

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No.6923 of 2014 (O&M)
DATE OF DECISION: 06.11.2015

The Legend Homes Residents Welfare Association

....Petitioners

versus

State of Haryana and others

.....Respondents

CORAM:- HON'BLE MR.JUSTICE S.J. VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA

Present: Ms. Pooja Aganpal, Advocate for the petitioners
Mr. Deepak Balyan, Addl. Advocate General, Haryana
Mr. Sanjeev Kumar, Advocate for
Ms. Kadambari Puri, Advocate for respondents No.5
and 6

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S.J. VAZIFDAR, ACTING CHIEF JUSTICE:

The petitioners seek a writ of certiorari to quash an order dated 12.02.2013 passed by respondent No.2-Director General, Department of Town and Country Planning, Haryana, Chandigarh, informing the respondents No.5 and 6-private respondents that the condition regarding the non creation of third party rights in respect of the nursery school stands infructuous in view of the judgment of the Supreme Court dated 17.02.2003 in the case of *DFL Qutab Enclave Complex Educational Charitable Trust vs. State of Haryana, C.A. No.49/2003*. The impugned communication was on the application of respondent Nos.5 and 6 dated 18.07.2012 for the transfer of a nursery school.

2. The petitioners are an association of apartment owners. Respondents No.2 to 4 are the Director General, Department of Town and Country Planning, Haryana, Senior Town Planner and the Haryana

Urban Development Authority (HUDA). Respondent No.5 and 6 are A.E.Z. Infrastructures Private Limited and Clarion Properties.

3. The private respondents entered into an agreement with the official respondents for the development of a group housing colony. A deed of declaration was executed by the private respondents under the provisions of the Haryana Apartment Ownership Act, 1983. The petitioners rely upon the following part of the declaration:-

"(A) GENERAL COMMON AREAS AND FACILITIES FOR COMPLETE SCHEME:-

Common area and facilities in this parcel of the land described in Para 1 of the this deed consist of common approach roads, land escape and parks (excluding underground parking in basements) lounges, corridors, stair cases and common services and equipments etc. as detailed below;

General & common areas and facilities for complete scheme in this scheme i.e. all apartments including open car parking, Nursery School situated in the complex.

- o Under Ground Domestic and Fire Water Tanks and Pump Rooms in Basement and near Tower D-4 & B-4
- o Electric Sub Station located near Tower D-3 & D-5.
- o Maintenance/Service Room located in basement near Tower D-3.
- o Open Surface Parking and lighting thereof in case of EWS "Dwelling Unit" is limited for scooter parking area provided on front side of EWS building.
- o Lawns and play area and lighting thereof.
- o Driveways/Roads/walkways and lighting thereof."

The petitioners' contention is that the nursery school is also a common area and that the private respondents are not entitled to transfer the same unilaterally. They contend that under Sections 3(f), 6(2) and 16(g) of the said Act, the owners of the apartments have an undivided interest in the common areas and

facilities; that the nursery school is a common area and facility and they, therefore, have an undivided interest therein. The main question, therefore, is whether the nursery school constitutes a common area wherein the purchasers of the premises under the group housing complex also have a right.

4. In April, 2012, the petitioners apprehending the sale *inter alia* of the nursery school by the respondents No.5 and 6, filed a suit for a permanent injunction restraining them from doing so. During the pendency of the suit, by an interim order dated 30.10.2012, the learned Civil Judge granted a temporary injunction restraining respondents No.5 and 6 from selling the nursery school.

5. During the pendency of the suit, at the petitioners' instance, the deed of declaration was amended by an order dated 30.04.2012. Clauses III and VII of the amended declaration read as under:-

"III. That the percentages of 'general facilities and Voting 'indicated in our original declaration will undergo minor adjustments based on the areas constructed in these eight towers and twenty villas as well as the final areas when constructed in the remaining unbuilt towers. Hence for obvious reasons, the present Declaration in respect of these eight towers and twenty villas is indicative with reference to the number of units and their areas now constructed and their tentative percentage rights are being based on the old projected total area cost of the project.

....

VII. That the Shops & Nursery School are not common area in the project."

The private respondents thereafter filed their written statement in the suit. The respondents made an application on 18.07.2012 for permission to alienate the nursery school. By the impugned order dated 12.02.2013, the Director General, Town and

Country Planning, informed respondent No.5 that the condition regarding non creation of third party rights stands infructuous in view of the said judgment of the Supreme Court.

6. As we mentioned earlier, by an order dated 30.10.2012 the learned Civil Judge had granted an interim stay restraining the alienation of the school by the private respondents. The private respondents filed an appeal against the said order in the Court of the Additional District Judge. The petitioners claim to have learnt of the aforesaid facts regarding the amendment to the deed of declaration; application for alienating the school and of the impugned order only upon being served in the appeal.

7. The appeal was disposed of by a judgment dated 20.03.2014. The learned Additional District Judge allowed the appeal and the interim order passed by the learned Civil Judge was set aside. The learned Additional District Judge, however, held that the respondents would remain bound by the provisions of the Act and the judgment of the Supreme Court. The parties were directed to appear before the trial Court on 27.03.2014. It is important to note the following observations in the judgment:-

"15. Reverting to the facts of the present case, the declaration submitted by the colonizer is on record. It is no where mentions nursery school, community centre etc. to be a part of the common areas. The general facilities for all apartment of the scheme and common facilities for dwelling units of individual tower were detailed out. In clause V (a), the general common areas and facilities for the complete scheme (complete scheme was not only qua the Legend but was qua the Aloha), it was stated that the common areas and facilities in this parcel of the land described in para 1 of the deed consist of common approach roads, land escape and parks (excluding underground parking in basements) lounges, corridors, stair cases and common services and equipments etc.. It was then laid down that general and common areas and facilities for complete scheme in that scheme i.e. all apartments including open car parking, nursery school

situated in the complex. It no where mentions that nursery, school, community centre or club etc. would be a part of the common areas and facilities. No doubt a second declaration was filed but that is of no consequence in the present case."

Thus, the learned Additional District Judge held that the nursery school does not form a part of the common area. If this observation is correct, the petition cannot succeed. Moreover, the issues raised in this petition have also been raised in the suit which was filed much earlier.

8. The petitioners filed a revision petition before this Court against the said order and judgment dated 27.03.2014. The same was disposed of by the following order:-

"Counsel for the petitioner seeks permission to withdraw this petition with liberty to take all the pleas taken in this petition before the trial court at an appropriate stage with further prayer that the rights of the parties in the lis may be adjudicated on evidence to be led by the parties and the observations made in the impugned order may not be allowed to stand in their way. Counsel for the petitioner has further prayed that the trial court may be directed to decide the suit in a time bound manner.

As prayed, dismissed as withdrawn with aforesaid liberty. The trial court shall make an endeavour to decide the suit within a period of one year."

9. The issue raised in this petition, namely, as to whether the nursery school forms a part of the common area or not has also been raised in the suit. This issue was urged, albeit at the interlocutory stage before the learned Civil Judge. The learned Civil Judge decided the same. The decision was overruled by the Additional District Judge in the appeal filed by the private respondents. An observation to the effect that the nursery school does not form a part of the common was expressly made. The

petitioner had withdrawn its Civil Revision No.3681 of 2014 as recorded in the order dated 26.05.2014.

10. In these circumstances, it is not open to the petitioners to agitate the same issue in the present writ petition. The petitioners must pursue their alternate remedy which they have already adopted, namely, the said suit. The order dated 26.05.2014 makes it clear that the petitioners are at liberty to take all the pleas before the trial Court. The suit has been ordered to be expedited. It is evident from the order in the civil revision that it was passed at the petitioners' request.

11. We hasten to add that we have not made any observations on the merits of the matter including as to the interpretation of the deed of declaration and the amended deed of declaration. All these issues would be decided in the suit. The petitioners are always at liberty to file a *lis pendens*.

12. The writ petition is accordingly disposed of.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

06.11.2015
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(TEJINDER SINGH DHINDSA)
JUDGE

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Note: Whether reportable: ~~YES~~/NO