

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya

WPA 302 of 2020

Rosedale Garden Apartment

Owners Association

vs

New Town, Kolkata Development

Authority & Ors.

For the Petitioner	:	Mr. Srijib Chakraborty, Adv. Mr. A. Mandal, Adv. Mr. Bimalendu Das, Adv. Mr. Shomrik Das, Adv.
For the respondent nos. 7 to 9	:	Mr. Rohit Das, Adv. Ms. Kishwar Rahman, Adv. Ms. Sristi Roy, Adv.
For the HIDCO	:	Mr. Debabrata Banerjee, Adv. Mr. Samir Chakraborty, Adv.
For the NKDA	:	Mr. Debabrata Banerjee, Adv. Mr. Tapojit Dey, Adv.

For the Developer /respondent no. 6: Ms. Suranjana Chatterjee, Adv.
 Ms. Suranjana Chatterjee, Adv.
 Ms. Madhusmita Senapati, Adv.

Last Heard on : 22.01.2024

Delivered on : 23.02.2024

Moushumi Bhattacharya, J.

1. The petitioner is an association of apartment owners registered under the West Bengal Apartment Ownership Act, 1972. The petitioner's cause of action arises out of a Development Agreement dated 24.02.2006, executed between the West Bengal Housing Infrastructure Development Corporation (HIDCO) and Rosedale Developers Private Limited (respondent no. 6/developer), for development of a residential project at New Town, Kolkata. The residential project was named "Rosedale Garden Complex".

2. The other parties before the Court are the New Town Kolkata Development Authority (NKDA) which was formed with effect from 24th June, 2008 and the respondent no. 4 being the West Bengal Housing Infrastructure Development Corporation. The respondent nos. 7-9 is M/s. Rosedale Plaza are the owners of a commercial plaza constructed inside the residential complex.

3. The petitioner prays for stay/quashing of an order passed by the New Town Kolkata Development Authority dated 27.02.2019 and a direction on the said respondent to demolish the construction made by

Rosedale Plaza (respondent nos. 7-9) within the residential complex. The petitioner urges that the commercial construction made by the respondent nos. 7-9 is beyond the Original Plan sanctioned by NKDA.

4. A brief list of events is relevant to the present controversy and is stated below.

Brief Facts

5. A Development Agreement dated 24.02.2006 was executed as stated above between HIDCO/the original land owner and the respondent no. 6 for construction of a housing complex consisting of original apartment and a commercial hub in accordance with the plan sanctioned by HIDCO. A Master Plan of the Rosedale Complex (residential complex) was sanctioned by HIDCO on 27th August, 2009 under the Planning Area (Building Portions) Rules, 2006. This plan was referred to as the “Original HIDCO Plan” and divided the entire plot into two demarcated areas comprising of a complex for residential use and a separate area for commercial use. The former was named “Rosedale Garden Complex” and the latter was named “Rosedale Plaza Complex”.

6. An agreement for sale dated 7th April, 2010 was entered into between one Ramji Power Construction for purchase of the entire Rosedale Plaza Commercial Complex with parking spaces and other amenities in terms of the Original HIDCO Plan. The developers/Rosedale Developers Private Limited obtained a revised Master Plan on 26th April, 2011. NKDA, in the meantime, became the

sanctioning authority pursuant to coming into force of the New Town Kolkata (Building) Rules, 2009. On 30th April, 2011 a final Agreement for Sale was entered into between Ramji Power, HIDCO and respondent no. 6 in terms of the original HIDCO Plan. The entire construction of the Rosedale Plaza Complex was handed to the Commercial Plaza Owner in February, 2013 as a bare shell and in August/September, 2013, the rights and interest of the Rosedale Plaza Complex was transferred in favour of the respondent no. 7/Commercial Plaza Owners. A registered deed of conveyance was executed on 21st September, 2013 in favour of the writ petitioner for sale of one apartment in Tower 1 of the residential complex on the basis of the original HIDCO Plan. Other deeds of conveyance were executed in December, 2013 and May, 2014 by HIDCO and the respondent no. 6 in favour of the writ petitioner and the commercial plaza owner in respect of the residential complex and the commercial plaza, respectively.

Litigations

7. In September, 2017, a representative of the petitioner complained to HIDCO alleging deviation from the Original HIDCO Plan. WPA 21146 of 2018 was filed in October, 2018 praying for restoring the nature and character of the Rosedale Garden Complex as depicted in the original Plan dated 27th August, 2009 which was approved by HIDCO. In November, 2018, the Commercial Plaza Owner/respondent nos. 7-9 approached NKDA for extension of the original HIDCO Plan but

was informed that notice of completion had already been given by the respondent no. 6 on 10th February, 2015 and the final Occupancy Certificate was issued by NKDA on 14th October, 2015. A Coordinate Bench passed an order on 15th November, 2018 in WPA 21146 of 2018 directing the concerned Officer of NKDA to visit the complex upon notice to the private parties and submit a report of any unauthorised construction. Pursuant to this order, NKDA filed an Inspection Report on 28th November, 2018 alleging deviations in the retail complex in relation to the completion drawings of plan. There was however no finding of any deviation in the Rosedale Plaza Complex/commercial complex.

8. A second writ petition being WPA 24454 of 2018 was filed by the commercial plaza owner praying for setting aside of the completion certificate in so far as the Rosedale Plaza Retail Complex was concerned and also for a right to file separate Occupancy Certificate for the retail complex as sanctioned vide the Original HIDCO Plan. This writ petition is pending as on date. A Co-ordinate Bench passed a second order on 4th December, 2018 in WPA 21146 of 2018 directing NKDA to invoke sections 81 and 82 of the New Town Kolkata Authority Act, 2007. The issue with regard to deviation and alleged unauthorised construction was kept open to be decided in the proceedings before NKDA. The Co-ordinate Bench passed an order on 6th December, 2018 in WPA 24454 of 2018 recording that the respondent nos. 7/commercial plaza owner was entitled to explain his conduct before NKDA.

9. NKDA passed the impugned order, which is under challenge in the present writ petition, on 27th February, 2019 directing the respondent no. 6 to file a fresh plan in respect of the entire project. NKDA however did not find any deviations in the Rosedale Plaza Complex in terms of the Original HIDCO Plan.

10. The instant writ petition was filed on 6.01.2020 by the petitioner's association praying for setting aside of the impugned order of NKDA and for demolition of the Rosedale Plaza Commercial Complex on the charge of deviation from the original sanction plan. On 10th January, 2020, the National Consumer Disputes Redressal Commission passed a judgment in Consumer Case no. 1270 of 2017 recording material alteration from the Original HIDCO Plan in the NKDA revised plan and declare that the NKDA revised plan was contrary to section 8(1) of the West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993. Further, NKDA replied to a RTI on 8th October, 2020 specifically stating that the construction in Rosedale Plaza Commercial Complex is in accordance with the sanctioned plan and that no demolition proceeding is required in respect thereto. On 28th February, 2022 pursuant to an application filed by the petitioner against the respondent no. 6, the National Company Law Tribunal (NCLT), Kolkata Bench, admitted the respondent no. 6 into Corporate Insolvency Resolution Process and declared moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 in respect of the respondent no. 6. The affairs

of the respondent no. 6 are presently under the control of the resolution professional appointed by the Committee of Creditors comprising solely of the petitioner.

11. The alleged deviation caused by the respondent no. 7 and 9 / Rosedale Commercial Plaza owners in respect of the commercial complex constructed by the said respondents as a part of the bulk project forms the background to the present writ petition. The petitioner has challenged the impugned order passed by NKDA on 27.2.2019 which in turn was passed following the order of the Co-ordinate Bench dated 4.12.2018 and 6.12.2018. Sections 81 and 82 of The Newtown, Kolkata Development Authority Act, 2007, form the statutory basis of the impugned order. Section 82(1) of the Act requires NKDA to adjudicate whether erection of any building has been commenced or completed without obtaining sanction under the Act or has been completed contrary to the sanction given or the permission granted under the said Act including any material alterations to any building which has commenced or is being carried on or has been completed in breach of the provisions of the Act or the rules and regulations framed thereunder. NKDA has been conferred with the power to make an order directing the erection, alteration or addition, as the case may be, to be demolished or altered after giving the owner a reasonable opportunity of hearing.

12. The foremost question which would be relevant for adjudicating on the validity of the impugned order is to determine which plan should

be accepted as the valid plan for the purpose of sections 81 and 82 of the NKDA Act.

13. In 1999, HIDCO was appointed as the Planning Authority for the area which included the Rosedale Project. This was before the NKDA Act came into force. As the Planning Authority, HIDCO was vested with statutory powers to regulate building operations in the said area and grant permission for building works. The original Master Plan of the Project was sanctioned by HIDCO on 27.8.2009 under the Planning Area (Building Operations) Rules, 2006 which was then in force. The original HIDCO plan of 27.8.2009 is part of the records and would show that the entire plot was divided into two clearly distinguishable complexes, namely, residential and commercial. The demarcation was made through a chain-link fence.

14. The area for residential use was subsequently named “Rosedale Garden Complex” having a separate entrance from the east side of the plot and the area for commercial use was named as “Rosedale Plaza Complex” also having a separate entrance from the west side of the plot. Since the amalgamation / sub-division of the plot did not affect building operations, the demarcation was not contrary to Rule 9 of the 2006 building Rules which disallows amalgamation and sub-division of plots affecting building operations. Notwithstanding the statutory position, the original HIDCO plan of 27.8.2009 clearly shows that the entire plot was segregated into two distinguishable areas / complexes. Hence there

was no scope or requirement for any separate amalgamation or sub-division.

15. It would also be evident from the records that the original HIDCO plan of 27.8.2009 formed the basis for sale of both the Rosedale Plaza Complex as well as the residential flats in the Rosedale Garden Complex. The original HIDCO plan is also mentioned in the registered Deeds of Conveyance executed in favour of the flat owners by the respondent no. 6 / Developer as well as HIDCO. Two of such Deeds in respect of the residential flats in the Rosedale Garden Complex are on record.

16. The Developer / RDPL obtained a revised / re-sanctioned Master Plan from NKDA on 26.4.2011 since NKDA became the sanctioning authority pursuant to the NKDA Act, 2007 and the NKDA Rules, 2009 coming into force. It is relevant that the NKDA revised plan has not been disclosed by any of the parties in the present proceedings. The Deeds of Conveyance entered into with the purchasers of the residential units also do not mention this revised plan but only refer the original HIDCO plan of 27.8.2009. Moreover, under the Development Agreement dated 24.2.2006 executed by HIDCO in favour of the respondent no. 6 / Developer, the latter was required to construct the entire complex in accordance with the plan sanctioned by HIDCO. Hence, no amendment / alteration in the sanctioned plan was permissible without the prior approval of HIDCO. However, the Developer / respondent no. 6 has not

placed any consent obtained by the Developer from HIDCO prior to obtaining the NKDA revised plan of 26.4.2011.

17. The NKDA revised plan relied upon by the petitioner and the respondent no. 6 developer cannot be accepted for several reasons.

18. The first is that Manoj Kumar Sharma, a representative of the petitioner along with Vinoy Chowdhury, who was the writ petitioner in WPA 21146 of 2018 along with seven other apartment owners made a complaint to the Chairman, HIDCO alleging specific deviation from Original HIDCO Plan. In the complaint, the petitioners sought restriction of the entire construction as per the Original HIDCO Plan. Second, there is no mention of the NKDA revised plan in WPA 21146 of 2018 which was filed by Vinoy Chowdhury and culminated in the impugned order dated 27th February, 2019 of the NKDA. In fact, in the earlier writ petition, the Original HIDCO Plan sanctioned on 27th August, 2009 was taken for determining the alleged deviations and the petitioners also prayed for restoration of the nature and character of the complex as depicted in the Original HIDCO Plan. Third, the NKDA revised plan is also contrary to the Development Agreement executed by HIDCO in favour of the respondent no. 6 and is also contrary to section 8(1) of the Promoters Act, 1993. The NKDA revised plan is also contrary to the judgment of the Supreme Court whereby it was held that the developer cannot revise a sanctioned plan without consent of the purchasers of the units in the project : Refer *Supertech Limited v. Emerald Court Owner Resident Welfare Association*; (2021) 10 SCC 1.

19. It would also be evident from the material disclosed to the Court that the completion plan dated 14th October, 2015 is also suspect. This completion plan was issued while the retail-cum-commercial building was under construction. NKDA further issued the Final Occupancy Certificate for the entire plot based on the notice of completion filed by the respondent no. 6 without the consent or knowledge of the respondent nos. 7-9, who were the commercial plot owners.

20. Rule 5(3) of the New Town Kolkata (Building) Rules, 2009 would be relevant in this context. Rule 5(3) states that the owner will have to issue notice of completion in the specified form together with the prescribed fees for obtaining Occupancy Certificate by the development authority. It is also the case of the said owners that the completion certificate was issued despite the retail building complex providing essential services including water, electricity, gas and fire-fighting infrastructure. The issue of the Completion Plan led to the filing of a writ petition by the commercial owners being WPA 21154 of 2018 wherein the commercial plaza owners prayed for setting aside of the Completion Certificate as far as the Rosedale Plaza Retail Complex was concerned. The writ petition is pending as on date.

21. It is also relevant that the inspection Report dated 28th November, 2018, which was filed by NKDA in terms of the order dated 15th November, 2018 passed by a Coordinate Bench in WPA 21146 of 2018 cannot be the basis of any proceedings under section 81 or 82 of the NKDA Act as the inspection Report is based on a comparison of the

construction against the later completion plan and not the Original HIDCO Sanctioned Plan.

22. More important, the inspection Report dated 28th November, 2018, it was concluded that there were some deviations in the commercial complex and residential complex, has now become redundant in light of NKDA's subsequent Report dated 7th October, 2020. This Report was filed pursuant to an RTI application wherein NKDA specifically stated that the construction was made by the commercial plaza owner as per the sanctioned drawing. NKDA also states in the Report that no demolition proceeding is required to be taken by NKDA in respect of the Rosedale Plaza Complex as the construction is in accordance with the sanctioned drawing. Significantly, NKDA revised report dated 7th October, 2020 was issued to the advocate of the petitioner and the petitioner has not challenged the report in the Court or forum till date.

23. The impugned order passed by NKDA dated 27th February, 2019 which is under challenge in the present proceedings, also suffers from several infirmities. First of all, there is no finding on the HIDCO Plan. The impugned order also equates the owners of the apartment in a retail building with the owner of an entire commercial complex whereas both these areas were demarcated by a chain-link fence. Moreover, the impugned order is beyond the scope of section 81/82 of the Act which clearly stipulates that NKDA can pass orders only where there has been a deviation from the Original Sanction Plan. There is no scope for the

NKDA to call any party to file a fresh sanctioned plan under sections 81 and 82 of NKDA Act.

24. As stated above, the entire issue of alleged deviations or calling upon the parties to file a fresh sanction plan became redundant in view of subsequent Report of NKDA dated 7th October, 2020 which was filed under the RTI Act. NKDA has made specific statement in the Report that there is in fact no deviation in construction by the commercial plaza owner and that no demolition proceedings are required in that light.

25. At this stage, it is also significant to mention that the NCLT, Kolkata, Bench, admitted the respondent no. 6 in a Corporate Insolvency Resolution Process and declared moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016. The affairs of the respondent no.6 are presently under the control of the Resolution Professional appointed by the Committee of Creditors which comprises solely of the petitioner. Thus, there is substance in the submission made on behalf of the respondent nos. 7-9 that the respondent no.6 is no longer under the control of its erstwhile promoters who developed the project but is now under the alter ego of the petitioner itself. Hence, it would be inequitable to allow the respondent no.6 to file a fresh plan for sanction in respect of the Commercial Complex which was purchased by the respondent nos. 7-9 in 2011-2014. The project was based on a valid plan sanctioned by HIDCO in 2009.

26. The only conclusion which can be drawn from the above material is that the original HIDCO plan dated 27.8.2009 is the only legally valid sanctioned plan under sections 81 and 82 of the NKDA Act, 2007. This plan has not been the subject matter of challenge by any of the parties to the present writ petition. Further, sale of the two units in the project, residential as well as commercial, through the residential Deeds of Conveyance as well as the Commercial Deed of Conveyance were executed on the basis of the original HIDCO plan. The Deeds record that the transferees are entering into the transactions upon being satisfied with the contents of the original HIDCO plan and have not raised any dispute in this regard at any time following the transactions. The Deeds of Conveyance are on record.

27. Further, the order passed by a Co-ordinate Bench of 4.12.2018 in WPA No. 21146 of 2018 directing NKDA to invoke sections 81 and 82 of the NKDA Act was only for the purpose of determining the issue of deviation, if any, from the sanctioned plan. This writ petition was also based on the original HIDCO plan.

28. On the other hand, the NKDA's revised plan dated 26.4.2011 has not been disclosed and also appears to have been obtained by the respondent no. 6 without the knowledge of the purchasers and transferees of the residential flats and commercial complex which is contrary to section 8(1) of The West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993. Reference in this regard may again be made to the National Consumer

Dispute Redressal Commission order which has been referred to in the earlier section of this judgment. In essence, the NCDRC held that modifications and divisions from the original HIDCO plan were without the consent of the purchasers and were illegal in that respect. It was also held that the NKDA revised plan was in violation of sections 8(1) of The West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993. This was also reinforced by the Supreme Court in the *Supertech vs. Emerald* (Supra).

29. The impugned order dated 27.2.2019 also becomes redundant in light of the NKDA's subsequent Report dated 7.10.2020 which was given under the RTI application, as stated above. The Report dated 7.10.2020 supersedes the previous Inspection Report dated 28.11.2018 as well as the impugned order dated 27.2.2019. NKDA specifically states in the Report that the construction by the Commercial Plaza owner has been made as per the sanctioned drawing and that no demolition proceedings were required to be taken up by NKDA in respect of the Rosedale Plaza Complex.

30. It is also significant that the impugned order does not record any deviation from the original HIDCO plan dated 27.8.2009. Hence, NKDA could not have passed any order under sections 81 and 82 of the NKDA Act or any direction on the respondent no. 6 to file a fresh plan for sanction which is beyond the scope of sections 81 and 82 of the said Act. Moreover, the impugned order does not contain any analysis of any deviation from any plan to justify a direction on the respondent no. 6 to

file a fresh plan for sanction which is contrary to both the NKDA Act as well as the *Supertech* judgment of the Supreme Court.

31. The rights of the Commercial Plaza owner / respondent no. 7-9 also cannot be ignored in respect of the reality of the situation. Admittedly, the respondent no. 7-9 have completed construction only of the ground floor of the ground + 1 building as originally sanctioned in the HIDCO plan. Hence, there can be no scope for the said respondents exceeding the construction beyond any sanctioned area. The respondent no. 7-9 are also not seeking any modification of the sanctioned original HIDCO plan but only to exercise their right to complete the construction of the ground + 1 storeyed retail building without any deviation from the original HIDCO plan. The said respondents are seeking to act in conformity with the original HIDCO plan and have also filed WPA no. 24454 of 2018 with a prayer for completing the construction of the building which is pending. The Co-ordinate Bench also passed an order in this writ petition on 6.12.2018 holding that the existing completion plan dated 14.10.2015 filed by the respondent no. 6 shall not prejudice the Commercial Plaza owner (respondent no. 7 -9).

32. The prayer of the petitioner for demolition of any construction in the Rosedale Plaza Retail Complex beyond the original sanctioned plan and for restoring the character of Rosedale Garden Complex as depicted in the original sanctioned plan does not have any fact or material to support such prayer. The petitioner as well as the respondent no. 6

have not produced the sanctioned plan which forms the basis of the prayer and have also not disclosed factual basis for granting relief in respect of any other plan save and except the original HIDCO plan dated 27.2.2009. The prayer for demolition is also contrary to NKDA's latest Report of 7.10.2020 under the RTI Act. The writ petition also acknowledges that the original sanctioned plan is the HIDCO plan dated 27.8.2009 as approved by HIDCO. The averment in paragraph 10 of the writ petition is that construction in the common area of the complex is said to be in deviation of the sanctioned building plan dated 27.8.2009 which is the original HIDCO Plan.

33. It further needs to be borne in mind that the allegations of encroachment are essentially a title dispute which is beyond the jurisdiction of a writ Court. The dispute with regard to the title is already the subject matter of a Title Suit being no. 286 of 2019 which has been filed by the petitioner's representative, Mr. Manoj Kumar Sharma before the learned Barasat Court. The petitioner has prayed for a declaration that the Commercial Plaza Owner (respondent no. 7 – 9 herein) do not have any right title or interest in the Rosedale Plaza Commercial Complex. The learned Barasat Court passed an order dated 17.4.2015 rejecting the prayer for ad-interim injunction and the prayer for ad-interim injunction was once again rejected by the Additional District Judge by an order dated 28.5.2019. The appeal filed by the petitioner was thereafter dismissed for default.

34. The above reasons are good grounds to disallow the prayers to the extent of demolition of the alleged unauthorised construction. The NKDA, as the authority which passed the impugned order dated 27.2.2019, has not shown any basis or credible defense for sustaining the impugned order. The impugned order is clearly contrary to sections 81 and 82 of the NKDA Act, 2007. The impugned order dated 27.2.2019 is therefore quashed and set aside.

35. The writ petition is allowed only to this extent. The prayer for a direction on the NKDA to demolish the unauthorised construction at Rosedale Garden Complex, New Town, Kolkata is however rejected for the absence of any material in support of the prayer. The prayer for direction on NKDA to stop all alleged unauthorised construction made at Rosedale Garden Complex is also rejected for lack of any factual basis in support of the prayer.

36. WPA 302 of 2020 is partly allowed and disposed of only to the extent of quashing the order of 27.2.2019. The petitioner is disentitled to any further or other reliefs for the reasons stated above.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)