A.F.R.
Reserved

Court No. - 45

Case :- WRIT - C No. - 65085 of 2012

Petitioner :- Emerald Court Owner Resident Welfare Association
Respondent :- State Of U.P. Thru Secy. And Others
Counsel for Petitioner :- Amit Saxena,Kunal Ravi Singh
Counsel for Respondent :- C.S.C.,Satish Mandhayan,Shivam Yadav,V.K.Singh

Hon'ble V.K. Shukla,J.
Hon'ble Suneet Kumar,J.

(Delivered by Suneet Kumar,J.)

The petitioner claims to be the recognized Resident Welfare Association (RWA) of Emerald Court Group Housing Society and by means of this writ petition the petitioner seeks *inter alia* the following reliefs:-

> **i.** Issue a writ, order or direction quashing the revised plan approved by respondent 2 for construction of new towers namely Tower 'APEX' and 'CEYANE' in plot no. 4, Sector 93-A, and issue further directions for demolishing of aforesaid towers, the approval and construction being in complete violation of provisions of U.P. Apartments Act of 2010.
>
> **ii.** Issue a writ, order or direction directing the Respondent 2 not to sanction amendments to any further building plans in respect of the Group Housing Society being developed by respondent 5 without obtaining consent of all the residents.
>
> **iii.** Issue a writ, order or direction quashing the permission granted to respondent 5 to link Tower T-1 and T 'APEX' / 'CEYANCE' through space frame.

> **iv.** Issue a writ, order or direction directing respondents 2 and 3 to ensure that fire safety equipment and infrastructure is installed at the expenses of respondent 5 within a specified period.
>
> **v.** Issue a writ, order or direction directing respondent 2 to demolish illegal construction made in the basement and setback area as per notice dated 19.06.2012 and 17.07.2012.
>
> **vi.** Issue a writ or direction directing respondent no. 2 and 5 to provide car parking spaces (both above ground and in the basement) as per the provisions of the NBC 2005 to all the legal allottees/residents of Supertech Emerald Court Complex, plot 4, Section 93-A NOIDA.

The petitioner has pressed reliefs no. 1 and 3. The other reliefs being disputed question of fact was not pressed by the petitioner.

The respondent no. 2, New Okhla Industrial Development Authority (herein after referred to as NOIDA Authority) is an authority, constituted under Section 3 of the Uttar Pradesh Industrial Area Development Act, 1976, whereas respondent no. 5 Supertech Ltd. is a company registered under the Companies Act and is the developer of Group Housing Society of which the petitioner association are residents.

The facts briefly is, that the respondent company was allotted, a part of Plot No. 4 measuring 48,263.00 sq.m. situated in Sector 93-A, by the NOIDA Authority on 23.11.2004 for development of Emerald Court Group Housing Society.

The NOIDA Authority vide approval dated 20.6.2005

sanctioned the layout plan on the aforementioned plot.

The NOIDA Authority vide supplementary lease deed dated 21.6.2006 allotted an additional area of 6,556.51 Sq.m. of the same plot, increasing the total area of the plot to 54,819.51 Sq.m. The sanctioned map was accordingly revised and it was proposed to built a shopping centre Ground plus one floor (G + 1) and a building block Ground plus eleven floors (G + 11) on the additional leased area. The NOIDA Authority accorded sanction on 29.12.2006.

The developer company submitted a third revised map, wherein the NOIDA Authority sanctioned the map vide sanction dated 26.11.2009. The sanction was for Tower No. 16 (CEYANE) and Tower No. 17 (APEX) with Ground + 24 stories (floors). Towers 16 and 17 (APEX & CEYANE) was to be built in place of (G + 11) and shopping center (G+1) as approved earlier. The height of the block was raised to 66 meters.

The developer company purchased additional floor area ratio (FAR) and got the map revised vide sanction dated 02.03.2012. The sanction permitted the raising of heights of Towers 16 and 17 (APEX & CEYANE) from (G + 24) floors to (G + 40) floors i.e. raising the height to 121 meters.

The petitioner is aggrieved by the sanction granted by NOIDA Authority, in violation of Building Regulations, to raise the heights of Towers 16 + 17 (APEX & CEYANE), without maintaining the mandatory distance of 16 meters between their building block Aster-2 (G + 11) and Towers 16 and 17 (APEX & CEYANE), as required by New

Okhla Industrial Development Area Building Regulations and Directions, 2010 (herein after referred to as Building Regulations, 2010), making their block unsafe, apart from blocking light and air.

According to the NOIDA Authority, the map was initially sanctioned on 20.6.2005 as per New Okhla Industrial Development Area Building Regulations and Directions, 1986 (herein after referred to as Building Regulations 1986). The second sanction and third sanction was granted on 29.12.2006 and 26.11.2009 respectively, as per New Okhla Industrial Development Area Building Regulations and Directions, 2006 (herein after referred to as Building Regulations, 2006). The fourth and the last sanction was granted to the respondent company on 2.3.2012 under building regulations of 2010 read with Apartment Act, 2010.

Towers 16 & 17 (APEX & CEYANE) was sanctioned in 2009 under Building Regulations 2006, fourth and final sanction, in 2012, only increases the heights of towers 16 and 17 (APEX & CEYANE) from 24 floors to 40 Floors, therefore, it is not correct to say that distance between the two building blocks have been violated. Under Building Regulations 2006 there was no provision with regard to the minimum distance between two building blocks. The National Building Code of 2005 was not incorporated by Building Regulations 2006, therefore, there is no mandatory requirement under the Building Regulation of 2006 to follow the National Building Code of 2005. The requirement of distance between two building blocks was mandated by the Building Regulations of 2010 and except for distance, the sanction dated 2.3.2012 is

strictly in accordance to the Building Regulations of 2010.

The respondent developer company, on the other hand, has questioned the locus of the petitioner by contending that the petitioner is not recognized by the respondent developer company under the Uttar Pradesh Apartment (permission of construction, ownership and maintenance) Act, 2010 (herein after referred to as the Apartment Act, 2010). The model bye-laws has not been adopted by the petitioners, as such, they are not entitled to become the member of Resident Welfare Association (RWA) of Emerald Court Phase I. Further the President of the said society is not the owner of any apartment in the society, therefore, he cannot become the member of the petitioners' society, as per the provisions of the Apartment Act, 2010. The impleadment of one of the owners subsequently is an inherent defect. Further the petitioner has an alternative remedy to first approach the competent authority under the Apartment Act, 2010 i.e. the Chief Executive Officer of NOIDA and the matter should be decided by way of mediation and conciliation process and in case any party is aggrieved then it should approach the State Government under Section 27 of the Apartment Act 2010. The present writ petition, bypassing the statutory provision, as such is not maintainable.

It is further stated that the writ petition is barred by delay and laches as the APEX & CEYANE (G + 24) floors was approved on 26.11.2009, whereas the writ petition, has been filed in December, 2012, that is, after 3 years. The Building is in advance stage of construction and more than 21 stories have been constructed in the APEX (Tower 16) and 17 stories in CEYANE (Tower 17), about 600 flats

have already been sold to the prospective buyers thus invaluable rights have crystallized in favour of third party.

From the rival submissions the following questions need to be answered:-

i.) As to whether the writ petition is maintainable at the behest of petitioner society?

ii.) As to whether the petitioner can be relegated to alternative remedy under Section 27 of the Apartment Act 2010?

iii.) As to whether the NOIDA Authority has violated the Building Regulations and Apartment Owners Act 2010 in granting sanction of Towers 16 & 17 (APEX & CEYANE)?

We have heard Sri Kunal Ravi Singh, learned counsel for the petitioners, Sri Ashok Mehta, Sr. Advocate assisted by Sri Shivam Yadav on behalf of NOIDA Authority and Sri Shashi Nandan, Sr. Advocate assisted by Sri Shatish Madhyan, on behalf of respondent Developer Company and learned Standing Counsel on behalf of State and perused the record and written submissions of the respective parties. The petition is being decided at the admission stage by the consent of parties and as per rules of the Court.

Question No. 1:- Locus

The meaning of the expression 'person aggrieved' will have to be ascertained with reference to the purpose and the provisions of the statute. One of the meaning is, that person will be held to be aggrieved by a decision if

that decision is materially adverse to him. The restricted meaning of the expression requires denial or deprivation of legal rights. A more legal approach is required in the background of statues which do not deal with the property rights but deal with professional misconduct and morality. ***(Bar Council of Maharastra vs. M.V. Dabholkar, (1975) 2 SCC 702-11, paras 27 & 28).***

Broadly, speaking a party or a person is aggrieved by a decision when, it only operates directly and injuriously upon his personal, pecuniary and proprietary rights (Corpus Juris Seundem. Edn. 1, Vol.IV., p. 356, as referred in ***Kalva Sudhakar Reddy vs. Mandala Sudhakar Reddy, AIR 2005 AP 45, 49 para 10)***

The expression 'person aggrieved' means a person who has suffered a legal grievance i.e. a person against whom a decision has been pronounced which has lawfully deprived him of something or wrongfully refused him something.

The Apartment Act, 2010 was notified by the State Government on 19.3.2010. Chapter VI deals with Association of Apartment owners and bye-laws for the registration of the affairs of such Association. The administration of the affairs in relation to the apartments and management of common areas and facility has been conferred upon the Association under Section 14. It is the joint responsibility of the promoter and the apartment owners to form an association. The promoter shall get the association registered. The Government may, by notification, frame model bye-laws in accordance with which the property referred to in Sub-section (1) shall be

administered by the Association of Apartment Owners and the Association shall in its first meeting make its bye-laws in accordance with the model bye-laws so framed. The model bye-laws under Sub-section (6) of Section 14 was notified on 16.11.2011.

As per the averments of the respondent/company, the flats were handed over to the apartment owners by September 2009. The owners immediately formed Resident Welfare Association (RWA) and got it registered with the Registrar Societies, in the very same year. Adopting the model bye-laws, did not arise, as it was not enforced until 2011. After notification of Model bye-laws, the Deputy Registrar Firm, Societies and Chits, Meerut vide letter dated 14.12.2012 informed, that pending instructions form the Registrar Firm Societies and Chits Uttar Pradesh, no decision in the matter can be taken in respect of Model bye-laws and its registration. The Registrar Firm, Societies and Chits Uttar Pradesh vide circular dated 5.2.2013 addressed to all Deputy Registrars/District Registrars issued instructions for registration under Apartment Act, 2010 and directed that bye-laws of existing RAW be accordingly amended. The petitioner/society vide resolution dated 20.10.2013 adopted the Model bye-laws and conducted elections and thereafter informed the Deputy Registrar.

The respondent/company has recognized the petitioners society as RWA of the Apartment owners since inception and has continuously corresponded with the petitioner society as RWA. Letter dated 9.10.2012, 27.9.2012, 4.9.2012 and January, 2013 addressed to the petitioner society regarding redressal of their grievance is

on record. The petitioner society has approached all the authorities, including C.E.O. NOIDA Authority, Fire Safety Officer, Police Official, who in turn have issued notices seeking explanation from the respondent/company. The respondent/company has never objected that petitioners, society is not competent to raise collectively the issues pertaining to apartment owners of Emerald Court, rather they have been engaged by the Respondent company in resolving the problem faced by the owners.

NOIDA Authority in granting sanction to respondent company, in violation of Building Regulation's, affects the rights of each and every apartment owner and in order to avoid multiple litigations, the petitioners society has locus to espouse the cause of the apartment owners in representative capacity. This aspect has to be assessed in the backdrop of the respondent company's own case, that by April, 2008 and finally by September, 2009 possession was handed over to the residents. After the Apartment Act 2010 was enforced, it is only thereafter, the final sanction was taken by the respondent-company from NOIDA Authority in 2012.

Both the NOIDA Authority, as well as, the respondent company had not taken the previous consent/objections of the petitioners' society, regarding the amendments/revision of the sanctioned plan, as required under the Apartment Act. Chapter V of the Apartment Act 2010 provides, Declaration of Building and Deed of Apartment, which requires declaration to be submitted by the promoter, in the office of the Competent Authority, in respect of building constructed, in such form as may be prescribed. In exercise of powers conferred under Section

30 of the Apartment Act, 2010, the Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Rules, 2011 (herein after referred to as Apartment Rules, 2011) was framed. Rule 3 of the Apartment Rules, 2011 prescribes the form of declaration under sub-section (1) of section 12. The declaration has to be submitted within 12 months from the date of approval of the plans and in case where the building has been constructed or is under construction, prior to the commencement of the rules, the declaration shall be submitted within 90 days from the date of such commencement. Rule 4 provides for the procedure for amendment of the declaration submitted under Rule 3. Rules 4, (1) (b)(c), (3), (4) and (5) are reproduced:-

> **4. Amendment of Declaration (sub section-2 of section 12).**--
>
> (1) The declaration submitted by a promoter under rule 3 may be amended at any time, by the promoter, If,-
>
> (a) the declaration suffers from any clerical or arithmetical mistake or error arising therein from any accidental slip or omission; or
>
> (b) the amendment is necessitated by reason of any revision in the sanctioned plan of the building; or
>
> (c) the proposed amendment is just and reasonable;
>
> provided that the amendment made by the promoter shall not violate the building bye-laws, sanctioned building plan or the contractual obligation of the promoter.

(2) .....

(3) The Competent Authority, on receipt of the application under sub-rule (2) shall issue a written notice to the association of the apartment owners of the building and shall also cause the publication of a public notice in two daily newspapers circulating in that locality.

(4) On receipt of the objections, if any, received within 30 days from the date of publication of notice under sub-rules (3) the Competent Authority shall, after giving an opportunity of being heard to the objector, association of apartment owners and promoter, pass such order thereon as it deems fit as expeditiously as possible.

(5) A true copy of the order passed under sub-rule (4) shall be sent by the Competent Authority to the promoter, association of the apartment owners or to the objector as the case may be.

The plain reading of the rule makes it clear that the amendment necessitated, by reason of any revision, in the sanctioned plan of the building shall not violate the building bye-laws, plan and contractual obligations of the promoter. Sub Rule (3) requires the competent authority to issue written notice to Resident Welfare Association of the building and after opportunity of being heard, the authority is required to pass orders and shall also cause publication of public notice in two daily newspapers circulating in the locality. It is not the case of the contesting respondents that the procedure prescribed was followed, and precise case of the petitioner is, that they are aggrieved, as no objections/consent was sought by the respondents as per Apartment Act 2010 read with

Apartment Rules 2011. The Association is an “aggrieved person” as its rights has been affected by the NOIDA Authority in sanctioning the map, in violation of statutory Building Regulations, in collusion with the respondent/company. The maps, specifications as required under rule 4 of the Apartment Rules, 2011 was never disclosed to the petitioner society and admittedly major alterations were made by linking petitioners' building block with T-16 and T-17 (Apex & Ceyane), by space frame making the petitioners block unsafe. No objection/consent, as required under proviso to sub-section (4) read with Section 12 and rule 3 and 4 of the Apartment Rules, 2011 was taken by the respondent-company or Noida Authority from the petitioners. In the opinion of the Court the petitioner has a right to maintain the writ petition against the NOIDA Authority and the respondent-company, as it is the NOIDA Authority that has violated the rule 4 of the Apartment Rules 2011 thus causing serious prejudice and harm to the petitioner society of apartment owners. The question is decided accordingly.

Question No. 2:- Alternative Remedy

It has been contended by the respondent/company that the petitioner society has an efficacious alternative remedy, either approaching the Chief Executive Officer, NOIDA Authority, under the Apartment Act, 2010 or by approaching the State Government under Section 27 of U.P. Industrial Area Development Act, 1976.

The petitioner society did approach the C.E.O. NOIDA Authority for redressal of their grievance, however, the

NOIDA Authority did not proceed after issuing notices dated 19.6.2012, 17.7.2012 and 28.8.2012 to respondent-company. The reason is writ large, as the respondent/company and NOIDA Authority are hand in glove, shielding each other against blatant violation of Building Regulations. The sanctioned map is the anchor sheet of defence of both respondents, that is, the constructions of Towers T-16 and T-17 (Apex & Ceyane) is being raised strictly as per sanctioned map. The case at hand is not violation of sanctioned map by the respondent-company but it is a case of violation of Building Regulations by NOIDA Authority, in collusion with the respondent-company, in sanctioning the map, that has adversely affected the rights of the apartment owners. It is for this reason the NOIDA Authority did not proceed beyond notices, as they could not hold themselves responsible for sanctioning the map in violation of their own Building Regulations, of which, they are framers as well as executors.

The plea of the respondent-company that the petitioners should first approach the CEO of NOIDA and get the matter settled through mediation and conciliation and thereafter, if aggrieved, they should approach the State Government, cannot be accepted, as admittedly the space/distance between building blocks is not as per Building Regulations 2010. The respondent-company has relied upon a Division Bench judgment of this Court in ***M/s Designarch Infrastructure Pvt. Ltd. & Anr. vs. Vice Chairman, Ghaziabad Development Authority & Ors. (2013) 9 ADJ 594***. Paragraph no. 45 and 65(1) of the aforesaid judgment is follows:

"45. Shri P.K. Jain, Sr. Advocate; Shri Navin Sinha, Sr. Advocate and Shri Kunal Ravi Singh submits that on the enforcement of the U.P. Apartment Act, 2010 on receiving the assent of the Governor on 18.3.2010 and its publication in the U.P. Gazette on 19.3.2010 provisions of the Act came into force and could not have awaited the notification of the Rules on 16.11.2011 and the Model Bye-Laws by notification of the same date on 16.11.2011. The Act is complete code in itself. The definition of competent authority, form of declaration, the amendment of declaration, grant of permission for prosecution and undertaking to be filed by the person acquiring apartment as well as model bye-laws would not have arrested the application of the provisions of the Act. They submit that as soon as the building containing four or more apartments or two or more building in any area designated as block each containing two ore more apartments with total of four or more apartments as defined in Section 3 (g) came into existence and is occupied by the apartment owners. The provisions of the Act become applicable to the building. The declaration of building and the deed of apartment under Chapter V does not depend upon the completion certificate to be given by the local authority and that as soon as such number of apartments have been handed over to the owners, which is necessary to form an association for 33% of the apartments, whichever is more by way of sale, transfer or possession provided the building has been completed along with all infrastructure services, the provisions of Chapter-II providing for duties and liabilities of Promoters and Chapter-III providing for rights and obligations of

> apartment owners become operative. The declaration has to be submitted under Section 12 by the promoter in respect of a building as defined in sub-section (3) (g) after the commencement of the Act. Section 13 providing for registration of deed of apartment after the commencement of the Act is mandatory to be made under the provisions of the Registration Act, 1908, which also provides for promoter or apartment owner to enclose true copy of the declaration made under Section 12 to such deed of transfer. The formation of a association is mandatory under sub-section (2) of Section 14 and is the joint responsibility of the promoter and the apartment owners with the obligation upon the promoter to get the association registered.
>
> **65.** To sum up the conclusions drawn by us are as follows:-
>
> (1) The U.P. Apartment Act, 2010 and the U.P. Apartment Rules, 2011 provides for a complete code for regulating the rights, duties and liabilities and for resolving the issues and disputes between the promoters and the apartment owners. The Act has overriding effect under Section 31 (1) over all other laws on the subject notwithstanding anything inconsistent therewith contained in any other law for the time being enforced."

The judgment does not help the respondent-company. The Apartment Act, 2010 operates in a restrictive field to provide "*ownership of an individual apartment in a building of an undivided interest in the common areas and facilities appurtenant to such apartment and to make*

such apartment and interest heritable and transferable and for matters connected therewith or incidental thereto."

The Apartment Act, 2010 is confined to disputes between Apartment Owners and developer pertaining to violation of common area or facilities in contravention of sanctioned map. Section 25 provides for offences Sub 1(b) reproduced below:-

> **25. Offences**. -- (1) If any promoter,
>
> (a) .....
>
> (b) illegally makes construction in contravention of the plan approved by the prescribed sanctioning authority beyond compoundable limits;

As stated earlier, the case at hand, is not a case where the developer has violated the common area or facilities under sanctioned plan/map, but it is a case of violation of Building Regulations by NOIDA Authority in sanctioning the map, which has adversely affected the rights of apartment owners.

The U.P. Industrial Area Development Act, 1976 and regulations framed thereunder is applicable in the present case. The language of Section 27(3) of the Apartment Act, 2010 and Section 41(3) of the U.P. Urban Development Act is pari materia. Sub-Section (3) of Section 27 is reproduced below:-

> **27.** Control by State Government.--
>
> 1.) .....
>
> 2.).....
>
> 3.) The State Government may, at any time,

> either on its own motion or on application made to it in this behalf, call for the records of any case disposed of or order passed by the competent authority for the purpose of the satisfying itself as to the legality or propriety of any order passed or direction issued and may pass such order or issue such direction in relation thereto as it may think fit:

The Supreme Court in ***Manohar Lal vs. Ugrasen and others (2010) 11 SCC 557*** has considered the scope of Section 41(3) of the U.P. Urban Development Act, 1973. Paras 36 and 37 are reproduced:-

> 36.) Sub-section (1) thereof empowers the State Government to issue general directions which are necessary to properly enforce the provisions of the Act. Sub-Section (3) thereof make it crystal clear that the State Government is a revisional authority. Therefore, the scheme of the Act makes it clear that if a person is aggrieved by an order of the authority, he can prefer an appeal before the Appellate Authority i.e. Divisional Commissioner and the person aggrieved of that order may file a revision Application before the State Government. However, the State Government cannot pass an order without giving opportunity of hearing to the person, who may be adversely affected.
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> 37. In the instant case, it is the revisional authority which has issued direction to GDA to make allotment in favour of both the parties. Orders had been passed without hearing the other party. The authority, i.e. GDA did not have the opportunity to examine the case of either of the said parties. The High Court erred in holding that sub-section (1) of Section 41 empowers the State Government to deal with the application of an

> individual. The State Government can take only policy decisions as to how the statutory provisions would be enforced but cannot deal with an individual application. The revisional authority can exercise its jurisdiction provided there is an order passed by the lower authority under the Act as it can examine only legality or propriety of the order passed or direction issued by the authority therein. In view thereof, we are of the considered opinion that there was no occasion for the State Government to entertain the applications of the said parties for allotment of land directly and issue directions to GDA for allotment of land in their favour.

In the facts of this case, the NOIDA Authority admits of issuing notices to the respondent-company on the complaints filed by the petitioner society, but has not proceeded any further. Had NOIDA Authority taken a decision only then the aggrieved party could approach the State Government under Section 27 of the Act, 1976. As discussed earlier the NOIDA Authority had itself violated its Building Regulations therefore, there was no occasion of it passing any order.

NOIDA Authority has colluded with respondent-company in sanctioning the plan hence there was no occasion of the NOIDA Authority to respond to the specific grievance of the petitioners. The letter dated 25.10.2011 approving the additional purchase of FAR and the sanction of the revised plan vide 2.3.2012 clearly states that the provisions of the Apartment Act 2010 and rules framed thereunder is applicable. In view of the undisputed facts between the parties, the plea of alternative remedy, raised by the contesting respondents at this stage is

rejected. Plea of alternative remedy cannot become the dumping ground of legitimate legal grievance of the Apartment Owners nor can it be the escape route for the developer for violations of Building Regulations in collusion with the NOIDA Authority. The question is decided accordingly.

Question No. 3:- Violation of Building Regulations

We proceed to examine as to whether sanction dated 2.3.2012 in respect of Towers 16 and 17 (APEX & CEYANE) is as per Building Regulations 2010. The admitted facts between the parties is that the NOIDA Authority has allotted Plot No. 4, Sector 93-A NOIDA, in two parts, for development of Group Housing Society. On 20.6.2005, the NOIDA Authority approved the plan on the site Plot No. 4, Sector 93-A measuring 48263.00 sq meter.

The NOIDA Authority vide lease dated 21.6.2006 alloted additional area measuring 6556.51 sq meter which was part and parcel of Plot No. 4, Sector 93-A enhancing the area of the Plot to 54819.51. Building Regulations 2006 came into force on 16.12.2006 superseding the earlier Building Regulations. Respondent company submitted an amended/revised plan and proposed to built a shopping centre and a building, Ground + 11 storey (G + 11) on the additional leased plot. There was no amendment/revision in the earlier sanctioned map. The respondent/company again got the layout map amended/ revised and Towers No. 16 and 17 (APEX & CEYANE) of 24 stories was proposed to be built on the additional leased out land instead of (G + 11) and shopping center (G + 1).

On 21.7.2010 U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 was enforced. The NOIDA Authorities framed Building Regulation, 2010 superseding the Building Regulation of 2006. The Building Regulation of 2010 came into force on 20.11.2010. The respondent-company again submitted an amended/revised plan and the heights of the Tower NO. 16-17 (APEX & CEYANE) were increased to 40 stories utilizing additional purchasable FAR 2.75, that is, raising the height to 121.5 meters. The additional F.A.R. was approved by NOIDA Authority vide letter dated 25.10.2011.

The case of the petitioner is that the sanction of towers (APEX & CEYANE) i.e. towers 16 and 17, violate the Building Regulations. The distance between petitioner's building block Aster II (Tower 1) and Towers 16 and 17 (APEX & CEYANE) must be sixteen meters which is mandatory under Building Regulations, 2010, read with National Building Code 2005. The sanction violates Apartment Act, 2010, as no permission was taken from the petitioner society, before getting the revised map sanctioned.

Admitted position between the parties, as well as, according to the NOIDA Authority, the distance between the two building blocks is only 9 meters, as against 16 metres, required under Building Regulations, 2010.

According to the respondent-company the project is in two phases, Emerald Court project (Phase-1) comprises of 15 towers. The company after being leased out additional area of land, phase-2 was launched

comprising of Towers 16 & 17 (APEX & CEYANE). The layout plan for construction of APEX & CEYANE (phase-2) was sanctioned on 26.11.2009, that is, before the enactment of the U.P. Apartment Act, 2010 and Building Regulations, 2010 respectively, therefore, according to them, the provisions of the said Act and Building Regulations would not apply to the respondents. By the last sanction dated 2.3.2012, when both the Apartment Act 2010 and Building Regulations 2010 was in force, only the heights has been raised to 40 stories (121 mtrs) by purchasing additional Floor Area Ratio (FAR). It is further stated that the possession of flats and amenities of phase-I has been handed over to the residents way back in April, 2008 and latest by September, 2009, that is, the flats have been sold before coming into force of the Act. According to the respondent-company the APEX & CEYANE (phase-2) are entirely separate projects having separate facilities and separate entry and exit gates, therefore, the petitioners' society Emerald Court (phase-1) has, no locus nor any concern with the towers APEX & CEYANE (Tower 17 and 16).

The NOIDA Authority in their counter affidavit has taken a stand which is tangent to the stand taken by the respondent company. The precise case of NOIDA Authority is that, the additional plot of land allotted to the respondent-company and the sanction of the map, thereon, dated 2.3.2012, was as per Building Regulations 2010 and the developer was required to comply with the provisions of the U.P. Apartment Act, 2010. The sanction letter dated 2.3.2012 categorically states that the provisions of the Apartment Act, 2010 and rules framed

thereunder has to be complied with. The NOIDA Authority has further stated that plot no. 4 is not separated in two parts and the final layout has been sanctioned on a single plot and it is a single project. FAR 2.75 has been sanctioned vide letter dated 25.10.2011 considering the entire area of the plot. In the counter affidavit it is admitted that the distance between previously built towers Aster-2 (Tower no. 1) and the newly built towers 16 and 17 (APEX & CEYANE) is 9 meters. This fact is also not disputed by the respondent/company.

Examining the pleadings of the parties, on admitted facts, it transpires that the stand of the developer is totally divergent to the stand of the NOIDA Authorities. The contention of the respondent-company that the map was initially sanctioned and revised and modified under provisions of Building Regulations 2006, hence the Building Regulations of 2010 is not applicable and further since possession was already handed over to the members of the petitioner society way back in the year 2009, therefore, provisions of the Apartment Act, 2010 is not applicable, is not borne out from the record. The approval for purchase of additional FAR is of the year 2011 and sanction of layout map dated 2.3.2012 is for single project and imposes the condition of applicability of Apartment Act 2010 on the project.

It is settled principle of law that rules and regulations applicable on the date of sanction i.e. 2.3.2012 will apply-vide ***Commissioner Municipal Corporation, Shimla vs. Prem Lata Sood and others (2007) 11 SCC 40, Union of India and others vs. Indian Charge Chrome and Another (1999) 7 SCC 314, Kuldeep Singh vs.***

Govt. of NCT of Delhi (2006) 5 SCC 702.

In this context we may usefully refer to the decision of Supreme Court in ***Union of India vs. R. Padmanabhan 2003 (7) SCC 270***, wherein this Court observed:

> "That apart, being ex gratia, no right accrues to any sum as such till it is determined and awarded and, in such cases, normally it should not only be in terms of the Guidelines and Policy, in force, as on the date of consideration and actual grant but has to be necessarily with reference to any indications contained in this regard in the Scheme itself. The line of decisions relation to vested rights accrued being protected from any subsequent amendments may not be relevant for such a situation and it would be apposite to advert to the decision of this Court reported in State of Tamil Nadu vs. Hind Stone and Ors. - 1981 (2) SCC 205. That was a case wherein this Court had to consider the claims of lessees for renewal of the Tamil Nadu Minor Mineral Concession Rules, 1959. The High Court was of the view that it was not open to the State Government to keep the time and then depose them of on the basis of a rule which had come into force later. This Court, while reversing such view taken by the High Court, held that in the absence of any vested rights in anyone, an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application, despite the delay, if any, involved although it is desirable to dispose of the applications, expeditiously."

We may also refer to the decision of Supreme Court in ***Kuldeep Singh vs. Government of NCT of Delhi***

[2006 (5) SCC 702] which considered the question of grant of liquor vent licences. The Supreme Court held that where applications required processing and verification the policy which should be applicable is the one which is prevalent on the date of grant and not the one which was prevalent when the application was filed. The Apex Court clarified that the exception to the said rule is where a right had already accrued or vested in the applicant, before the change of policy.

The map sanctioned in the year 2005 was amended and revised by the respondent-company time to time under subsequent building regulations. It was in the fourth and final sanction dated 02.03.2012, maximum permissible FAR 2.75 was purchased. The company could have purchased the aforementioned maximum FAR 2.75 in 2009 when building regulations 2006 was amended in 2009. The company chose to purchase FAR 2.75 in 2011, when building regulations 2006 was superseded by building regulations 2010 and Apartment Act, 2010 was enforced. The map was sanctioned as per Building Regulation 2010. The respondent-company never questioned the condition regarding the application of Apartment Act, 2010. The stand of the respondent-company that the project is in two phases is also not borne out from the record, as NOIDA Authority had permitted the purchase of additional Floor Area Ratio (FAR) and subsequent sanction, treating the project as a single project. The respondent-company has not only mislead the petitioner but has tried to mislead, the Court by pleading false facts. The record reveals that the respondent-company at no point of time treated the

project in two phases. The maps submitted and sanctioned is for a single project on the entire site.

In order to appreciate the arguments advanced by the parties. It is essential to examine the Act as well as the building regulations framed thereunder.

The State legislature enacted the Uttar Pradesh Industrial Area Development Act, 1976. The Act provided for the constitution of an authority for the development of certain area in the State into Industrial Urban Township and for matters connected therewith.

Under Section 3 of the Act, the State Government may by notification constitute for the purpose of the Act an Authority. The Authority shall be a body corporate. The State Government under Section 4 is required to appoint a Chief Executive Officer (CEO) of the Authority, who shall be the whole time Officer of the said Authority.

Section 6 provides for functions of the Authority which *inter alia* requires to secure the planned development of the Industrial Development Areas. Sub-section 2(g) provides to regulate the erection of buildings and setting up of industries.

Section 8 confers powers upon the authority to issue directions.

Sub-section 1(c) of Section 8 provides for issuing directions regarding the restrictions and conditions with regard to open spaces to be maintained in around buildings and heights and character of buildings and Sub clause (d) regarding number of residential buildings that may be erected on any site.

Section 9 provides for ban on erection of buildings in contravention of regulations. Sub-clause 1 categorically states that no person shall erect or occupy the building in the industrial development area in contravention of any building regulations made under Sub-section 2. Sub-clause 2 provides that the authority may by notification with prior approval of the State Government make regulations to regulate the erection of buildings and such regulations made provide for on or any of the matters contained in Sub-clause A to I. Sub-clause B pertains to layout plan of building whether industrial, commercial or residential and Sub-clause E is with regard to number of heights of stories of buildings.

The Authority with the prior approval of the State Government and in exercise of its powers under sub-section 2 of Section 9 of the Development Act, 1976 enacted the New Okhla Industrial Development Area Building Regulations and Directions 2006. The said regulations superseded the New Okhla Industrial Development Area Building Regulations and Directions 1986. The Building Regulations of 2006 was notified on 5.12.2006 and published in the U.P. Gazette dated 16.12.2006. The regulations 2010 came into force on 20.11.2010 superseding Building Regulations 2006.

Distance Requirement as per height under Building Regulations is as follows:-

I.) Building Regulation, 2006:-

Regulation 33.2.3

“(i.) Distance between two adjacent building blocks shall not be less than half the

height of the tallest building".

II.) Building Regulation 2010:-

Regulation 24.2.1(6)

"Distance between two adjacent building blocks shall be minimum 6 mtrs. to 16 mtrs. depending on the height of blocks. For building height up to 18 mtrs., the spacing shall be 6 mtrs. And thereafter the spacing shall be increased by 1 mtrs. For every addition of 3 mtrs. In height of buildings subject to a maximum9834 spacing of 16 mtrs. As per National Building Code, 2005. If the blocks have dead-end sides facing each other, than the spacing shall be maximum 9 mtrs. Instead of 16 mtrs. Moreover the allottee may provide or propose more than 16 meters space between two blocks."

III.) National Building Code,2005:-

"8.2.3.1 For buildings of height above 10 m, the open sapces (side and rear) shall be as given in Table 2. The front open spaces for increasing heights of buildings shall be govered by 9.4.1 (a)."

Table 2 Side and Rear Open Spaces for Different Heights of Buildings

(Clause 8.2.3.1)

Sl.	*Height of Building (meters)*	*Side and Rear Open Spaces to be Left Around Building (meters)*
i.	*10*	*3*
ii.	*15*	*5*
Iii.	*18*	*6*
iv.	*21*	*7*

v.	*24*	*8*
vi.	*27*	*9*
Vii	*30*	*10*
Viii	*35*	*11*
Ix	*40*	*12*
X	*45*	*13*
Xi	*50*	*14*
Xii	*55 and above*	*16*

The respondent-company has purchased the additional FAR in 2011 and the sanction of the map, accordingly is in 2012. The sanction has to be as per the Building Regulations applicable on the date of sanction. Admittedly, the distance between the building blocks has been violated by seven metres.

Not only this, the respondent-company has also violated the clear space of 7.5 mtrs after providing for surface parking. The respondent-company in para 37 of their counter affidavit has stated that "*That the contents of para 15 of the Writ Petition are wrong and denied. It is stated that no setback area has been converted into parking area. The parking of the vehicles are being allowed leaving aside the 6.00 m clear setback from the tower as per the sanction of the Completion Drawing dated 16.9.2009 by Noida Authority.*" Whereas the stand of the NOIDA Authority is that as per Government notification dated 4.12.2010 the provisions of parking is allowed only after leaving clear space of 7.50 metre. It is

evident, on admitted facts, that the respondent company in collusion with the NOIDA Authority have managed to obtain sanction of layout map in violation of mandatory spaces between building blocks and clear space, but for these violation the additional FAR purchased by the respondent company in 2011, could not have been executed on the ground/site. The stand of both the respondents that constructions are being carried out, strictly as per sanction is untenable, as the sanction itself grossly violates the Building Regulations.

In this regard the provisions of Uttar Pradesh Fire Prevention and Fire Safety Act, 2005 needs to be examined.

The purpose of the Act is to make more effective provisions for the fire prevention and fire safety measures in certain buildings and premises in the State of Uttar Pradesh.

Section 4 provides for, measures for the prevention and fire safety. The nominated authority shall, after the completion of the inspection of the building for permission under Section 3, record its views on the deviation from or the contravention of, the building bye-laws with regard to fire prevention and fire safety measures and inadequacy of such measures provided therein with reference to the height of the building or the nature of activities carried on in such building and premises and issue of notice to the owner or occupier of such building or premises directing him to undertake such measures as may be specified in the notice.

Section 7 provides for, permission for certain

buildings: Every building above 15 meters of height whether existing or to be erected shall submit plan and obtain permission from entity authorized by the State Government that safety from fire is reasonably attainable in practical and can be achieved.

In exercise of its power under Section 17 of the Fire Safety Act, 2005, the State Government framed the Uttar Pradesh Fire Prevention and Fire Safety Rules 2005. Rule 4 of the Rules provides the minimum standards for fire prevention and fire safety measures specified for building or premises shall be such as are provided in the building bye-laws and National Building Code of India or any other law for the time being in force as amended from time to time. Rule was notified on 18.6.2005 and Act came into force on 24th January, 2005.

From the aforementioned provisions, it is clear that both the respondents are bound to comply with the provisions of the Fire Safety Act, 2005 and the rules framed thereunder which was enforced way back in the year 2005. The distance between building blocks as well as clear space of 7.5 mtrs for fire tenders is mandatory, which admittedly, has been violated while sanctioning the map in the year 2012. The respondent company was put to notice under the Act for violation of distance and space.

Learned counsel for the respondent-company finally made an attempt to argue that the phrase “building blocks” is not defined under the bye-laws and according to the learned Senior Advocate building blocks would mean the entire building on plot no. 4 of Sector 93-A

NOIDA. The said argument is far fetched and against the provisions of the Building Regulations of 2006 as well as 2010. Building Block means group of buildings on the plot/site. The sanctioned maps clearly shows that the respondent-company has got the layout approved consisting of separate blocks. The nomenclature of the blocks was subsequently changed by the respondent-company, in each successive plans and finally the buildings were numbered as Towers (1 to 17). The maps sanctioned clearly shows that the buildings in dispute Aster II (Tower 1) and Apex & Ceyane (Towers 16 and 17) are separate building blocks. The argument has been advanced without there being any foundation in the pleadings. Without pleadings argument cannot be advanced.

For the reasons stated herein above, it is evident that the map sanctioned by NOIDA Authority is in teeth of the Building Regulation, the mandatory distance has not been maintained between building blocks and movement space. The violation has seriously affected the rights of the apartment owners and safety of their block. The question is accordingly decided.

Illegal and unauthorized constructions are on the rampant rise with the connivance of the officials of development authority and such activities is required to be dealt with by firm hand otherwise builders/colonizers would be encouraged to raise constructions under the garb of sanction which otherwise is gross violation of the Building Regulations and the Act. The ultimate aim is planned development and the flat owners should not fall prey to such activities as the ultimate desire of the family

of common man is to have a shelter of his own. Other fundamental rights is also associated with dependent upon the right to property especially right to shelter. Unlawful constructions in violation of building regulation is definitely against public interest and hazardous to the safety of occupiers and residents of multistoreyed buildings/group housing.

The Supreme Court in **Priyanka Estates International (P) Ltd. v. State of Assam** and other (2010) 2 SCC 27, was of the opinion that unauthorized constructions should not be allowed to stand or given a seal of approval by the court as it is bound to affect the public at large. Paragraph No. 74 is reproduced hereinbelow:

> "74. Even though on earlier occasions also, under similar circumstances, there have been judgments of this Court which should have been a pointer to all the builders that raising unauthorised construction never pays and is against the interest of society at large, but, no heed to it has been given by the builders. Rules, regulations and bye-laws are made by Corporation or by Development Authorities, taking in view the larger public interest of the society and it is a bounden duty of the citizens to obey and follow such rules which are made for their benefit. If unauthorised constructions are allowed to stand or given a seal of approval by court then it is bound to affect the public at large. An individual has a right, including a fundamental right, within a reasonable limit, it inroads the public rights leading to public inconvenience, therefore, it is to be curtailed to that extent.

The Apex Court after considering the cases pertaining to illegal and unauthorized constructions especially **M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu and Others** (1999) 6 SCC 464; **Friends Colony**

Development Committee v. State of Orissa and Others (2004) 8 SCC 733; **Royal Paradise Hotel (P) Ltd. Vs. State of Haryana and Others** (2006) 7 SCC 597; **and Mahendra Buburao Mahadik and Others v. Subhash Krishna Kanitkar and Others** (2005) 4 SCC 99, came to the conclusion that constructions made in violation of sanctioned approval laws and in violation of building regulations, the consequence is demolition. Paragraph 66 is reproduced hereinbelow:-

> **66.** It is not necessary to deal with the aforesaid judgments of this Court in greater detail as the consistent ratio decidendi of this Court is that if the constructions are in absolute violation of sanctioned or approved plans and are not likely to fall in the category of compoundable items, then the necessary consequence is to order its demolition and seal of approval for such illegal activities is not required to be given by this Court.

In **Dipak Kumar Mukherjee vs Kolkata Mun.Corp.& Ors, 2013 (5) SCC 336**, the Supreme Court observed that in last four decades, the menace of illegal and unauthorized constructions of buildings and other structures in different parts of the country has acquired monstrous proportion.

In **Friends Colony Development Committee** (supra) Supreme Court noted that large number of illegal and unauthorized constructions were made in the city of Cuttack and made following observations:-

“In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalization of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the state. The exercise of such governmental power is justified on account of its being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable inter-meddling with the private ownership of the property may not be justified.

The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. Zoning and building regulations are also legitimized from the point of view of the control of community development, the prevention of over-crowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility

services.

> Structural and lot-area regulations authorize the municipal authorities to regulate and restrict the height, number of stories and other structures; the percentage of a plot that may be occupied; the size of yards, courts, and open spaces; the density of population; and the location and use of buildings and structures. All these have in view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building.

What needs to be emphasized is that illegal and unauthorized constructions of buildings and other structure not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that illegal and unauthorized constructions are supported by the people entrusted with the duty of preparing and executing master plan and zonal plan as well as building regulations. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery including the development authority when it is required to deal with those who have money power or unholy nexus to the power corridors.

In **Dipak Kumar Mukherjee** case (supra), the Apex Court held that there should be no judicial tolerance of

illegal and unauthorized constructions by those who treat the law to be their sub-servient and those indulging in such activities will not be spared. (Refer ***Ravindra Mutneja, Rajendra vs. Bhawan Corporation A Partnership, 2003(5) Bom CR 695.***)

The Court is not at all impressed by the plea of financial loss or proposed sale in respect of the flats being constructed. It has repeatedly come to the notice that builders by joining hands with the officer of the development authorities openly flout every conceivable rule, including building regulations. The builder is always under the impression that once the frame of the building is illegally constructed then the Court can be persuaded to take a sympathetic view and permit the construction even though in total breach of legal provision. The price of land is sky rocketing as well as there is scarcity of land in group housing. Taking advantage of the situation the Builder lobby is exploiting need of the people by setting up illegal construction and the unfortunate part of this is that it has active assistance of the officers of the development authority. Once the sanction for Apex & Ceyane (T 16 and 17) was in total breach of the building regulations, 2010 and Apartment Act, 2010, then the Court would be failing in its duty if respondent company/developer is permitted to raise the constructions. The time has come when everyone should realize that rule of law is not a purchasable commodity and illegalities will not be tolerated merely because the builder has taken protection against the sanction which admittedly is illegal and in violation of building regulations and the Act.

The respondent-company has pleaded falsely and destroyed facts to non-suit the petitioner and mislead the Court. The then official of NOIDA Authority have not acted bona fide in discharge of their duties, the map has been sanctioned and is being executed in violation of Building Regulations. The officials cannot claim protection under section 50 of the U.P. Urban Development Act, 1973 as incorporated under section 12 of the 1976 Act.

For the reasons and law stated herein above, it is directed that :

I.) The Towers 16 & 17 (Apex & Ceyane) situated on Plot No. 4, Sector 93A NOIDA shall be demolished by the NOIDA Authority within period of four months from the date of filing of the certified copy of this order,

ii.) Expenses of the demolition and removal of the debris shall be borne by the respondent-company, failing which it shall be recovered by NOIDA Authority as arrears of land revenue.

iii.) The officials of the respondent-company and the officers of the NOIDA Authority have exposed themselves for prosecution under the Uttar Pradesh Industrial Area Development Act, 1976 and Uttar Pradesh Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010. Sanction for prosecution as required under section 49 of the U.P. Urban Development Act, 1973, as incorporated by section 12 of the U.P. Industrial Area Development Act, 1976, shall be sanctioned by the Competent Authority within a period of three months from the date of filing of certified copy of this order.

iv.) The respondent-company shall refund the consideration received from the private parties, who have booked apartments in Apex & Ceyane (T 16 and 17) along with 14% interest compounded annually within four months from the date of filing of certified copy of this order.

Subject to the above, the writ petition stands **allowed**.

No order as to costs.

Order Date :- 11.04.2014
S. Prakash

(Suneet Kumar, J.) (V.K. Shukla,J.)