1. These Petitions all raise a common question of law under the Maharashtra Stamp Act 1958. All of them relate to Stamp Duty sought to be levied on what are called Permanent Alternate Accommodation Agreements ("**PAAA**"). Typically, these are executed by a developer with individual members of housing societies or other persons already in occupation and whose houses are being redeveloped. As we shall presently see, these agreements follow a pattern. The society enters into an agreement, often called a Development Agreement ("**DA**") or a Redevelopment Agreement with a developer. That DA has two parts. One part is the construction of new homes for existing society members or occupants. The second part is the construction of what are called free sale units which the developer can put to sale in the open market. Sometimes, but not always, individual society members also sign the DA. Equally, there are many cases where the society executes the DA with the developer, but individual members do not. Those individual members are still members of the society and the society acts on their behalf.

2. There is no dispute that the DA is to be stamped. The issue is the demand by the stamp authority that *the individual PAAAs for members or existing occupants must also be stamped on a value reckoned at the cost of construction*. This overlooks a fundamental aspect, viz., that existing members and occupants are not in any sense 'purchasers' of the areas to which they are entitled in law on reconstruction. This may be an area equivalent to what they earlier occupied or, by operation of law, maybe slightly more. If a society

member or occupant purchases from the developer any additional area, then again it is not contentious that this additional area purchased by a member must be assessed to stamp duty. The Petitioners all make the point that so far as the existing area (or the area to which the members are entitled) is concerned, there is in fact no "purchase" at all. They are being provided new accommodation in *lieu* of earlier accommodation. In any case, the DA has already been stamped and covers all tenements or units to be constructed for the purposes of individual members of the society. There can be no question of stamping or of a levy of stamp duty twice for the same transaction. The other argument also raised is that for the purposes of the stamp, the PAAA is never independent of the DA. There are other dimensions to this argument which we will consider shortly.

3. On 9th December 2021, in Writ Petitions now numbered as Writ Petition No. 4575 of 2022, Writ Petition No. 4609 of 2022 and Writ Petition No. 4580 of 2022, we issued Rule and then made the following order.

> "1. Rule in all three Petitions.
>
> 2. The Petitions raised a question about the interpretation of validity of two circulars dated 23rd June 2015 and 30th March 2017 issued by the Inspector General of Registration and Controller of Stamps, Maharashtra State.
>
> 3. The issue will affect a large number of redevelopment projects across the State because it pertains to the stamp duty that is correctly payable on instruments typical in such projects. In Mumbai, in particular, redevelopment by societies will be affected.

4. The Petitioners have an estimated stamp duty liability adjudicated at about Rs 27 lakhs in each of the three Writ Petitions. They will be required to deposit 50% of the amount in each matter. Subject to that deposit being made by 3rd January 2022 and on the further undertaking, which we accept, to pay the balance if found due by this Court and if the Petitions fail, we permit the Petitioners to proceed with registration of the permanent alternate accommodation agreements in the form proposed.

5. The Sub-Registrar of Assurances and the Collector of Stamps will permit the registrations of the documents in question without insisting on payment of the adjudicated stamp duty liability. The deposit in Court is a pre-condition to registration. The Petitioners will have to place before the Sub-Registrar an authenticated copy of this order and proof of the deposit/s having been made. No registration is permitted unless and until the deposit/s are made.

6. If the deposits are not made by 3rd January 2022, this interim protection will cease without further reference to the Court and the Petitioners will not be entitled to have any of the documents registered.

7. The Sub-Registrar of Assurances and the Collector of the Stamps will act on production of an authenticated copy of this order.

8. We request Mr Samit Shukla who is present in Court to assist as Amicus. We also request him to brief counsel of his choice and if possible, either Mr Mayur Khandeparkar or Mr Karl Tamboly, each of whom has considerable experience in such matters.

9. Respondent Nos 1 to 3 waive service. So far as Respondent No 4 is concerned, we permit private service by courier.

10. Given the fact that the issue is relatively narrow but

> is likely to have a significant impact, we will give the matter priority and we list it for final disposal on 3rd February 2022.
>
> 11. All concerned will act on production of a digitally signed copy of this order."

4. Other Writ Petitions raising identical challenges came to be filed. Similar interim reliefs then came to be granted in the other matters. We have today heard learned Counsel, including Mr Shukla who appears as Amicus at our request. He has given us a compilation including some judgments to which we will refer a little later in this judgment.

5. One significant concern, as Mr Shukla points out, is that whenever this Court has pronounced the law on similar aspects relating to stamp, it is found that the stamp authorities choose to see that decision as being confined to the facts of that case. They then proceed to make the same demand again. This results in more petitions being filed in this Court, all revisiting laws already settled and decided. We deprecate this approach. For this reason, while we begin this judgment with a very short summary of the facts in each case, our interpretation of the law is not confined to the facts of these cases. This is also why we have in the very first paragraph of this judgment set out the general principle to which we address ourselves.

THE IMPUGNED CIRCULARS

6. On 4th June 2013, the State Government issued a circular that stamp duty would be chargeable on these PAAAs. The value would be computed on the basis of the costs of construction of the flats and the market value of the additional area if any. As we noted earlier, we are not concerned with the additional area stamp duty.

7. On 7th November 2013, the Chief Controlling Revenue Authority of the Maharashtra State issued a circular with guidelines for charging stamp duty on PAAAs. This said that the stamp duty would be computed on the costs of construction of the retained area. Where fungible FSI was used, stamp duty would be computed on the construction cost and the premium paid on the fungible area.

8. On 23rd June 2015, came the impugned circular from the Chief Controlling Revenue Authority. A copy of this is at Exhibit "A" and "A1" at pages 35 and 47 of Writ Petition No 4575 of 2022. This circular makes a distinction between what is called the cooperative society and the 'owners', meaning the members of the Society. The impugned circulars contemplate that any PAAAs between the Society members and the developer is different from the DA between the Society and the developer. Specifically, and this is the beginning of the problem that we noted earlier, this circular seeks to distinguish, in our view quite impermissibly for the reasons that follow, the Division Bench judgment of this in *Prabha Laxman*

Ghate v Sub-Registrar and Collector of Stamps.[1] We will consider that decision later.On 30th March 2017, the Chief Controlling Revenue Authority came out with a clarificatory circular. This is at Exhibit "A1" to Writ Petition No 4575 of 2022 at page 39. A translation is also annexed. This clarificatory circular purports to specify criteria that must be complied with and goes on to specify that only on such compliance PAAAs with individual society members would be treated as documents incidental to the DA, attracting the application of Section 4 of the Stamp Act. This 'clarificatory' circular purports to say that compulsorily individual society members must join in the execution of the original DA, i.e., that every single society member must countersign the DA and that the DA is thus not just bipartite or tripartite but if there is such a word, *multipartite*. The submission of course is that it is no part of the business of the Revenue Authority to specify the form of legally binding documentation.

9. The challenge in most of the Petitions is to both circulars, i.e., the circulars of 23rd June 2015 and 30th March 2017.

INDIVIDUAL PETITIONS

10. WRIT PETITION NO. 4575 OF 2022 (Adityaraj Builders-1, Petition No.1): The Petition relates to a DA dated 19th April 2012 with the 4th Respondent, the Tagore Nagar Suyog CHSL at Vikhroli. A stamp duty of Rs.8,32,450.00 was paid on this DA under Article 5(g-a) of the Maharashtra Stamp Act 1958. This

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1 2004 SCC OnLine Bom 74: (2004) 2 Mh. LJ 665: (2004) 4 Bom CR 148: AIR 2004 Bombay 267: (2004) 106 (2) Bom LR 745.

DA was followed by a set of Tripartite Agreements for PAAA between Adityaraj Builders, the Society and individual members. These Tripartite Agreements are related to the allotment of self-contained apartments of a carpet area of 484 sq ft. This area followed the applicable MHADA policy, guidelines and circulars and those of the State Government relating to redevelopment in such cases.

11. WRIT PETITION NO. 4609 OF 2022 (Adityaraj Builders–2, Petition No.2): This Petition is also by Adityaraj Builders. It also relates to the Tagore Nagar Manoranjan CHSL. Otherwise, the facts are identical. The DA here is dated 26th November 2015 and this was similarly followed with PAAAs with individual members. Stamp duty was paid on the main Agreement of Rs.50,87,400.00. Further stamp duty was paid on the Supplementary Agreement is Rs.88,580.00.

12. WRIT PETITION NO. 4580 OF 2022 (Adityaraj Builders–3, Petition No.3) is between Adityaraj Builders and the Tagore Nagar Saiprasad CHSL. The DA here is of 26th November 2015 and this was followed with PAAAs with individual members. Stamp duty was paid on the main Agreement of Rs.44,02,100.00. Further stamp duty payable on the Supplementary Agreement is Rs.85,725.00.

13. WRIT PETITION (L) NO. 32182 OF 2022 (Vaibhav Lakshmi Builders & Developers–1, Petition No.4) is between Vaibhav Laxmi Builders & Developers and the Chembur Crystal

CHSL at Chembur, Mumbai. The DA here is 15th March 2007 and this was followed with PAAAs with individual members. Stamp duty payable or paid on the main Agreement is Rs.1,16,335.00. Further stamp duty on the Supplementary Agreement is Rs.1,39,830.00.

14. WRIT PETITION (L) NO. 28336 OF 2022 (Vaibhav Lakshmi Enterprises-2, Petition No. 5) is by Vaibhav Laxmi Builders. The society is the Kannamwar Nagar Kranti CHSL. The DA is dated 20th December 2010 and the stamp duty paid is Rs.23,06,700.00.

WRIT PETITION (L) NO. 13608 OF 2022 (Vaibhav Lakshmi Developers-3, Petition No 6) is a third Petition by Vaibhav Laxmi Developers. The society is the Kannamwar Muktidham CHSL. The DA is of 20th June 2012 and the stamp duty paid is Rs.24,64,100/-.

15. WRIT PETITION (L) NO. 13295 OF 2022: (Varad Vastu Enterprises, Petition No.7) is by Varad Vastu Enterprises. The society is the Tilak Nagar Lok Seva CHSL in Chembur. The DA here is of 3rd November 2006. There was a Supplementary Agreement of 26th September 2012. Stamp duty was paid on the main Agreement of Rs.3,36,590.00. Further stamp duty paid on the Supplementary Agreement was Rs.13,43,550.00.

16. WRIT PETITION (L) NO. 24539 OF 2022 (Konark Shakti, Petition No.8) is by two individuals and the developer, Konark Shakti. The society is the Lijjat Godawari CHSL and the

development is at Kandivali (West). The DA in question is of 20th July 2016. Stamp duty was paid on the DA of Rs.1,47,43,300.00 followed by a PAAAs.

17. WRIT PETITION (L) NO. 41143 OF 2022 (Kabra Estates, Petition No.9) is filed by the Juhu Chandan CHSL, the developer Kabra Estate and Investment Consultant, and a partner of Kabra Estates. The Redevelopment Agreement is of 9th May 2016. The Society's property is at Ville Parle (West). The stamp duty paid or payable is Rs.1,85,92,600/-.

GENERAL DIRECTIONS

18. All Writ Petitions that are on a stamp number are to be finally numbered with objections removed by 6th March 2023.

19. In all Petitions where Rule has not been issued, Rule is hereby issued. Respondents waive service. Rule is made returnable forthwith and all Petitions are taken up for hearing and final disposal.

20. Ms Chavan for the State Government tells us that there is an Affidavit in Reply filed by the State Government on the legal aspects in Writ Petition 2310 of 2016. We are surprised that the 2016 Petition which was admitted has never been sought by the Government to be tagged or listed with this group. That is now really no longer our concern since this group has been listed before us several times. Obviously, the 2016 Petition at least to the extent to

the question of law will be covered by the present Petition. In any case, the 2016 Petition is or must be overtaken by subsequent events because these Petitions all pertain to the clarificatory circular of 30th March 2017 as well. For whatever it is worth we will treat that Affidavit in Reply on law as an Affidavit in Reply to all these Petitions.

ANALYSIS AND FINDINGS

21. First, we set out the provisions of Article 5(g-a) of The Maharashtra Stamp Act 1958:

Description of Instrument	**Proper Stamp duty**
1	2
5. AGREEMENT OR ITS RECORDS OR MEMORANDUM OF AN AGREEMENT—	
(g-a) (i) if relating to giving authority or power to a promoter or a developer, by whatever name called, for construction on, development of or, sale or transfer (in any manner whatsoever) of, any immovable property.	The same duty as is leviable on a Conveyance under clauses (b) or (c), as the case may be, of Article 25, on the market value of the property. Provided that, the provisions of section 32A shall, *mutatis mutandis,* apply to such agreement, records thereof or memorandum, as they apply to an instrument under that section: Provided further that, if the proper stamp duty is paid under clause (g) or article 48 on a power of attorney executed

Description of Instrument	Proper Stamp duty
	between the same parties in respect of the same property then, the stamp duty under this article shall be one hundred rupees.
(ii) if relating to the purchase of one or more units in any scheme or project by a person from a developer: Provided that, on conveyance of property by the person, under an agreement under this sub-clause to the subsequent purchaser, the duty chargeable for each unit under this sub-clause shall be adjusted against the duty chargeable under Article 25 (conveyance) after keeping the balance of one hundred rupees, if such transfer or assignment is made within a period of one year from the date of the agreement. If on adjustment, no duty is required to be paid, then the minimum duty for the conveyance shall be rupees one hundred. *Explanation.* — For the purposes of this sub-clause, the unit shall include a flat, apartment, tenement, block or any other unit by whatever name is called, as approved by the Competent Authority in the building plan.	The same duty as is leviable on conveyance under clause (a), (b) or (c), as the case may be, of Article 25 on the market value of the unit.

22. The principal Article has been amended many times. As we can see, it relates to every kind of Agreement or a record of an Agreement or Memorandum of an Agreement. Our concern here admittedly is only with sub-Clause (g-a). This has two sub-clauses, a proviso and an explanation. For our purposes, it is sufficient to note that such an Agreement is treated on par with a conveyance under Article 25 of the Maharashtra Stamp Act 1958. There is no issue raised under Article 25, so we need not reproduce it.

23. With this we turn to the provisions of the Stamp Act itself. The Act was most recently amended in 2021. The relevant definitions are as follows:

> "2. In this Act, unless there is anything repugnant in the subject or context, —
>
> (d) "chargeable" means, as applied to an instrument executed or first executed after the commencement of this Act, chargeable under this Act and as applied to any other instruments, chargeable under the law in force in the State when such instrument was executed or, where several persons executed the instrument at different times, first executed;
>
> (g) "Conveyance" includes, —
>
> (i) a conveyance on sale,
>
> (ii) every instrument,
>
> (iii) every decree or final order of any Civil Court,
>
> (iv) every order made by the High Court under section 394 of the Companies Act, 1956 or every order made by the National Company Law Tribunal under sections 230 to 234 of the Companies Act, 2013 or every confirmation issued by the Central

> Government under sub-section (3) of section 233 of the Companies Act, 2013, in respect of the amalgamation, merger, demerger, arrangement or reconstruction of companies (including subsidiaries of parent company); and every order of the Reserve Bank of India under section 44A of the Banking Regulation Act, 1949 in respect of amalgamation or reconstruction of Banking Companies.

by which property, whether moveable or immovable, or any estate or interest in any property is transferred to, or vested in, any other person, inter vivos and which is not otherwise specifically provided for by Schedule I.

(h) "duly stamped" as applied to an instrument means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in the State.

(ja) "immoveable property" includes land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

(l) "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt.

Explanation.—The term "document" also includes any electronic record as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000.

(na) "market value" in relation to any property which is the subject matter of an instrument, means the price which such property would have fetched if sold in open market on the date of execution of such instrument or the

consideration stated in the instrument, whichever is higher."

24. Chapter II of the Act deals with stamp duties. Part (A) of Chapter II is of direct concern and it deals with the liability of instruments to duty, i.e., it deals with those instruments that are liable to stamp. Section 3 specifies the class or classes of instruments that are chargeable with duty:

> "**3. Instrument chargeable with duty**
>
> Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in Schedule I as the proper duty therefor respectively, that is to say—
>
> (a) every instrument mentioned in Schedule I, which, not having been previously executed by any person, is executed in the State on or after the date of commencement of this Act;
>
> (b) every instrument mentioned in Schedule I, which, not having been previously executed by any person, is executed out of the State on or after the said date, relates to any property situate, or to any matter or thing done or to be done in this State and is received in this State:
>
> **Provided** that a copy or extract, whether certified to be a true copy or not and whether a facsimile image or otherwise of the original instrument on which stamp duty is chargeable under the provisions of this section, shall be chargeable with full stamp duty indicated in the Schedule I if the proper duty payable on such original instrument is not paid:

Provided further that no duty shall be chargeable in respect of—

(1) any instrument executed by or on behalf of, or in favour of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument or where the Government has undertaken to bear the expenses towards the payment of the duty.

(2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Bombay Coasting Vessels Act, 1838, or Merchant Shipping Act, 1958."

25. We are not concerned in this case with instruments executed outside the State. For our purposes. the reference to Schedule I (which contains the Articles including the ones that we set out above) is sufficient. Then come Sections 4, 5 and 6. Each of these relates to situations of what we will call multiplicity. Section 4 pertains to several instruments relatable to a single transaction of development, agreement sale, lease, mortgage. Section 5 deals with instruments that relate to distinct matters. Section 6 is clarificatory and addresses itself to instruments that come within different descriptions in Schedule I. We reproduce Sections 4, 5 and 6:

"**4. Several instruments used in single transaction of development agreement, sale, lease, mortgage or settlement.**

(1) Where, in the case of any development agreement, sale, lease, mortgage or settlement, several instruments are employed for completing the

transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I for the conveyance, development agreement, lease, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of one hundred rupees instead of the duty (if any) prescribed for it in that Schedule.

(2) The parties may determine for themselves which of the instruments so employed shall, for the purposes of sub-section (1), be deemed to be the principal instrument

(3) If the parties fail to determine the principal instrument between themselves, then the officer before whom the instrument is produced may, for the purposes of this section, determine the principal instrument:

Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.

5. Instruments relating to several distinct matters or transactions

Any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under this Act.

6. Instruments coming within several descriptions in Schedule I

Subject to the provisions of section 5, an instrument so framed as to come within two or more of the descriptions in Schedule I shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties:

> **Provided** that nothing in this Act contained shall render chargeable with duty exceeding one hundred rupees a counterpart or duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid."
>
> (*Emphasis added*)

26. On a plain reading of the caption of Part (A) and the titles of Sections 3, 4, 5 and 6, the one thing that is apparent, and this again is not contentious in law, is that stamp duty is attracted by the instrument.

27. Section 4(1) is the concept of what has been called in a different branch of law, the "Master Agreement". This is familiar to transactional documentation in various kinds of commercial dealings. Examples abound: there may be a two-part Leave and License Agreement, one relating to the immovable property and the other to furniture and fixtures. In arbitration law, this is even more familiar. There is a settled line of authority from the Supreme Court that parties' attempts to avoid arbitration by claiming segregation in separate Agreements has not been permitted: *see Chloro Controls India Pvt Ltd v Severn Trent Water Purification Inc & Ors.*[2]

28. In the context of redevelopment and the rights of individual members of a cooperative society, the law itself has been well settled in different dimensions. There used to be an argument that individual society members have rights independent of the society

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2 (2013) 1 SCC 641.

in dealing with third parties. A Single Judge of this Court negatived that contention: *Aditya Developers v Nirmal Anand CHSL*.[3] This decision has been followed consistently. A Division Bench of this Court, speaking through AM Khanwilkar J, as he then was, in *Girish Mulchand Mehta & Anr v Mahesh S Mehta & Anr*[4] specifically dealt with this argument where there were two sets of agreements or dealings, one with the society and the other with members, the members would have rights independent of the society. That judgment was specifically in the context of a development agreement with a society and separate agreements with members, and a situation where members had not signed the DA. The Court held that members were nonetheless bound by the terms of the DA (albeit for the purposes of the arbitration act). There is a long line of authority in this vein. We need not revisit it.

29. Whether in the context of arbitration and commercial law or in cases of transactions between a developer and a society has now evolved such that an agreement between an outsider and a society binds members of the society. Conversely, an agreement with an individual member is part and parcel of, included in, covered by or subordinate to the principal DA between the society and the developer. The situation is highlighted perhaps most dramatically when it comes to arbitration clauses. These are to be found in DA between the society and the developer. This was the case in *Girish Mulchand Mehta* when the Court was told that the arbitration clause bound only the society. Other provisions of the DA bound only the

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3 2016 SCC OnLine Bom 100 : 2016 (3) Mh LJ 761, per KK Tated J.

4 2009 SCC OnLine Bom 1986 : (2010) 2 Mah LJ 657 : (2010) 1 Bom CR 31.

society. Because individual members had not signed the DA, therefore they were not bound by the arbitration agreement or certain other provisions of the DA. The Court had not the slightest hesitation in repelling this argument.

30. Lest it be brought into question again, we take the opportunity of now once again reaffirming *Girish Mulchand Mehta* in every single aspect. We most respectfully are in accord with the entirety of its findings.

31. This assessment of the law as pronounced by the Courts, fit exactly with the statutory contemplation under Section 4(1) of the Stamp Act, extracted above. The statute itself makes no distinction between several instruments being used to "complete the transaction". All instruments are treated as one. The Section may not use the words 'Master Agreement' but the statutory intent is plain and unmistakable.

32. Is there a meaningful distinction to be made between the society and its members in the context of a re-development by an outsider (a developer)? What precisely is the relationship between a DA by a developer with the society and PAAAs by the developer with the members?

33. The distinction that there exists a juristic entity known as the society even *without* its members is a submission that has only to be stated to be rejected. A cooperative society without members is a creature unknown to law.

34. This guides our approach to the needlessly nice distinction sought to be made between a DA and a PAAA. In executing a DA, the society acts for all its members — even those who may disagree, because a society sometimes is run by majority. The PAAA may provide for other matters such as bespoke questions of the amount of transit rent, individual flat numbers, distinct flat sizes, and so on. But a PAAA is only a particularisation per member of the redevelopment contemplated by the DA itself. To view it differently, it is the *society* that goes into re-development. This is governed by the DA. There can, conceivably, be a DA without a single PAAA — for example by adding pages and pages of annexures, one per member — but there can never be society re-development only by PAAAs without a DA with the society. It is, therefore, a distinction without a difference. The segregation is merely one of convenience. It is done thus for simplicity, clearer understanding. and ease of reference of all concerned.

35. For the purposes of Section 4(1), therefore, the entirety of PAAA may be physically included in a DA. If that be done, then there is only one Agreement covering the whole of the DA. Then the charging of stamp duty by the stamp authority simply would not arise because there is no method by which the stamp authority could levy stamp on every annexure to a DA.

36. The requirement in the impugned clarificatory circular of 30th March 2017, that every member must also sign the DA suffers from two vulnerabilities. *Firstly*, it is entirely beyond the jurisdictional remit of the revenue authorities to dictate what form

the instrument must take. A revenue authority must take the instrument as he finds it. *Secondly*, there is no concept in law of a society not representing the interests of all its members. As we noted, societies are often accused of something very close to mob rule because it is sheer brute force majority that prevails in a society. As Tated J held in *Aditya Developers*, once a person becomes a member of a society, and no one is ever compelled to become a member of any society, he loses his individuality and is subsumed within the identity of the society. Of course, there are often disputes between a member and the society but those are to be separately dealt under the Maharashtra Cooperative Societies Act by the jurisdictionally competent authorities. This requirement by the stamp office that unless a member personally signs the DA, Section 4(1) is not attracted is a submission that is purely of the stamp authorities' or the state government's own invention. It is unanchored to anything in law or, for that matter, logic.

37. Ms Chavan raises a question regarding the area, i.e., the square footage of the redeveloped homes. She puts it like this. If a person occupying 350 sq ft in the old building receives 350 sq ft in the new building, then there is no question of additional stamp duty. Unfortunately for Ms Chavan, the circulars in question do not make this distinction at all. They treat every PAAA irrespective of the area as effectively an instrument of purchase of new premises. That is plainly wrong and cannot be sustained.

38. The next point that Ms Chavan makes is that sometimes by operation of law, a member is entitled as of right to an additional

area over and above the area that he or she presently occupies. Under the Development Control & Promotion Regulations 2034 ("**DCPR**"), and extant policy of other authorities such as the Maharashtra Housing & Area Development Authority regarding on cessed building redevelopment, or in the case of society redevelopment, an additional area is promised to existing occupants. Let us take one dramatic recent example that of the massive redevelopment currently planned of the BDD chawl at three locations in Mumbai. Every one of the existing tenants/occupants has premises between 170 and 240 sq ft. They are all promised, without any element of purchase, rebuilt homes of 500 sq ft with built-in toilets and bathing facilities. It surely cannot be suggested that these persons who are entitled to an enhanced area on redevelopment by MHADA are deemed to be 'purchasers' of not only the existing area but the increased area in their rebuilt homes. There is no exemption from stamping that is pointed out to us for such transactions. We do not see how the stamp authorities' or State Government's logic can be differentiated between a MHADA redevelopment and a redevelopment privately between a society and a developer.

39. There is a third element regarding square footage. Sometimes the society member has the option of purchasing even further area. To be clear, this means not only the inch-for-inch, square-feet-for-square-feet area equivalent to what that member earlier occupied, and any additional area permissible free under law, but, in addition, additional area available to the project that any member may purchase for valuable consideration. We noted at the beginning that none of the Petitioners have any quarrel with the payment of stamp

duty computed on the third element, that is the purchase of free sale of additional area added to members' rebuilt tenements. Every one of the societies, developers and, in at least one case, individual society members accept that they are liable to pay full stamp duty on that purchased additional area. They also agreed that the stamp duty is to be reckoned for the additional purchase area at market value and not at the cost of construction.

40. The last argument on area, presented by Ms Chavan, is about the concept of what is called "fungible FSI". This is indeed a peculiar concept in development law and it may not be appropriate to enter into a larger discussion. It is enough to note that additional Floor Space Index or buildability, or the right to put up more built-up area, is available under the concept of fungible FSI. This is nothing but additional FSI, over and above that permissible on the plot. It can be purchased for what is called a premium. If the plot area is 2000 sq ft and the *permissible* FSI is 3.0, the built-up area is 2000 x 3 = 6000 sq ft. Additional FSI may be purchased at a premium. This is the 'fungible' FSI. How that fungible FSI is dealt with is a matter between the Society (representing all members) and the developer. It is always the subject matter of the DA. In some cases, the developer may agree to make it available pro rata, free of cost to members. In some cases, the developer and society may agree that members will have to pay for additional fungible FSI. The amount of available fungible FSI is also capped, and most DAs therefore require the builder — as part of the consideration — to make this available free to members through the society.

41. There can be no question of members having to pay stamp duty on acquisition of additional built-up area or carpet area derived from fungible FSI. The only stamp duty a member must pay is for any additional area that she or he actually purchases for consideration.

42. The reason for this is self-evident. It takes us to the concept of redevelopment to begin with. The society is the owner of the structure and the land. It is the society that owns the property and the land. Members have shares in the society. That membership allows them to have occupancy rights for individual flats and use of certain parking spaces, garages, common areas and facilities and so on. When a member 'sells' her or his flat, she or he is actually selling membership of the society. That is treated as a conveyance because the membership, apart from the right to stand for and contest elections, is the right to hold, occupy, possess and enjoy an immovable property. The law earlier was, until it was clarified in the early 1980s by a Division Bench of this Court, that a transfer of shares in a society did not attract stamp as a conveyance. This Division Bench held that it did, and that law has now for the last 35 years have been firmly settled. It is impossible to argue that the land and building are not the property of the society itself. In redevelopment, this means that it is the society that has the right to all benefits on the land on redevelopment. This includes any incentive FSI, additional FSI as permissible in law (and possibly, if so agreed, fungible FSI as well). A society may not have the means to carry out redevelopment on its own. It may just not have the funds to engage a project management consultant, architect, and a civil contractor. The DA comes into play because it is the developer

who bears the burden and costs of redevelopment. But consideration must pass between the developer and the society. That consideration takes the form of the society yielding or ceding to the developer in lieu of cash consideration, and additional FSI benefits. This is the free-sale component that is made available to the developer. This is the consideration. The developer's obligation is to complete construction and deliver possession (and of course to pay transit rent in the meantime plus such amounts as may be negotiated between the parties.) If what Ms Chavan says is correct, then this entire structure in law is completely obliterated. A simple illustration will suffice. If a society decides to undertake the redevelopment itself without appointing a developer, but, instead, itself engages an architect, a structural engineer and a contractor, it is clear that all benefits of redevelopment will belong to and only to the society. Every member of the society will be entitled to a larger flat on redevelopment. But there will be no PAAA because it is the society that is doing the development itself. Any additional FSI will be consumed by the society itself. Any free-sale FSI will be available to the society and the society may itself sell those free-sale flats (on which stamp duty will be paid at the market rate). In that scenario, the principle being advocated by the stamp authorities completely fails: it would mean that in society redevelopment, there is no stamp duty payable in regard to the redeveloped homes, but this duty is payable only when a developer enters the picture. To put it even more bluntly: the developer is not selling homes to society members on re-development. The only sale is of any additional area that the member purchases. The rest is an obligation to be performed by the developer in consideration of the members, through their society, giving the developer the benefit of the free-sale units.

43. We are concerned here with only one aspect: the redevelopment of society buildings and premises. It does not matter how that redevelopment takes place. From the perspective of a society member, she or he is getting: (a) a home in replacement of a home; (b) a larger home in replacement of a smaller home; and (c) the option of purchasing additional area for the replacement home. It is only item (c) that can ever be brought to stamp. Items (a) and (b) are never liable to stamp.

44. The case of *Prabha Ghate* is interesting. That case also related to stamp duty under Article 5(g-a), DAs and societies. The challenge dealt with an amendment that came into from 7th February 1990 and a DA of 10th April 1995. In paragraphs 3 and 4 the Division Bench speaking through FI Rebello J, as he then was, said:

> "3. Having heard the learned Counsel for both the parties, the real question is whether the petitioner is liable to pay tax on the agreement either under Article 5(g-a) as amended or by treating the document as a conveyance. Dealing with Article 5(g-a), it is clear that the said Article applies only in respect of those agreements which have come into effect from 7th February 1990. The amending Act though published in the official gazette on 16th January 1997, insofar as Article 5(g-a) came into force with effect from 7th February 1990. There is no dispute between the parties that the agreement in question was before that date having been entered into on 10th April 1989. It is thus clear that insofar as the agreement in question is concerned, no stamp duty was payable. Stamp duty, if at all, would be payable only in respect of those agreements as set out under Article 5(g-a) which are entered into on or after 7th

February 1990. This being not the case, in the present petition, the demand made by the respondents even at the petitioner's request on that count is liable to be set aside. Even assuming that the petitioner had wrongfully applied, that, by itself, is no ground for the respondents to insist on the petitioner paying stamp duty, if the same is not due and payable according to law. The respondents, therefore, could not call upon the petitioner to pay the stamp duty on agreement. The demand by the respondents is clearly without jurisdiction.

4. The second contention of the respondents is that the Agreement dated 10th April 1989 is a conveyance. Conveyance in law would contemplate a transfer of the property or interest from one person to another. **In the instant case, on a perusal of the agreement between the petitioner and the developer, it is clear that there has been no transfer of property or interest in property by the petitioner in favour of the developer. On the contrary, all that is provided is that the developer shall develop the property and reserve for the petitioner herein two flats on the said property. The developer in turn was given the right to sell FSI in respect of other four flats. The petitioner, therefore, continued to be the owner of the property and if and at all in respect of the other four flats, at the highest, on the conveyance being entered into with parties purchasing the flats, stamp duty would be payable. Insofar as the two flats, which are reserved for the petitioner on her own land, the petitioner continued to be the owner of the land and the flats and, therefore, there was no question of the petitioner being called upon to pay stamp duty.**

Even in respect of the remaining four flats, the petitioner has averred in paragraph 5 of the petition that the four flat purchasers had already paid their respective stamp duties for their flats as such there is no requirement of

> payment of stamp for the agreement. Insofar as these averments are concerned, there is no specific denial by the petitioner. Even otherwise, at the highest, if the flat purchasers had not paid the stamp duty, it is only those other flats which have been transferred to the flat purchasers which will be assessable to stamp duty. **It is clear that insofar as the petitioner is concerned, the developer has only constructed a building for the petitioner on the petitioner's own land and there has been no transfer of interest in the property in favour of the developer nor would the agreement constitute an instrument under which any right, title or interest has been transferred from the petitioner to the developer.** The very fact that Article 5(g-a) was introduced by the amendment would indicate that the legislature, in order to bring such transactions, which otherwise were not covered under the provisions of the Act, as it then stood, thought to amend the Stamp Act and bring such transactions also within the ambit of the Stamps Act and subject to duty. Considering that we find that the second contention of the respondents is also devoid of merit."
>
> (*Emphasis added*)

45. Now as we can see, there was no question of limiting the decision in *Prabha Ghate's* case to the facts of that case. Paragraph 4 sets out the position in law. The clarificatory circular of 30th March 2017 attempts to bypass the decided jurisprudential question.

46. For our present purposes, it is necessary to reproduce both circulars of 23rd June 2015 and 30th March 2017. The originals annexed in Marathi are illegible. Translations have been provided. Nobody has told us that these transactions are inaccurate, and we

refer therefore to these. The 23rd June 2015 guidelines at page 37 to 38 read thus:

O.No.15/Va.Mudat/Guidelines/ 621
Office of the Inspector General of
Registration and Controller of Stamps,
Government of Maharashtra, Pune.
Date : 23/06/2015

Circular

Subject: Regarding stamp valuation at the time of allotment of area to the members in new building in redevelopment project of the Co-operative Housing Society.

In the cases similar to the case of Prabha Laxman Ghate, while transferring the built-up area to the original owner vide the incidental document to be executed as per the development agreement executed between the owner of the property and the developer, directions were issued pursuant to a circular No. Petition-2013/1425/ Pra. Kra. 260/ M-1 dated 09/05/2014 of Revenue and Forest Department, to charge stamp duty as per Section 4 of the Maharashtra Stamp Act.

This office observed that different types of stamp duty has been charged on the documents executed at the time of allotment of new premises/ tenements in the new building to the members in Redevelopment Project of the Co-operative Housing Society.

The guidelines given in the above Government circular are applicable only to cases similar to the case of Prabha Laxman Ghate, while transferring the built-up area to the original owners vide the incidental document to be executed. In redevelopment project of the Co-operative

Society the development agreement has been executed between the Co-operative Society (Original Owner) and Developer. Therefore, in the incidental agreement to be executed in favour of Co-operative Society in accordance with the said redevelopment agreement so executed, it is necessary to charge stamp duty as per Section 4 of the Maharashtra Stamp Act.

However, if the development agreement is executed only between the Co-operative Housing Society and Developer, the document to transfer the premises/ tenements, which is for the personal benefit to the original member of the housing society, it is not to be construed as an incidental agreement pursuant to the original development agreement and it shall be treated as an independent agreement. Therefore, on such documents, stamp duty shall be levied on the construction costs for the area approved by the housing society for the premises/ tenements to be transferred. If member is purchasing additional construction area to that, then in such cases, stamp duty shall be levied on the basis of the Annual Ready Reckoner Rate table (Premises/ shops/ tenements/ office/ industrial).

Copy of the said Circular is available on www.igrmaharashtra.gov.in website in Circulars under the Publication heading.

Sd/-
(Dr. Ramaswami N.)
Inspector General of Stamps and
Controller of Stamps
Government of Maharashtra, Pune

(*Emphasis added*)

47. The 23rd June 2015 guidelines reference the *Prabha Ghate* case. The exception sought to be carved out by the last paragraph is clearly incorrect. On the face of it, this exception is unsupported by the decision of this Court in *Prabha Ghate*. It is an impermissible and entirely incorrect assessment of the nature of the transactions and of the statute.

48. The second clarificatory circular of 30th March 2017 refers to the 23rd June 2015 circular, and reads thus:

> No.K.5/Stamp-17/Pra.Kr.10/13/303/17
> inspector General of Registration & Controller of Stamps (Maharashtra State),
> Gr.Floor, New Administrative Building,
> Opp. Vidhan Bhawan, Pune-1.
> Date: 30.03.2017
>
> **CIRCULAR:**
>
> Subject: Regarding stamp duty on the document executed in favour of a member after redevelopment of the property of Co-op. Housing Society is completed.
>
> Reference: Circular No.K.15/Bamudat/ Margarshak Suchana/621 dt.23.06.2015 of the office of Inspector General of Registration.
>
> **INTRODUCTION:**
>
> 1) It has been made clear vide Government Revenue & Forest Department Circular No. Petition-2013/1425/ Pra.Kra. 260/M-1 dt. 09.05.2014 that, while transferring the built up area to the owner vide the incidental document to be executed as per the development agreement executed between the owner of the property and the developer, the property does not get

transferred, hence stamp duty on such documents should be charged as per Sec.4 of Maharashtra Stamp Act.

2) Pursuant to the above, clarification as to how the stamp duty should be charged while giving premises in the new building in redevelopment project of old building of the co-operative housing society (i.e. when the original owner is a certain housing society), has been given in Circular No. K.15/Bamudat/ Margadarshak Suchana/621 dt. 2306.2015 issued by the office of Inspector General of Registration, in which it has been clearly stated that,

(A) **If a development agreement has been entered into between the housing society (original owner) and developer and when the incidental agreement in compliance of the said agreement is executed in favour of housing society, the stamp duty on such incidental agreement should be charged as per Sec. 4 of Maharashtra Stamp Act.**

(B) **However, <u>if the development agreement has been executed only between the housing society (original owner) and developer</u>, the document transferring the flat/unit in individual favour of the original member of the housing society will <u>not</u> be treated as an incidental document made for compliance of the original development agreement, but will be an independent document.** Therefore, the stamp duty for the area approved by the housing society for the flat to be transferred through such document, should be charged on the construction cost.

3) National Real Estate Development Council, Mumbai and other various units had called for detailed explanation of this clarification from this office. It was especially demanded that, the document to be executed in individual favour of the member in compliance of the tripartite development agreement entered into between the developer, housing society and member, is required to be treated as the incidental document of the original development transaction/agreement, hence the provisions of Section 4 should be made applicable to such agreement.

On deliberations of the above factors, following explanation is being given:

(1) **In cases where the development agreement has been made only between the housing society (owners) and developers, the individual member is not a party to such development agreement, hence the provision of Section 4 will not be applicable to the transfer document in his (member) favour and the stamp duty will have to be charged as mentioned in 2(B) in the introduction above.**

(2) **In cases where the following criterion are being complied with —**

(a) if a tripartite development agreement has been made between the housing society (original owner), member and developer, And,

(b) if a condition of making separate transfer document of new flat in favour of each member is incorporated in the original development agreement, And,

(c) if there is limited objective of transferring the built-up area in the transfer document

in favour of the said member as per the terms and conditions of the original development agreement. And,

(d) if the housing society is a consenter party in the transfer document in favour of such individual member,

in such circumstances, the transfer document in favour of the individual member shall be treated as incidental document of the original development agreement and the provisions of Sec. 4 should be made applicable to it.

(3) Here, it is clarified that the above explanation will be applicable only to the area agreed in the development agreement. In case the member is getting/purchasing more that the said agreed area, the stamp duty should be charged on the valuation arrived at as per the Annual Market Value Rate Chart for such additional area (flat/shop unit/office/industrial) or the consideration amount, whichever is more, as clarified in the circular under reference.

(4) However, in regard to the criterion regarding the document in favour of individual member as mentioned in Sr.No.2 above especially regarding confirmation about the compliance of the Criteria (c), is quasi-judicial process. Hence the directions are also being given that, if the parties in such document are of the opinion that these criterion in regard to the document are being complied with and that the provision of Sec.4 is becoming applicable, then they may get one such transfer document in the redevelopment scheme adjudicated from the Collector of Stamps and accordingly the Sub Registrar may directly register

other similar documents having same draft in the scheme as per the adjudication decision.

A copy of this circular is available on website www.igrmaharashtra.gov.in of Registration & Stamp Department under the category Publication at 'Circulars'.

1) All the Collectors of Stamps

2) All Sub Registrars

Issued
sd/-
Jt Inspector General of Registration &
Supdt of Stamps (H.Q.), Maharashtra"

(*Emphasis added*)

49. The reference here seems to be to a requirement that the DA between the developer, the society and the member should be treated as an incidental Agreement attracting Section 4(1). There is no problem with that requirement. The difficulty is with the refusal to see the PAAA for what it actually is, and to demand that there should be only one document, tripartite or multi-tripartite in nature, that everybody must sign. As we noted, that does not even stand to reason because if everybody signs the document, then Section 4(1) which speaks of several instruments (meaning more than one document) simply has no application. Section 4(1) clearly contemplates more than one document. It does not speak of more than one party to a single document. The stamp authorities are not entitled in law to issue such a circular or to insist on any such requirement.

50. Further, in the 30th March 2017 circular, the distinction to be drawn between the agreed area is only applicable where a society member purchases at market value or agreed value additional FSI or built-up area. It cannot apply to a member getting an equivalent area or additional area as permitted in law. The conditions and criteria imposed in sub-Clause (2) that there must be a Tripartite Development Agreement, that this must require the execution of PAAA, that the only objective must be to transfer the existing built-up area and that the society must also be a consenting party to the PAAA is not a requirement in law. It cannot be imposed at all under the Stamp Act. Most certainly, it cannot be applied by means of a circular. It is in fact entirely doubtful whether the circular is even law. It certainly cannot do something that the parent statute does not contemplate.

51. The difficulty with the 30th March 2017 circular is that it apart from saying that it is a guideline or a circular, and apart from setting out certain criteria, that document purports to create certain exclusions, exemptions and prohibitions. Viewed from any perspective what it says is that if a document does not conform to the entirely artificial criteria set out in that circular, and which have no basis in law, then the PAAA must be assessed to stamp although there is nothing in PAAA that is any sense an exception to, a departure from or a variation of the DA.

52. The only possible addition there is the extra area, but that, as we noticed, is not even the subject matter of the controversy before us.

53. The result of this discussion is as follows:

(a) A Development Agreement between a cooperative housing society and a developer for development of the society's property (land, building, apartments, flats, garages, godowns, galas) requires to be stamped.

(b) The Development Agreement need not be signed by individual members of the society. That is optional. Even if individual members do not sign, the DA controls the re-development and the rights of society members.

(c) A Permanent Alternative Accommodation Agreement between a developer and an individual society member does not require to be signed on behalf of the society. That, too, is optional, with the society as a confirming party.

(d) Once the Development Agreement is stamped, the PAAA cannot be separately assessed to stamp beyond the Rs.100 requirement of Section 4(1) if it relates to and only to rebuilt or reconstructed premises in lieu of the old premises used/occupied by the member, and even if the PAAA includes additional area available free to the member because it is not a purchase or a transfer but is in lieu of the member's old premises. The stamp on the Development Agreement includes the reconstruction of every unit in the society building. Stamp cannot be levied twice.

(e) To the extent that the PAAA is limited to the rebuilt premises without the actual purchase for consideration of any additional area, the PAAA is an incidental document within the meaning of Section 4(1) of the Stamp Act.

(f) A PAAA between a developer and a society member is to be additionally stamped only to the extent that it provides for the purchase by the member for actual stated consideration and a purchase price of additional area over and above any area that is made available to the member in lieu of the earlier premises.

(g) Clauses (B), (1) and (2) of the 30th March 2017 circular are unsustainable in law. The circular must be quashed. Similarly, the 23rd June 2015 circular that purports to exclude PAAAs from Section 4(1) is ultra vires the Stamp Act and is liable to be quashed.

(h) The provision or stipulation for assessing stamp on the PAAA on the cost of construction of the new premises in lieu of the old premises cannot be sustained.

54. These findings are not limited to the facts of the present cases before us.

55. Thus, the Petitions must succeed. Rule is accordingly made absolute in terms of prayer clauses (a), (b), (c1) and (c2) of Writ Petition No. 4575 of 2022. Those prayers are set out below:

"(a) This Hon'ble Court be pleased to declare the Impugned Circulars dated 23rd June 2015 and 30th March 2017 (Exhibit- "A" & "A/1" to be ultra vires of Section 4 of the Bombay Stamp Act, 1958 and being arbitrary, unreasonable and violative of Article 14 of the Constitution of India and thus unconstitutional.

(b) This Hon'ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of certiorari or any other appropriate Writ, order or direction under Article 226 of the Constitution of India calling for the record and proceedings of the issuance of the Impugned Circulars dated 23rd June 2015 and 30th March 2017 issued by Respondent No. 2 and after going through the legality, validity and propriety thereof, quash and set aside the same;

(c) This Hon'ble Court may be pleased to issue a Writ of Mandamus or a Writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of directing: -

(i) The Respondent No. 1 to cancel, withdraw or revoke the Impugned Circulars dated 23rd July 2015 and 30th March 2017;

(ii) Directing the Respondents to correctly apply the ratio of Prabha Laxman Ghate's case, the Notification dated 9th May 2014 and Section 4 of Maharashtra Stamp Act equally to the Society and its members as a Owner/s and not to levy stamp duty of more than Rs. 100/- on the instrument entered into by the members of the Society with the Developer for the Permanent Alternate Accommodation."

56. Our reference to re-development and homes is to be read to include garages, galas, commercial and industrial use and every form of society re-development.

57. In the interim orders we had required the Petitioners to make a deposit of 50% of the differential amounts demanded under the PAAAs. These are obviously now required to be refunded. Where the deposits are made with the Court, the Registry will permit all applications for a refund with accrued interest. Where deposits are made with the stamp office all refunds are to be processed upon production of an authenticated copy of this order within four weeks from today.

58. We say nothing in regard to interest payable by the Government.

59. We express our thanks to learned Counsels who appeared in the matter and especially Mr Shukla for his assistance and for the compilation that is being given to us.

60. All Writ Petitions are disposed of in these terms. In the facts and circumstances of the case, there will be no order as to costs.

61. In view of the this, all pending applications are disposed of as infructuous.

(Neela Gokhale, J) **(G. S. Patel, J)**