

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

**WPA 15903 of 2018
RAJAN KUMAR PRASAD & ORS.**

VS.

NEW TOWN KOLKATA DEVELOPMENT AUTHORITY & ORS.

For the Petitioners : Mr. Sabyasachi Chowdhury,
Mr. Rajarshi Dutta,
Mr. Soorjya Ganguli,
Ms. Pooja Chakrobarti,
Ms. Radhika Misra,
Ms. Arti Bhattacharya,
Ms. Devanshi Prasad ... advocates

For the respondent no. 1 : Mr. Anirban Ray,
Mr. Debahish Ghosh,
Ms. Munmun Ganguly ... advocates

For the respondent no. 6 : Mr. Abhrajit Mitra,
Mr. Arindam Banerjee,
Mr. Saptarshi Datta,
Mr. Satadeep Bhattacharyya,
Ms. Srinjita Ghosh,
Mr. Rafat Reyaz,
Mr. Pourush Kanti Pal ... advocates

Reserved on : 14.09.2023

Judgment on : 18.10.2023

Hiranmay Bhattacharyya, J.:-

1. A group of persons claiming to be the apartment owners of a complex known as “Elita Garden Vista” (hereinafter referred to as “EGV”) have filed this writ petition jointly praying for issuance of a writ of mandamus to command the authorities of New Town Kolkata Development Authority

(hereinafter referred to as “NKDA”) to set aside and quash the revised sanction plan dated August 20, 2015 and direct demolition of structures erected in terms thereof.

2. Facts giving rise to this writ petition in a nutshell are as follows-

- i) West Bengal Housing Infrastructure Development Corporation Ltd. (for short “WBHIDCO”) granted permission to the predecessor-in-title of Elite Garden Vista Projects Pvt. Ltd. being the 6th respondent for construction of a proposed residential project on land measuring about 99.983 sq. meters in aggregate at premises no. AA-III in New Town under Police Station Rajarhat in the district of 24 Parganas (North).
- ii) Sanction to the original plan was granted on September 10, 2007 for construction of a residential complex having 15 Towers.
- iii) Being lured by the attractive brochure floated by the erstwhile promoter, which envisaged huge areas of greenery, open spaces and ample spaces between buildings coupled with modern amenities, petitioners intended to purchase the apartments in the said complex and became the owners of the apartments by virtue of registered deeds of conveyance executed by and between the parties.
- iv) For the purpose of managing the facilities of EGV, a declaration in Form A as required under Section 10 of the West Bengal Apartment Ownership Act, 1972 (for short the “1972 Act”) read with Rule 3 of the West Bengal Apartment Ownership Rules, 1974 (for short the 1974 Rules) was submitted and upon registration of Form A Declaration EGV Association of Apartment Owners was registered.
- v) Partial occupancy certificate was issued in the year 2013.
- vi) In or around November 2016, the petitioner came to learn that the 6th respondent had submitted an application for revision of the original

sanctioned plan and such revised plan was sanctioned by NKDA vide letter dated August 20, 2015.

- vii) The application for sanction of revised plan was made without any intimation to 600 registered Apartment owners and such sanction was obtained behind their back.
- viii) The major and significant changes that have been brought about in the revised sanction plan to the original sanction plan which are tabulated hereunder.

Sl. No.	Description	Original Sanctioned Plan	Revised Sanctioned Plan
1.	Total Towers	15	16
2.	Total Flats	1,278	1,511
3.	Car Parking	1,688	1,947
4.	Plinth Area	37,369.74 Sq. Metres	66,531 Sq. Ft.
5.	Road Pathway	99,983 Sq. Metres	93,981.74 Sq. Metres
6.	Common Area	0.1%	0.08%
7.	Landscape and open area	Substantially more	Substantially less

- ix) On the basis of the revised sanction plan, the 6th respondent altered the entire landscape of the project by raising an illegal construction marked as Tower No. 8 (for short “T-8”) on a portion of the property which was indicated as a vacant space in the Original Sanction Plan.
- x) The height of T-8 as per the Revised Sanction Plan is 85 metres and the distance between T-8 and T-7 is only about 8 metres while the

distance between T-8 and T-9 is only around 9 metres. T-8 does not have the minimum open space as per the National Building Code of India, 2016 (for short “NBC, 2016”).

- xi) By a letter dated April 19, 2018, the apartment owners called upon the authorities of NKDA to cancel the revised sanctioned plan dated August 20, 2015. Since the respondent authority did not initiate any steps on the basis of the aforesaid letter dated 19.04.2018, petitioners issued another letter dated 28.05.2018 requesting NKDA to cancel the revised sanctioned plan.
3. Alleging inaction on the part of the NKDA the instant writ petition has been filed.
4. Mr. Chaudhury, learned Senior Advocate appearing in support of the writ petition submitted that the registered Apartment owners are co-owners of the project and the 6th respondent by suppressing the aforesaid fact obtained sanction to the revised plan by claiming to be the sole owner. He submitted that the open spaces as indicated in the original sanction plan could not be utilised for construction of T-8 as that would amount to alteration of the percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in Form A Declaration. In support of such contention, Mr. Chaudhury placed reliance upon Section 5 of the 1972 Act. By referring to various Clauses of the deed of conveyance dated 19.02.2013, Mr. Chaudhury contended that the provisions of the 1972 Act read with the 1974 Rules shall have application to the case on hand and the 6th respondent was obliged to follow the said provisions. He contended that the registered apartment owners are owners in relation to the property which is the subject matter of this project in view of Section 3(ia) of the 1972 Act and therefore, an application for sanction of the revised plan could not have been submitted without the consent of the registered apartment owners, who have become co-owners of the property. The learned Senior advocate

further contended that the 6th respondent attempted to amend the Form A declaration by filing the revised details in Form B without seeking the approval of the registered apartment owners but upon an objection being raised by the registered apartment owners, the Competent Authority under the 1972 Act rejected the Form B by an order dated 11.04.2018. Mr. Chaudhury contended that the declaration made in Form A is required to be preserved and consequently the revised sanction plan is liable to be cancelled being contrary to declarations in Form A. He submitted that since the 1972 Act is binding upon the 6th respondent, sanction to the revised plan could not have been obtained without the consent of the apartment owners.

5. Mr. Chaudhury contended that the provisions of the National Building Code has been incorporated in The New Town Kolkata (Building) Rules 2009 (for short “2009 Rules”). He contended that T-8, as per the revised plan, does not have the minimum open space required as per NBC, 2016 and, therefore, the said plan is liable to be cancelled.
6. Mr. Chaudhury submitted that the authorities of NKDA acted illegally and in an arbitrary manner by not taking steps pursuant to the representations of the petitioners. He submitted that the sanction to the revised plan was given by NKDA in consequence of material misrepresentation and fraudulent statement by the 6th respondent. He, therefore, submitted that such sanction to the revised plan should be cancelled and the erection done in terms thereof should be directed to be demolished.
7. In support of the aforesaid contentions, Mr. Chaudhury placed strong reliance upon the decision of the Hon’ble Supreme Court in the case of ***Supertech Limited vs. Emerald Court Owner Resident Welfare Association and others*** reported at ***(2021) 10 SCC 1***.
8. Mr. Mitra, learned Senior advocate appearing for the 6th respondent seriously disputed the contentions of Mr. Chaudhury. Mr. Mitra raised

serious objections against applicability of the 1972 Act to the present case. He contended that the New Town Kolkata Development Authority Act, 2007 (for short the “2007 Act”) contains a non-obstante clause and therefore, such Act shall have primacy over the 1972 Act and the rules framed thereunder. He submitted that the apartment owners had consciously waived the benefits under the 1972 Act as would be evident from the terms incorporated in the deed of conveyance. In support of his contention that an individual may renounce a law made for his benefits, Mr. Mitra relied upon a decision of the Hon’ble Supreme Court in the case of **Krishan Lal vs. State of J & K** reported at **(1994) 4 SCC 422**.

9. Mr. Mitra submitted that NKDA has no authority under the 2007 Act to administer the law relating to the 1972 Act. Therefore, according to him, NKDA while granting sanction was only obliged to ensure compliance with the provisions of the 2007 Act read with the 2009 Rules. In support of such contention he relied upon a decision of a co-ordinate bench in **Re: Bejoy Raj Jain** reported at **AIR 1995 Cal 216**.
10. By placing reliance on the decision in the case of **Smt. Rinkoo Mitra vs. State of West Bengal & Ors.** reported at **(2003) 2 CLT 588**, Mr. Mitra contended that the apartment owners are estopped by the principle of estoppel by deed from questioning the right of the promoter to raise additional construction. He submitted that the apartment owners having accepted the benefits of the deed of conveyance is estopped from denying the right reserved to the developer/ promoter to raise additional construction. In support of the contention that a party cannot be allowed to blow hot and cold, Mr. Mitra relied upon the decision of the Hon’ble Supreme Court in the case of **Rajasthan State Industrial Development and Investment Corporation and Anr. vs. Diamond & Gem Development Corporation Limited and Anr.** reported at **(2013) 5 SCC 470**.

11. Mr. Mitra next contended that the writ petitioners are in effect seeking adjudication of the rights and obligations of the parties to the deed of conveyance by filing this writ petition. He submitted that a writ court cannot decide such interse disputes. In support of such contention. Mr. Mitra placed reliance upon the decision of the Hon'ble Supreme Court in the case of ***Maharaji Educational Trust vs. SGS Construction and Development Private Limited and ors.*** reported at **(2015) 7 SCC 130**.
12. Mr. Mitra next contended that the sanction to the revised plan was granted on 20.08.2015. Construction in terms of the revised sanction plan commenced on and from 26.08.2015. Long thereafter, the petitioners lodged a complaint before the competent authority under the 1972 Act sometimes in the year 2017 and the instant writ petition has been filed at a belated stage only in the month of August, 2018.
13. Mr. Mitra further contended that the writ petitioners claiming to be the apartment owners were well aware of raising of such construction by the 6th respondent on and from August, 2015. After allowing such construction to proceed to a considerable extent, the writ petitioners have approached this Court at a belated stage. Mr. Mitra submitted that delay defeats equity and therefore, the writ petitioners are not entitled to any reliefs by invoking the writ jurisdiction. Mr. Mitra submitted that third party rights have intervened due to passage of time and therefore an order of demolition should not be passed without giving the affected parties an opportunity of hearing. In support of such contention, Mr. Mitra referred to a decision of the Hon'ble Supreme Court in the case of ***Kishorsinh Ratansinh Jadeja vs. Maruti Corporation and ors.*** reported at **(2009) 11 SCC 229** and another judgment dated 30.08.2022 of the Delhi High Court in ***CM (M) 862/2022*** in the case of ***MS HNUNPII vs. Municipal Corporation of Delhi & Anr.***
14. Mr. Banerjee assisting Mr. Mitra contended that NBC guidelines are non-statutory in nature and non-adherence of such guidelines cannot be a

ground for revoking the sanction plan. In support of such contention, he relied upon the decision of the Hon'ble High Court at Kerala in the case of **C.M. Dinesh Mani vs. State of Kerala** reported at **2015 SCC Online Ker 20058**.

15. Mr. Ray, learned advocate representing NKDA submitted that sanction of a building plan may be refused only if one or more grounds specified in Clause (a) to (g) of Section 75 is/are attracted.
16. He contended that the 2007 Act has an overriding effect over any other law in force including the 1972 Act. He contended that the NKDA acted in terms of the provisions of the 2007 Act and being a statutory authority has to act within the forecorners of the statute which created it.
17. Heard the learned advocates for the parties and perused the materials placed.
18. Sanction to the original plan was granted on 10.09.2007 for construction of a complex having 15 towers. Pursuant to such sanction construction was made and apartments were transferred to several intending purchasers including the writ petitioners.
19. In the meantime the 6th respondent obtained sanction to the revised plan on 20.08.2015. Such revised plan dated 20.08.2015 has been challenged by the writ petitioners on two fold grounds. Firstly, that the revised plan was sanctioned in violation of the provisions of the 1972 Act. The other ground of challenge to the revised plan is that the minimum open space as required under the provisions of the NBC, 2016 between the proposed tower namely T-8 and the adjacent towers have been totally ignored.
20. Mr. Chaudhury, learned Senior advocate for the petitioner placed the decision in the case of **Supertech Limited** (*supra*) in extenso and vehemently contended that the Hon'ble Supreme Court in the said reports has recognised the applicability of the provisions of the Uttar Pradesh Apartment Act, 2010 and the guidelines contained in the

National Building Code for regulating the action of the promoters. He submitted that the propositions laid down in the said reports shall squarely apply to the case of the writ petitioners.

21. Mr. Mitra, learned Senior advocate for the 6th respondent, in course of his argument, raised serious objections against the applicability of the 1972 Act and the guidelines contained in NBC, 2016.
22. This Court shall first deal with the objection of Mr. Mitra, as to the applicability of the 1972 Act to the case on hand. Mr. Chaudhary vehemently contended that after registration of Form A declaration under the 1972 Act, the declarations contained therein cannot be altered by way of a revised plan. According to him, the provisions of the 1972 Act shall have consequences in the sanction to the revised plan. Mr. Chaudhary would contend that the issue as to the applicability of the provisions of the Apartment ownership Act in the matter relating to sanction of plan is no longer res integra in view of the decision of Supertech Limited (supra). For deciding the aforesaid objection raised by Mr. Mitra, this Court shall have to consider the factual background, the issues raised and the proposition of law laid down in **Supertech Limited** (supra) in some details.
23. At this stage, it will be beneficial to note the relevant facts giving rise to the writ petition filed by the Residents Welfare Association in Supertech Limited (supra) and therefore, the same is extracted hereinbelow.

“5. On 23-11-2004, Noida allotted to the appellant a plot of land admeasuring 48,263 sq. m, which was a part of Plot No. 4 situated in Sector 93-A. This plot of land was allotted for the development of a group housing society, by the name of Emerald Court.

6. The first deed of lease was executed on 16-3-2005 between the appellant and Noida. A possession certificate was issued on 17-3-2005.

7. On 20-6-2005, Noida sanctioned the building plan for the construction of Emerald Court consisting of fourteen towers, each with ground and nine floors (G+9). This sanction was granted under the New Okhla Industrial Development Area Building Regulations and

Directions, 1986 (“the NBR 1986”). The construction commenced for these fourteen towers.”

“10. On 29-12-2006, Noida sanctioned the first revised plan for Emerald Court under the NBR 2006, by which two additional floors were envisaged in addition to the already sanctioned G+9 floors in the original fourteen towers, thereby bringing all of them to ground and eleven floors (G+11). Furthermore, additional buildings were also sanctioned, namely: (i) Tower-15 [comprising of ground and eleven floors (G+11)]; (ii) T-16 [comprising of a cluster of wings including 1 wing of ground and eleven floors (G+11) and 3 wings of ground and four floors (G+4)]; and (iii) a shopping complex [comprising of ground and first floor (G+1)]. As a consequence, under the first revised plan, Noida permitted a total of sixteen towers (G+11) (which would each be 37 m in height) and one shopping complex (G+1). It is important to note that the appellant was able to have this additional construction due to the area that was made available to it under the supplementary lease deed, and further, when the appellant had allotted flats to the purchasers, only a small building on the additional leased area was sanctioned. Pertinently, it is also necessary to highlight that the first revised plan contemplated a green area in front of Tower- 1 (“T-1”/ “Aster 2”). According to the purchasers, when the flats were sold, the brochure of the appellant contained information in accordance with the first revised plan dated 29-12-2006, which shows the area in front of T-1 as a green area.

11. On 10-4-2008, a completion certificate was granted in relation to the first eight towers (G+11). Thereafter, various owners of flats were granted possession by the appellant. Crucially, the completion map also indicated a green area in front of T-1, where currently T-16 and T-17 are being constructed.”

“16.4 The appellant represented to the flat-owners that a revised building plan for replacing the existing T-16 (G+11) and the shopping complex (G+1) was sanctioned, with twin towers T-16 and T-17, each of G+24 floors and a height of 73 m, replacing them.

17. On 11-9-2009, the Chief Fire Officer of Gautam Budh Nagar (CFO”), the fourth respondent, issued a report to the In-charge (Building Cell) Noida, Sector 6 for the grant of the provisional no-objection Certificate (“NOC”) for T-16 and T-17. The provisional Fire NOC was made subject to compliance with the requirements of the National Building Code, 2005 (“the NBC 2005”).

18. On 16-9-2009, a completion certification was granted in relation to another six towers (G+11). The completion map accompanying this certificate again showed the green area in front of T-1, where presently T-16 and T-17 are being constructed.

19. On 26-11-2009, Noida sanctioned the second revised plan for Emerald Court under the NBR 2006. In this plan, the earlier T-16 (G+11) was replaced with a T-16 consisting of ground and twenty-four floors (G+24). Similarly, the shopping complex (G+1) was replaced with T-17 consisting of ground and twenty-four floors (G+24). T-16 and T-17 would each be of a height of 73 m. According to the plan, T-17 was to be at a distance of 9 m from T-1, and there was a provision for their connection through a space-frame at the upper level. This plan was sanctioned by Noida on the basis of the appellant having purchased thirty-three per cent of the purchasable FAR (27,135.657 sq. m), in addition to the permissible 1.5 FAR (82,229.265 sq m), totalling to 1.995 FAR (1,09,364.922 sq. m). The second revised plan expressly provided for the following, among other conditions:

“2. Due to this sanction of the building plan, the right and ownership of any government authority like (municipality, Noida) any other person will not get affected.

8. A set of sanctioned building plan shall be kept at the construction site so that it can be checked at the site at any time and the construction work shall be done as per the sanctioned building plans specifications as per the rules of Noida Building Rules. The allottee shall start the construction work of the ground floor only after getting the inspection of the basement done upon completion of the work of basement from Building Section Department, Noida. Otherwise sanctioned map deemed to be cancelled.” (emphasis supplied)

“21. On 19-3-2010, the U.P. Apartments Act, 2010 came into force. Section 4(4) and Section 5 of this Act provide for the consent of the owners of flats before any change in the sanctioned plans is effected and also envisage that the percentage of undivided common interest of the owners of the flats cannot be changed without their consent.

22. On 30-11-2010, the New Okhla Industrial Development Area Building Regulations, 2010(“the NBR 2010”) came into force. Regulation 24.2.1.(6) contains the following stipulations:

“24.2.1. (6) Distance between two adjacent building blocks.- Distance between two adjacent building blocks shall be minimum 6 m to 16 m, depending on the height of blocks. For building height up to 18 m, the spacing shall be 6m and thereafter the spacing shall be increased by 1 m for every addition of 3 m in height of building subject to a maximum spacing of 16 m as per National Building Code 2005. If the blocks have dead-end sides facing each other, than the spacing shall be maximum 9 m. Instead of 16 m. Moreover, the allottee may provide or propose more than 16 m space between two blocks.”

“24. On 25-10-2011, in view of the notification dated 20-2-2010, the appellant purchased an additional FAR at a cost of Rs 15 crores, so as to enhance the available FAR from 1.995 to 2.75 (1,50,753.652 sq m). On the same date,

Noida issued a letter to the appellant in relation to the purchase of the FAR, imposing several requirements, including compliance with the provisions of the U.P. Apartments Act, 2010.

25. On 2-3-2012, the third revised plan was sanctioned by Noida for Emerald Court. Through this sanction, the height of T-16 and T-17 was permitted to be raised from 24 floors to 40 floors (i.e. G+40), resulting in the building's height being 121 m. Further, T-16 and T-17 would also consist, inter alia, of two basements and open space for parking beneath the towers. The third revised plan also contained a requirement of compliance with the U.P. Apartments Act 2010, along with similar requirements which were present in the second revised plan."

24. The Residents Welfare Association lodged a complaint before Noida alleging violations and misrepresentation made to the owners by the promoter and sought cancellation of the lay out plan of the two new towers T-16 and T-17.
25. Thereafter, the Residents welfare Association filed a writ petition before the Hon'ble Allahabad High Court praying for quashing the revised plan and for issuance of further directions for demolishing the two towers. The Hon'ble Division Bench of the Allahabad High Court directed demolition of the two towers apart from passing other directions.
26. Challenging the order passed by the Hon'ble Division Bench of the Allahabad High Court, the Special Leave Petition was filed before the Hon'ble Supreme Court.
27. On the basis of submissions of the promoter and Noida, the Hon'ble Supreme Court appointed NBCC, a government owned enterprise as an expert agency with a view to obtain its views on certain issues. By its report dated 13.10.2016, the NBCC concluded that the two towers are not compliant with Regulation 24.2.1(6) of the NBR.2010. Apart from that report, the Resident Welfare's Association obtained reports from IIT Delhi and IIT, Roorkee on the disputed issues which were also placed on record.

28. Argument advanced by the learned counsel for the Residents Welfare Association in **Supertech Limited** (supra) which may be relevant for the case on hand are extracted hereinbelow.

“44. Mr Jayant Bhushan, learned Senior Counsel appearing on behalf of RWA urged that the members of the RWA purchased their flats after being shown a layout which included a limited number of flats and gardens, including a garden in front of T-1. Many of the allottees are retired persons who have suffered as a result of the unilateral changes made by the appellant, which resulted in an increase in the number of flats from 689 to 1573. The garden area in front of T-1 has been completely removed and instead of a complex of 11 storeyed buildings, two long and tall structures have been sanctioned without the consent of the existing allottees obliterating their right to light, air, view and garden area, thereby endangering their safety. Mr Bhushan submitted that:

44.1. The sanctions of 2009 and 2012 are in violation of the minimum distance criteria required to be maintained between two buildings. Under Regulation 32.3.1(i) of the NBR 2006, the distance required is half the height of the tallest building. The tallest building, T-17, under the second revised plan of 2009 is 73 m and hence, the minimum distance of 36.5 m was required between T-1 and T-17. Even the existing T-1 is of 37 m height and therefore, even a building smaller than T-1 could come up only at a distance of at least 18.5 m from T-1.

44.2. Regulation 24.2.1(6) of the NBR 2010 requires a minimum distance of 16 m between T-1 and T-17, as opposed to 9 m at the side.

44.3. Under Para 8.2.3.1 of NBC 2005, the distance required between buildings would be 16 m plus ten per cent of the building length minus 4 m. The length of the proposed tower is 84.5 m, and hence the distance required would be $[16 + (10 \text{ per cent of } 84.5) - 4]$, which is equal to 20.45 m.

44.4 The requirement of complying with NBC 2005 is prescribed by NBR 2010 and the NOC issued by the CFO in 2009. In this regard, on 24-4-2012, the CFO inquired from Noida how the new buildings were sanctioned in violation of the distance criteria prescribed in NBR 2006 and 2010, and NBC 2005, which was not responded to by Noida.

44.10. Consent of flat owners was required under U.P. Apartments Act, 2010 before an alteration in the sanctioned plan:

(a) Sections 4(4) and Section 5(3) of the U.P. Apartments Act, 2010 requires the consent of all allottees before a change in the sanctioned plan/undivided interest in the common area is made. The removal of the green area reduced the common areas and, with an increase in the flats

from 689 to 1573, the proportionate undivided interest in the common areas has been reduced substantially;

(b) The U.P. Apartments Act, 2010 is applicable irrespective of whether or not a society is formed. The rights are vested with the apartment owners and not the association; and

(c) Gardens as well as land are included in the definition of common areas over which all residents have rights;

44.11. Consent of flat owners ought to have been obtained before obtaining an alteration of the sanctioned plan, under U.P. Act, 1975:

(a) Under Sections 5(2) and 5(3), undivided interest cannot be altered without the consent of all owners of flats;

(b) Clause II(h) of the lease deed stipulates the applicability of the U.P. Act, 1975. This is not confined only to maintenance. The tripartite sub-lease between Noida, the appellant and the allottees also mandates the applicability of the U.P. Act 1975; and

(c) The appellant was responsible to ensure that the declaration under the U.P. Act, 1975 was made. It cannot take advantage of its own wrong in failing to submit a declaration.”

29. On the issue of applicability of U.P. Apartments Act, 2010, the Hon'ble Supreme Court held thus-

“145. The general liabilities which have been cast upon promoters intending to sell an apartment are set out in Section 4(1), which reads as follows:

“4. General liabilities of promoter.— (1) Any promoter who intends to sell an apartment, shall make a full and true disclosure in writing of following to an intending purchaser and the competent authority:

(a) rights and his title to the land and the building in which the apartments have been or proposed to be constructed;

(b) all encumbrances, if any, on such land or building, and any right, title, interest or claim of any person in or, over such land or building;

(c) the plans and specifications approved by or submitted for approval to the local authority of the entire building of which such apartment forms part;

(d) detail of all common areas and facilities as per the approved layout plan or building plan;

(dd) built-up area and common area of an apartment.

(e) the nature of fixtures, fittings, and amenities, which have been or proposed to be provided;

(f) the details of the design and specifications of works or and standards of the material which have been or are proposed to be used in the construction of the building, together with the details of all structural, architectural drawings, layout plans, no objection certificate from Fire Department, external and internal services plan of electricity, sewage, drainage and water supply system etc. to be made available with the Association;

(g) all outgoings, including ground rent, municipal or other local taxes, water and electricity charges, revenue assessments, maintenance and other charges, interest on any mortgage or other encumbrance, if any, in respect of such land, building and apartments;

(h) such other information and documents as may be prescribed.”

Sub-Section (4) of Section 4 contains the following stipulations:

“4.(4) After plans, specifications and other particulars specified in this section as sanctioned by the prescribed sanctioning authority are disclosed to the intending purchaser and a written agreement of sale is entered into and registered with the office of concerned registering authorities. The promoter may make such minor additions or alterations as may be required by the owner or owners, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by authorised Architect or Engineer after proper declaration and intimation to the owner:

Provided that the promoter shall not make any alterations in the plans, specifications and other particulars without the previous consent of the intending purchaser, project Architect, project Engineer and obtaining the required permission of the prescribed sanctioning authority, and in no case he shall make such alterations as are not permissible in the building bye-laws.”

146. Under clause (c) of sub-Section (1) of Section 4, a promoter who intends to sell an apartment is required to make a full disclosure in writing to an intending purchaser and to the competent authority of the plans and specifications approved or submitted for approval to the local authority, of the building of which the apartment is a part. Similarly, under clause (d), a disclosure has to be made in regard to the common areas and facilities in accordance with the approved layout plan or building plan. Once such a disclosure has been made, sub-Section (4) stipulates that upon the execution of a written agreement to sell, the promoter may make minor additions or alterations as may be required or necessary due to architectural and structural reasons duly authorised and verified by authorised architects or engineers. Apart from these minor additions or

alterations which are contemplated by sub-section (4), the proviso stipulates that the promoter shall not make any alterations in the plans, specifications and other particulars “without the previous consent of the intending purchaser”. Mr Vikas Singh’s submission, that this provision will apply to intending purchasers of Apex and Ceyane and not to the persons who had purchased apartments in the existing fifteen towers, cannot be accepted. The above proviso is evidently intended to protect persons to whom the plans and specifications were disclosed when they were the “intending purchasers”. Further, a construction to the contrary will run against the grain of the intent and purpose of the statute as well its express provisions.”

30. The Hon’ble Supreme Court after noting the provisions of the U.P. Apartments Act, 2010 held that the provisions of the said Act shall have consequences for the plan which was sanctioned after the said Act was notified. The Hon’ble Supreme Court in paragraph 148 of the said reports held thus-

“148. It is important to clarify at this stage that the U.P. Apartments Act, 2010 will not apply with retrospective effect to the second revised plan, which was sanctioned on 26-11-2009. However, the legislation, which came into force upon publication in the U.P. Gazette on 19-3-2010, will have consequences for the third revised plan sanctioned on 2-3-2012, as analysed below.”

31. It would be relevant to point out at this stage that Section 4(4) of the U.P. Apartments Act, 2010 imposes a restriction upon the promoter from making any alterations in the plans, specifications and other particulars without the previous written consent of the intending purchaser after the plans, specification and other particulars are disclosed to the intending purchasers and a written agreement of sale is entered into and registered with the office of registration authorities.
32. That apart the said Act has an overriding effect over other laws by virtue of Section 31(1) which reads as under-

“31(1) The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force;”

33. In the West Bengal Apartment Ownership Act, 1972, there is no such provision which is in parimateria with Section 4 of the U.P. Apartments

Act 2010. Furthermore, the 1972 Act do not contain any provision giving the said Act an overriding effect over other laws.

34. On the contrary by virtue of Section 184, the 2007 Act shall have an overriding effect over other laws. Section 184 is extracted hereinbelow.

“184....The provisions of this Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force or any judgment, decree, or order of any court, tribunal or other authority.”

35. The learned Senior advocate for the petitioner in course of his argument could not point out any provision in the 2007 Act restricting the power of the promoter to make any alteration in plans, specifications and other particulars after execution and registration of deeds of conveyances in favour of apartment owners. In absence thereof, this Court is of the considered view that the provisions contained in the 1972 Act prohibiting the alteration of the percentage of undivided interest of each apartment owner in the common areas and facilities as specified in Form A declaration cannot prevail upon the provisions of 2007 Act. The provisions of the 1972 Act is not in parimateria with the provisions of the U.P. Apartments Act, 2010. In view thereof, to the mind of this Court, the observations made in Supertech Limited (supra) with regard to the applicability of the Apartments Act in the matter of sanction of plans is of no assistance to the petitioners in the case on hand. This Court accordingly holds that the provisions of the 1972 Act do not have any consequences on the right of the promoter to obtain revised plan. Therefore, the issue of taking consent of the apartment owners while submitting the application for revised plan does not arise in the case on hand.
36. In view of the aforesaid discussion, this Court is not inclined to accept the argument of Mr. Chaudhary that the percentage of undivided interest of each apartment owner in the common areas as indicated in the original plan could not have been altered in the revised sanction plan as such

argument is based on the prohibition against alteration of the particulars in Form A declaration filed under the provisions of the 1972 Act.

37. Mr. Chaudhary would contend that non disclosure of the Form A declaration at the time of submission of the revised plan for obtaining sanction amounts to suppression of material particulars for which the revised plan is liable to be cancelled.
38. The learned senior advocate for the petitioner could not point out any provision under the 2007 Act which obliges a promoter to disclose the Form A declaration or any particulars in connection therewith in the application for sanction of plan/revised plan. Therefore, non disclosure of the particulars contained in Form A declaration cannot be a ground for cancellation of revised sanction plan under Section 81 of 2007 Act.
39. It is well settled that the Municipal/Development Authority has to act within the forecorners of the statute which creates it and also that it cannot enforce the provisions of any other law.
40. In **Bejoy Raj Jain** (supra), a coordinate bench observed that obtaining a plan and making a construction does not and cannot change the nature of the right, title and interest in the land in question. The Municipal authorities are only concerned with the planning of the cities and to see that no construction is made save in accordance with the sanctioned plan and after complying with the condition and restrictions imposed under Municipal laws. It has no jurisdiction to adjudicate on the ownership of the land in question. The Municipal authorities are concerned with the prima facie title of the applicant in such land. It was further observed that the sanctioning of plan did not and could not create any right, title and interest in the land in question if it is not otherwise there.
41. The coordinate bench further held that the Municipal Corporation do not have any authority to enforce or administer any other law.

42. By applying the aforesaid proposition of law laid down in Bejoy Raj Jain (supra), this Court holds that NKDA is not obliged to enforce the provisions of 1972 Act.
43. By referring to clause 4 under Schedule G of the Deed of Conveyance, Mr. Choudhury would contend that the provisions of the 1972 Act and the 1974 Rules are binding upon the 6th respondent. Upon reading the said clause this Court finds that the purchaser is under obligation to become and remain a member of the Apartment Owners' Association to be formed by and consisting of all the apartment owners in the residential complex as per the provisions laid down in the 1972 Act and the 1974 Rules.
44. Incorporation of the said clause in the deed of conveyance cannot confer any right upon the purchaser to take advantage of the provisions of the 1972 Act for the purpose of raising an objection against sanction of the revised plan. It has nothing to do with regard to the right of the promoter to apply for revised plan in accordance with the 2007 Act and the rules framed thereunder.
45. The said clause is also not binding upon the NKDA which has to act within the forecorners of 2007 Act and is not under any obligation to enforce the provisions of the 1972 Act. Therefore, the NKDA cannot be faulted for not considering the provisions of the 1972 Act while granting sanction to the revised plan.
46. Having steered clear of this issue, this Court has to now consider whether the 6th respondent had the right to apply for sanction of the revised plan.
47. Rule 2(c) of the 2009 Rules defines "applicant" to mean owner of the land and includes authorised representative of the owner or anybody having construction right in accordance with law and shall also include the transferee.
48. Mr. Chaudhury would contend that the expression "Owner" used in the definition of applicant in Rule 2(c) of 2009 Rules would having the same

meaning as the “owner” defined in Section 3(ia) of the 1972 Act. Therefore, according to Mr. Chaudhury, an apartment owner falls within the definition of “applicant” under Rule 2(c) and the promoter cannot apply for sanction of revised plan claiming to be the sole owner.

49. This Court has already held that the provisions of the 1972 Act do not have any manner of application in case of sanction of plan. Therefore, the definition of “applicant” in 2009 Rules cannot be given a wider meaning as argued by Mr. Chaudhury. To the mind of this Court, the 6th respondent falls within the definition of “applicant” under 2009 Rules and therefore, had the right to apply for sanction of revised plan.
50. Mr. Chaudhury would contend that by virtue of the registered deed of conveyance, the apartment owners are entitled to a specific percentage of undivided interest in the common areas and facilities as indicated in the original plan and such rights of the petitioners have been infringed by sanction of the revised plan allowing construction of T-8 in the common area. Such act has resulted in alteration of the percentage of the undivided interest in common areas.
51. The decision on the aforesaid contention would depend upon whether or not the percentage of undivided interest of an apartment owner crystallised upon registration of deed of conveyance. In order to decide the said issue, the terms and conditions of the registered deed of conveyance are to be interpreted.
52. The learned senior advocate for the respective private parties have made elaborate submission as to the legal effect of the various clauses in the deed of conveyance.
53. However, bearing in mind the well settled proposition of law reiterated in ***Diamond and Gem Development*** (supra) that the dispute relating to interpretation of the terms and conditions of a contract which is in the realm of private law and not a statutory contract is a matter to be

adjudicated by a Civil Court or in arbitration, as the case may be, this Court is not inclined to enter into and adjudicate the dispute as to whether the undivided interest in the common areas have crystallised upon registration of the deed of conveyance.

54. One of the obligatory functions of the KMDA is to control the building operations within the limits of the area of New Town, Kolkata. In order to regulate and control the building operation, KMDA has to sanction building plans in accordance with the rules framed under the 2007 Act. It has the power to refuse sanction to a building plan on any of the grounds stipulated under Clauses (a) to (f) of Section 75.
55. While granting sanction to the building plan, KMDA has to see whether the plan is in accordance with the rules framed under the 2007 Act. It has no power to adjudicate the right of the parties to a deed of conveyance while granting sanction to a plan. It is only concerned with the prima facie title of the applicant in the land where such construction is to be made.
56. In the event, KMDA is satisfied that sanction to a building plan has been given in consequence of any material misrepresentation or fraudulent statement contained in the plans, elevation, sections or specifications of land or any material particulars submitted in respect of such building, Section 81 of the 2007 Act empowers NKDA to cancel the permission.
57. Application for permission to erect building has to be in accordance with Rule 4 of the 2009 Rules. In case of any material misrepresentation or fraudulent statement in the particulars disclosed in such application, NKDA has the power to cancel the permission. It does not appear to this Court that Rule 4 of the 2009 Rules obliges an applicant to disclose the particulars contained in Form A declaration registered in terms of the 1972 Act. Therefore, the alleged non-disclosure thereof, in the considered view of this Court does not fall within the expression “material

misrepresentation or fraudulent statement” used in Section 81 of the 2007 Act.

58. This Court is now left with the other contention of Mr. Choudhury that the revised plan has been sanctioned in violation of the distance restriction between two buildings stipulated in NBC, 2016.
59. NBC guidelines is non statutory in nature and it is for general application as held by the Hon’ble High Court at Kerala in **C.M. Dinesh Mani** (supra). It has been further held therein that it is for the respective State Governments to either decide to incorporate any provisions in the NBC as applicable to their building rules or to modify such provisions or to incorporate the same with such modifications as may be required in a particular State.
60. After going through the 2009 Rules, this Court finds that the applicability of the provisions of the prevailing National Building Code for protection in case of fire has been incorporated in Rule 25. Several rules falling under Chapter III of 2009 Rules, also stipulated conformity with the accepted standards as per the National Building Code of India.
61. In **Supertech Limited** (supra), the Hon’ble Supreme Court noted that NBC, 2005 is referenced in Regulations 24.2.1(6) of the NBR, 2016. The report of the expert agency appointed by the Hon’ble Supreme Court also concluded that the two towers are not compliant with the said Regulation. On such facts the Hon’ble Supreme Court held that the distance requirement under NBC, 2005 has not been complied with.
62. The issue with regard to violation of the distance restriction as per the guidelines of the NBC is a mixed question of law and fact. In order to decide such issue, the relevant provisions under the 2009 Rules regarding distance restriction between the building and whether such provision has been complied with or not is to gone into. It is also to be seen as to whether the NBC guidelines as to restriction between two

towers/buildings have been incorporated in the 2009 Rules. Whether there has been any violation of distance restriction involves an adjudication on facts and a field verification may also be necessary. This Court is, therefore, of the considered view that such issue is best left to be decided by the authorities of NKDA.

63. Mr. Chaudhury contended that the petitioner in their representations dated 19.04.2018 and 28.05.2018 have alleged violations of the distance restrictions embodied in the guidelines of NBC, 2016. Whether NBC, 2016 or any other guidelines issued by NBC that was in force at the time of grant of sanction to the revised plan with regard to distance restriction shall at all be applicable is to be decided by the NKDA first before arriving at a decision whether the provisions of Rule 2009 has been violated while granting such sanction.
64. This Court shall now deal with the other judgments relied upon by the learned advocates for the respective parties.
65. In ***Maharaji Educational Trust*** (supra) the Hon'ble Supreme Court held that the High Court in writ jurisdiction could not have declared that the property is unencumbered under the guise of directing demarcation of land. The said decision being distinguishable on facts do not have any manner of application to the case on hand.
66. In ***Rinkoo Mitra*** (supra), the issue which fell for consideration was whether the owner of the ground floor of a building can object against the proposal for construction of the second and third floor. The said decision being distinguishable on facts is of no assistance for the purpose of deciding the issues involved in the writ petition.
67. In ***Maruti Corporation*** (supra), the restraint order on the transferees were set aside in the light of the observations that the transfers were effected at a point of time when there was no injunction as far as the said

transfers were concerned. The said decision is of no assistance to the 6th respondent in the case on hand.

68. In **M.S. HNUNPUII** (supra) the Hon'ble High Court of Delhi after noting that the prayer for demolition of the property is the subject matter of civil suit observed that if during the pendency of the said suit the property is demolished, nothing would survive for adjudication in the suit. The said decision being distinguishable on facts do not have any manner of application to the case on hand.
69. In **Krishanlal** (supra) one of the issues that fell for consideration was whether the requirement of giving copy of the proceeding of the inquiry as per the mandatory provision of the Act is for the benefit of the individual concerned or serves a public purpose. While dealing with such issue the Hon'ble Supreme Court held that such requirement is for the benefit of the person concerned which is to enable him to know as to what had taken place during the course of the proceedings so that he is better situated to show his cause as to why the proposed penalty should not be imposed. The Hon'ble Supreme Court further observed that such a requirement cannot be said to be relatable to public policy or one concerned with public interest or to serve a public purpose. The decision being distinguishable on facts is of no assistance for the purpose of deciding the issues in this writ petition.
70. For all the reasons as aforesaid, this Court directs the Chairman of NKDA being the 2nd respondent to consider the representations of the petitioner dated 19.04.2018 and 28.05.2018 in so far as it relates to alleged violation of the guidelines of NBC and/or the 2009 Rules with regard to distance restriction in the light of the observations made hereinbefore and to decide the said issue by passing a reasoned order upon giving an opportunity of hearing to the respective parties or their authorised representatives. The said authority will be free to conduct physical inspection of the property through competent officials upon prior notice

to the parties in order to take a decision in terms of this order. The reasoned order shall be communicated to the parties immediately thereafter. The entire exercise shall be completed within a period of 30 working days from the date of receipt of a server copy of this order. Any action/steps taken by the 6th respondent in the meantime shall abide by the decision to be taken by the 2nd respondent pursuant to this order.

71. With the aforesaid direction and observations the writ petition stands disposed of. There shall be, however, no order as to costs.
72. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)

(P.A.-Sanchita)