
(2009) 09 P&H CK 0060
In the Punjab And Haryana At Chandigarh

Cap. (Retd.) Manmohan Lowe and Others	APPELLANT
Vs	
State of Haryana and Others	RESPONDENT

Date of Decision : 09-09-2009

Acts Referred:

Haryana Apartment Ownership Act, 1983 — Section 3(f)

Citation : (2009) 09 P&H CK 0060

Hon'ble Judges : Daya Chaudhary, J; Adarsh Kumar Goel, J

Bench : Division Bench

Judgement

Adarsh Kumar Goel, J.—This writ petition has been filed by the petitioners, who are apartment owners of Silver Oaks Apartments, DLF Qutab Enclave Phase I, Gurgaon and in substance seeks quashing of declaration dated 19.4.2001, Annexure P.12 filed by respondent No. 3 mainly on the ground that the said declaration does not include certain areas of the complex as common areas and thus deprives the apartment owners of their rights therein. Original petition sought direction for filing declaration. The declaration in question having been filed during the pendency of the writ petition, amendment was made in the petition to challenge the declaration. Amendment was allowed vide order dated 26.11.2001 in C.M. No. 30167 of 2001.

2. Broad averments in the petition are that respondent No. 3 was granted licence under the provisions of the Haryana Development and Regulation of Urban Areas Act, 1975 (1975 Act) read with the Haryana Development and Regulation of Urban Areas Rules, 1976 which lay down specifications and Standards of development (External and Internal) which a colonizer must adhere to in the construction, transfer and maintenance of the colonies to be developed. The Haryana Legislature enacted the Haryana Apartment Ownership Act, 1983 (1983 Act) to provide for ownership of individual apartments in a building and to make such apartments heritable and transferable property and matters connected thereto. Under the said Act, an apartment owner acquires right of undivided interest in common areas and facilities in the percentage specified in the

declaration. The 1983 Act was first notified in the year 1986 and again on 10.11.1997. Respondent No. 3 filed declaration on 19.4.2001. The Silver oaks Society representing apartment owners filed objections dated 2.7.2001, Annexure P.14, inter-alia, pointing out that certain community buildings and other areas were not declared to be common areas in the declaration. This was followed by representation dated 20.9.2001, Annexure P.16. The society was allowed to intervene in the petition vide order dated 4.2.2002 and is represented by same counsel who represents original petitioners, who are some of the apartment owners.

3. Reply has been filed by the District Town Planner on behalf of the State of Haryana and Department of Town and Country Planning, inter- alia, stating that representation of the petitioners against the impugned Declaration was pending with respondent No. 2. It has been further stated that total area of the licence given to respondent No. 3 is 130.62 acres out of which 14.75 acres is for a group housing and 115.87 acres for plotted colony. Licences for development were initially given in the years 1981-82 for two years under Rule 12(2) which were renewed from time to time till completion of development. In the agreement, executed in compliance with conditions of licence, 1983 Act was required to be complied. The 1983 Act was enforced vide notification dated 8.9.1986 which was issued by Housing department but was rescinded on 24.10.1997 as concerned department to notify the Act was Town Planning Department. A fresh notification dated 10.11.1997 was issued by Town and Country Planning department. For group housing, plan was approved in the year 1982 wherein apart from residential blocks, three shops, community centres and two nursery schools were approved. Thereafter, on 30.5.1990, condition was imposed by the competent authority that colonizer will provide EWS flats and service units to the extent of 10% of main dwelling units. Accordingly, revised plan was approved on 8.11.1990 in which residential blocks, parking in basement, EWS flats and three shops were approved. There was further revision for zoning and building plans in the years 1992 and 1995. The colonizer applied for completion certificate on 15.4.1996 for group housing scheme measuring 14.75 acres. It is also mentioned that with reference to various queries, the department issued clarification on 15.12.1998 vide Annexure R3/1 which, inter-alia, shows that the association is to be formed by apartment owners and not by colonizer and also clarifying areas included in common areas. Part of completion certificate was given on 22.1.2001 subject to the condition of filing of deed of Declaration under the Apartment Ownership Act, 1983 within 90 days. Accordingly, respondent No. 3 filed the declaration on 19.4.2001. Against the deed of Declaration, representation dated 10.8.2001 was received from the petitioners and comments from respondent No. 3 were sought. The parties were given hearing and the matter was under consideration.

4. Reply has also been filed by respondent No. 3, the colonizer, inter-alia, stating that the dispute raised was a private dispute for which writ petition was not maintainable. Challenge with regard to common areas specified in the declaration

was a disputed question of fact. The declaration was rightly filed by the colonizer. Common areas and facilities mentioned in Section 3(f) of the 1983 Act are governed by the declaration u/s 6 thereof.

5. Vide order dated 4.2.2002, CM No. 3795 of 2002, the Silver Oaks Society was given liberty to act as intervener in the writ petition. The petitioners had earlier filed complaint in the MRTTP which was withdrawn, as mentioned in order dated 5.9.2003, as the petitioners were advised that the issue of validity of the declaration could not be gone into in those proceedings. The writ petition was admitted to D.B. vide order dated 10.9.2003 and interim order of status quo was granted with regard to the areas claimed to be common in the writ petition. On account of pendency of Civil Appeal No. 550 of 2003 filed by respondent No. 3 in the Honble Supreme Court, which arose out of order of this Court dated 31.5.2001 in CWP No. 6704 of 1999 (DLF Universal Limited v. Director Town and Country Planning), upholding notification of the State Government dated 5.5.1990 debarring respondent No. 3 from collecting maintenance charges for a period of five years, certain paras in the writ petition were allowed to be deleted vide order dated 17.1.2008 read with order dated 1.11.2007. Complaint is also said to be pending before the National Commission u/s 21 of the Consumer Protection Act, 1986 filed by Silver Oaks Society, inter-alia, seeking direction for handing over common areas and facilities in 14.75 acres complex and to pay compensation. Learned Counsel for the petitioners, however, states that relief sought before the National Commission will be pursued only for compensation.

6. We have heard learned Counsel for the parties and perused the record.

7. Contention raised on behalf of the petitioners mainly is for quashing of the declaration on the ground that the same did not conform to the mandate of 1983 Act in so far as it excludes common areas and facilities existing in the Group Housing Complex and thereby continuing claim of ownership rights by respondent No. 3 and denying the rights of apartment owners. To substantiate this submission, reference has been made to provisions of 1983 Act, as amended by 2002 Act, the 1975 Act and Rules and conditions of licence. Learned Counsel for the petitioners refers to averments in para 31(f) of the petition which is as under:

31. (f) That the above stated common areas and facilities have been fully paid for by the apartment owners as under:

i) It is clearly defined in sale deeds Annexure P.18, wherein, it is stated the above sale price is inclusive of common services, including land for common use in the said plot of land which is also defined as 14.75 acres;

ii) It is further defined in the terms of Group Housing scheme (Annexure P.17) wherein the external development charges (EDC) inter alia includes for schools, community centre, swimming pool etc.;

iii) The respondent is also under contractual obligation with the State

Government to construct in Silver Oaks, a primary-cumnursery school community building/dispensary and first aid centre at its own cost:

iv) Further, it has been also clearly ruled by the competent authority i.e. the Director, Town and Country Planning vide his Memo No. STP (Enf.1-98), 1367 dated 15.12.1998 (Annexure P.19) that convenient Shopping centre, parking slots, community centre, schools, health centre etc., are common areas and facilities meant for apartment owners for particular Group Housing Scheme.

From the above, it is more than amply clear that the above common areas and facilities have been more than fully paid and they cannot be segregated from the main dwelling units as indicated by respondent No. 3 in the unlawful declaration.

Reply of respondent No. 3 to the above para is as under:

That in reply to para 31(f) it is stated that the averments made therein clearly reflect the greed of the petitioners and is a blackmailing effort. The implication of the sub para under reply is that the apartment owners have a share in the entire 14.75 acres, which is totally far-fetched in view of Clauses 1, 2(a), 2(b), 3(a) and 3(b) of the Apartment buyers Agreement (Annexure R3/2) reproduced in para 8 above. Terms of Sale Deed cannot be torn out of context and have to be read as a whole harmoniously to know the subject matter of conveyance. The declaration filed by the owner/respondent No. 3 correctly sets out the common areas and facilities and the percentage of undivided interest of each apartment owner in such common areas and facilities. The averments made in the sub para under reply are not even worthy of countenance.

8. Apart from the above, learned Counsel for the petitioners submitted that the scheme of the Act is to recognise ownership of apartment owners in apartments as defined in Section 3(b) read with Section 5 and their interest in limited common areas and facilities as defined u/s 3(l) and common areas and facilities as defined u/s 3(f) read with Section 6 of the 1983 Act. Though, the apartment owners are entitled to undivided interest in common areas and facilities in percentage expressed in the declaration, the declaration to be made by the colonizer cannot classify common areas as apartment and thereby claim ownership on such areas and deny statutory rights of apartment owners. The area has either to belong to apartment owners individually or to limited number of apartment owners to the exclusion of others or has to be common areas and facilities which have to be vested in the apartment owners to be used for their benefit. According to the petitioners, Group Housing Colony Scheme Annexure P.17 was framed by the State Government, which contemplated signing of agreement LC-IVA, which was in fact signed, a copy of which is Annexure P.1.

9. As per declaration, Annexure P.12, the property consists of:

- i) 14 Main Apartment building blocks.
- ii) Three Underground parking basements.

- iii) One EWS building.
- iv) One Community Building.
- v) Two Nursery Schools.
- vi) One Shopping Block.

In all there are 749 main Dwelling Units, 150 Dwelling Units for Economically Weaker Section, 554 covered parking in basements and 14 Garages. The open areas have been landscaped with greenery, play areas, driveways, walkways and open surface parking.

10. Objections of the petitioners, Annexures P.14 and P.15, inter-alia, are:

g) Common Areas and facilities (Page 21): This should also include shops, all parking areas, community centre, Nursery Schools, Swimming Pool and related common facilities. Status of EWS units to be confirmed later. All common areas and facilities other than Dwelling Units should be included as defined in Section (f) 3 of the Act.

(From Annexure P.14).

i) Common areas and facilities are clearly defined in Section 3(f) of the Act and further enumerated as part of External Development Charges (EDC) in the defined terms of Haryana Group Housing Scheme. In the sweep of definitions they include shops, all parkings, Nursery schools and the Community Centres. These common areas and facilities are indivisible and cannot be sold/divorced from the apartments under the provisions of Section 3(b) and Section 6 of the Act. Builder has no discretion whatsoever to retain any such area or any facility, which is for common use for himself which is clear breach of the provisions and the very spirit of the Act. Any such step would only lead to illegal action.

(From Annexure P.15).

11. Further grievance is that though the petitioners and other apartment owners have purchased the apartments, they have not been enrolled as members of the condominium association only on the ground that they have not signed the apartment deed. The reason for not signing apartment deed is dispute raised in this petition relating to common areas and facilities. The petitioners have been wrongfully denied membership of the condominium association.

12. Stand on behalf of the State is that while there is no dispute about common areas covered by Clauses (1) to (6) of Section 3(f), dispute arises with regard to interpretation of Clause (7) and the disputed items may or may not fall under the said clause. Since the matter is pending before the competent authority, the competent authority may be required to take a decision or the Court may clarify the position.

13. Stand of respondent No. 3 is that declaration deed dated 19.4.2001 was in consonance with the statutory provisions. The shops, the community centres, the

school, building etc. were not part of common areas and facilities. It was for the colonizer to declare the said areas as common areas or to sell the same separately. Reliance has been placed on judgment of the Honble Supreme Court in D.L.F. Qutab Enclave Complex Educational Charitable Trust Vs. State of Haryana and Others, . The colonizer was not under any obligation either under the conditions of licence under the 1975 Act or under the provisions of the 1983 Act to declare the said areas to be common areas and facilities. The Group Housing norms Annexure P.17 relied upon by the petitioners were never made applicable. The requirement of signing LC-IVA was incorporated for the first time in rules on 29.1.2007 by way of amendment of Rule 11(1)(h). The same could not apply earlier on the basis of group housing norms. Respondent No. 3 developed an integrated colony of which group housing scheme measuring 14.75 acres was a part and thus, the apartment owners could not claim any exclusive right to the said areas. In any case, there being disputed questions, the matter should not be gone into in writ jurisdiction.

14. From the pleadings and submissions, main question for consideration is interpretation of Clause 7 of Section 3(f) read with Section 6 of the Act. The areas claimed by the petitioners to be covered by Clause (7) are mainly two primary schools, shops and community centre about which there is dispute. The petitioners have also raised dispute regarding underground parking and premises allotted to persons employed for management of apartments and giving of voting rights to such persons.

15. The petitioners have also claimed that they have not been enrolled as members of condominium association which has certain statutory rights on the ground that they did not sign the apartment deeds and did not accept the declaration. On the other hand, the stand of respondent No. 3 is that declaration filed u/s 11 was conclusive as to which area was common area and there was no forum to question such a declaration. Disputed questions being involved, this Court should not go into the question. Only remedy of the petitioners may be to file a suit.

16. The questions involved can, thus, be formulated as under:

- i) Whether declaration filed by respondent No. 3 u/s 11 was conclusive or could be questioned?
- ii) Whether the area of Primary Schools, shops and community centre could be treated as common area?
- iii) Whether other claims raised by the petitioners in their objections Annexures P.14 and P.15 could be accepted?
- iv) Whether apart from civil court, there was any other forum at which the said declaration could be examined?
- v) Whether on account of disputed questions, this Court could not go into the questions?

17. It will be appropriate to refer to the relevant statutory provisions dealing with the subject.

1983 Act

2. Application of Act The provisions of this Act shall apply to every apartment lawfully constructed for residential purposes, integrated commercial complexes, flatted factories, Information Technology Industrial Units, Cyber park and Cyber City for the purpose of transfer of ownership of an individual apartment in a building whether constructed before or after the commencement of this Act. In case of licences issued under the Haryana Development and Regulation of Urban Areas Act, 1975(8 of 1975), the owner of such property/building shall duly execute and get registered a declaration within a period of ninety days after obtaining part completion/completion certificate under the rules framed under the Haryana Development and Regulation of Urban Areas Act, 1975(8 of 1975) or occupation certificate under the rules framed under the Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963(41 of 1963), whichever is earlier. In case of property/building falling in the area developed by the Haryana Urban Development Authority, the owner of such property/building shall duly execute and get registered a declaration within a period of ninety days after obtaining occupation certificate of the building under the regulations framed under the Haryana Urban Development Authority Act, 1977 (13 of 1977). In case of property/building where the owner has already obtained part completion/completion certificate or occupation certificate under the rules and regulations framed under the said Acts, the period of ninety days shall take effect from the commencement of this Act.

Explanation for the purpose of this section Information Technology Industrial Units, Cyber park and Cyber City shall have the same meaning as assigned to them in the Zoning Regulations of Development Plans of various cities published u/s 5 of the Punjab Scheduled Roads and Controlled Areas Restrictions of Unregulated Development Act, 1963 (41 of 1963).

3. In this Act, unless the context otherwise requires:

a) Apartment means part of the property intended for any type of independent use, including building having one or more rooms with enclosed spaces located on one or more floors or any part or parts thereof, to be used for residence, office or for practicing any profession or for carrying on any occupation, trade, business or manufacturing or other uses relating to information technology or for such other type of independent use as may be prescribed, with a direct exit to the public street, road or highway or to a common area leading to such street, road or highway and includes any garage or room (whether or not adjacent to the building in which such apartment is located) provided by the colonizer/owner of such property for use by the owner of such apartment for parking any vehicle or for the residence of any person employed in such apartment, as the case may be.

Explanation-For the purpose of this clause as colonizer shall have the same meaning assigned under the Haryana Development and Regulation of Urban Areas Act, 1975 (8 of 1975);]

b) apartment owner means the person or persons owning an apartment and undivided interest in the common areas and facilities in the percentage specified and established in the declaration;

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d) association of apartment owners means all the apartment owners acting as a group in accordance with the bye-laws and the declaration;

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f) common areas and facilities unless otherwise provided in the declaration or lawful amendments thereto, means

1) the land on which the building located;

2) the foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stair ways, fire escapes and entrances and exits of the building;

3) the basements, cellars, yards, gardens, parking area and storage spaces;

4) the premises for the lodging of janitors or persons employed for the management of the property;

5) installation of central services such as power, light, gas, hot and cold water, heating refrigerations, air conditioning and incinerating;

6) the elevators, tanks, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for common use;

7) such community and commercial facilities as may be provided for in the declaration; and

8) all other parts of the property necessary or convenient to its existing maintenance and safety or normally in common use.

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i) competent authority means Chief Administrator, Haryana Urban development Authority in respect of the area developed by the said Authority constituted under Sub-section (1) of Section 3 of the Haryana Urban development Authority Act, 1977 (13 of 1977) till maintenance of that area remains with the said authority, Director, Urban Development Department, Haryana, in respect of the other area falling within the municipal limits and Director, Town and Country Planning Department, Haryana, in respect of the other area falling outside the municipal limits and includes a person for the time being appointed by State Government, by the notification, to exercise and perform all or any of the powers

and functions of the competent authority under this Act and the rules made there under;

j) declaration means the instrument to be executed and got registered in the prescribed form and includes the amended declaration;

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l) limited common areas and facilities means those common areas and facilities designated in the declaration and reserved for use of certain apartment or apartments to the exclusion of other apartments;

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p) property means the land, the buildings, all improvements and structures thereon, owned in free hold or held on lease or as occupant under any law relating to land revenue and all easements, rights and appurtenances belonging thereto and all articles of personal property intended for use in connection therewith.

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5.(1) Ownership of apartments : Each apartment owner shall be entitled to the exclusive ownership and possession of his apartment in accordance with the declaration.

(2) Each apartment owner shall execute a deed of apartment in relation to his apartment in the manner prescribed.

6.(1) Common areas and facilities Each apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration. Such percentage shall be computed by taking as a basis the value of the apartments in relation to the value of the property; and such percentage shall reflect the limited common areas and facilities.

2) The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered without the consent of all the apartment owners and expressed in an amended declaration duly executed and registered as provided in this Act. The percentage of the undivided interest in the common area 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 other instrument.

3) The common areas and facilities shall remain undivided and no apartment owner or any other person shall bring any action for partition or division of any part thereof unless the property has been removed from the provisions of this Act as provided in Sections 14 and 22. Any covenant to the contrary shall be null and void.

4) Each apartment owner may use the common areas and facilities in accordance with the purpose for which they are intended without hindering or encroaching upon the lawful rights of the other apartment owners.

5) The necessary work of maintenance, repair and replacement of the common areas and facilities and the making of any additions or improvements thereto shall be carried out as provided herein and in the bye-laws.

6) The association of apartment owners shall have the irrevocable right, to be exercised by the Manager or Board of Managers thereof, to have access to each apartment from time to time during reasonable hours as may be necessary for the maintenance, repair and replacement of any of the common areas and facilities therein or accessible there from or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to another apartment or apartments.

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10. Common profits and expenses: The common profits of the property shall be distributed among and the common expenses shall be charged to, the apartment owners according to the percentage of the undivided interest in the common area and facilities.

11. Contents of declaration: 1) The declaration shall contain the following particulars, namely:

a) description of land on which the building and improvements are to be located and whether the land is freehold or leasehold;

b) description of the building stating the number of storeys and basement, the number of apartments and the principal materials of which it is or is to be constructed;

c) the apartment number of each apartment and a statement of its location, approximate area, number of rooms and immediate common area to which it has access and any other data necessary for its proper identification;

d) description of the limited common area and facilities;

e) description of the limited common areas and facilities, if any, stating to which apartments their use is reserved;

f) value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities appertaining to each apartment and its owner for all purposes, including voting, and a statement that the apartment and such percentage of undivided interest are not encumbered in any manner whatsoever or not on the date of the declaration;

g) statement of the purposes for which the building and each of the apartments are intended and restricted as to use;

h) the name of a person to receive service of process in the cases hereinafter provided, together with the residence or place of business of such persons which shall be within the city, town or village in which the building is located;

i) provisions as to the percentage of votes by the apartment owners which shall be determinative of whether to rebuild, repair, restore or sell the property in the event of damage or destruction of all or part of the property;

j) any other details in connection with the property which the person executing the declaration may deem desirable to set forth consistent with this Act; and

k) the method by which the declaration may be amended consistent with the provisions of this Act.

2) A true copy of each of the declaration and byelaws and all amendments to the declaration or bye-laws shall be filed in the office of the competent authority.

24A. Penalties.-Any owner of property/building, who does not file declaration within the period specified u/s 2, shall be punishable with imprisonment of either description for a term which may extend to three years and shall also be liable to a fine of not less than Rs. 50,000 and Rs. 10,000 for each day of continuing offence.

24B. Sanction of prosecution-No prosecution of any offence punishable under this Act, shall be instituted except with the previous sanction of the competent authority or any officer authorized in writing by him in this behalf.

24C. Composition of Offence (1) The Competent Authority or any person authorized by him by general or special order made in this behalf, may either before or after the institution of the prosecution compound any offence made punishable by or under this Act.

2) Where an offence has been compounded the offender, if in custody, shall be released and no further proceedings shall be taken against him in respect of the offence compounded.

1975 Act

2. In this Act, unless the context otherwise requires

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hh) group housing means a building designed and developed in the form of flats for residential purpose or any ancillary or appurtenant building including community facilities, public amenities and public utility as may be prescribed.

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3. Application for licence (1) Any owner desiring to convert his land into a colony shall, unless exempted u/s 9, make an application to the Director, for the grant of a licence to develop a colony in the prescribed form and pay for it such fee

and conversion charges as may be prescribed. The application shall be accompanied by an Income Tax clearance certificate and conversion charges:

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(3) After the enquiry under Sub-section (2), the Director, by an order in writing, shall

(a) grant a licence in the prescribed form, after the applicant has furnished to the Director a bank guarantee equal to twenty five per centum of the estimated cost of development works in case of area of land divided or proposed to be divided into plots or flats for residential, commercial or industrial purposes and a bank guarantee equal to thirty seven and a half per centum of the estimated cost of development works in case of cyber city or cyber park purposes as certified by the director and has undertaken (i) to (iii) xx xxx xxx xxxx (iv) to construct at his own cost, or get constructed by any other institution or individual at its cost, schools, hospitals, community centres and other community buildings on the lands set apart for this purpose, or to transfer to the Government at any time, if so desired by the Government, free of cost the land set apart for schools, hospitals, community centres and community buildings, in which case the Government shall be at liberty to transfer such land to any person or institutions including a local authority on such terms and conditions as it may deem fit.

Provided that in the licenced colony permitted as a special project by the Government, the license shall be valid for a maximum period of five years and shall be renewable for a period as decided by the Government.

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8. Cancellation of licence (1) A licence granted under this Act, shall be liable to be cancelled by the Director if the colonizer contravenes any of the conditions of the licence or the provisions of the Act or the rules made there under; provided that before such cancellation the colonizer shall be given an opportunity of being heard.

2) After cancellation of the licence, the Director may himself, carry out or cause to be carried out, the development works in the colony and recover such charges as the Director may have to incur on the said development works from the colonizer and the plot holders in the manner prescribed as arrears of land revenue.

3) The liability of the colonizer for payment of such charges shall not exceed the amount the colonizer has actually recovered from the plot holders less the amount actually spent on such developments works and that of the plot holders shall not exceed the amount which they would have to pay to the colonizer towards the expenses of the said development works under the terms of the agreement of sale or transfer entered into between them:

Provided that the Director may, recover from the plot holders with their consent,

an amount in excess of what may be admissible under the aforesaid terms of agreement of sale or transfer.

(4) Notwithstanding anything contained in this Act after the colony has been fully developed under Sub-section 2), the Director may, with a view to enabling the colonizer, to transfer the possession of and the title to the land to the plot holders within a specified time, authorise the colonizer by an order to receive the balance amount, if any, due from the plot holders, after adjustment of amount which may have been recovered by the Director towards the cost of the development works and also transfer the possession of or the title to the land to the plot holder within aforesaid time. If the colonizer fails to do so, the Director shall on behalf of the colonizer transfer the possession of and the title to the land to the plot holders on receipt of the amount which was due from them.

5) After meeting the expenses on development works under Sub-section (2), the balance amount shall be payable to the colonizer.

The Haryana Development and Regulation of Urban Areas Rules, 1976

Rule 11. Conditions required to be fulfilled by applicant (1) The applicant shall

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e) undertake to construct at his own cost or get constructed by any other institution or individual at its cost, schools, hospitals, community centres and other community buildings on the land set apart for this purpose, or undertake to transfer to the Government at any time, if so desired by the Government free of cost, the land set apart for schools, hospitals community centres and community buildings in which case the Government shall be at liberty to transfer such land to any person or institution including a local authority on such terms and conditions as it may deem fit; and

18. It is clear from the scheme of the Act as reflected in Sections 5, 6 and 11 read with Clauses (a), (f), (l) and (p) of Section 3 of the 1983 Act that the declaration must categorise the whole property into apartments, common areas and facilities and limited common areas and facilities. The definition of word apartment initially was limited to part of the building used for residential purposes only but in 2002 amendment, the same has been expanded to include other purposes. It has been explained on behalf of the petitioners that the reason for expanding the definition is that the Act itself was initially applicable only to residential buildings but has been later extended to cover other buildings. The definition has to be read in the context of nature of building for which licence was given under the 1975 Act. In the context of the present complex, the licence was for residential purpose and the definition of apartment referred to residential areas. Commercial areas or community centres or other buildings which were not meant for residential purpose could not be covered by definition of apartment and has to be covered by the definition of limited areas and facilities or common areas and facilities.

19. We are of the view that the declaration must categorise the entire property into either apartments or limited areas and facilities or common areas and facilities. The declaration u/s 11 may define rights inter se. Common areas and facilities normally in common use and not covered by the definition of apartment had to be covered by either common areas and facilities or by limited areas and facilities. In the present case, there are certain areas which may be meant for shared use but have not been so declared. The competent authority before whom the declaration was filed is entitled to go into the rival contentions and decide as to whether the declaration has included some areas as apartments even though such areas are common areas. u/s 24B, the competent authority has incidental power to decide these questions when it has power to decide whether or not to grant sanction for prosecution for violation of provisions requiring filing of correct declaration. Such power is also referable to Section 11(2) of the Act. This being the position, the competent authority having not so far taken any decision in the matter, it may take a decision after hearing the parties in accordance with law.

20. As regards judgment of the Honble Supreme Court in DLF Qutab Enclave Complex (supra), holding that community buildings etc. covered by Section 3(3) (a)(iv) could be transferred by the colonizer and under the licence, the obligation of the licensee was only to construct the said buildings and not to hand it over to the Government, the same will not apply for interpretation of provisions of Sections 5, 6 and 11 read with Clauses (a), (f) and (l). The said question was not before the Honble Supreme Court.

21. In view of shortage of land in urban areas, concept of apartments has been evolved. Town Planning laws require development of apartments in accordance with a plan and the apartment laws apart from making apartments heritable and transferable, provide safeguards for the apartment owners for their shared use of common area. If shared use of common areas is not allowed, the concept of apartments may not be workable as persons living on different floors require certain services in the complex itself. Purchasers of apartments are also attracted by the services available in a complex and are directly or indirectly made to pay for such services. It is not the intention of the legislature that the developer assumes absolute power of declaring or not declaring areas, normally in common use, to be common areas. Section 11, which deals with contents of declaration, cannot be read as giving absolute power to the developer to exclude common areas from the said concept. To advance the social objective for which the law is enacted, the competent authority before which declaration is filed must be held to have power to consider objections of apartment owners as to whether particular area, which is normally in common use, could be described otherwise. Requirement of making declaration implies that the declaration must be consistent with the spirit of the Act. In the course of exercising power of cancellation of licence u/s 8 of the 1975 Act or in the course of receiving declaration u/s 11(2) of the 1983 Act or in the course of considering grant of sanction for prosecution u/s 24B of the 1983 Act, the competent authority is entitled to go into the objections of the apartment owners. Declaration made by

the developer, if objected to by apartment owners, cannot be accepted as conclusive. We are, thus, of the view that the apartment owners are entitled to object to the contents of the declaration. As already noticed above, the grievance in the writ petition originally filed was that the declaration was not being filed. During pendency of the petition, declaration was filed, which has been challenged as not conforming to the statutory provisions and spirit of the 1983 Act. Stand of the competent authority is that though objections have been received from the petitioners, the same have yet to be decided. The competent authority must decide the objections within reasonable time. Such authority must be guided by the provisions of the Act as well as the objects and spirit thereof.

22. It is not necessary for us at this stage to go into any disputed question except to hold that the declaration by itself cannot be treated as conclusive and competent authority is not only entitled to but is under obligation to take decision on objections of the apartment owners. The competent authority must evolve a mechanism for deciding such issues within reasonable time.

23. One more issue which has been raised is of allowing the apartment owners who have purchased apartments as members of condominium association if they have not been so far been allowed to join the association on the ground that they have raised objections to the declaration and on that ground not signed the apartment deed. Pending decision of the matter, they be allowed to join the association and the elections may be conducted under the supervision of a representative of the competent authority within two months from the date of receipt of a copy of this order in accordance with law. After elections take place, there will be only one association.

24. Accordingly, the questions formulated in para 16 are answered by holding that declaration filed by respondent No. 3 is not conclusive and could be questioned by apartment owners. The question whether area of Primary Schools, shops or community centre are common areas or any other objections of the petitioners, could be decided by the competent authority having regard to the provisions, objects and spirit of the Act. The competent authority could decide such questions apart from the jurisdiction of the civil court.

25. We sum up our conclusions as under:

1. Filing of declaration u/s 11 by developer of apartments is mandatory.
2. Apartment owners are entitled to undivided interest in common areas and facilities u/s 6 of the 1983 Act and, thus, are vitally affected if common area in which apartment owners are entitled to undivided interest is not declared to be common area. They can, accordingly, file their objections before the competent authority.
3. The competent authority defined u/s 3(i) of the 1983 Act is under obligation to decide objections of the apartment owners to the declaration filed by the developer.

4. The competent authority is to be guided by provisions, objects and spirit of the Act to decide whether particular area is common area or not.

5. Apartment owners are entitled to be enrolled as members of the condominium association.

26. Accordingly, we direct that the competent authority may take its decision on objections of the petitioners within six months from the date of receipt of a copy of this order. As already observed in para 23 above, the petitioners will be entitled to join condominium association subject to dispute raised by them as to contents of common area being decided. Elections may be conducted under supervision of representative of competent authority within two months from the date of receipt of a copy of this order, in accordance with law.

27. The parties may appear before the competent authority for further proceedings on October 5, 2009. Status quo granted by this Court on 10.9.2003 will continue till the competent authority takes its decision.

28. The writ petition is disposed of accordingly.