IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-20330-2015
Date of decision : 10.07.2020

Dr. Amitabha Sen & Anr. ....Petitioners

V/s

Raj Singh Gehlot & ors. ....Respondents

CORAM: HON'BLE MR. JUSTICE RAJAN GUPTA
HON'BLE MR. JUSTICE KARAMJIT SINGH

Present: Mr. R.S. Bains, Advocate for the petitioners.
Mr. Sanjay Kaushal, Sr. Advocate with
Mr. R. Kartikiya, Advocate for respondents no. 1 to 3.
Mr. Ankur Mittal, Addl. A.G. Haryana with
Mr. P.P. Chahar, DAG Haryana.
Mr. Sudershan Kumar, Advocate for
Mr. Deepak Balyan, Advocate for respondent no. 9.

RAJAN GUPTA J.

The matter pertains to the construction raised in approximately 18.98 acres of land right adjacent to the Delhi-Jaipur National Highway, in Gurgaon, which comprises of residential complex, commercial buildings as well as a Mall, popularly known as Ambience Mall.

The writ petition has been filed alleging that while raising the commercial complex there has been blatant violation of the statutory provisions and rules made thereunder. It has been indicated in the petition that the entire complex could not have come up without collusion of the government authorities who granted various approvals and permissions. At the time of filing of the petition, a prayer was made to restrain construction of commercial complex on Ambience Lagoon Complex (having licence for residential colony) and to seal the commercial building. However, it appears that during the pendency of petition, the entire construction has been completed. It has further been prayed that the illegally constructed commercial complex be demolished and a CBI investigation be ordered for the usurpation of the land by the builder in active connivance with the authorities; as also, to strictly maintain 35% ground coverage area and

maximum FAR prescribed for group housing, as stipulated under the law; and for restoration of peaceful possession of 18.98 acres of land originally reserved for the said residential complex. Petitioner also prayed for interim orders more or less on similar terms. At the outset it is necessary to reproduce hereunder the interim order passed by the 1st Division Bench on 23.09.2015:-

> *"Issue notice of motion returnable on 08.10.2015.*
> *Any third party rights created hereafter shall be subject to further orders.*
> *Respondent Nox 1 to 3 shall inform third parties of this order in the event of entering into any agreement."*

Number of orders were passed thereafter by coordinate Benches seeking information pertaining to licence no. 19 of 1993 originally granted to the builder as also the multiple licences issued thereafter.

It appears earlier the association of residents was litigating before various forums. As per averments made in paras 1 to 3 of the petition, the builder infiltrated into the association thereby compromising the cause being espoused by the association. They had thus no option but to approach the Hon'ble Supreme court under Article 32 of the Constitution. The Writ Petition (Civil) No. 338 of 2015 came to be disposed off on 08.07.2015.

As many as 28 apartment owners had approached the National Consumer Disputes Redressal Commission in the year 2005. Therein the builder filed a reply dated 31.03.2008. As per stand of the petitioners, the builder made a false statement before the Commission that he had already filed a Deed of Declaration. Apartment owners thereafter filed a civil suit in the year 2010 wherein Deed of Declaration came on record, perusal whereof revealed that area of the housing complex had been reduced from 18.98 acres to 11.83 acres. It also transpired that Deed of Declaration was dated 25.03.2009, thus statement made by

the builder before the National Consumer Commission was, in fact, false. The civil suit was ultimately withdrawn by the Association of the apartment owners. Thereafter CWP No. 2147 of 2012 was filed before this court claiming limited relief of quashing of licence dated 01.09.2010 relating to another commercial structure within the same piece of land. The said petition was disposed of as the State readily agreed to reconsider the grievance of the petitioner therein whether commercial building had been raised legally (pursuant to licence 1.9.2010) and to pass a speaking order on the issue. The petition was thus disposed of vide order dated 16.1.2020, in following terms:-

> *"Grievance of the petitioner inter alia is that after grant of licence dated July 15, 1993, Annexure P-1 by the Director, there was a declaration to raise a construction of apartments buildings, apartment complex, club building and building for economically weaker sections of the society. There was no mention of any commercial activity to come up. However, vide order dated September Ist, 2010, Annexure P-11, wherein it is mentioned that the Director, Town and Country Planning allowed raising construction of commercial building over the land. This is despite the fact that there is no mention in the licence pursuant to which the builder can be allowed to raise commercial project.*
>
> *At the outset, Mr. Mittal, learned State counsel submits that the matter shall be reconsidered by the Director General, Urban Estates, Department of Town and Country Planning within three months and a speaking order shall be passed which shall be duly conveyed to the petitioner. It is made clear that while reconsidering the issue, order Annexure P-11 shall not stand in the way of the concerned authority.*

Disposed of."

Said writ petition related only to the commercial building raised pursuant to licence dated 1.9.2010. The court had thus no occasion to examine entire issue on merits in view of concession given by the State which was acceptable to the petitioners therein i.e. the Ambience Lagoon Apartment Residents Welfare Association. It will not be out of place to state here that when instant petition came up for hearing before this Court on 16.1.2020, a specific query was put to Mr R.S. Bains, Advocate whether anything survived in this petition in view of disposal of *CWP No.2147 of 2012* filed by the Association, on 28.1.2020, he apprised the court that the order passed in *CWP No.2147 of 2012* had no bearing on facts of the present petition. On the other hand he submitted that the Association was no longer espousing the cause of the residents of the group housing. The case was thus adjourned to 18.2.2020 and final arguments were heard from 2.3.2020 to 4.3.2020. Even during course of arguments, Mr R.S.Bains, the counsel for the petitioner contended that their association had come under the influence of the builder and interest of the residents had been compromised. As CWP No.1247 of 2012 related only to commercial building raised pursuant to licence dated 1.9.2010 and the said issue is under consideration of the State in view of order dated 16.1.2020 (reproduced above), scope of the present writ petition is being confined to examining the legality of sanction for raising rest of the commercial structures within the area of 18.93 acres. The petitioners had approached Hon'ble Supreme Court vide Writ Petition (Civil) No.338 of 2015 wherein it was directed that it would be proper if petitioners ventilated their grievance before the High Court. In case they do so the High Court would do the needful to prevent the construction activities, if same were found to be in violation of building bye-laws or construction was being raised without getting building plans sanctioned. Hon'ble Supreme Court also observed that if the irregularities

were there, same would be looked into seriously and high court would take action against all persons including the builder and erring officials, as soon as possible. With these directions the petition was disposed of vide order dated 8.7.2015. Hence, the instant writ petition was filed.

During the course of arguments, it was vehemently pleaded by learned counsel for the petitioners that Ambience Lagoon Island Residential Complex as originally conceived had an area of 18.98 acres, however, later in collusion with the authorities said area was reduced to 10.98 acres by de-licensing 8 acres thereof. Another 3.9 acre was taken out reducing the residential area to merely 7.93 acres. According to them, the Deed of Declaration filed by builder on 25.3.2009 was for 11.83 acres which was not as per the licence No.19 originally granted in 1993. Learned counsel also emphasized that even after furnishing this deed of declaration, aforesaid area of 3.9 acre was allowed to be used for raising another commercial complex in the year 2010. As per the counsel, the object of setting up the entire housing project known as Ambience Lagoon Island Residential Complex thus stood defeated. The promises made in the brochure as well as Builder-Buyer agreement were violated. All this illegal exercise was conducted in violation of the statutory provisions of the Haryana Development and Regulation of Urban Area Act, 1975 (hereinafter referred to as the Act of 1975) and rules framed thereunder. The authorities either shut their eyes or acted in collusion with the builder. It was also submitted that the entire statute contains no provision for delicensing a piece of land, once licence is granted for any particular project. Learned counsel also referred to various violations of building norms, provisions of Apartments Act, 1983 etc.

In response, a joint reply was filed on behalf of respondents 1 to 3. As per the State counsel, respondent no.3 and other group companies purchased

about 132.06 acres of land in village Nathupur, Distt. Gurgaon, adjacent to Delhi Gurgaon border during the period 1991-1993. They planned to develop integrated township there. Respondent No.3, then known as HLF Ltd., was granted Licence No.19 of 1993 for development of Group Housing Colony. According to him, the entire project went as per the plan. Though he admitted that in the year 2001, out of 18.98 acres an area of 8.0 acres was delicensed and licence for raising a commercial complex was granted simultaneously, there was no illegality in this exercise. On being asked about the enabling power, if any, in the statute to permit delicensing, he was not able to refer to any provision. He however tried to justify the action of the State by referring to certain provisions of the General Clauses Act.

Counsel for the builder heavily relied upon the Builder-Buyer agreement, referring to stipulations in the same, he contended that it was made clear to the buyers that the housing project was to come up on 10.98 acres only, as rest of the area was reserved for "future development". According to him, even occupation certificate was issued by the authorities on 31.12.2001 on completion of 13 blocks on 10.98 acres. Thus on 14.1.2002 respondent no.2 submitted building plans of construction of two more blocks in residential complex for economically weaker sections.

We heard learned counsel for the parties at length and have given careful thought to the submissions made. Original record was perused with the assistance of State counsel.

At the border or Delhi-Gurgaon village Nathupur is situated. Due to increasing shortage of space in Delhi, builders thronged to Gurgaon with various housing projects. Certain builders, including the present one, floated companies to buy land in village Nathupur and other adjacent villages with the avowed purpose

of developing housing projects. Apparently, this move was welcomed by the State Government as well. It had in fact already enacted a statute known as Haryana Development and Regulation of Urban Areas Act, 1975 within the framework of which such housing projects could be set-up/developed. This enactment was with a view to regulate the use of land in order to prevent ill-planned and haphazard urbanization in or around the towns and for development of infrastructure.

The builder identified a piece of land measuring 18.93 acres in village Nathupur and submitted an application for establishing a group housing project thereon. The firm HLF Enterprises made an application in form LC-1 under rule 3(1) of the Haryana Development and Regulation of Urban Areas Rules, 1976 (hereinafter referred to as the 1976 Rules). A copy of the application is on record. Surprisingly, perusal thereof shows that builder at the outset made certain changes/ interpolations in the application dated 17.2.1992 itself. The format for the application is provided in rule 3(1) of the 1976 rules. The application was required to be filled in form in LC-1. Clause 2(v) whereof reads as under:-

> *"(v) Layout plan of the colony on a scale of 1 centimetre to 10 metre showing the existing and proposed means of access to the colony, the width of streets, sizes and types of plots, site reserved for open spaces, community buildings and schools with area of each and proposed building lines on the front and sides of plots."*

However, in the application the builder made changes as per his will and submitted an application which was not in the prescribed format. This would be evident by plain reading of the various clauses of the actual application submitted by the builder. Form LC-1 is reproduced hereunder:-

"Form LC-I [see rule 3 (1)]

Registered

To

The Director,

Town and Country Planning, Haryana,

Chandigarh.

Sir,

I/ We beg to apply for grant of licence to set up a residential/ industrial /Commercial colony at _____at tehsil _____and district_____. The requisite particulars are as under:-

1. to 10 xxx xxx

2. I/We enclose the following documents in triplicate:—

(i) Copy or copies of all title deeds and/or other documents showing the interest of the applicant in the land under the colony, along with a list of such deeds and/or other documents.

(ii) a copy of the shajra plan showing the location of the colony along with the names of revenue estate, Khasra number of each field and the area of each field.

(iii) A guide map on a scale of not less than 10 centimetres to 1 Kilometre showing the location of the colony in relation to surrounding geographic features to enable the identification of the site.

(iv) A survey map of the land under the colony on a scale of 1 centimetre to 10 metres showing the spot levels at distance of 30 metres and where necessary, contour plans. The survey will also show the boundaries and dimensions of the said land, the location of streets, buildings, and premises within a distance of at least 30 metres of the said land and existing means of access to if from existing roads.

(v) Layout plan of the colony on a scale of 1 centimetre to 10 metres showing the existing and proposed means of access to the colony, the width of streets, sizes and types of plots, sites reserved for open spaces, community buildings and schools with area under each and proposed building lines on the front and sides of plots.

(vi) An explanatory note explaining the salient feature of the proposed colony, in particular the sources of water supply arrangement for disposal and treatment of storm and sullage water and site for disposal & treatment of storm and sullage water.

(vii) Plans showing the cross-sections of the proposed roads showing in particular the width of the proposed carriage ways, cycle tracks and footpaths,

green verges, position of electric poles and of any other works connected with such roads.

(viii) Plans as referred to in clause (vii) above indicating in addition the position of sewers, storm water channels, water supply and other public health services.

(ix) Detailed specifications and designs of road works shown in clause (vii) above and estimated cost thereof.

(x) Detailed specifications and designs of sewerage, storm-water and water supply schemes with estimated cost of each.

(xi) Detailed specification and design for disposal and treatment of storm and sullage water and estimated cost of works.

(xii) Detailed specification and designs for electric supply including street lighting.

3 to 5 xx xx xx

[Amenities

6. I/We solemnly affirm that the particulars given in para 1 above are correct to the best of my/ our knowledge and belief.

Dated :

Place : *Your faithfully*

Attested : Oath Commissioner/Magistrate, Ist Class *(Name and address)"*

It was mandatory for the builder to apply as per the above format, however, in the application submitted by him, many changes were made. Same would be evident from a perusal thereof. Relevant part thereof is being reproduced hereunder:-

"HRY. DEV. & REGULATION OF URBAN AREA RULES, 1976

Form LC-I

[see rule 3 (1)]

To

The Director,

Town and Country Planning Department,

Haryana, Chandigarh.

Sir,

We beg to apply for grant of licence to set up a residential colony at Village Nathupur, Distt. Gurgaon, Haryana.

The requisite particulars are as under:-

1 to 6	*xxx*	*xxx*
7. Details of movable/immovable Property held by the applicant	*:*	*Land admeasuring 23 acres, bearing khasra no.2/2,3,4,5,528,529,530, 531,532,533,535,527 at Village Nathupur, Distt. Gurgaon.*
8.Whether the application had ever been granted permission to set up a colony under any other law, if so, details thereof	*: No.*	
9.Whether the applicant has ever established a colony or is establishing a colony and if so, details thereof	*:*	*Not done earlier intends to establish a residential complex (Group Housing on 19 acres. Land out of mentioned above.*

We enclose the following documents in triplicate:—

(i) Copy or copies of all title deeds and/or other documents showing the interest of the applicant in the land under the proposed colony, along with a list of such deeds and/or other documents.

(ii) a copy of the shajra plan showing the location of the colony along with the names of revenue estate, Khasra number of each field and the area of each field.

(iii) A guide map on a scale of not less than 10 centimetres to 1 Kilometre showing the location of the colony in relation to surrounding geographic features to enable the identification of the site.

(iv) A survey map of the land under the colony on a scale of 1 centimetre to 10 metres showing the spot levels at distance of 30 metres and where necessary, contour plans. The survey will also show the boundaries and dimensions of the said land, the location of streets, buildings, and premises within a distance of at

least 30 metres of the said land and proposed building lines on the front and sides of plots.

(v) An explanatory note explaining the salient feature of the proposed colony, in particular the sources of water supply arrangement for disposal and treatment of storm water and sullage water.

(vi) Plans showing the cross-sections of the proposed roads showing in particular width of the proposed carriage ways, cycle tracks and footpaths, green verges, position of electric poles and of any other works connected with such roads.

(vii) Plans as referred to in clause

(viii) above indicating in addition the position of sewers, storm water channels, water supply and other public health services.

(ix) Detailed specifications and designs of road works shown in clause (vii) above and estimated cost thereof.

(x) Detailed specifications and designs of storm-water and water supply schemes with estimated cost of each.

(xi) Detailed specification and design for disposal and treatment of storm and sullage water and estimated cost of works.

(xii) Detailed specification and designs for electric supply including street lighting."

A comparison of the prescribed format in LC-1 and the application submitted by the builder purportedly in form LC-1 shows that he omitted clause (v) from the application which provides for submission of a lay out plan of the colony on a scale of 1 centimetre to 10 metre showing the existing and proposed means of access to the colony, the width of streets, sizes and types of plots, site reserved for open spaces, community buildings and schools with area of each, besides proposed building lines on the front and sides of plots. He made changes in clause (iv) and omitted the line *"….. and existing means of access to it from existing roads"* and instead substituted the same by *"….proposed building lines on the front and sides of plots."* In a clever move he projected as if the application contained all (xii) clauses envisaged by rule 3(1). A careful perusal, however, shows that one para i.e. para 2(v) with regard to lay out plan is missing which was

mandatory. Strangely, this application was accepted by the authorities as such and licence was granted. It is inconceivable that concerned authorities failed to notice the stark omissions, interpolations and tampering with the basic document required for purpose of initiation of a project. This is fortified from the fact that during the course of hearing when we asked the authorities to produce the original record they straightway referred to licence No.19 granted on 9.7.1993 to M/s HLF Enterprises. Para 3(a) thereof reads as under:-

"3. Licence is granted subject to the conditions:-

(a) That the colony is laid out to conform to the approved layout plan and development works are executed according to the designs and specifications shown in the approved plan accompanying this licence."

On being asked to refer to the lay out plan stated to be accompanying the licence, the State counsel showed his inability. He sought instructions from the officials of the department, who were present in court, they had no option but to admit that there was no lay-out plan available on record either with the licence or with the application submitted by the builder. It is thus not a matter of chance that in the initial application submitted by the builder that very para was omitted which referred to the lay out plan. It appears, the builder never intended to submit the lay out plan as his intention from the very beginning was just not to establish a housing project but other commercial buildings within the area sanctioned for group housing. We find it difficult to accept that all these clever tactics went unnoticed by the department. On the other hand, it points to their active connivance from the very initiation of the project. Needless to say that this fraudulent exercise had a cascading effect on the project resulting into non-adherence to FAR, lack of open spaces, reduced width of streets and absence of community buildings and schools etc. This was a result of omission of clause 2(v) from the application which was not submitted as per format LC-1 (under rule

3 of the 1976 rules). We are constrained to draw a conclusion that the possibility of builder acting in collusion with the authorities and duping innocent buyers of apartments cannot be ruled out. It appears they were made to sign on the dotted line in the Builder-Buyer Agreement, oblivious of the probable mischief by the builder in connivance with State officials.

In this context it is apposite to refer to section 3(2) of the 1975 Act which is as below:-

3. [(I) xxx xxx

(2) On receipt of the application under sub-section (I), the Director shall, among other things, enquire into the following matters, nameIy:-
(a) title to the land;
(b) extent and situation of the land;
(c) capacity to develop a colony
(d) the layout of a colony
(e) plan regarding the development works to be executed in a colony; and
(f) conformity of the development schemes of the colony land to those of the neighbouring areas."

A perusal of the aforesaid section shows that a duty is cast on the Director to enquire into the title of the land, extent and situation thereof, capacity to develop a colony and layout of the colony, plans of the works to be executed in the colony and conformity of the development scheme of the colony land to those of neighbouring areas. It is inexplicable how the Director conducted the enquiry in the absence of the layout plan of the colony which was admittedly not submitted by the builder. Even other related aspects could not have been enquired into as the builder interpolated form LC-1 as per his convenience. Needless to say that this appears to be a result of pre-conceived design and deceit.

A perusal of record further shows that on 6.5.1996, the Director, Town & Country Planning granted approval to erect building on 18.98 acre for

group housing scheme in phase I in accordance with the building plan submitted by the builder. On the basis of this letter the builder issued a brochure in 1998 promising following amenities to the buyers:-

> *"**Amenities and Facilities***
>
> *24 hour water supply with 100% power back-up. Round-the-clock 3 Tier Security System with CCTVs and intercom. Cables, internet and Telephone wiring. One live telephone line with connection in every apartment. Club House with recreational facilities including indoor Badminton, Squash & TT courts, Gym, Billiard Room & Swimming Pool. Recreation space even for drivers. High speed elevators. Multi-level covered parking. More than 80% area reserved for open and community services. Total landscape surrounded by water falls, fountains and lagoons. Fully developed water body/channel for recreational facilities and recycling of water. Hassle-free property management services. Optimum space utilisation."*

Prominent amongst the above promises made to the buyers was that 80% areas shall be reserved for open and community services out of 18.98 acres. It is pertinent to point out here that it is the requirement of rule 4 of 1976 rules as well. As per said rule 45% area is otherwise required to be kept as open area for roads, schools, community buildings etc. Same is reproduced as under:-

> *"**4. Percentage of area under roads, open space etc. in layout plans [Sections 3(3) 4 and 24]**—(1) In the layout plan of a colony, other than an industrial colony [or low-density-eco friendly colony], the land reserved for roads, open spaces, schools, public and community buildings and other common uses shall not be less than forty five percent of the gross area of the land under the colony;*
>
> *Provided that the Director may reduce [after recording reasons therefor] this percentage to a figure not below thirty-five where in his opinion the planning requirements and the size of the colony so justify."*

However, things did not stop here as suddenly an application came forth from builder seeking delicensing of 8 acres of land out of 18.98 acres with further permission for erection of commercial complex thereon. Ignoring all statutory provisions and throwing caution to winds, the authorities acted more promptly than expected. The order granting permission on 8 acres of land to establish a commercial complex out of 18.98 acres was passed on 16.10.2001 while the order to delicense the same area was passed on 18.10.2001 i.e. two days before the order of delicensing, showing a preconceived plan for a commercial complex to be raised within the area licenced for residential complex. This led to a situation that almost every statutory provision contained in the Act and the Rules was violated resulting in a cascading effect compromising open spaces, roads, parks, community buildings and schools etc.

At this juncture the State counsel was asked to refer to the provisions under which the order of delicensing was passed by the authorities. He, however, candidly admitted that there was no such provision in the Act. He tried to justify this act by referring to clause 21 of the General Clauses Act that power to grant a licence also contains implied power to delicense as well. We, however, find the argument bereft of any merit or logic. The Act contains a specific provision for cancellation of licence in case the builder fails to comply with specific conditions of licence. If any such situation had arisen the only option with the authorities was to have invoked powers under section 8 of the Act and cancel the licence. In this context the term 'delicensing' is a misnomer. Besides, provisions of the statute have to be strictly interpreted as they exist. Reference to clause 21 of General Clauses Act is only an *ex post facto* justification and an after-thought. Law is settled on the point that State affidavit/plea cannot augment or add to the orders passed by the authority. The reasons, if any, have to be contained in the order itself

as same would only be subject to judicial review. No authority by adopting a circuitous route can circumvent the settled legal position.

This court finds equally absurd the stand of the State as spelt out in response to information sought under RTI (supplied vide memo No.RTI-648/613 dated 15.1.2010) by the office of Director, Town & Country Planning, Annexure P-43, same reads as under:-

> *"Since the Director is empowered under the Act to grant a license and undertake regulatory functions for development of a colony, it is an implied function of the Director to allow an exit route to a developer who is not interested to pursue the development of a project and wishes to withdraw from its obligations. The Director after ensuring that no public interest is harmed, allow such withdrawal after forfeiture of scrutiny fees, licence fees, conversion charges etc. Though at times the same land can be again considered or g rant of separate licence. The entire process of grant of licence or change of project is at times referred as* ***"delicencing" though such item does not exist in the Act/Rules."***

The aforesaid stand of the Department which aims to provide exit plan to the builder by delicencing part of the housing project (8.0 acre) out of total 18.98 acres for establishing commercial complex is clearly in derogation to the object of the 1975 Act. Such a plea is preposterous in view of provisions of Section 8 which confer enough power on the State to deal with a situation in which a builder is unwilling to complete the project as sanctioned.

It is noteworthy that in the reply dated 15.1.2010, Annexure P-43, the State has clearly admitted that no item such as 'delicencing' exists in the Act/Rules. Thus, origin of power, if any, can be traced to Section 8, which, however, does not deal with delicencing. It contemplates only cancellation of licence and obligations of the Director, Town & Country Planning, thereafter.

There is no dispute about the fact that the provisions of Haryana Apartments Ownership Act, 1983 are also attracted to a group housing project sanctioned under 1975 Act. This finds mentioned in clause 27 of the Builder-Buyer Agreement as well. As per section 6(1) and (2) thereof, the undivided interest of each apartment owner in the common area would be in the percentage expressed in the Deed of Declaration. The percentage of undivided interest of each apartment owner as expressed in the Deed of Declaration has to have a permanent character and cannot be altered without consent of the apartment owners expressed in an amended declaration duly executed and registered as provided. By resorting to delicencing and sanction of the commercial project the authorities completely ignored the vested right of the apartment owners and acted in flagrant violation of section 6 (1) and (2) of 1983 Act. Section 6(1) and (2) read as under:-

> ***"6. Common areas and facilities-***
>
> *(1) Each apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration. Such percentage shall be computed by taking as a basis the value of the apartments in relation to the value of the property; and such percentage shall reflect the limited common areas and facilities.*
>
> *(2) The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered without the consent of all of the apartment owners and expressed in an amended declaration duly executed and registered as provided in this Act. The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains and shall be deemed to be conveyed or encumbered with the apartment even though such interest is not expressly mentioned in the conveyance or other instrument."*

This apart as per section 2 of the 1983 Act, the builder had to submit a Deed of Declaration within 90 days of being granted part completion under the rules framed under 1975 Act and in case of failure to do so, penalties as provided under section 24-A would be attracted. The said section lays down that builder

who does not file Deed of Declaration within the period specified under section 2 would be punished with imprisonment which may extend to three years and also fine of not less than Rs.50,000/- and Rs.10,000/- for each day of continuing offence. From the record it is evident that part completion certificate was granted to the builder vide memo no.5DB-2002/927 dated 10.01.2002 under rule 16 of 1976 Rules. However, Deed of Declaration was submitted by the builder on 25.3.2009. It is inexplicable as to why authorities did not resort to the provisions of Section 24-A of the 1983 Act forthwith on expiry of the prescribed period which would be considered as date of offence under section 24-A of the Act. Said provision leaves no room for doubt that failure to submit the Deed of Declaration within the period prescribed attracts a penalty of Rs.50,000/- straight-way whereafter it is considered a continuing offence inviting a penalty of 10,000/- per day.

The conclusion is inescapable that the submission of Deed of Declaration was intentionally delayed for so many years as there appears to be dishonest intention of the builder from the very inception of project to dupe the buyers by raising a commercial complex within the space sanctioned for group housing project. The design to develop a commercial complex was never divulged either by the builder or State authorities to the innocent buyers at any stage. An ambiguous term was used in the Builder-Buyer agreement that 8.0 acre was reserved for "future development". It is beyond comprehension how builder himself could reserve a part of the area (8.0 acres) out of 18.98 acres for future development. The builder acted in a manner as if he was not governed by any Enactment/Rules. In view of same, the reliance placed by the counsel for the builders repeatedly on Builder-Buyer agreement is absurd. An agreement between parties cannot override the law lay down to regulate urbanization and to prevent ill-planned and haphazard development.

As regards delicencing of an area of 3.9 acres vide order dated 1.9.2010 this court does not intend to give any finding on the same, it being subject matter of CWP No.2147 of 2012 wherein the matter is pending before the concerned authority. The petitioners, in the instant petition, however, maintained that they were left with 7.9 acres out of 18.93 acres meant for housing project.

The probability of connivance between the builder and the Department cannot be ruled out in view of delicencing of area meant for residential purposes and allocating the same to commercial projects. Entire sequence of events points to a prior meeting of minds between the builder and the officials who dealt with the matter. Apart from above, the fact that there has been undue enrichment of the builder perhaps with the active involvement of the State officials, cannot be ignored by this Court. Such enrichment is not just in violation of various enactments but also a loss to public exchequer at the cost of general public, the apartment buyers in particular. However, this aspect needs to be investigated by an expert agency.

The entire record leaves no room for doubt that various authorities, builders and probably some facilitators got unnatural gains with impunity making the entire scheme contained in Acts and Rules with respect to setting up a group housing project a mockery. Unjust enrichment has been defined by the Courts as retention of benefit by one to the loss of another or retention of money or property of another against the fundamental principles of justice, equity and good conscience. A person is enriched if he has received a benefit and is unjustly enriched if retention of benefit would be illegal. Such enrichment occurs if he has retained money for benefits which actually belonged to another (***See Indian Council for Enviro-Legal Action v. Union of India, (2011)8 SCC 161).***

As regards the action of the authorities in "delicensing" area meant for housing project, the same can be termed as nothing but a colourable exercise of power. It is settled position that when a custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested, such exercise amounts to colourable exercise of power ***(see State of Punjab v. Gurdial Singh, (1980)2 SCC 471).*** It is settled proposition of law that fraud on power vitiates the State action. If State seeks to do some action indirectly though it has no power to do it directly, such action cannot be sustained. In other words, fraud vitiates all actions ***(see Uddar Gagan Properties Ltd. v Sant Singh, (2016)11 SCC 378)***.

In ***Kerala State Coastal Zone Management Authority Vs State of Kerala Maradu Municipality & Ors.***, ***(2019)7 SCC 248,*** setting up of a resort was challenged as the same was set up within 200 meters of the High Tide Line, construction activities whereof are strictly restricted under the provisions of Coastal Regulations Zones. Permission from Kerala State Coastal Zone Management Authority was not sought. The resort was set up on the basis of permission granted by local Panchayat. Kerala High Court found the action illegal and directed demolition of the resort. It rejected the argument that resort would promote tourism in Kerala and it had immense potential for creation of jobs. It held that notification issued under the Environment Protection Act was meant to protect the environment and bring about sustainable development. It held that the law of the land was meant to be obeyed and enforced. The *fait accompli* of the construction made in teeth of notification was unsustainable. Hon'ble Supreme Court upheld the view of the Kerala High Court.

In the case in hand, no justification whatsoever is forthcoming for delicensing of part of the area meant for housing project for commercial purpose

and a huge mall (Ambience Mall) having been allowed to be raised thereon. We are, thus, faced with a similar situation as in Kerala case (supra) due to flagrant violation of provisions of 1975 Act which are meant to prevent ill-planned and haphazard urbanization in or around towns.

In ***Rameshwar & Ors Vs State of Haryana & Ors (2018)6 SCC 215,*** Hon'ble Supreme Court found that State sought to acquire land issuing notification by the process contemplated under Land Acquisition Act. Certain private builders, however, purchased the land from land owners at higher price post issuance of notification and thereafter State denotified the same. It is thus observed that this action led to unjust enrichment of individuals and revealed unholy nexus between the builder and the State authorities. It found that where power is conferred to achieve a particular purpose, same has to be exercised reasonably and in good faith. Where power is exercised for extraneous or irrelevant considerations, it would unquestionably be a colourable exercise of power. It further held that State had enabled the builder to enter the field after initiation of acquisition to seek colonization of the land covered by acquisition defeating the objective for which the land was acquired. The Supreme Court thus declared the action of State illegal and also ordered CBI investigation into the matter.

It would be relevant to reproduce the order of Hon'ble Supreme Court passed while disposing of Writ Petition (Civil) No.338 of 2015 on 8.7.2015 filed by the instant petitioners, which is as below:-

> *"Upon hearing the learned counsel for the petitioners and upon perusal of the papers, we find that the main allegation, along with other allegations, in the petition is that the respondent-Builder has put up construction in violation of the Building Bye-laws and without having proper sanction from the concerned authority.*

In the aforesaid circumstances, it would be proper if the petitioners ventilate their grievance before the High Court. If the petitioners approach the High Court, the High Court will do the needful to prevent the construction activities if the same are in violation of the Building Bye-laws or if the construction is being put up without getting building plans sanction.

We are sure that if the High Court finds that the irregularities are committed, the same will be looked into quite seriously and shall take appropriate action against all persons including the builders and erring officers as soon as possible.

With the above directions, the writ petition stands disposed of."

Though irregularities, as pointed out above, at the time of initial submission of application sans the layout plan and drastic changes made in the format by the builder, it cannot be disputed that the original idea was to set up group housing complex on entire 18.93 acres. The court thus feels that the rights of the residents of the housing project need to be preserved. The court cannot countenance blatant violation of statutory provisions and erection of buildings, particularly commercial in nature, conceived by a builder for unjust enrichment, at the cost of general public. It cannot turn a blind eye to such illegal actions and possible collusion between private builder and State authorities. The interpolations and/or tampering with the application form and record is, however, a matter of investigation. We thus have no option but to hold that the order delicencing part of residential area for commercial purpose is without authority of law and needs to be quashed. As regards, the illegal actions and offence, if any, made out, and possible collusion between the builder and State authorities, a separate investigation is necessary by an independent agency.

We thus hold as under:-

(a) Delicensing orders dated 18.10.2001 (Annexure P-9), orders granting license/permission vide order dated 16.10.2001 (Annexure P-10) and dated 01.09.2010 (Annexure P-13) passed after submission of Deed of Declaration on 25.03.2009 (Annexure P-8) are hereby quashed;

(b) In view of our findings in the foregoing paragraph, the State shall take necessary consequential steps forthwith;

(c) In view of the fact that the responsibility has to be fixed it is further directed that the Central Bureau of Investigation would investigate the entire issue after registering a formal FIR by a team of Officers to be chosen by the Director, CBI within six weeks from today. An effort shall be made to complete the entire investigation within six months and a status report be submitted in sealed cover within three months.

The original record of HUDA be retained in the safe custody of Registrar (Judicial). CBI shall be at liberty to move an application for obtaining the record after it begins its proceedings.

(RAJAN GUPTA)
JUDGE

July 10, 2020 (KARAMJIT SINGH)
Ajay JUDGE

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No