
(2003) 04 AP CK 0027
In the Andhra Pradesh High Court
Case No : WA No. 2261 of 1998

C. Shekar Reddy	Vs	APPELLANT
C.S.R. Estates Flat Owners Welfare Association and Others		RESPONDENT

Date of Decision : 09-04-2003

Acts Referred:

Andhra Pradesh Apartments (Promotion of Construction and Ownership) Act, 1987 —
Section 14, 6, 6(1)

Citation : AIR 2003 AP 491 : (2003) 3 ALD 553 : (2003) 3 ALT 413

Hon'ble Judges : C.V. Ramulu, J;B. Sudershan Reddy, J

Bench : Division Bench

Advocate : C. Nageswara Rao, for the Appellant; Vedula Srinivas, for Respondent No. 1, T. Niranjana Reddy, SC for HUDA for Respondent No. 2 and V. Viswanatham, SC for L.B. Nagar Municipality, for the Respondent

Final Decision : Dismissed

Judgement

C.V. Ramulu, J.—This Writ Appeal is directed against an Order of the learned Single Judge of this Court allowing Writ Petition No. 6211 of 1998, dated 2-11-1998 and quashing the Proceedings No. 696/P4/H/ 94, dated 2-1-1998 issued by the Hyderabad Urban Development Authority permitting substantial changes in the original sanctioned plan dated 19-7-1991 relating to C.S.R. Estates, Kothapet, Ranga Reddy District,

2. For the sake of convenience, the parties are hereinafter referred to as arrayed in the Writ Petition.

3. The writ petitioner - C.S.R. Estates Flat Owners Welfare Association, Kothapet, Ranga Reddy district, represented by its President G. Jagannadha Rao - filed the Writ Petition challenging the Proceedings No. 696/ P4/H/94, dated 2-1998 issued by the Hyderabad Urban Development Authority (HUDA) permitting certain modifications and alterations in the original sanctioned plan dated 19-7-1991 in favour of the 3rd respondent (appellant-builder). It is stated by the petitioner that HUDA notified certain residential plots, in the year 1989 inviting builders to

purchase plots of 1200 square metres each, in the public auction for the purpose of building residential complexes and the purchaser will be permitted to build ground floor + 3 storeys or ground floor + 4 storeys, in case they decide to leave ground floor for parking. In case the purchaser chooses the second alternative, a minimum of 1/3rd area shall be kept open for parking and it shall not be sold to any prospective buyer of flats. In pursuance to the said notification, the 3rd respondent (appellant) applied for allotment of a plot and he was successful in getting Plot No. 42 admeasuring 1280 square metres at Kothapet. Subsequently, he applied for permission to construct a complex (apartment) consisting of stilt + four floors. Permission was accorded by the 1st respondent on 19-7-1991. According to the plan, stilt area consists of generator room, A.C. plant, electrical cabin, watchman room, store room, office room and open parking area for flat owners, which will be a common area. The construction was started in the year 1991 and was completed by 1993 and in all 42/46 flats were built. Immediately, the members of the petitioner-association purchased the flats by entering into agreements with the 3rd respondent and sale deeds were also executed in favour of most of the purchasers. Respondent No. 3 charged Rs. 20,000/- extra for each flat towards open parking in the stilt. Thus, according to the association, each member became the owner of undivided land approximately at 16.70 square metres out of the total land. However, the 3rd respondent did not complete the construction in time in all respects and did not put up a compound wall. When the association wanted to put up a compound wall, the 3rd respondent went to Civil Court and obtained an injunction against them in O.S. No. 444 of 1997 and on the application filed by the association, the said injunction was vacated. Ultimately, the petitioner-association constructed the compound wall.

4. Thereafter, the 3rd respondent converted stilt area into closed mulgies so that he could lease them out to various parties for running commercial shops, but the petitioner opposed the same. The 3rd respondent harassed the members of the petitioner-association by filing police complaints, criminal cases etc. In order to achieve his object, the 3rd respondent had applied to the 1st respondent for sanctioning permission to close the parking in the stilt area, for conversion of four flats in the ground floor to commercial use and to construct a further floor on the terrace. The 1st respondent without any notice and opportunity to the petitioner association, sanctioned the modification of the plan sought by the 3rd respondent, on 2-1-1998. The 3rd respondent immediately filed a suit in O.S.No. 135 of 1998 on the file of the Principal Junior Civil Judge, East and North, Ranga Reddy and obtained an ex parte injunction against the members of the petitioner-association restraining them from interfering with the construction he was making in the building. Under the strength of the ex parte injunction orders of the Civil Court, the 3rd respondent hurriedly constructed the closed mulgies in the stilt and also commenced construction of an additional floor on the terrace. He had also converted four flats in the ground floor for commercial purpose as per the modified plan. Even in the area shown for electrical cabin, watchman room, store room and office room in the stilt, he built mulgies for commercial

purpose. According to the petitioner, the modified plan sanctioned by the 1st respondent is arbitrary, illegal and prejudicial to the interest of the flat owners apart from being violative of the provisions of Section 6 of the Andhra Pradesh Apartments (Promotion of Construction and Ownership) Act, 1987 (for short "the Act").

5. A detailed counter-affidavit was filed by the 3rd respondent denying the allegations made by the petitioner-association. According to the 3rd respondent, while determining the FSI ratio, the height of the building formulated by the Government was wrongly applied by the 1st respondent while granting the original plan and as such, he applied to the Government for amendment of the plan and in turn, the Government vide G.O. Rt. No. 689, M.A., dated 26-8-1997 considered his representation and accepted the case regarding Plot No. 42. Further, the HUDA had included balcony area also for the calculation of FAR and accordingly relaxed the zoning regulations in favour of CSR Estates in Plot No. 42, to the extent that balcony area be excluded for the calculation of FSI (floor space index) up to 0.90 metres of width. In view of this relaxation by the Government, he applied for modification of the original plan to the 1st respondent to the extent he is eligible to put up construction under FAR (floor area ratio) and accordingly, the impugned proceedings were issued for effecting modifications of the building. It is further stated that there was no necessity of obtaining the consent of the members of the petitioner- association since they have agreed by way of a covenant in the sale deed that the vendor/3rd respondent shall have right to construct further floors over and above the terrace of the building and thus the purchasers shall not have any objection whatsoever for the additional construction in view of the said covenant. They cannot also complain against the construction according to the modified plan since he is at liberty to undertake construction activity over the terrace. The construction undertaken as per amended plan does not affect the individual flats, which were constructed as per the original sanctioned plan and the flat owners are not affected in any way by such construction. In this view of the matter, there is no necessity of a notice to the petitioner-association as required u/s 6 of the Act since there is no material alteration to the plan, which was disclosed to the purchasers in relation to the individual flats and subsequent amended plan is nothing but continuation of the earlier sanctioned plan. Moreover, entire flats were not sold and he continues to be the owner. The Writ Petition is devoid of merits and is liable to be dismissed.

6. The 1st respondent-HUDA filed a separate counter-affidavit and asserted that in view of the relaxation granted by the Government vide G.O. Rt. No. 689, M.A., dated 26-8-1997 the modified plan was approved and the Government granted relaxation of zoning regulations exempting balcony area for the purpose of calculation of FSI. Basing on the said relaxation, permission was granted for construction of two units (flats) on the fourth floor and another two units on the fifth floor, which would come to a total area of 165.58 sq.mtrs. along with four covered garages in stilt floor. After approving the amended plan, the height of

the building and the FSI used are within the permissible limits. But, it was contended that it had not granted "no objection certificate" for conversion of four flats for commercial purpose i.e., for the use of commencing Vysya Bank, Even otherwise, the Vysya Bank is not located in the said complex and as such, there is no change in the use of the flats and there is no alteration in the plan and, therefore, the contention of the flat owners that their individual flats would be affected by change in the plan is untenable and prayed for dismissal of the Writ Petition.

7. It is curious to note that the 2nd respondent-Municipality has not filed any counter-affidavit, but the Counsel for the Municipality contended that the alleged modified plan under the impugned proceedings is illegal.

8. According to the petitioner, the 1st respondent could not have permitted the modification of the original plan, as it would be detrimental to the interests of the members of their association. According to the original plan, there can be only ground floor + four storeys and 1/3rd of the ground floor must be left open for parking area and it shall not be sold to anybody. Once this is so, neither the 1st respondent could permit nor the 3rd respondent could effect further constructions. The complex in question is purely a residential one and it cannot be used for commercial purposes and as per Section 6 of the Act, after the plans, specifications and the nature of fixtures, fittings, amenities and common areas as sanctioned by the appropriate authority and after the builder enters into agreement with the flat purchasers, such builder is not entitled to make any additions or alterations without the previous consent of the flat owners and in the instant case, no notice as required under the said Section 6 of the Act was issued.

9. On the above pleadings, the learned Single Judge noticed that it is not in dispute that the original plan approved provided stilt/ ground floor + four floors (second alternative mode) with a minimum of 1/3 of the parking area, which has to be kept for open parking and it shall not be sold to any prospective purchaser of flats. Further, it is also not in dispute that no notice was issued to the members of the petitioner-association before sanctioning the modified plan under the impugned Proceedings dated 2-1-1998. It was also noticed by the learned single Judge that it is the case of respondents 1 and 3 that such modified plan does not affect any substantial alteration in the original plan and the area of the flat owners would not be affected and as such, the petitioner cannot make any grievance. In this backdrop, the learned Judge examined the following relevant provisions of the Act:

"3(d) "Common areas and facilities" unless otherwise provided in the declarations, means;

(i) the land on which the building is located;

(ii) foundation, columns, girders, beams, supporters, main walls, roofs including terraces, halls, corridors, stairs, stairways, fire-escapes and entrances and exits of the buildings;

- (iii) basements, cellars, yards, gardens, parking areas, children's playground and storage spaces;
- (iv) the premises for the lodging of janitors or caretakers or persons employed for the management of the property;
- (v) installations of general services, such as, power, light, gas, hot and cold water, heating, refrigeration, air-conditioning and incinerating;
- (vi) elevators, tanks, wells and bore-wells, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for common use;
- (vii) such other community and commercial facilities as may be provided for in the building plan and declaration;
- (viii) all other parts of the property necessary or convenient to its existence, maintenance and safety or normally in common use."

4. General liabilities of Promoter :--(1) Any promoter who intends to sell an apartment, shall, on being so required by an intending transferee, make a full and true disclosure in writing of--

- (a) his title to the land on and the building, in which the apartments are, or are to be constructed;
- (b) all encumbrances, if any, on such land or building and any right, title, interest or claim or any person in or over such land or building;
- (c) the plans and specifications approved by the local authority as the case may be or the Urban Development Authority of the entire building of which the apartments form part;
- (d) the nature of fixtures, fittings and amenities which have been or are proposed to be provided;
- (e) the particulars in respect of the designs and materials which have been or are proposed to be used in the construction of the building, together with the details of all agreements entered into by him with the Architects, Engineers and Contractors;
- (f) all outgoings, including ground rent, if any, municipal or other local taxes, taxes on income, water and electricity charges, revenue assessment, interest of any mortgage or other encumbrances, if any, in respect of the land, building and apartments;
- (g) such other information and documents as may be prescribed.

(2) Such promoter shall also--

- (a) specify in writing the date by which possession of the apartments is to be handed over to such transferee;

(b) supply in writing a list of all the apartments which have already been taken or agreed to be taken, together with their distinctive numbers, names and addresses of the transferees, either actual or intended, the prices paid or agreed to be paid therefore and any other particulars as may be prescribed;

(c) transfer the open space earmarked for parks, playgrounds, market places and for other common use free of cost to the Government through a registered gift deed.

6. No alterations after disclosure of plans etc. :--(1) After the plans, specifications and the nature of fixtures, fittings, amenities and common areas as sanctioned by the local authorities or Urban Development Authority concerned are disclosed to an intending transferee u/s 4 and a written agreement, of sale is entered into u/s 5, the promoter shall not make any additions and alterations therein,--

(i) if it affects any apartment, without the previous consent in writing of the transferee, who intends to take that apartment; and

(ii) if it affects more than one apartment, without the previous consent in writing of all the transferees who intend to take those apartments.

(2) Any of the additions or alterations referred to above shall be carried out with the prior approval of the local authority or the Urban Development Authority concerned.

9. Common areas and facilities :--(1) Each apartment owner shall be entitled to the percentage of undivided interest in the common areas facilities as expressed in the declaration. Such percentage shall be computed by taking as basic the value of the apartment in relation to the value of the property, and such percentage shall also reflect the limited common areas and facilities.

(2) The percentage of undivided interest of each apartment owner in the common areas and facilities as expressed in the declaration shall not be altered without the consent of all the apartment owners expressed in an amended declaration duly executed and registered as provided in this Act. The percentage of undivided interests in the common areas and facilities shall not be separated from the apartment to which it appertains, and shall be deemed to be conveyed or encumbered with the apartment even though such interest is not expressly mentioned in the conveyance or either instrument.

(3).....

(4).....

(5)....."

and held that under the modified plan the 3rd respondent was permitted to construct two units (flats) on the fourth floor and two units on the fifth floor and four covered garages in stilt floor and also permitted the use of four flats for

commercial purpose, which is nothing but material modifications to the building in all sense of the term and the same cannot be done contrary to the declaration or disclosure already made u/s 14 of the Act. The common areas and facilities, which are provided as per the plan approved and all other amenities as contemplated under the definition of "common areas and facilities", it is the flat owners, who shall be entitled to the same as they have undivided share and interest as per Section 9 of the Act. As such, once the common areas and facilities are declared as provided under the Act, the same shall not be altered without the consent of all the flat owners. The builder, at this stage, cannot say that he sought amendment of the original plan for the reason that in the original plan the balcony area was also included in the FSI/FAR and the same could not have been included and, therefore, to the extent of the area covered by balcony he is entitled to put-up further constructions. In fact, u/s 14 of the Act, such declaration made is a statutory declaration and shall contain the description of the building stating the number of storeys and basements, the number of flats and the principal materials of which it is or is to be constructed and also the description of common areas and facilities. It further declares, any amendment sought shall be only in such manner as may be prescribed. If some more construction is to be made according to the plan approved, he could only complete the same and nothing more. The object of the Act is to protect such poor and middle class flat owners as against the builders, so as to see that the purchaser should know what is the flat he has purchased and what are the facilities in that apartment area. It was further noticed that in all probability, the foundation that is provided as per the original plan takes only the building as per the plan. Thus, permitting the 3rd respondent to construct certain flats as per the modified plan is illegal. It was also held that the building in question is a residential one and without the consent of the flat owners, the same could not have been given for commercial purposes to the Vysya Bank and accordingly, the modified plan providing four flats in the first floor for banking purpose is also illegal. Thus, the learned Judge held as follows:

".....The impugned proceedings are quashed with a further direction to the 3rd respondent not to put up any building or any alterations contrary to original sanctioned plan and if any construction is made in pursuance of the amended plan, the same shall be demolished within a period of two months from today. In case of default the respondent No. 2 shall take appropriate steps to demolish the same at the cost of respondent No. 3, within a period of two months thereafter...."

Aggrieved by the said order, the present Writ Appeal is filed.

10. The Counsel for the appellant-3rd respondent mainly raised the following points:

(1) Section 6 of the Act has no application to the facts of this case and the members of the writ petitioner-association are not entitled for any notice;

(2) The members of the petitioner-association have not filed any declaration as required u/s 2 read with Section 14 of the Act and in fact, the provisions of Chapter III are applicable to the facts of this case; and

(3) The appellant-3rd respondent is the real owner of the property and as such, he has every right to seek amendment of the plan and make further constructions as permitted by the 1st respondent.

11. Counsel for the appellant-3rd respondent at the outset argued that in view of the change in the zoning regulations and in view of the addition gained in the FSI/ FAR, the 1st respondent sanctioned the modified plan as per law and there is no necessity of issuing any notice to the petitioner-association or its members as required u/s 6 of the Act, since there is no material alterations in the original plan and the flats already sold are not being affected. Learned Counsel further submits that the consent of the owners of the flats is required only when their interest is affected and not otherwise. In the instant case, absolutely there is no alteration of the flats already sold and the modified plan does not affect the common area declared and facilities provided. He also submits that Section 6 of the Act itself is not applicable to the present case for the reason that there was no declaration as to the plans, specifications and the nature of fixtures, fittings, amenities and common areas as sanctioned by the competent authority as the members of the petitioner-association have not disclosed and declared as required u/s 2 read with Section 14 of the Act. He also contended that what all held by the members of the petitioner-association is only an undivided share and as such, the appellant is still the owner of the entire land and building and he can go ahead with the further construction having obtained the modified plan. The appellant-3rd respondent is under obligation, only to the extent that the individual flat owners are not affected and their amenities are not disturbed.

12. Learned single Judge has categorically held that the 3rd respondent having sold majority of the flats, in the guise of the change in the zoning regulations and FSI, obtained the modified plan for construction of two flats each on the fourth and fifth floors and converting the stilt portion into garages, can be said to be a material alteration in the original plan approved and also affects the individual flat owners of their right to use the common areas and facilities as understood by them as per the original sale deeds/agreements.

13. Learned Counsel for the appellant-3rd respondent submitted that in this case, the declaration is made by the appellant-3rd respondent before the competent authority and as such, he has a right to seek alteration of such declaration made by him, in the absence of any declarations made by the individual owners as required u/s 2 read with Section 14 of the Act. At this stage, the Counsel for the writ petitioner-1st respondent herein, argued that though there is some lacuna in the Act, it is for the owner/promoter of the flats who is supposed to know the entire plan, the amenities provided and the facilities required for the said building and he is supposed to file a declaration and in fact, in this case, he did so. Thus, the question of individual flat owners submitting a

declaration before the competent authority as to the common areas and facilities does not arise. Though this point was not urged before the learned single Judge or in the grounds of appeal, being a question of law, was allowed to be argued. We accept the contention of Sri V. Srinivas, the Counsel for the 1st respondent-writ petitioner without any hesitation. Further, in view of this, the argument of the learned Counsel for the appellant-3rd respondent that Section 6 of the Act has no application to the facts of this case and it is Chapter III, which takes care of the situation falls into insignificance.

14. It is submitted by the learned Counsel for the appellant-3rd respondent that the members of the writ petitioner-association have no right whatsoever to object for the modified plan and undertaking of the constructions by the 3rd respondent as there is a covenant in the sale deeds executed in their favour permitting the 3rd respondent to undertake such constructions in future, which reads as under:

"That it is specifically agreed that the Vendor shall have a right to construct further floors over and above the terrace of the building and the Purchaser/Purchasers shall have no objection for the proposed additional construction."

15. The Counsel for the writ petitioner-1st respondent herein argued that though there is such a covenant, the further construction was neither contemplated in the original plan nor it is permissible under the allotment order issued by HUDA. Be that as it may, any agreement made between the parties cannot override the statutory provisions of the Act. In view of this, it is not necessary for this Court to go into that aspect.

16. Learned Counsel for the appellant-3rd respondent made a frantic effort to contend that the appellant is the real owner of the property and he has every right to seek amendment of the plan and raise further constructions, only to be rejected without there being any substance. The original plan was approved way back in the year 1991 and constructions were completed in the year 1993 and more than 42 flats were sold out along with their undivided share in the land to the members of the petitioner-association, even before the amended plan came into existence. Even if the appellant-3rd respondent is still in possession of some undisputed flats, he cannot be called to be the owner of the land and the apartment. Thus, the contention of the 3rd respondent that he is the real owner of the land and building and as such, he can undertake modification of the plan and the building as he likes is neither tenable nor acceptable.

17. There is no necessity of going into the intricacies to understand the impugned proceedings in the Writ Petition. A bare look at the order indicates that the appellant-3rd respondent was permitted to modify and construct two flats each on fourth and fifth floors apart from converting the stilt area to garage and also permitted to use four flats for commercial purpose. This can be said to be not only a material alteration in the original sanctioned plan, but also a major alteration in the original building plan and affects the usage of the common area

and amenities already provided to the individual flat owners, and as such, notice to the individual flat owners is a must u/s 6(1) of the Act and the learned single Judge was right in holding that without there being any notice given to the affected individual flat owners, the modification of the plan as was sanctioned by the 1st respondent is arbitrary and illegal. Thus, the order of the learned single Judge does not suffer from any infirmity.

18. However, we are of the considered opinion that the learned Judge ought not to have issued a Mandamus for demolition of the structures, if any made in pursuance to the impugned proceedings in the Writ Petition without there being any enquiry into the said matter by an expert committee in the field. Thus, while upholding the order of the learned single Judge in quashing the impugned proceedings, we direct the 2nd respondent herein to issue notice to all the individual flat owners and after hearing them and taking their written submissions decide as to what extent the modified plan affects the amenities and facilities enjoyed by all the flat owners as per the original plan. The 2nd respondent herein shall also decide as to whether the construction of two floors each on fourth and fifth floors affects the longevity or endangers the building as constructed originally. Till such time, the appellant-3rd respondent shall maintain status quo obtained as on the date of passing of the order by the learned single Judge i.e., 2-11-1998.

19. Subject to the above observation, the writ appeal is dismissed. No order as to costs.