*IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CS(OS) 2140/1998**

% **Date of decision: 28th May, 2009**

GURU RAM DAS BHAWAN & Ors. ..... Plaintiffs

Through: Mr. Suryakant Singhla and
Mr. Shanto Mukerjee, Advocates

Versus

M/S DOON APARTMENTS PVT. LTD. ..... Defendant

Through: Ex-parte

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may be allowed to see the judgment? Yes

2. To be referred to the reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. The plaintiff No. 1 claims to be an Association of the occupants of Guru Ram Das Bhawan constructed by the defendant at Plots No. A3 & A4, Community Centre, Ranjit Nagar, New Delhi. The plaintiffs No. 2 & 3 are the President and the Secretary of the plaintiff No. 1 Association. The record reveals that the Delhi Municipal Corporation on 11th March, 1979 held a public auction in respect of perpetual lease hold rights of the aforesaid plots of land and the bid of the defendant was highest and was accepted and the defendant was put into possession of the said land on 19th July, 1979. The defendant constructed on the aforesaid plots of land a Multi Storeyed Building with a number of offices, flats, shops and godowns. The said building was named 'Guru Ram Das Bhawan'. The defendant entered into separate agreements with different persons regarding the offices/flats/shops/godowns in the said building and agreed to sell

the offices/flats/shops/godowns in the said building to the said purchasers on the terms and conditions contained therein.

2. As per the documents on record, it was inter alia agreed between the defendant and the purchasers of the different offices/flats/shops/godowns in the said building that possession will be delivered after full payment; that upon receipt of requisite permission from the DDA/MCD for the sale of the flat to the buyer, the defendant shall complete the sale and effect the conveyance of the flat to the buyer in such manner as may be permissible; that the buyer upon sale and delivery of possession will be entitled to use and occupation of the flat without any interference or hindrance but subject to the terms and conditions of the agreement: that the buyer shall however have no right of the plots of land or to any portion of the building other than the office/flat/shop/godown be sold to it/him/her; that at an appropriate time of which the defendant was to be the judge, the defendant shall promote a Limited Company, Cooperative Society or some other Body Corporate of the buyers, to take over from the defendant the ownership right in the land and the structure thereon and to take the responsibility for the preservation and maintenance of the building and for the operation of common services thereon; that the buyers had agreed and undertaken to be a member of such Limited Company or Cooperative Society or Body Corporate to be so formed; that till the transfer to such Body Corporate or Cooperative Society, the defendant shall have the right to make additions, raise additional structure as may be permitted, over the building; the buyer agreed and bound itself to pay to the defendant or to the proposed Limited Company or Body Corporate or Cooperative Society his proportionate share of all taxes, Ground rent, insurance premium, water charges, salaries of persons

appointed by the defendant or by such Body Corporate/Cooperative Society for the purposes of preservation and maintenance of the property and for the provision of common services in the property; that the buyer also agreed to deposit an amount by way of security and which on the formation of the Body Corporate/Cooperative Society was to be transferred thereto; the buyer also agreed to contribute to a fund called the Sinking Fund for replacement of capital equipment like elevator, pumping sets, electrical cables in the building form time to time. The agreement also provides for insurance of the building, maintenance, restrictions on use, etc. but all of which are not relevant herein. Clause 32 (b) however provides if the Cooperative Society or Body Corporate is not formed for any reason whatsoever, then the defendant may transfer and assign the building to the purchasers of flats/shops/godowns in the said building with each of them having a share therein in proportion to the price paid by him/her to the total price of all the flats/shops/godowns etc.

3. The plaintiffs instituted this suit averring that the buyers/allottees as well as the occupants had been requesting the defendant to form the Body Corporate/Cooperative Society aforesaid and which the defendant had been postponing; accordingly, the plaintiff no. 1/Association was formed and got registered under the Societies Registration Act; that the buyers of different flats/shops/godowns as well as the occupants thereof have a common interest of safeguarding their rights and interests in respect of common area and facilities and which are required to be handed over by the defendant to the plaintiffs. Reliance is also placed on the provisions of the Delhi Apartments Ownership Act, 1986 to contend that the defendant was required to transfer the legal title of the

respective flats/shops/godowns in favour of the purchasers thereof. It is further pleaded that the defendant in spite of being called upon to do so had failed to hand over the amounts collected by way of security deposit and in Sinking Fund and by way of insurance and was required to hand over the same together with the sanctioned building plans and other documents of the property to the plaintiff No. 1 Association. It is further averred that the defendant is required to hand over the maintenance of the building to the plaintiffs. Though various grievances have been made in the plaint but in the prayer paragraph of the plaint the reliefs claimed are of (i) declaration that the plaintiff No. 1 is a body incorporated in terms of the provisions of the Flat Buyers Agreement aforesaid and is legally entitled to enforce the same on behalf of its members and (ii) a decree for accounts and recovery of amounts found due thereon is claimed against the defendant and (iii) a decree for mandatory injunction is claimed directing the defendant to perform its obligations as set out in paragraphs No. 6 to 11 of the plaint and (iv) a decree for permanent injunction is claimed restraining the defendant from demanding any money from the members of the plaintiff on any account whatsoever.

4. On an application of the plaintiff for interim relief vide ex parte order dated 7th October, 1998 the defendant was restrained from resuming possession over the flats of the members of the plaintiff No. 1 Association. The said order appears to be in force till now.

5. The defendant appeared and contested the suit. However, it is not necessary to go into the details of the defence of the defendant, the defendant having since been proceeded ex parte. The plaintiffs filed a replication to the written statement of the defendant and on the pleadings of the parties, on 22nd May, 2000 the following issues

were framed and which would also give inkling of the defence of the defendant.

(i) Whether the plaintiff No. 1 is not a legally constituted Association as alleged by the defendant in the preliminary objections? OPD

(ii) Whether the suit has been signed, verified and instituted by duly authorized persons? OPP

(iii) Whether the common areas and facilities etc. of the property in question can be transferred in favour of plaintiff No. 1 in terms of Flat Buyers Agreement? OPP

(iv) Whether the claim in suit is premature as alleged in paragraph No. 8 of the written statement? OPP

(v) Whether the plaintiff No. 1 is entitled to Insurance Policies, approved plans and completion certificate alongwith other records in respect of the building in question? OPP

(vi) Whether the defendant No. 1 is liable to hand over the amounts due in Sinking Fund Account alongwith all necessary documents and records pertaining to the same? OPP

(vii) Whether the defendant has been maintaining the property in question as required of it by maintaining the required staff etc? OPP

(viii) Whether the lifts in the property in question are working properly and whether there has been proper arrangement for the upkeep of Electrical, Water and sanitary lines and equipments? OPD

(ix) Whether the plaintiffs are entitled to the various reliefs claimed in the suit?"

6. The defendant was proceeded ex parte on 8th November, 2001. The plaintiffs filed affidavits by way of examination in chief of their witnesses. The defendant thereafter applied for setting aside of the ex parte and the said application of the defendant was allowed on 30th July, 2003 and the defendant was permitted to cross-examine the witnesses of the plaintiff. The defendant however again failed to

appear and was proceeded against ex parte on 30th September, 2008. The counsel for the plaintiffs has been heard.

7. It is the pleading of the plaintiffs in the plaint itself that the plaintiff No. 1 is an Association of the occupants. In response to the written statement of the defendant, in the replication it is pleaded that all occupants of the building are members of the plaintiff No. 1 and more than 50% of them are also the owners of the portion of the building occupied by them. With respect to the plaintiffs No. 2 & 3 it is clarified that though the plaintiff No. 2 was the President of the plaintiff No. 1 but it was his wife who was buyer of the flat and in which the plaintiff No. 2 was carrying on business. Similarly with respect to the plaintiff No. 3, secretary of the plaintiff No. 1 it was clarified that he is the Managing Director of the company in occupation of the flats. The said company was not pleaded to be the owner/buyer of the flats.

8. The legislature promulgated Delhi Apartment Ownership Act, 1986 to provide for the ownership of an individual apartment in a Multi-Storeyed Building and 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. Though there was some controversy as to the applicability/enforcement of the said but this Court in **Sagar Apartments Flat Owners Society (Regd.) vs. Sequoia Construction Pvt. Ltd.** 1993 Rajadhani Law Reporter 446 has held that the said law is in force and rights of the parties created under the said law have to be taken into consideration and the court has to ensure that the legislative intent in the said law is fulfilled rather than allow it to flouted.

9. Section 2 of the Apartment Act provides that the provisions thereof shall apply to every apartment in a multi-storeyed building constructed for residential or commercial purposes by any group housing society or any other person and whether before or after the commencement of said Act, and on a free hold land or a lease hold land, if the lease for such land is for a period of thirty years or more. The Act applies to all buildings which have four or more apartments. As per the plaintiffs themselves Guru Ram Das Bhawan has more than four apartments and the documents show the lease of land underneath the same to be perpetual. Thus the Apartment Act applies to the said building. The flats/shops/godowns in the said building in occupation of the members of the plaintiff No. 1 are covered by the definition of Apartment in Section 3(c) of the said act. Section 3(e) defines an apartment owner as meaning a person owing an apartment and an undivided interest in the common areas and facilities appurtenant to such apartment. Section 3 (f) defines an Association of apartment owners as meaning of the owners of the apartments therein. Section 3 (w) defines a promoter as meaning any authority, person or cooperative society, by which or by whom any multi-storeyed building has been constructed.

10. Section 4 of the Apartment Act provides that every person to whom any apartment is allotted, sold or otherwise transferred by the promoter shall be entitled to the exclusive ownership and possession of the apartment so allotted, sold or otherwise transferred to him. In the present case, the defendant having constructed the multi-storeyed building named Guru Ram Das Bhawan is the promoter and the persons to whom the defendant had allotted, sold or transferred the flats/shops/godowns are the owners thereof. Section 4(3) provides that every person who becomes entitled to ownership and

possession of an apartment shall also be entitled to such percentage of undivided interest in the common areas and facilities as may be specified in the Deed of Apartment and such percentage shall be computed by taking, as a basis, the value of the apartment in relation to the value of the land underneath the multi-storeyed building and the structure of the multi-storeyed building and all the fixtures, fittings, appurtenances thereto. Under Section 4(5) common areas and facilities which have been defined in Section 3(j) are to vest collectively in the apparent owners and to remain indivisible.

11. Section 9 of the Act provides for the provisions of the Act to become applicable inter alia to a lessee of a period of 30 years or more of any apartment. Section 13 imposes obligation on the promoter, as the defendant herein is, to execute a deed of apartment in favour of the apartment owners. Section 15 provides for an Association of apartment owners for the administration of all the affairs in relation to the apartments and the property appertaining thereto and for the management of the common areas and facilities. Section 24 makes the provisions of the Act effective notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any contract, undertaking or other instrument and all the apartment owners or tenants or any person in use of the property or any part thereof to which the Act applies shall be subject to the provisions of the Act.

12. Thus, notwithstanding anything to the contrary contained in any agreement executed by the defendant at the time of allotment/sale of any of the offices/flats/shops/godowns, the provisions of the Act are to remain prevalent.

13. It would thus be seen that the law contemplates an association of owners of the apartments and not an association of occupants of the apartments as the plaintiff No. 1 is. The body corporate/cooperative society contemplated under the agreement executed by the defendant at the time of agreeing to sell different offices/flats/shops/godowns to different persons also provides for owners thereof being members of the same and not for the occupants being the members. The Division Bench of this Court in **Star Estate Management Pvt. Ltd. vs. Neo Securities Ltd.** FAO (OS) No. 390/1996 decided on 31st October, 1996 has also held, only association of apartment owners has the right to maintain the common areas and amenities and facilities in the multi-storeyed building.

14. Seen in this light, the plaintiffs are not entitled to the declaration that the plaintiff No. 1 is the body corporate in terms of the provisions of the agreements aforesaid or is legally entitled to enforce the same on behalf of its members. Such right under the agreement as well as under the Apartment Act is of the Association of apartment owners only. Only some of the members of the plaintiff No. 1 are the owners. Others are the occupants/lessees. It is not the case that the said occupants/lessees are lessees for a period of over 30 years so as to be covered by the Act under Section 9 of the Act. The plaintiff cannot thus be entitled to the first relief claimed.

15. As far as the relief of rendition of accounts and recovery is concerned, the right to the said relief is again either of an association of apartment owners or collectively of all the owners of the apartments. The plaintiffs do not meet the said parameter also. Consequently, the plaintiffs are not entitled to that relief also.

16. The plaintiffs have also claimed enforcement of obligations pleaded in paras 6 to 11 of the plaint. In para 6 of the plaint grievance is made of the defendant having not transferred legal title to the respective flats in favour of the various owners of the flats. The right to have the deed of apartment executed in terms of the Apartment Act or to have a sale deed executed/registered is of the individual owners. The Deed of Apartment or the Sale Deed of an individual flat is not to be executed in favour of the plaintiff No. 1 Association/Society. Thus the plaintiffs are not found entitled to be having a locus to sue for the same relief.

17. Para 7 of the plaint deals with the obligation of the defendant to transfer the common areas and facilities. The agreement was for transfer thereof to a body corporate/cooperative society of all the apartment owners. The plaintiff No. 1 is not such a body or society. Even though the agreement provides for the defendant to constitute such a body corporate/cooperative society but had all the apartment owners themselves constituted such body corporate or society, they would still have been entitled to the relief. However, the relief cannot be granted to an association of the occupants and of which only some of the members are the owners. In fact, under the Act, upon such association of apartment owners being constituted, no formal transfer of common areas and facilities by the defendant to such association is required inasmuch as under the law the common areas and facilities vest in such association.

18. The grievance in para 8 of the plaint is that after the formation of the plaintiff No. 1 the defendant is not entitled to receive any payment on account of common service charges. It is further pleaded that the defendant is required to hand over the amount received by way of security deposit to the plaintiff No. 1. Para 9 deals with the

amount collected towards insurance and para 10 deals with the sanctioned plans and other documents pertaining to the property. As far as the entitlement of the defendant to recover the charges is concerned, I find that the defendant has no right to claim such payments or to enforce the same from the apartment owners. This court in **Dhawan Deep Residents Welfare Asso. (Regd.) vs. M/s. Star Estate Management Ltd.** IA No. 8319/2006 in CS(OS) No. 1474/2006 decided on 20th September, 2007 has inter alia held that the owners/residents of a multi-storeyed building have a right of maintenance of common areas and amenities and the builder/promoter or its agency cannot forcibly recover maintenance charges. Thus even though all the owners are not before this Court and the plaintiff No. 1 is not an association of all the owners but the plaintiffs are found entitled to the relief of restraining the defendant form recovering any monies on account of common charges or maintenance charges or any other charges with respect to the building from any apartment owner/occupant/lessee of any apartment not willing to pay the same to the defendant. However the association of occupants having no right to the amounts collected by way of security deposit, insurance monies or the sanctioned plans of the building and the right thereto being of an association of apartment owners only the plaintiffs are not found entitled to that relief.

19. Para 11 of the plaint deals with the obligation of the defendant to hand over the maintenance of the building to the plaintiff No. 1. However as aforesaid under the agreement as well as under the law the right of the maintenance is of the association of apartment owners and which is not before the Court. The plaintiffs thus are not entitled to the said relief also.

20. Having held so, I may express that though this court in the judgments aforesaid as well as in several other judgments viz. **Ganesh Prasad Seth vs. Karam Chand Thapar** 1998 (IV) AD Delhi 657, **Om prakash Charaya vs. Ashok Kamal Capital Builders Pvt. Ltd**. 2000 (VII) AD Delhi 67, **Municipal Corporation of Delhi vs. A.M. Khanwilkar** 2002 (65) DRJ 38 and **R.L. Bhardwaj vs. Shivalik Cooperative Group Housing Society Ltd.** 56 (1994) DLT 600 has been attempting, while faced with applications for interim relief, to give effect to the provisions of the Apartments Act but in practice, the Apartment Act has failed to fulfill the purpose for which it was enacted. Though changes/amendments to the said Act have been heard to be under consideration for long but nothing has happened in the last over 22 years. Though the Government takes a stand that there is no impediment to the registration of Deeds of Apartments but in practice it is found that the Registrar of Assurances refuses to register documents of transfer of individual flats constructed over the leasehold lands. There appears to be no clear directions by the perpetual lessors of the land viz. DDA, MCD for registration of deeds of individual flats/apartments with proportionate rights in the land. All this has reduced the apartments which are valuable immovable property to be not having any mortgageable title and has encouraged the Builders/Promoters to illegally collect transfer charges whenever an apartment is bought and sold and at the loss of stamp duty payable to the Government.

21. In most of the buildings, the owners are not the occupants. As per normal terms of letting of the apartments, it is the tenant who is responsible for payments of maintenance charges. The owner being not in use/occupation of the apartments is not concerned with the

standard/quality of maintenance provided. He is only concerned with his rent. The tenant thus though paying the maintenance charges on behalf of the owners under agreement from the owners is left at the vagaries of the builder and as found in this case, not entitled to enforce rights against the builders, owing to the association contemplated under the Act being of the owners. The builders of multi-storeyed building are found to continue managing the common areas and services and earning profits therefrom and which under the agreement and under the law they are not entitled to. All this is to the prejudice of the occupants of the apartments. The legislature needs to consider providing for the association of the occupants to carry on the maintenance of common areas and amenities in the building since it is they who are vitally concerned therewith. However, till the legislature makes such provision, it is essential for the tenants of such apartments to at the time of entering into lease also obtain authorization in their favour from the owners of the apartment to deal with the builder in relation to the rights of the owners of maintenance of common areas and amenities and/or to represent the owner in the association of the apartment owners during the term of their lease/occupation of the flats.

22. Thus though while disallowing most of the reliefs claimed in the suit, I do the same with a heavy heart being fully aware of the difficulties being faced of the members of the plaintiff No. 1. However there being no remedy in law, my hands are constrained.

23. The suit of the plaintiffs is thus decreed only for the relief of injuncting the defendant from recovering the charges towards maintenance of any common areas or amenities/facilities in the building known as Guru Ram Das Bhawan at Plots No. A3 & A4, Community Centre, Ranjit Nagar, New Delhi from any of the

occupants thereof who are not willing to pay the same. The suit for the remaining reliefs is dismissed.

24. In the facts of the case, the parties are left to bear their own costs. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW
(JUDGE)

May 28, 2009
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