

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.12.2013

CORAM

THE HONOURABLE MR. JUSTICE N.PAUL VASANTHAKUMAR
AND
THE HONOURABLE MR. JUSTICE R.MAHADEVAN

W.A. NO.599 OF 2008

&

M.P.NOS.1 & 2 OF 2008

&

M.P.NO.1 OF 2010

1.P.Sivanesan
2.S.Thiruvadi
3.K.A.Shanmughanantham
4.S.Bhaskaran

...Appellants/Petitioners

-Versus-

1.Tamil Nadu Housing Board,
Rep.by its Chairman,
Nandanam, Chennai.

2.Executive Engineer & A.O.,
Anna Nagar Division,
T.N.H.B., Anna Nagar Western Extension,
Chennai - 600 101.

...Respondents/Respondents

PRAYER: Writ Appeal filed under Clause 15 of the Letters Patent to set aside the order of the learned single Judge dated 29.04.2008 in W.P.No.46508 of 2006.

PRAYER IN WP.NO.46508/2006;-

Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorarified Mandamus Calling for the Records of the Second Respondent connected with four impugned letters A.Na.Ko/Survey/4874 Dated 10.11.2006 and quash the same and consequently direct the respondents not to proceed any further in respect of the matter by a mandamus.

For Appellants : Shri.V.Raghavachari
For Respondents : Shri.C.Kasirajan
TNHB
* * * * *

J U D G M E N T

Questioning the correctness of the order passed by the learned Single Judge dated 29.04.2008 in W.P.No.46508 of 2006 this Appeal is filed.

2. The Writ Petition was filed by the appellants for a Writ of Certiorarified Mandamus calling for the records of the second respondent connected with four impugned letters A.Na.Ko/Survey/4874 dated 10.11.2006 and quash the same and for consequential relief.

3. The appellants, allottees of residential flats in the Housing Scheme called "Belly Area Housing Scheme" were utilizing the garage area located along the residential flats for parking purpose. The second respondent by the impugned letters directed them to vacate the garage treating them as encroachment. The reason behind issuing such letter was that the Housing Board had decided to allot the garage area to third parties. The conversion of garage sites into the commercial/residential use had already been approved by the Housing Board and planning permission was also obtained from the Chennai Metropolitan Development Authority. Challenging the impugned letters, the Writ Petitions were filed claiming that the area including the garage was sold to them, and that they have been using the garage for parking for the past several years. Relying upon the sale deed it was contended that the garage was always used as common area for parking and therefore alleged that the conversion of the user of the lands by the respondents is illegal and contrary to the Scheme.

4. On the other hand, the respondents defended the action of the Housing Board contending that the garage area was not sold to the appellants, and that the ownership over the garage area was retained by the Housing Board. Accepting the submission of the respondents, the Writ Petition was dismissed by the learned Single Judge. Aggrieved by the same, the present Writ Appeal has been filed.

5. The learned counsel for the appellants took us through the contents of the sale deed and submitted that the sale deed, if read as a whole, would certainly indicate that the garage area was also sold to the allottees. Further, no dispute was ever raised by the respondents for the past several years regarding the title and user of the garage, and therefore they are not entitled to claim ownership over the same. The learned counsel also placed reliance upon Section 3 (h) of Tamil Nadu Apartment Ownership Act, 1994 and argued that any condition or restriction relating to the common areas is invalid. Relying the judgments reported in 2013-2-L.W.685 [THE TAMIL NADU HOUSING BOARD vs. MARY RANI IMMANUAL AND 12 OTHERS], AIR 2000 MADRAS 446 [HIG FLAT OWNERS WELFARE ASSOCIATION vs. TAMIL NADU HOUSING BOARD AND OTHERS], 1997 WRIT L.R. 721 [RAMAKRISHNA NAGAR FLAT ALLOTTEES/OWNERS' CO-OP. HOUSING SOCIETY vs. TAMIL NADU HOUSING BOARD] the learned counsel argued that once the sale deed is

executed, the Housing Board loses its right over the property and without notice to the appellants and other owners, the conversion of user is illegal.

6. Per contra, the learned counsel for the respondents submitted that the garage portion was not sold to the residents, and that the allotment to other parties is being made only after the approval of the Board and after obtaining planning permission from the Chennai Metropolitan Development Authority. The learned counsel for the respondents further submitted that in view of retention of ownership in the sale deed, the appellants cannot claim any right over the garage which fall under the "Saleable Area". Contending that the issue on hand is covered by the judgments of this Hon'ble Court in W.P.No.11297 of 2007 and W.A.No.821 of 2007, the learned counsel for the respondents urged that the order of the learned Single Judge does not warrant any interference.

7. When the appeal was moved, an interim stay was granted by this Hon'ble Court. Subsequently, the appeal was admitted and interim stay was extended and on 21.07.2008, this Hon'ble Court after hearing the parties in detail, directed the respondents to give certain particulars which are as follows:

"i. Whether the Housing Board, while fixing the cost of the individual flat under the scheme, has taken into consideration, the total cost of the land as was paid towards acquisition; cost of construction of the buildings; charges for development of land, service charges, etc.

ii. Whether the land for garage(s) shown in the approved plan under the scheme was also acquired along with the land on which the flats in question are constructed? If the land for garage (s) have been acquired separately they will give details of such acquisition cases.

iii. If the Housing Board has decided to sell the space in question, shown as garage in the sanctioned plan, has it taken any approval from C.M.D.A. for change of nature of use of land and issued any notice in newspapers calling for application from individuals for the auction purchase of the lands in question ?

iv. Whether the Housing Board has taken a decision to sell the land in question (shown as garage), to any individual, as was the stand taken by them in W.P.No.11297 of 2007. If such decision has been taken it will give details of purchaser / proposed purchaser.

v. If the housing Board had taken a decision to convert the area sanctioned in the plan as garage to residential area, it will give reasons for such conversion.

vi. The Housing Board will enclose the copies of document in support of statement as may be made."

8. An additional affidavit was filed on behalf of the respondents along the particulars sought by this Hon'ble Court.

9. Heard the learned counsel for the appellants and the learned counsel for the respondents.

10. In view of the interim orders granted by this Hon'ble Court earlier, no sale in favour of third parties was executed and third party rights have not accrued and therefore, there is no necessity to implead the third parties/allotees in the Writ Appeals. The decision in W.P.No.11297 of 2007, confirmed by the Division Bench of this Court in W.A.No.821 of 2007 cannot be squarely applied to the present case, as this Hon'ble Court has not gone into the terms and conditions in the sale deed and other documents, earlier. Further, the Division Bench has not dealt with the right of the respondents to convert the user of the land and rather confined itself to the right of the appellants. Hence, the merits of the case is necessarily to be gone into.

11. From the pleadings and documents, the issues that are to be decided by this Court can be summarized as follows:

"1.Whether the garage space forms part of the undivided share of land sold to the residents and intended for their use ?

2.Whether the respondents are entitled to impose any restriction in the sale deed and retain ownership over a portion of undivided share of land ?

3.Whether the respondents are entitled to convert the user of the land and sell the same to third parties ?"

12. Under the "Belly Area Housing Scheme", the Government promoted 16 Blocks bearing Nos.295 to 310 and each block comprised of six residential flats. The petitioners were allotted one flat each in Block No.298. A perusal of the sale deed points out that neither the total extent of land nor the extent of undivided share conveyed is mentioned. We presume the same to be the condition of the sale deeds with respect to all the flats. The respondents have filed additional affidavit stating that a total extent of 16.10 acres were acquired for Belly Area Scheme. According to the respondents, the total extent

of undivided share of land conveyed is only 33.31 grounds to all the occupants of the 16 Blocks, and that the extent of garage is 4.51 grounds. What can be seen from the Scheme is that the portions now converted and proposed to be sold were earmarked as garages. Apart from the affidavit, the respondents have not produced any materials to show that the garages are not part of 33.31 grounds. Or for the matter of fact, there is nothing on record to show that these garages were not intended for the use of the residents of Belly Area Scheme.

13. As rightly contended by the learned counsel for the appellants, the contents of the sale deed has to be looked into as a whole along with the layout. If the garages are not covered under the sale deed and not meant to be for the use of the residents, there would be no reference to garage in clause 13. Sub-clause (f) of clause 13 also makes provision of insurance for the garage and the flat. Restriction 8 in second schedule states that "No vehicle other than a private motor car or private motor cycle shall be kept in the Garage".

14. Under item 3 in the third schedule, there is a restriction for parking of vehicles beyond three hours in the areas marked "Parking". This restriction can only be with reference to parking of vehicles of visitors and not that of owners. It defies common logic to say that such restriction is meant for owners. It is also not the case of the respondents that the garage referred to in the sale deed is some other garage, and not the garages, which are subject matter of these appeals. Fifth Schedule to the sale deed deals with the cost, expenses, outgoing and matters in respect of which the purchaser is liable to contribute. It can be seen that the fifth schedule is only related to maintenance of the common amenities. Further, by exclusion of the word "Garage" from the meaning of the word "Building" in item 8 of fifth schedule, it is found that the garage was only an open space and part of the undivided share of land. Therefore, the garage space is certainly part of the undivided share of the land conveyed to the allottees under the Belly Scheme Area.

15. It can also be seen from the part layout approved by the Chennai Metropolitan Development Authority, the Block No.298 is in Group III of the Layout. Admittedly, the garage is located at the eastern boundary of Group III Block 298, which is also reflected in the sale deed. To the east of Garage is Group IV Blocks. From the arrangement of the Blocks, the east of the garage in dispute is Block No.297 of Group IV. Therefore, the garage is located between Block No.298 and 297.

16. In view of the above, it can be concluded that the garage was meant for the use of the residents of Block No.298. It is also beyond logic that the respondents would retain the ownership of a portion of the land in middle and sell the neighbouring lands.

Therefore, the contention of the respondents that the garages were within the "Saleable Area" does not merit consideration.

17. The scheme was approved and the flats were allotted to the residents in the year 1981. Now after 30 years, the respondents have, by a resolution suo motto claimed ownership over the garage area and converted the user of the land and allotted the same to third parties. The contention of the respondents that such an exercise was carried out to raise revenue for the Housing Board, cannot be accepted. The policy decision of the State cannot be made to suit an individual or a group of individuals, without valid reasons. Such policy decisions must also be within the scope of law, and judicial review is always available to a person aggrieved by the unsustainable policy decision of the Government. In the present case, the actions of the respondents to convert the user of land deviating from the Scheme is illegal and is only to benefit a group of individuals. The respondents have completely lost sight of the purpose for which the Housing Board was created. It was not to raise the revenue but for the purpose of ensuring a house at a reasonable price for the residents of the State, who do not own one.

18. The Board invites applications from the public with certain conditions. One of the conditions for seeking allotment in the Chennai City is that the applicant should not own a house either in his own name or in the name of his spouse or minor children. Subsequently, after following the due procedure, allotment is made. When a particular piece of land is earmarked for a particular use and sold to various persons, the respondents cannot convert the same. Here, the area earmarked and used as garage have been converted for residential use without notice and hearing the allottees. The action of the respondents by converting the user of land, which was already conveyed under the Scheme to many persons without hearing them is definitely contrary to the principles of natural justice and is therefore illegal and invalid.

19. Further from the records, it is found that in the letter dated 29.01.2007, the Housing Board claiming that there is no encroachment, has allotted 1 Ground and 1833 Sq.ft to Thiru.P.Kalimuthu, I.P.S., (Rtd). In the impugned proceedings which was issued on 10.11.2006, the appellants were directed to remove the encroachment of garage i.e the asbestos sheet. Therefore, it can be inferred that the conversion and allotment have all taken place, without any notice and behind the back of the appellants.

20. As per section 3 (h) of the Tamil Nadu Apartment Ownership Act, 1994 "Common areas and facilities" unless otherwise provided in the Deed of Apartment, means-

"(1) the land on which the building is located;

(2) the foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, terrace, compound walls, fire escapes, wells and sumps and entrances and exits of buildings;

(3) the basements, cellars, yards, gardens, parking areas and storage spaces;

(4) the premises for lodging of caretakers or persons employed for the maintenance of the property;

(5) water supply, sewerage and drainage connections and the installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air-conditioning and incinerating;

(6) the elevators, tanks, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for the common use;

(7) automatic fire detecting and alarm facilities necessary to warn the occupants of the property of the existence of the fire;

(8) such other community and commercial facilities as may be prescribed ; and

(9) all other parts of the property necessary or convenient to its existence, maintenance and safety or normally in common use."

21. Rule 6 (3) of the Tamil Nadu Apartment Ownership Act, 1994 makes it explicit that "The Common areas and facilities and the limited common areas and facilities shall remain undivided and no apartment owner or any other person shall bring any action for partition or division of any part thereof and any covenant to the contrary shall be null and void."

22. Hence, it is very clear that the vendor of the premises ceases to have any right over the areas commonly enjoyed by the purchasers once the land and building are conveyed.

23. In the Judgment reported in AIR 2000 MADRAS 446 [HIG FLAT OWNERS WELFARE ASSOCIATION vs. TAMIL NADU HOUSING BOARD AND OTHERS], when the issue whether the Housing Board can convert the open space area for residential use and allot the same to third

parties was raised, this Court held that such conversion was illegal. In the Judgment reported in 1997 WRIT L.R. 721 [RAMAKRISHNA NAGAR FLAT ALLOTTEES/OWNERS' CO-OP. HOUSING SOCIETY vs. TAMIL NADU HOUSING BOARD], the Division Bench of this Court held that having conveyed the entire land and parted with possession, the claim of retention of a portion of the land is illegal and held that the Housing Board has no right over the land in the entire area in question.

24. In the Judgment reported in 2013-2-L.W.685 [THE TAMIL NADU HOUSING BOARD vs. MARY RANI IMMANUAL AND 12 OTHERS], the Full Bench of this Hon'ble Court held that the Tamilnadu Housing Board loses its rights, as soon as it executes sale deed in respect of the flats, appurtenant land and even the areas earmarked for the common enjoyment of the flat owners.

25. The Hon'ble Full Bench also held while answering Reference-ii as "the restrictive covenants in the sale deed executed by the Tamil Nadu Housing Board in favour of the allottees will not prevent the allottees or the subsequent purchasers from the allottees, in utilizing the common areas, so long as the society or Association which have been formed by the allottees gives consent for the same and no doubt, that the construction are within the parameters of the rules and regulations of the CMDA" and Reference-iii as "When once the scheme is implemented, the Housing Board loses its rights and the scheme does not come into play".

26. Therefore, the argument of the learned counsel for the appellants that the restriction, though not specific regarding retention of rights in garage are invalid, is well founded and acceptable.

27. In view of the findings that the area earmarked as garage is part of the undivided share of land conveyed under the Belly Area Scheme and that the restrictions are illegal and void, the respondents are not entitled to convert the user of the land and hence, the Writ Appeals are allowed. The order of the learned Single Judge dated 29.04.2008 as well as the impugned notice dated 10.11.2006 are set aside. The respondents are directed to restore possession of the area earmarked as garage to the Belly Area Scheme Welfare Association, within a period of two weeks from the date of receipt of a copy of this order. No Costs. Consequently, connected miscellaneous petitions are closed.

sri

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1.The Chairman,
Tamil Nadu Housing Board,
Nandanam, Chennai.

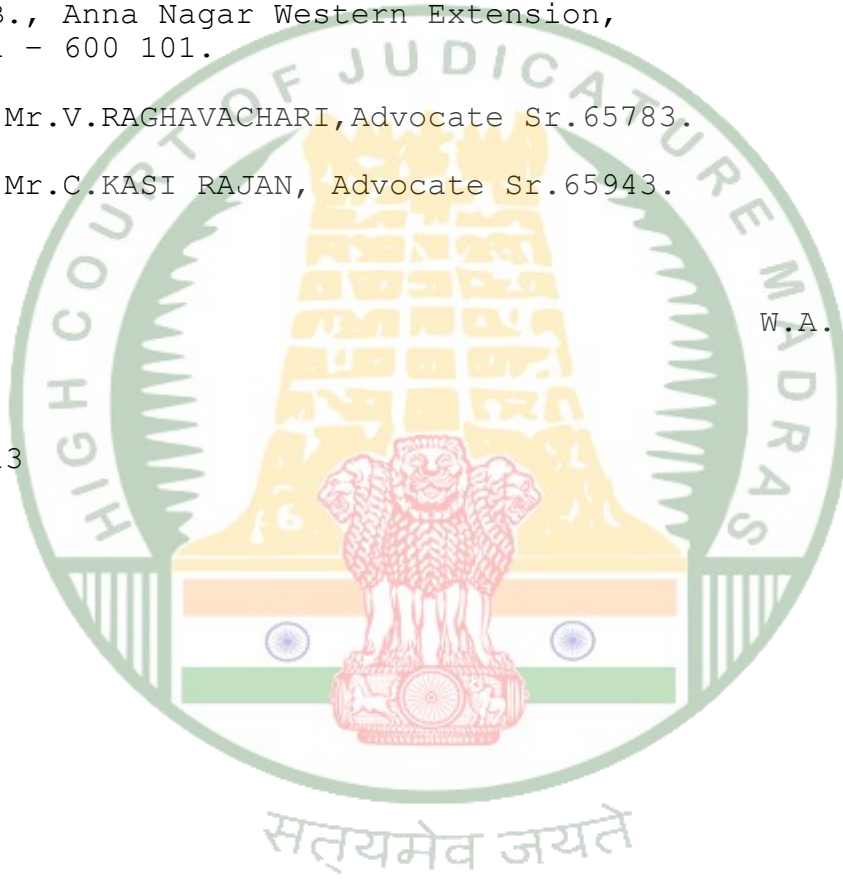
2.The Executive Engineer & A.O.,
Anna Nagar Division,
T.N.H.B., Anna Nagar Western Extension,
Chennai - 600 101.

+ 1 cc to Mr.V.RAGHAVACHARI, Advocate Sr.65783.

+ 1 cc to Mr.C.KASI RAJAN, Advocate Sr.65943.

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