioner, the Society and its members. But the statutory rights of the Bank arising from the mortgage and under the SARFAESI Act cannot be taken away only because the Society and the Petitioner have entered into the Development Agreement. At the same time, it cannot be said that because the Bank has not signed the Development Agreement, the property cannot be redeveloped at all. It will not be proper to carry out redevelopment without taking the Bank's interest into consideration. The Bank's security is in the property. If the old property is demolished and new property is constructed in its place, the security has to continue with the property which comes in place of the original property. The Bank

cannot be made to lose its security only because the Society and the developer have agreed to redevelop the property. But equally, the Bank cannot insist that the whole redevelopment should remain stopped when its security can otherwise be protected in the redeveloped property.

15. In *Transcore*, the Supreme Court considered the effect of Section 13(6) of the SARFAESI Act and observed in paragraph 26:

> "26. Section 13(6) inter alia provides that any transfer of secured asset after taking possession or after taking over of management of the business, under Section 13(4), by the bank/FI shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured asset., Section 13(6) inter alia provides that once the bank/FI takes possession of the secured asset, then the rights, title and interest in that asset can be dealt with by the bank/FI as if it is the owner of such an asset. In other words, the asset will vest in the bank/FI free of all encumbrances and the secured creditor would be entitled to give a clear title to the transferee in respect thereof."

16. The above judgment holds that once the Bank has taken possession of the secured property under the SARFAESI Act, it has statutory rights and control over that property for enforcing its security. The property continues to remain as security for the amount payable to the Bank. However, this does not mean that every benefit which may come from the property in future becomes the absolute property of the Bank. It is necessary to see what happens to the secured property and what happens to any addition or benefit which comes because of the redevelopment.

17. In this connection, the judgment of the Supreme Court in Ram Chand v. Randhir Singh, (1994) 6 SCC 552, at paragraph 7, is relevant. The Supreme Court observed:

> "7. The words “if it were his own” in Section 76(*a*) of the Transfer of Property Act make the mortgagee, unless prohibited from doing so, the second self of the mortgagor, when he as a prudent owner leases out agricultural land."

18. The Supreme Court further observed in the same paragraph:

> "It is well known and settled that in case of lease of agricultural land, the lessee, by the very process of cultivation, has to bring in inputs, effort and as a termed measure fertilization of the soil, pursuing constant and continuous agricultural activity and vigil to attain acceptable results. His effort is not that of one time but a continuous one with a future in view…"

19. The facts of that case were regarding agricultural land and they are not the same as the facts in the present case. This difference has to be kept in mind. Even then, the principle stated regarding Section 76(a) is relevant. A mortgagee in possession is expected to deal with the property in the manner in which a prudent owner would deal with his own property. The Supreme Court has described such mortgagee as the "second self of the mortgagor", the mortgagee cannot deal with the property in such a manner that its value is unnecessarily reduced.

20. In the present case, redevelopment cannot be seen only as demolition of the old flats. The existing flats are to be replaced by new premises. The redevelopment arrangement provides for additional carpet area., after redevelopment, the property will be

different in form and will have better utility. The larger and redeveloped premises would normally have greater utility and value than the old premises., the Bank's interest cannot be treated as ending with Flat Nos.303 and 304 in their present condition. The security has to be considered with reference to the property which comes into existence after the redevelopment.

21. The question regarding addition or accession to mortgaged property was considered by the Privy Council in *K.B. Seth Sorabjee*. The Privy Council referred to Section 90 of the Indian Trusts Act, 1882 and observed:

> "The equitable principles applied by their Lordships in that case to acquisitions by a mortgagee have now been embodied by S. 90 of the Indian Trusts Act, 1882, in a wider rule dealing with acquisitions by tenants for life, co-owners, mortgagees and other qualified owners."

22. The principle contained in Section 90 is that when a mortgagee or another person having a limited interest in the property gets some benefit by using his position, that benefit cannot be dealt with in a manner which defeats the rights of other persons having interest in the property. The illustration relating to a mortgagee is relevant. The Privy Council reproduced the following provision:

> “90. Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or, where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained,

but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.

Illustrations.

(*a*) A, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease.

(*b*) A village belongs to a Hindu family. A, one of its members, pays nazrana to Government and thereby procures his name to be entered as the inamdar of the village. A holds the village for the benefit of himself and the other members.

(*c*) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A."

23. The above principle does not mean that every addition to the property becomes the absolute property of the Bank. It does not mean that the borrower loses every benefit which comes from redevelopment. The principle is that the mortgagee cannot use his position in such a manner that the rights connected with the property are defeated., when Flat Nos.303 and 304 are replaced by alternate premises in the redeveloped building, the Bank's security must continue over those premises. The rights of the borrowers and the rights of the Bank have to be worked out accordingly.

24. The Privy Council considered Section 63 of the Transfer of Property Act and reproduced the provision concerning accession to mortgaged property:

> "63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.
>
> "Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.
>
> "In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.
>
> "Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended."

25. The Privy Council thereafter explained the position regarding such accession and the rights of the mortgagee and mortgagor. It concluded:

> "In the present case it is sufficient to say that their Lordships are clearly of opinion that S. 63 of the Transfer of Property

> Act cannot be read as entitling the mortgagor to recover acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within S. 90 of the Indian Trusts Act."

26. The facts of the present case are different. Here, the additional area is not being purchased by the Bank. It comes as part of the redevelopment of the same property which is subject to the mortgage. Even so, the above principle is useful. The existing security has to continue in the redeveloped premises. The additional area is connected with the redeveloped property., it cannot be ignored while considering how the Bank's security is to be protected.

27. Therefore, the submission of Mr. Khandeparkar that the additional area can be considered as an addition to the mortgaged property has substance to that extent. However, the further submission that the entire cost of such additional area can be put upon the Bank cannot be accepted. The Bank has not signed the Development Agreement. It has not agreed to purchase the additional area., merely because the Bank has a mortgage over the flats, the obligation contained in Clause 8 of the Development Agreement cannot be imposed upon the Bank.

28. This conclusion is supported by the principle stated by the Supreme Court in *Rana Girders Ltd. v. Union of India, (2013) 10 SCC 746*, particularly paragraph 21. The Supreme Court held:

> "21. A harmonious reading of the judgments in *Macson* [(2008) 15 SCC 481 : (2003) 158 ELT 424] and *Sicom* [(2009) 2 SCC 121] would tend us to conclude that it is only in those cases where the buyer had purchased the entire unit

> i.e. the entire business, that he would be responsible to discharge the liability of Central Excise as well. Otherwise, the subsequent purchaser cannot be fastened with the liability relating to the dues of the Government unless there is a specific provision in the statute, claiming "first charge for the purchaser"."

29. The principle which can be taken from the above is that a person cannot be made liable only because he has some legal interest connected with the property. There must be basis for putting that particular liability upon him., in the present case, the Bank's security can continue over the property which replaces the existing flats and over the benefits connected with that security. But the Bank cannot be treated as having agreed to pay the developer for additional area merely because such a term is contained in the Development Agreement.

30. The next question is whether the Bank should still be compelled to accept the additional area. In my view, it should not be compelled to accept it. Respondent No.5 is the secured creditor and is admittedly in physical possession of Flat Nos.303 and 304 under the measures taken under the SARFAESI Act. The Bank must have the choice to decide, after considering the outstanding loan amount, the value of the redeveloped property and the terms of redevelopment, whether it wants to take the additional area by making the payment required for it. However, this choice cannot remain open without any time limit. The Petitioner and the Society have to proceed with the redevelopment and they cannot be kept uncertain for an unlimited period. The Bank has stated that it has no objection in principle to the redevelopment if its security is

protected. The Petitioner has stated that it is ready to modify the plan if the additional area is not required. In these circumstances, the Bank should be given a fixed and reasonable time to make its decision. Respondent No.5 Bank shall have the option to accept the additional area proposed in respect of Flat Nos.303 and 304. If the Bank decides to take the additional area, it shall inform the Petitioner and Respondent No.1 Society about its decision and shall pay the amount required for such additional area within two weeks from the date of the order. If the Bank does not exercise the option and does not make the required payment within two weeks, it shall be treated as having not opted for the additional area. In that event, the Petitioner shall be entitled to proceed with the redevelopment on that basis, subject to the other terms applicable to the redevelopment. This direction will not prevent Respondent No.5 Bank from protecting the value of its security when it takes steps for enforcement of the mortgage. It shall be open to the Bank to put an appropriate condition in the auction notice or auction terms. Such condition may give the auction purchaser an option to obtain the additional area by paying the amount required for such additional area. In such a case, the rights of the auction purchaser shall be governed by the auction terms. The Bank cannot be compelled at this stage to pay for the additional area merely because such area is available under the redevelopment scheme.

31. The submission that the additional area must become the property of Respondent Nos.2 to 4 cannot be accepted. The redeveloped premises are being created in place of the original mortgaged flats. The Bank's security cannot disappear merely

because the old building is demolished. If the Bank chooses the additional area and makes the necessary payment, such additional area shall form part of the security. If the Bank does not choose the additional area, the redevelopment may proceed by providing the area otherwise available under the sanctioned redevelopment arrangement, while continuing to protect the Bank's existing security.

32. I now consider the submission of Mr. Deokar that the rent and brokerage charges should be paid to Respondent Nos.2 to 4. It is admitted that the flats are in the physical possession of Respondent No.5 Bank. The transit rent and other amounts payable because the flats are being vacated for redevelopment arise in connection with the secured premises.Therefore, these amounts cannot be considered separately from the Bank's security interest. I find substance in the submission of Respondent No.5 that the monetary benefits arising from the mortgaged flats should remain subject to its security interest. At this stage it is not necessary for this Court to finally decide the borrower's account or the exact manner in which every amount has to be appropriated. The proper course is to direct that these amounts be paid to the Bank, subject to proper accounting towards the dues of Respondent Nos.2 to 4. Accordingly, the transit rent payable in respect of Flat Nos.303 and 304 shall be paid directly to Respondent No.5 Bank. The corpus amount, shifting charges, hardship or displacement compensation and other similar monetary benefits payable in respect of the said flats shall be paid or credited to Respondent No.5 Bank, subject to the outstanding

dues under the loan account. This will protect the Bank's security and at the same time will not create any fresh liability upon the Bank.

33. As regards brokerage charges, the material placed before the Court shows that an amount of Rs.20,700/- has been calculated towards one month's brokerage. This amount arises because of shifting and redevelopment of the flats. Since Respondent No.5 Bank is in possession of the flats and the flats are subject to its security interest, the brokerage amount relating to Flat Nos.303 and 304 shall be paid to Respondent No.5 Bank. The Bank shall account for the said amount in accordance with law and its rights as secured creditor.

34. The calculation regarding the area and the payment placed before the Court needs to be considered. The existing area of Flat Nos.303 and 304 is stated to be 414 square feet. The free 10% additional area is stated to be 41 square feet. The compulsory purchase area is stated to be 33 square feet. The amount stated for such compulsory purchase is Rs.6,60,000/-. The Petitioner has further stated that the total final area would be 488 square feet and that Rs.50/- per square feet would be payable towards the excess area. These calculations arise from the redevelopment arrangement. They do not make the Bank liable to pay the amount. If the Bank chooses to take the additional area, it shall pay only the amount required under the redevelopment arrangement for obtaining that additional area.

35. The submission of the Bank that the compulsory purchase arrangement was not agreed to by the Bank has force for the limited purpose of deciding whether a payment liability can be imposed upon the Bank. However, this Court is not deciding in the present proceedings the enforceability of the compulsory purchase clause between the Society, its members and the developer. If such a dispute arises, the concerned parties can pursue the remedy available to them in law. For the present proceedings, it is sufficient to hold that the said clause cannot be enforced against the Bank as if the Bank had signed the Development Agreement.

36. The judgment in *Pranav Constructions Limited v. Priyadarshini Cooperative Housing Society Limited, Arbitration Appeal (L) No.20093 of 2025, decided on 14 July 2025*, supports the limited manner in which disputes are required to be considered in a proceeding under Section 9. In paragraph 17, the Court held:

> "The members of the Society are bound by the covenants of the Development agreement and if they act contrary to the covenants of the Development agreement, the Court exercising power under Section 9 of the Act can step in and make necessary interim measures."

37. The same judgment makes it clear that merely because an individual member has a grievance regarding appointment of the developer, implementation of redevelopment or grant of additional area, such grievance cannot stop the redevelopment. Such grievance has to be dealt with in appropriate proceedings. In the present case, this Court is not deciding the entitlement of Respondent Nos.2 to 4 to additional area. The Court is not finally

deciding their rights against the Society. The present order is concerned with protecting the secured property and allowing redevelopment to proceed in a manner which does not defeat the Bank's security. Paragraph 18 of the said judgment considers the position of persons who are not members or signatories to the Development Agreement. The Court noticed that the position is different where a person claims that his premises are separate from the Society's building and should not be included in the redevelopment. In the present case, Respondent Nos.2 to 4 are concerned with flats forming part of the Society's building. There is no case that Flat Nos.303 and 304 are outside the redevelopment scheme.Therefore, the redevelopment of these flats cannot be stopped merely because there is a dispute regarding the exact area or the benefits which may be received.

38. The submission that the present Petition is not maintainable against Respondent No.5 because the Bank is not a party to the arbitration agreement has to be accepted only to a limited extent. This Court is not granting any final relief against the Bank. The purpose of the directions is to preserve the secured property and regulate the interim arrangement during redevelopment. If the old flats are demolished without making provision for corresponding security in the new premises, the Bank's security may become uncertain. Such a situation has to be avoided. Section 35 of the SARFAESI Act cannot be understood to mean that a secured property can never be redeveloped. The provision protects the operation of the SARFAESI Act against inconsistent provisions contained in other laws. It does not mean that redevelopment

must stop even when the Bank's security is properly protected. The Bank continues to have its independent remedies under the SARFAESI Act. Nothing in this order shall prevent Respondent No.5 from taking or continuing any action which it is entitled to take under Sections 13 and 14 of the SARFAESI Act in accordance with law.

39. The Bank is justified in insisting that its charge should continue over the alternate premises. If Flat Nos.303 and 304 are demolished for redevelopment, the security cannot be treated as having come to an end. The alternate premises constructed in their place shall continue to remain subject to the Bank's security interest to the extent of the outstanding dues. The same protection shall extend to the monetary benefits connected with the said flats, including transit rent, corpus, brokerage and other redevelopment benefits.

40. The submission that Respondent No.5 should hand over the alternate premises to Respondent Nos.2 to 4 cannot be accepted. The Bank is in possession of the secured flats. The arrangement concerning the alternate premises must protect the Bank's rights as secured creditor. Possession of the alternate premises shall be dealt with in a manner consistent with the Bank's security and the outstanding dues. Respondent Nos.2 to 4 cannot claim possession in a manner which reduces the security of Respondent No.5. However, the Bank cannot use its security interest as a reason to keep the redevelopment stopped. The redevelopment has been approved by the Society. The Petitioner and the Society have entered into the Development Agreement. The majority of the

members have given their consent and have executed PAAA or furnished written consents. Respondent No.5 has stated that it has no objection in principle to the redevelopment, provided its security is protected. Therefore, after the Bank's security is protected, there is no reason to keep the entire redevelopment project stopped only because of the dispute concerning the additional area.

41. The proper course is to allow the redevelopment to proceed while protecting the Bank's security and at the same time giving the Bank a genuine choice regarding the additional area. This choice has to be exercised within two weeks. The period is reasonable because the Bank is aware of the redevelopment proposal and is in possession of the flats. The Petitioner has to proceed with finalising the redevelopment plans. The Bank can take its decision after considering the value of the additional area, its outstanding dues and the manner in which it proposes to enforce its security.

42. In view of the foregoing discussion and for the reasons recorded hereinabove, the following order is passed:

(i) The Petition is partly allowed in terms of the following directions;

(ii) Respondent Nos.2 to 4 shall cooperate with the redevelopment of the property of Flat Nos. A-303 and A-304 to Respondent No.1 Society and/or the Petitioner;

(iii) Respondent No.5 Bank shall hand over vacant and peaceful possession of Flat Nos. A-303 and A-304 within 7

days from the date of receipt of written intimation from the Petitioner, subject to preservation of its mortgage, charge, priority, security interest and all other rights in respect of the said flats and the premises to be allotted in their place;

(iv) Respondent No.5 Bank shall hand over possession of Flat Nos. A-303 and A-304 for the limited purpose of demolition and redevelopment, such handing over shall not amount to waiver, release or extinguishment of its mortgage, charge or security interest. The Petitioner and Respondent No.1 Society shall hold and deal with the property only for the purpose of carrying out the redevelopment;

(v) The alternate/redeveloped premises to be allotted in lieu of Flat Nos. A-303 and A-304 shall remain subject to the mortgage, charge and security interest of Respondent No.5 Bank to the extent of the outstanding dues of Respondent Nos.2 to 4;

(vi) Respondent No.5 Bank shall have the option to accept the additional area proposed to be allotted in respect of Flat Nos. A-303 and A-304. If Respondent No.5 exercises such option, it shall communicate its decision to the Petitioner Respondent No.1 Society within two weeks from the date of this order and shall pay the amount required for such additional area;

(vii) If Respondent No.5 Bank does not exercise the aforesaid option within the period of two weeks, the Petitioner shall be entitled to proceed with the

redevelopment without allotting such additional area to the Bank;

(viii) It shall be open to Respondent No.5 Bank, while conducting any auction or other enforcement proceedings in respect of the secured asset, to incorporate an appropriate condition in the auction terms permitting the auction purchaser to exercise an option to obtain the additional area, subject to payment of the amount required for such additional area and subject to the applicable redevelopment terms;

(ix) Pending the hearing and final disposal of the arbitral proceedings, Respondent Nos.2 to 4, their agents, servants or any person claiming through or under them, are restrained from obstructing, interfering with or creating any hindrance in the demolition of the existing buildings and redevelopment of the subject property in accordance with the sanctioned plans;

(x) Prayer clause (c), insofar as it seeks the same restraint against Respondent No.5 Bank, shall stand modified. Respondent No.5 Bank shall not obstruct the redevelopment merely on the ground that it is the secured creditor, provided that its mortgage, charge, priority and security interest are duly preserved in accordance with this order;

(xi) Respondent Nos.2 to 4 shall not sell, transfer, assign, alienate, encumber, or create any third-party right, title or interest in respect of Flat Nos. A-303 and A-304 in any

manner which is inconsistent with the redevelopment and the rights of Respondent No.5 Bank as secured creditor;

(xii) The restraint contained in clause (xi) shall not prevent Respondent No.5 Bank from exercising its statutory rights and remedies under the SARFAESI Act, including the right to conduct auction or otherwise enforce its security in accordance with law;

(xiii) The transit rent payable in respect of Flat Nos. A-303 and A-304 during the redevelopment period shall be paid directly to Respondent No.5 Bank and shall be duly accounted for against the outstanding dues of Respondent Nos.2 to 4;

(xiv) The corpus amount, brokerage charges, shifting charges, hardship or displacement compensation and any other monetary benefit payable in respect of Flat Nos. A-303 and A-304 under the Development Agreement, PAAA or otherwise in connection with the redevelopment shall be paid or credited directly to Respondent No.5 Bank, to the extent of the outstanding dues of Respondent Nos.2 to 4, and shall be duly accounted for by the Bank;

(xv) Respondent No.5 Bank shall be entitled to continue to hold possession of the alternate/redeveloped premises allotted in lieu of Flat Nos. A-303 and A-304, subject to its rights as secured creditor and until the outstanding dues of Respondent Nos.2 to 4 are fully satisfied, unless otherwise directed by a competent Court or authority;

(xvi) Nothing contained in this order shall be construed as adjudicating upon the final rights of Respondent Nos.2 to 4 regarding the additional area or any other benefit claimed by them under the Development Agreement. Such rights, if disputed, shall remain open to be agitated in appropriate proceedings in accordance with law;

(xvii) Nothing contained in this order shall affect the independent statutory rights and remedies of Respondent No.5 Bank under Sections 13 and 14 of the SARFAESI Act;

(xviii) In view of the above directions, prayer clause (b) for appointment of the Court Receiver is not required, at this stage;

(xix) The Petitioner shall be entitled to proceed with the redevelopment of the subject property in accordance with the sanctioned plans, subject to the directions contained in this order and subject to preservation of the rights and security interest of Respondent No.5 Bank;

(xx) The Petition stands disposed of in the above terms.

(xxi) All contentions of the parties not specifically dealt with in this order are kept open only to the extent that they are required to be decided in appropriate proceedings and shall not be treated as having been finally adjudicated by this Court.

(AMIT BORKAR, J.)