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(R)

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 22nd DAY OF DECEMBER, 2005

BEFORE:

THE HON'BLE MR. JUSTICE ANAND BYRAREDDY

MISCELLANEOUS FIRST APPEAL No.2508 OF 2003 (CPC)

c/w.

MISCELLANEOUS FIRST APPEAL No.2564 OF 2003 (CPC)

BETWEEN:

1. K. Raheja Development
Corporation, A Partnership
Concern, having its Office
at 13th Floor, No.26/27,
M.G.Road, Bangalore – 560 001
Represented by its Partner

2. John Fowler India Limited
A Company registered under
The Companies Act, 1956
Having its registered office at:
Marshal's Building, Shoorji
Vallabhdas Marg, Mumbai
Represented by its Power of
Attorney holder

... APPELLANTS
(COMMON IN BOTH APPEALS)

(By Sri. Udaya Holla, Senior Advocate for M/s. Holla & Holla,
Patil and Nettar, Advocates)



AND:

1. Raheja Residency Apartment
Owners' Apex Body
Having its registered Office at:
Club House, Raheja Residency
BDA Complex Road, 7th Cross
3rd Block, Koramangala
Bangalore – 560 034
Represented by its President

2. Apartment Owners' Association
Cypress Block, Raheja Residency
(A Block), having its registered
office at: Cypress, Raheja Residency
BDA Complex Road, 7th Cross
8th C Block, III Block, Koramangala
Bangalore – 560 034
Represented by its President

3. Raheja Residency Ebony
Block Apartment Owners'
Association (B Block)
Having its registered office at:
'Ebony', Raheja Residency
BDA Complex Road, 7th Cross
8th C Main, III Block, Koramangala
Bangalore – 560 034
Represented by its President

4. Raheja Residency Maple
Block Apartment Owners'
Association (C Block)
Having its registered office at:
7th Cross, 3rd Block,



Koramangala
Bangalore – 560 034
Represented by its President

5. Olive Block Apartment
Owners' Association
(D Block), Having its registered
office at: Olive Block,
7th Cross, 3rd Block,
Koramangala
Bangalore – 560 034
Represented by its President
6. Raheja Residency 'Pine'
Block Apartment Owners'
Association (E Block)
Having its registered Office
At: 'Pine', Raheja Residency
3rd Block, Koramangala
Bangalore – 560 034
Represented by its President
7. Raheja Residency Hazel
Block Apartment Owners'
Association (H Block)
Having its registered Office
At: 7th Cross, 3rd Block,
Koramangala, Bangalore – 560 034
Represented by its President
8. Corporation of the City
of Bangalore, Bangalore
Represented by its
Commissioner

... RESPONDENTS
(COMMON IN BOTH APPEALS)

B. Anur

(By Sri. A. Madhusudhana Rao for K. Raghavendra Rao,
Advocates)

These Miscellaneous First Appeals are filed under Order XLIII Rule 1 (r) of the Code of Civil Procedure, 1908 praying to set aside the order dated 17.1.2003 passed on I.A.2 (in M.F.A. No.2508/2003) and on I.A.III (in M.F.A. No.2564/2003) in O.S.No.113/2002 on the file of the XVI Additional City Civil and Sessions Judge, Bangalore City, etc.

These appeals having been heard and reserved and coming on for pronouncement of judgment this day, the Court delivered the following:-

J U D G M E N T

The defendants Nos. 1 and 2 before the trial court are in appeal challenging a common order passed under two interlocutory applications, of the plaintiffs.

2. The facts of the case are as follows:

Appellant No.1 had entered into an agreement dated 16.11.1988 with Appellant No.2 to develop land measuring 3,55,490 sq. ft. into apartment complexes. The appellants, as already stated, are the defendants before the trial court.



In terms of the agreement the appellants sold the undivided interest in land, corresponding to individual apartments, to the prospective purchasers of apartments in the various blocks of apartments, under substantially identical terms and conditions.

Respondents Nos. 1 to 7 , are the plaintiffs, they are the several associations comprising of members who are purchasers of the apartments aforesaid. They have sought for the relief of a declaration that the appellants have no right to form or allot any parking places on the ground floor surface area and between the compound wall and the peripheral roads and in any other common areas located in the suit schedule property. They have also sought for injunctory reliefs in this regard.

Interlocutory applications were filed seeking temporary injunction. I.A.No.2 was filed to restrain the appellants from forming or allotting car parking areas in the areas aforesaid and I.A.No.3 was filed to restrain, respondent No.8 herein, the Bangalore Mahanagara Palike (hereinafter referred to as 'BMP')



for short) from granting any permission to the appellants to form car parking areas as aforesaid. The applications were allowed. The appellants have challenged the same.

3. Heard Shri Udaya Holla, Senior Advocate for M/s. Holla & Holla, Patil and Nettar for the appellants and Shri Madhusudhan Rao for Sri. K. Raghavendra Rao, for respondents Nos. 1 to 7.

4. It is contended on behalf of the appellants as follows:

Respondents Nos. 1 to 7 associations are aware that the scheme of development of the schedule property involved, inter alia, conveyance of undivided share only in that portion of the schedule property which is covered by the plinth area of the apartment building where the purchaser has purchased his individual apartment and not in the rest of the area of the schedule property. The right to form car park areas in the open spaces of the schedule property is conferred on the appellants. In this



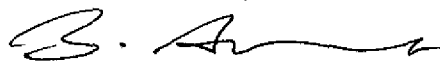
regard, my attention is drawn to the several clauses of the agreement providing for such rights.

The recital at Clause (0) of the agreement enables the appellant No.1 to confer exclusive right of use of car parking spaces in the basement and the compound adjacent to the building on the purchasers.

Clause 18 provides that the purchaser shall have no claim other than in respect of the particular car parking space allotted by the appellant and that all other open spaces, unallocated apartments and other spaces would remain the property of the appellant until the entire schedule property is conveyed.

Clause 22 empowers the appellant No.1 to put up further construction as may be permitted by the authorities, over and above the construction already sanctioned. The clause precludes the purchaser from raising any objection in this regard.

Clause 32 gives liberty to the appellant to make variations in the layout, elevation of the building, relocating the buildings,



open spaces and car parking spaces as the exigencies of the situation and circumstances warrant.

Clause 36(a) specifically excludes the car park areas from the scope of common areas.

Clause 36 (c) reserves in favour of appellant No.1 the right to construct and develop the schedule property with such modifications from time to time as may be approved by the authorities.

Clause 36(d) affirms the right of use of car parking areas would be allotted by appellant No.1 and such right would then rest solely in the respective apartment owner to whom it is allotted, notwithstanding that such reserved parking area may be deemed to be part of the common area.

It is therefore submitted that the respondents have no subsisting right under which they can claim any relief in the suit.

5. It is contended on behalf of the appellants that the trial court has overlooked the fact that the earmarking of car parking



spaces and allotment of the same is not building activity. The endeavour by the trial court to examine whether the formation of the parking spaces was duly sanctioned is hence irrelevant. Reliance is placed on the case of J. BHAWARILAL V. CORPORATION OF THE CITY OF BANGALORE AND OTHERS – (1989) 2 KAR.L.J. 198 to contend that sanction of plan is required only if a building is erected.

6. Consequently the finding of the court that the formation of parking spaces on the surface area was in violation of building bye-laws and the zonal regulations, was completely out of place.

7. It is contended that apart from the Engineer-in-Chief of the BMP stating, in a letter to the appellant, that having regard to the available area there would be no impediment for the formation of car parking spaces, the trial court has failed to note that the Fire Department had also issued a No-objection certificate on the condition that a five metre wide space be left all around the building for movement of fire tenders or other emergency service




vehicles. And this having been provided there was no impediment either under contract or in law for car parking spaces. Hence the impugned orders require to be set aside.

8. The counsel for the appellant has relied on the following authorities in support of its case:-

J. BHAWARILAL V. CORPORATION OF THE CITY OF BANGALORE AND OTHERS – (1989) 2 KAR.L.J. 198: that in terms of Section 299 of the Karnataka Municipal Corporations Act, 1976, permission is required only if a building is erected.

K.L. NARAYAN MURTHY AND ANOTHER VS. RAJINI AND ANOTHER – 2001 (3) KAR.L.J. 84 : no injunction to issue in the absence of a prima facie case based on positive pleadings and positive material. a neighbour cannot be restrained from putting up construction on the assumption of injury or loss in the future.

M/S. VORA AUTOMOTIVES PVT. LTD. V. GOPALRAO NAMDEORAO POHRE AND OTHERS – AIR



1993 BOMBAY 151 : Building construction requires compliance with the law. The statutory authority being adequately vested with the power to enforce the compliance. To redress grievance in respect of the violation of a duty or obligation is under the Act which creates such duty or obligation. There is thus an implied ouster of jurisdiction of the civil court. A suit for injunction restraining construction is hence untenable.

9. Per contra, Shri Madhusudhan, counsel for the respondents urged that as per the sanctioned plan obtained by the appellants in the year 1992, in respect of the apartment blocks, the car parking spaces of the respective apartment block were to be situated only in the basement floor of each apartment building. The appellants now seeking to form parking spaces over the area between the compound wall and peripheral roads was contrary to law and the representations made earlier that such area was reserved for jogging track and greenery.



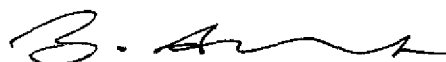
10. The contention of the respondents is that the appellant seeking to form or transfer car parking spaces on the surface area and between the compound wall and boundary roads, is in breach of representations to the effect that the said areas are reserved for providing a jogging track and greenery as evidenced by brochures distributed. Having thus attracted prospective purchasers, formation and transfer of car parking areas was not only in breach of such a representation but was also in violation of the building bye-laws. The appellants having obtained sanction of plan for construction of eight apartment blocks each consisting of basement, ground floor plus seven floors and having regard to the fact that car parking was to be provided only in the basement – the appellants were clearly precluded from forming any car parking areas on the surface areas between the road margin and the compound wall.

11. It is contended that, the apartment complex consisting of eight apartment buildings, each consisting of basement floor,



ground floor and seven upper floors, answers the definition of group housing as well as Hi-rise building as defined under the City of Bangalore Municipal Corporation Building Bye-Laws, 1983 and in terms of Bye-law 23, Part III of the Bye-laws, buildings are required to be planned, designed and constructed to ensure adequate fire safety and this shall be carried out in accordance with the National Building Code of India, 1983. And the said Code prescribes eight metres, side and rear space, to be left around buildings measuring 24 metres in height, such as the apartments in question. Further, the Zoning of land use and Regulations of the Bangalore Development Authority also prescribe the minimum side and rear set backs in respect of group housing projects with plot area measuring above 0.80 hectares, at eight metres.

12. The appellants in defence, had set up a revised plan of the year 1997. And the fact that the Engineer-in-Chief of Respondent No.8, BMP, had, by a letter dated 26.11.2001,



allowed the appellants to convert the set back area into a parking area.

13. It is contended that the appellant has not obtained sanction for formation of the parking areas in dispute. The appellant was blatantly misleading the court in seeking to rely on the plan indicating the alleged parking spaces when in fact such revised plan was specifically in respect of a shop premises to be established in the complex and did not relate to any such parking spaces.

14. Reliance is placed on the following authorities:

K. RAMADAS SHENOY VS. THE CHIEF OFFICERS, TOWN MUNICIPAL COUNCIL, UDIPI AND OTHERS – AIR 1974 SC 2177: wherein the Supreme Court has held that the illegal construction of a building materially affects the right to enjoyment of property by persons residing in the area. The authorities owe a duty and obligation under the statute to prevent



such unauthorised construction. The rights of residents in the area can be said to be violated.

1982 (2) KAR.L.J. SHORTNOTES 35: A Division Bench of the Karnataka High Court has held that the petitioners who were residents in the planning area under the Karnataka Country and Town Planning Act, 1961, and residents in the neighbouring buildings in the locality had the locus standi to question licences issued in respect of a building.

FAKIRAPPA VS. BASALINGAPPA – ILR 1999 KAR 3506 : The trial court, in this reported judgment, had decreed the suit for mandatory and permanent injunction restraining the defendant from putting up construction which was in violation of the KMC Act and KCTP Act, interfering with the easementary right of the plaintiff. The first appellate court had set aside the judgment as it was of the view that an alternative efficacious remedy was available under Section 34 of the Specific Relief act, 1963, and that the grant or otherwise of a licence to construct was a matter to be considered by the competent authority under the

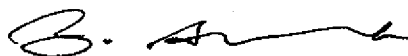


provisions of the K.M.C. Act. The High Court, in second appeal, however held, that injunction could be granted as prayed for, in respect of construction which was in violation of the law.

ONKAR NATH VS. RAM NATH GUPTA AND OTHERS

– AIR 1985 DELHI 293: This judgment has been followed in the above case by the Karnataka High Court to hold that a neighbour has a right to obtain injunction restraining another from proceeding with unauthorised construction.

15. The trial court has found that an area 11 metres wide surrounding all apartments, abutting the compound wall is “common area” in terms of the definition of common area and facilities under the Karnataka Apartment Ownership Act and hence the respondents have an implied right over the said area. Further, as per the building bye-laws, zoning and the land use regulations of the Bangalore Development authority, the norms for Group Housing Plan requires a space of 12 metres being set off between the road margin and compound wall. The National



Building Code of India, 1983, also contemplates front open space of 12 metres – in this light of the matter the court concludes that the law restricts the use of open space for car parking and hence found a prima facie case for the respondents. The trial court has also held that the balance of convenience is in favour of the respondents.

16. On the above rival contentions and on a careful consideration of the case law on the subject, it is to be seen that the respondents do not seek the enforcement of any contractual obligation, in that, it is not the respondents case that the appellants are creating parking spaces in violation of the express terms of agreement. It is claimed that there were representations in the first instance that the disputed area was reserved for jogging track and greenery – and therefore, should now be restrained from acting otherwise.

17. It is secondly contended that the appellants are precluded from forming any parking spaces as it would then

B. A.

violate the National Building Code of India, the City of Bangalore Municipal Corporation Building Bye-Laws, 1983 and the Zoning and Land Use Regulations of Bangalore Development Authority.

18. The parking spaces in question are not covered parking areas and do not involve any construction. In that light, it is to be seen how far the same would violate the relevant bye-laws or other provisions. It is not in dispute that adequate "set backs" are provided for each of the apartment buildings – whether there would be diminution of such set backs by virtue of providing open parking spaces, can only be answered in the negative. It is further significant to note that the Building Bye-laws provide for the standards to which parking spaces ought to conform.


19. 16.3 of the Building Bye-laws reads as follows:

"Off street parking space shall be provided with adequate vehicular access to a street and the area of drives of not less than 2.5 m wide aisles and such other provisions requires for adequate maneuvering of vehicles shall be exclusive of the parking space stipulated in these bye-laws."



20. As there is no civil construction or "building" involved in the formation of open parking spaces proposed, whether there is a need for a sanctioned plan is a question to be answered in the light of the judgments of this court referred to hereinabove.

21. The principles governing the grant of relief of injunction in matters where the plaintiff seeks such relief to prevent the breach of an obligation existing in favour of the plaintiff are well-settled. Chapter VIII of the Specific Relief Act, 1963 and the definition of the word "obligation" in Section 2(a) of the Act, would give wide import to the obligation on the part of the defendant that is contemplated, it would mean any duty enforceable by law. It is not confined to a contractual obligation only. In this light, it is possible to accept a contention that the appellants are obliged to permit the user of the open spaces, provided as set backs, in such a manner that it does not pose a danger or cause inconvenience or hardship to the occupiers, whether or not such user is prohibited by contract or under the



Building Bye-laws or any other provision of law or regulation. However, in the instant case, by virtue of the intended provision for open parking spaces, the respondents are possibly denied the jogging track and greenery allegedly assured to the respondents, but the same would not hinder the movement of Fire Service or other emergency service vehicles or cause hardship and injury for the movement of the occupiers. In any event, it cannot be said that the respondents had made out a prima facie case for temporary injunction. In my opinion, therefore, the respondents cannot be said to have made out a prima facie case either in contract or in law to be entitled for any relief of injunction nor can it be said that there is any apparent obligation enforceable at law.

3. ... are

22. Hence, the appeals ~~is~~ allowed and the order of the trial court ~~is~~ set aside.

Sd/
Judge

Gcs/-