IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
30.11.2022	20 .01.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE K.KUMARESH BABU

W.P.No.5765 of 2020

Abbotsbury Owners' Association,
Rep. By its Secretary, Mr.T.N.C.Govindarajan,
No.74/42, C.P.Ramaswamy Road,
Alwarpet, Chennai – 600 018. ...Petitioner

Vs.

1.The Member Secretary,
Chennai Metropolitan Development Authority,
No.1, Gandhi Irwin Road, Egmore, Chennai – 600 008.

2.R.Sriram (alias) Rajivakshan

3.M/s.Ramaniyam Real Estates Limited,
Rep. By its Managing Director,
Mr.V.Jaggannathan, having office at
"Sruthi" No.11, Second Main Road,
Gandhi Nagar, Adyar, Chennai – 600 020. ... Respondents

For Petitioner : Mr.N.Muralikumaran for
M/s.Mcgan Law Firm

For Respondents : Ms.P.Veena Suresh for R1
Mr.S.Sundaresan for R2 & R3

O R D E R

(Order of the Court was made by R.SUBRAMANIAN, J.)

The petitioner, an Association of apartment owners in a project developed by the 3rd respondent, has come up with this Writ Petition, seeking a Writ of Mandamus, directing the respondents to handover possession of the portion of the building consisting basement and ground floor to the Association, on the ground that the Association is the rightful owner of the said portion of the building and land upon which it has been constructed.

2.The facts as disclosed in the pleadings in the Writ Petition are as follows:-

The 3rd respondent, which is a promoter of residential apartments had obtained a sanctioned plan for construction of about 77 flats residential apartments in a piece of land abutting Sir C.P.Ramaswamy Road, Alwarpet, Chennai – 18 in the year 2001. It appears that the 3rd respondent had proposed to put up a Software Technology Park with built up area of about 2,00,000 Sq.ft in the said land in tandum with M/s.SRA Systems. It is

claimed that an advance of Rs.20,00,000/- was also paid by the said SRA Systems. However, even before the necessary permission could be obtained, SRA Systems backed out of the contract. The 3rd respondent, however, sold the residential apartments along with necessary undivided share in the land as per the planning permission dated 27.08.2001 to various allottees.

3.It is claimed that by oversight, the total constructed area was shown as 2,00,000 Sq.ft instead of 1,30,000 Sq.ft as per the approved plan. While the process of execution of the sale deeds was on, a neighbour filed a Writ Petition in W.P.Nos.16477 & 16505 of 2001 seeking stoppage of construction. Around that time, 38 sale deeds were executed in respect of the undivided share of the land. On 16.11.2001, this Court had disposed of the said Writ Petitions with certain directions on the nature of the pile foundation that is to be done for the purpose of erection of the entire structure. This led to developor being forced to give up the plan to construct basement floors.

4.The 3rd respondent applied for revised plan for construction of

Stilt + 8 floors and a Non-FSI block but, they could not construct one wing of the 8 floors in the second block facing Beemanna Garden Street. While approving the revised proposal, the Chennai Metropolitan Development Authority insisted upon construction of a building in the front portion of the land abutting Sir C.P.Ramasamy Road, since it apprehended that the said open car parking could be sold separately thereby, a multi storried building will be left with access from 40 feet Beemanna Garden Road, since the entire FSI (Floor Space Index), which was available was consumed.

5.It was agreed that a Non-FSI building would come up in a property abutting Sir C.P.Ramaswamy Road. The same proportion of undivided share was conveyed to all the 77 flat owners taking the total built up area of 2,00,000 Sq.ft. and it is claimed that all the owners had confirmed in the handing over agreements that the Non-FSI building is not part of the common area and the builder retains the same. Therefore, according to the 3rd respondent, Non-FSI area does not form part of the common area and it had not collected monies either for the value of the land or for the building.

6.In the light of the above, the 3rd respondent claimed ownership

over the land and the Non-FSI building and sold the same to the 2nd respondent. The 2nd respondent had let it out for non-residential purposes to M/s.Sabari Super Markets Private Limited. This resulted in the petitioner Association filing a Writ Petition in W.P.No.19374 of 2014 , claiming that there has been a violation of the planning permission with regard to user of the Non-FSI structrure and seeking a mandamus, directing the respondents therein to restore the building in accordance with the sanctioned plan.

7.It is also borne out from the records that action was initiated by the Chennai Metropolitan Development Authority under Section 56 r/w. 85 of the Tamil Nadu Town and Country Planning Act for violation of the conditions of the planning permission. This resulted in the purchaser of the Non-FSI area and the builder challenging the said notices in W.P.Nos.41786 & 41922 of 2006 and W.P.Nos.36741 & 36742 of 2006.

8.When those Writ Petitions were taken for hearing, the purchaser of the Non-FSI area, who was the petitioner in W.P.Nos.41786 & 41922 of 2006 had filed an affidavit undertaking to restore the building to its rightful

usage as a Non-FSI building. The relevant clauses of the said affidavit as extracted by the Hon'ble Division Bench, in its order dated 04.01.2007, which read as follows:-

> *"5.I submit that at that point of time my counsel has offered to the Court that the building usage will be stopped if the notices goes and also sought time for 6 months to restore the same to its original usage as NON FSI as sanctioned since there are so many crores invested by way of interior decoration and face lifting.*
>
> *6.I submit that pursuant to the undertaking by counsel I am filing this affidavit to restore the usage in the construction within 6 months from today i.e. on or before 30.06.2007."*

9.It is also seen from the order of the Hon'ble Division Bench dated 04.01.2007 that the counsel appearing for the other petitioner namely, the builder had made a statement that he will also abide by the undertaking given by the petitioner in W.P.No.41786 of 2006. Recording the said undertaking, the Division Bench disposed of the Writ Petitions in the following terms:-

"4.In view of the same, the petitioners are granted six months time, namely, upto 30.06.2007 to restore the building to its original usage as NON FSI as sanctioned. It is made clear that after restoration, the petitioners are directed to intimate the same to the respondent and it is for the respondent to inspect and verify the same. It is further made clear that if any deviation and violation is noticed, the respondent is free to proceed further in accordance with law. Till such time, namely, 30.06.2007, the impugned notice shall be kept in abeyance."

10.Claiming non-compliance with the order and complaining about continued violation, the petitioner association filed W.P.No.19374 of 2014 with the following pryaer:-.

"directing the respondents to restore the building, namely basement plus ground floor constructed in Block No.II at Door No.74/42, C.P.Ramaswamy Road, Alwarpet, Chennai – 600 018 in accordance with the sanctioned plan issued by the 1st respondent and in terms of the order of this Court dated 04.01.2007 made in W.P.Nos.41786, 41922, 36741 and 36742 of 2006."

11.When the above Writ Petition was taken up for hearing on 02.09.2014, a counter affidavit was filed by the 2nd respondent. The relevant portion of which as extracted in the order of the Division Bench, which reads as follows:-

> *"11. This respondent further submits that as it has now been brought to this Hon'ble Court for implementation of the undertaking by restoration of the building and due to efflux of time after the undertaking this respondent has been continuing the business and the state of affairs that was prevalent at the time of filing the initial undertaking seeking 6 months is prevalent even as on date. Under these circumstances, without any intention of ill-motive for further and with a bonafide intention, apart from conviction to comply with the restoration of the building, this respondent seeks time upto 31.01.2015 and thereby specifically and categorically undertakes to restore the building to its original usage as non FSI as sanctioned on or before the said date. This respondent expresses his un-conditional apology for not having complied with the undertaking given during 2007 and that the same was neither willful nor wanton but only for the reasons detailed supra that the said undertaking was failed to be complied with. However, the time sought for presently and*

as mentioned supra will be strictly adhered to and in any event the restoration of the building to its original usage as non FSI as sanctioned would be restored on or before 31.01.2015."

12.The 3rd respondent / builder filed an affidavit stating as follows:-

"4....I submit that the 2nd respondent has committed an error with the bonafide intention that his revised approval can be granted since it is well within the permissible limit and satisfy the FSI norms. There is no willful intention or disobedience has been shown in not complying with the order.."

Recording the statement made in the affidavits as stated above, the Division Bench granted time to the purchaser and the builder to restore the building to its original usage as a Non-FSI building up to 31.10.2014. Since the said order dated 02.09.2014 was not complied with, the Chennai Metropolitan Development Authority issued de-occupation notice to the tenant as well as the owner, which was challenged in W.P.Nos.7183 & 7199 of 2015 and an application in M.P.No.1 of 2014 was also filed seeking extension of time to

handover the building.

13.While the two Writ Petitions were filed by the tenant and the purchaser, the tenant attempted to file a review petition seeking review of order made in W.P.No.19374 of 2014 dated 02.09.2014 by filing an application for leave to file review. All these proceedings were taken up together by the Hon'ble Division Bench and disposed of, directing the owner and the builder to file affidavits, indicating the time that would be required by them to restore the portion to its original usage. This order came to be passed on 12.01.2017.

14.The builder namely, the 3rd respondent sent a letter to the Member Secretary, Chennai Metropolitan Development Authority on 09.02.2017 citing the order dated 12.01.2017 and requesting six months time for restoring the building as per the original plan. It was also stated that they contemplate an application under Section 49 for retention of usage of the building as a commercial building. It appears that such an application was filed and the same came to be rejected by the Chennai Metropolitan Development Authority. Attempts made by the purchaser to move the

Government under Section 49 of the Tamil Nadu Town and Country Planning Act had also failed.

15.At this juncture, the petitioner Association has come up with an instant Writ Petition seeking direction to handover possession of the building to the Association. The 1st respondent, Chennai Metropolitan Development Authority has filed a counter affidavit stating that it has taken all the steps and ensured that the Non-FSI block remains vacant. The 3rd respondent has filed a counter reiterating th above facts relating to the developments that took place before filing of the Writ Petitions and insisting that in view of the execution of sale deeds for undivided share for a lesser extent, it has a right over the land in question and as such, the Association without paying the land cost cannot insist upon the building being handed over to it. It was also claimed that there is no direction in the orders passed by this Court in the previous proceedings to handover the building to the association. A rejoinder was filed by the petitioner Association, again reiterating its contentions in the affidavit filed in support of the Writ Petition and also pointing out that there has been deliberate violations of the undertakings

given before this Court by the respondents 2 and 3. A reply affidavit was also filed.

16.We have heard Mr.N.Muralikumaran, learned counsel for the petitioner / Association, Ms.P.Veena Suresh, learned counsel for the 1st respondent and Mr.S.Sundaresan, learned counsel for the 2nd and 3rd respondents.

17.Admittedly, the disputed portion of the building formed part of the original planning permission and it was shown as a generator block, constituting a portion of Non-FSI constructions. It was intented to be a common facility for the residents of the apartment. It is now claimed that the residents had in the handing over agreements admitted that the disputed portion of the construction does not form part of the Non-FSI area.

18.Mr.S.Sundaresan, learned counsel appearing for the respondents 2 and 3 would vehemently contend that since the ownership in the land was not conveyed in full to the purchasers of the apartments and it

remained in the hands of the original owners, the association cannot claim ownership of the Non-FSI structure.

19.Contending contra, Mr.N.Muralikumaran, learned counsel for the apartment owners' association would submit that this contention of the counsel for the respondents 2 and 3 runs counter to the undertakings given by them to this Court earlier. Both in W.P.Nos.41786 of 2006 etc., batch and in W.P.No.19374 of 2014, the respondents particularly, the purchaser and the builder had given an unequivocal undertaking that the Non-FSI block would be restored to its original user. The conveyance of undivided share in the land along with Non-FSI block to the 2nd respondent by the 3rd respondent itself is highly irregular and against the sanctioned planning permission. The Non-FSI was not salable area and therefore, the sale by the 3rd respondent to the 2nd respondent is clearly in violation of the planning permission granted. Though it is contended that there was a genuine mistake in calculation of the undivided share of the land and the total construction area was taken as 2,00,000 sq.ft instead of 1,30,000 sq.ft, by oversight, we are unable to buy that argument.

20.The 3rd respondent is not a novice, it is a prominent builder. The conduct of the 3rd respondent through out the proceedings and the earlier proceedings lead us to formally believe that the 3rd respondent had hoodwinked the purchasers by adopting a wrong formula for calculating the undivided share in the land. Normally, the undivided share in the land is calculated by dividing the land area by the total constructed are and multiplying it by the size of the apartment and it is as follows:-

$$\frac{\text{Total Land Area}}{\text{Total Built Up Area}} \times \text{Area of the Apartment}$$

21.By artificially increasing the total built up area to 2,00,000 Sq.ft., the 3rd respondent has ensured that the flat owners did not get their actual entitlement of the undivided share in the land. The 3rd respondent has repeatedly maintained that the land owners have not paid for the remaining UDS (Undivided share). We are unable to accept the said contention because no promoter charges for the land and the building separately. If a person buys an apartment measuring 1000 sq.ft., the builder charges at a particular rate for the entire 1,000 sq.ft., which includes the land cost and the building cost. If the land that is to be conveyed is reduced, it does not

mean that the purchaser has not paid for the entire UDS.

22.In the case on hand, the allottee of Flat No.1A in Block-1 has purrchased a flat measuring an extent of 1,360 sq.ft. She has been conveyed an UDS of 47.44 Sq.ft, she is actually entitled to 70.95 sq.ft. The difference is about 23.51 sq.ft of land. It does not mean that she has not paid for this 23.51 Sq.ft. of undivided share of the land. By increasing total construction area, the 3rd respondent had ensured that each of the flat owner gets a reduced UDS. This in our opinion, is a deliberate wrong doing on the part of the 3rd respondent. The 3rd respondent cannot be heard to contend that the flat owners are not entitled to the UDS that would be allotable to them as per the planning permission granted, since they have not paid for it. We find that the said contention is an artificial illusion created by the Engineers working for the 3rd respondent. We are therefore, unable to accept the said argument. Hence we record a finding that the flat owners would be entitled to the actual UDS as calculated by the 3rd respondent in the tabular column annexed by the 3rd respondent to the affidavit filed by the authorized

signatory of the 3rd respondent on 28.11.2022.

23.Even in the affidavit filed on 28.11.2022, the 3rd respondent would continue to insist that the association should be directed to pay the land costs. We do not think that we could accept the said claim of the 3rd respondent. There is also a fallacy in the contention of the 2nd and 3rd respondents that the undertakings given by them in the earlier proceedings, which has been extracted supra cannot be understood as they have agreed to part with the land. Again, we must bear in mind the position of the 3rd respondent as a builder, which had constructed several apartment complexes in the City.

24.As we had already pointed out, the 3rd respondent is not novoice, it is an experienced builder having constructed several apartments in the City. When it gives an undertaking to a Court stating that it would restore the building to its original position and ensure that the building is used for Non-FSI purposes, it cannot go back and claim that it is entitled to use it for another purpose or to seek permission of the authorities to use it for other purposes. Fortunately, the authorities have not yielded to the

attempts made by the 2nd and 3rd respondents to have the Non-FSI area converted into a commercial area.

25.It is now claimed that the 2nd respondent has been paid monies and he has been compensated. We therefore, find that the undertakings given by the 2nd and 3rd respondents are binding on them and they cannot claim title to any portion of the land. The sale deed executed in favour of the 2nd respondent in respect of the undivided share in the land and the Non-FSI portion of the building is clearly invalid. We do not have the slightest hesitation in concluding that it is a void instrument.

26.The 3rd respondent has filed an affidavit on 28.11.2022 stating that it would arrange for execution of sale deeds for the remaining UDS, upon payment of consideration and the additional stamp duty. We do not think that it is a great offer made by the 3rd respondent. Once the land is shown as a common area and common facility is developed, the land will belong to the owners of such common facility. If there is a mistake in the calculation of the UDS, it has got to be rectified by the builder. The builder

cannot take advantage of the mistake and claim that the purchasers must be made to pay for the unsold portion of the UDS. Though the Writ Petition is for a direction to handover possession of the Non-FSI building, we do not think that the entire matter will stand resolved by granting the mandamus as prayed for.

27.In order to resolve the entire issue and put a quietus and to ensure appropriate title passesto the purchasers of the flats, we direct the 3rd respondent builder to ensure execution of rectification deeds in favour of each individual flat owners, rectifying the UDS as shown in the tabular column filed by it along with the affidavit dated 28.11.2022. Any stamp duty payable on such rectification should be borne by the individual flat owners. Though they have paid the consideration for the land, they have not been vigilant enough in ensuring that they got the correct UDS. By reducing the UDS the value of the land shown in the conveyance is also reduced, reducing the revenue payable to the Government.

28.The Chennai Metropolitan Development Authority will

forthwith handover the vacant Non-FSI building to the flat owners' association. The execution of the rectification deeds shall be completed within a period of three months from today. Though in the normal circumstances, we would have imposed costs on the 2nd and 3rd respondents. We desist from doing so, hoping that the 3rd respondent will see reason and comply with our direction within the time stipulated by us without making any further attempts to litigate on this issue. This Writ Petition stands disposed of as above.

Post after three months 'for compliance'.

(R.S.M., J.) **(K.B., J.)**
20.01.2023

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Internet:Yes
Index:Yes
Speaking

19/21

R.SUBRAMANIAN, J.
and
K.KUMARESH BABU, J.
KKN

To:-

The Member Secretary,
Chennai Metropolitan Development Authority,
No.1, Gandhi Irwin Road,
Egmore, Chennai – 600 008.

W.P.No.5765 of 2020

20/21

20.01.2023