

(2013) 02 DEL CK 0181

In the Delhi High Court

Case No : Writ Petition (C) 3703 of 2011 and W.P. (C) 6161 of 2011

Commonwealth Games Village Allottees Welfare Association APPELLANT
Vs

DDA and Others
 Anoop Sharma and Others Vs DDA RESPONDENT
and Another

Date of Decision : 07-02-2013

Acts Referred:

Citation : (2013) 02 DEL CK 0181

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : Ramjit Srinivasan, with Rahul Dhawan, Ms. Shobna Masters and Mr. Aditya, in W.P.C 3703/2011 and Through Mr. Ravinder Sethi with Mr. Jasmeet Singh, Mr. Preetesh Kapur and Ms. Rashmi Chopra, in W.P. C 6161/2011, for the Appellant; Indira Jaisingh, ASG with Mr. Ajay Verma, for DDA, Mr. Arvind Nigam, with Mr. Darpan Wadhwa, Ms. Deepali Sharma, Akhil Sachar, Ms. Simran Brar, Dheeraj Kumar, Sunil Goel for Respondent No. 2, Mr. Amrit Pal Singh, Advocate for Respondent No. 4, Mr. Rakesh Khanna, Ms. Deepti Sinha and Ms. Arzu Chimni, Advocates for Respondents 6 to 14 and Mr. Rajeeve Mehra, ASG with Mr. Ravinder Agarwal, Girish Pandey and Mr. Amit Yadav for UOI and Mr. Chetan Sharma Mr. Yudhister Singh and Mr. Susheel Bhatiya for Respondent No. 2. in W.P. (C) 3703/2011, for the Respondent

Judgement

G.S. Sistani, J.—Both the writ petitions have been heard together and are being disposed of by a common order. Pleadings in these matters are complete. With the consent of the parties the writ petitions are taken up for final hearing and disposal.

2. W.P.(C) 6161/2011 has been filed by the flat owners under Article 226 of the Constitution of India seeking the following directions to the respondents:

(i) Issue an appropriate writ, order or direction and more particularly a Writ in the nature of mandamus, directing DDA to forthwith hand over possession of the private portion of the Project to the Developer and to ensure that the Developer completes the refurbishing activity within 15 days, subject to the condition that

the Developer will not hand over possession to the buyers till the issuance of Completion Certificate.

(ii) Issue an appropriate writ, order or direction directing DDA to take a decision, one way or the other, on the issue of Completion Certificate within a period of 30 days, in accordance with the final and binding directions issued by the Lieutenant Governor vide his order dt. 7.4.2011

(iii) Issue an appropriate writ directing the DDA to forthwith seal an appropriate number of Apartments from amongst those which have not been sold to third party purchasers, so as to bring the Project within the permissible FAR

(iv) Issue an appropriate writ directing the DDA to forthwith withdraw the order dt. 10.8.2011 insofar as it purports to seal Residential Towers 5 & 15 and unit 601 in Tower 7, to extent third party rights were specifically permitted by DDA to be created in respect of such Apartments.

(v) Direct DDA to disclose what action has been taken against the members of the Monitoring Committee and if no action has been taken, the DDA be directed to take appropriate action against the Committee members who were utterly derelict in checking the undue delay and sub-standard construction

(vi) Issue an appropriate writ Directing DDA to hold a proportionate share (approximately 1/3rd) of the amounts encashed under the Bank Guarantees furnished by the Developer, in trust/escrow for the satisfaction of the claims for damages that the Apartment owners including the Petitioners shall be filing in due course of time

(vii) Issue an appropriate writ, order or direction, directing an Inquiry by a retired High Court Judge or any other independent agency into the lapses committed by DDA/ Monitoring Committee due to which the Developer/Builder flagrantly committed irregularities, so as to pin the responsibility for the lapses.

3. In W.P.(C) 6161/2011, out of 27 petitioners, learned counsel for the petitioners wishes to delete petitioners no. 1, 3, 6, 7, 8, 10, 12 to 15, 17, 18, 19, 22 to 25, as the said petitioners have already been allotted flats in different towers of Commonwealth Games Village Complex and possession thereof has also been granted to them. At the oral request of counsel for the petitioners, petitioners no. 1, 3, 6, 7, 8, 10, 12 to 15, 17, 18, 19, 22 to 25 are deleted from the array of parties. Let an amended memo of parties be filed by petitioners within two days from today.

4. W.P.(C) 3703/2011 has been filed by petitioners under Articles 226 and 227 of the Constitution of India. Petitioner no. 1 is the Commonwealth Games Village Allottees Welfare Association and petitioner no. 2 is the Treasurer of petitioner no. 1. The following prayers are made by petitioners in W.P.(C) 3703/2011:

(a) Issue an appropriate writ, order or direction for appointment of an Independent Expert Committee to submit a report regarding compliance with the

safety and adherence to quality of the facilities, especially with regard to completion of construction repair, refurbishment and rectification of the CWGV Complex by the Respondents in a time bound manner;

(b) Issue an appropriate writ, order or directing the Respondents to immediately carry out rectification of the defects in particular water logging, seepage, completion of construction in accordance with the requisite standards and specifications within a specified timeframe.

(c) Issue an appropriate writ, order or direction directing DDA to grant Completion Certificate at the earliest and handover possession to the members of the Petitioner Association within a specified timeframe after executing conveyance deed and at no extra cost of financial implications to the buyers.

(d) Issue an appropriate writ, order or direction directing Respondents to pay suitable compensation to the members of the Petitioner Association on account of delays in handing over the apartments to them.

(e) Issue an appropriate writ, order or direction directing the Respondents to bear all cost and expenses incurred with respect to the working of the said Independent Expert Committee.

5. Both counsel for the petitioners submit that the petitioners are only concerned with the allotment of the flats to them.

6. In W.P.(C) 6161/2011 petitioners no. 1-27 claim themselves to be the allottees of flats in the Commonwealth Games Village Complex.

7. The brief facts of W.P.(C) 6161/2011 are that pursuant to awarding the rights to host the Commonwealth Games for the year 2010 by the Commonwealth Games Federation, the Government of India mandated DDA to undertake the construction and development of CWG Complex required for hosting the Athletes during the games. After bidding, the DDA and Emaar MGF entered into a Project Development Agreement dated 14.9.2007 (hereinafter referred to as "Development Agreement"), whereby the DDA appointed Emaar MGF as the Developer to construct the CWG Village Complex.

8. Although the remaining petitioners have been allotted flats in tower nos. 5 and 15 yet possession of the same have not been handed over to them nor a completion certificate has been issued by the DDA with respect to towers no. 5 and 15.

9. It is the case of the petitioners in W.P.(C) 6161/2011 that similarly situated persons have already derived benefit of possession of flats allotted to them whereas the petitioners, who are similarly situated have made all the payments out of their hard earn savings, to the Developers as far back as in the year 2008 to 2011, have not been handed over possession of their flats.

10. Brief facts of W.P.(C) 3703/2011 are that petitioner no. 1 Association consists of 84 purchasers of apartments in the Commonwealth Games Village Complex.

The case of the members of petitioner no. 1 Association is that its members comprising of 84 members are purchasers of the Apartments in the Village Complex. The members of the Association have invested their hard-earned life savings; they have taken significant loans; despite which the developer has failed to hand over possession of the flats; DDA has failed to grant completion certificate and on account of the delay they are suffering financial loss as they had anticipated that upon grant of possession they would be able to generate funds to repay the loans raised by them.

11. It may be noticed that since October, 2011, both the writ petitions have been heard together on all the dates of hearing and common orders have been passed.

12. It would be relevant to notice some of the orders, which have been passed by this Court. On 24.8.2011 while issuing notice in W.P.(C) 6161/2011 and CM 12424/2011 the respondents were restrained from disposing of or creating any rights in the flats. Operative portion of the order dated 24.8.2011 reads as under:

3. The petitioners seek stay of the order dated 10th August, 2011 of sealing. It is contended that the respondent No. 1 DDA instead of sealing the residential flats which have not been sold by the respondent No. 2 till now has passed the sealing order with respect to the flats which have been sold to the petitioners by the respondent No. 2 under authority from the respondent No. 1 DDA.

4. The counsel for the respondent No. 1 DDA appearing on advance notice on enquiry states that all flats at the moment are in possession of the respondent No. 1 DDA.

5. The respondent No. 1 DDA vide order dated 10th August, 2011 has directed sealing of some of the towers / flats for the reason of the same being in excess of the permitted FAR. It has been enquired as to how the portion in excess of FAR has been determined. No basis has been forthcoming. Prima facie, it appears that the excess FAR ought to be determined on the basis of construction in excess over and above the sanctioned plan.

6. In the circumstances, it is deemed expedient to prevent further rights being created in the flats so that unencumbered flats are available for demolition to bring the constructed area in consonance with available FAR. Till the next date both the respondents are restrained from disposing of or creating any rights in the flats.

13. On 14.10.2011 a common order in W.P.(C) 3703/2011 and W.P.(C) 6161/2011, was passed by this Court in an application, being CM 16969/2011, filed by respondent DDA. By means of the said application the DDA sought modification of the interim order dated 24.8.2011. During the hearing of the application, a submission was made by counsel for the DDA that there are about 711 flats, which fall to the share of the DDA and even if there is found to be any excess FAR it would require demolition of not more than 65 flats. It was also submitted that the DDA is prepared to keep 100 flats available for the said

contingency but DDA should not be restrained from commencing the proceeding for auctioning of at least 100 flats at that stage. This prayer was opposed by learned senior counsel appearing on behalf of the EMAAR MGF construction Pvt. Ltd. It was contended by learned senior counsel appearing on behalf of EMAAR MGF that the question of excess FAR already stood resolved by the Appellate Tribunal, DDA, which had held that the construction to be within the permissible limit as envisaged in MPD 2021 and Building Bye Laws. Although time was granted to the parties to file reply yet it was observed that since a large number of persons are affected and the flats are lying vacant the Ministry of Urban Development should take a decision in the matter at the earliest.

14. In W.P.(C) 3703/2011, CM 3039/2012 was filed by DDA inter alia praying for permission to invite tenders/bids through public notice to dispose of 110 flats in the first phase out of 711 flats owned by DDA in the Commonwealth Games Village Complex. The said application was listed before the Court on 18.4.2012, when the Court noticed that out of 711 flats, 378 flats had originally fallen to the share of respondent DDA and 333 flats were purchased later on by the DDA from respondent no. 2 Emaar MGF. The Court also noticed that on 23.2.2012 on an application filed by DDA being CM No. 16969/2011 by which DDA sought modification of the stay granted on 24.8.2011 respondent no. 1 DDA was permitted to commence the codal formalities for the purposes of auctioning 110 flats in the CWG village complex. Since the Court had directed the DDA to seek permission for the purposes of inviting bids from the public by issuing fresh notices the Court was informed that codal formalities sought have been completed by the DDA in respect of 110 flats located in towers no. 1, 9 and 14, proposed to be disposed of through auction in the first phase. The Court also noticed that there are in all 34 towers in the village complex, out of which 11 towers had fallen in the 1/3rd share of DDA on the basis of the Collaboration Agreement. The said towers are numbered as towers no. 1, 3, 4, 9, 10, 11, 14, 16, 18, 23, 26 and 28. As an interim measure, vide Order dated 23.2.2012, DDA was directed to keep aside towers no. 26 and 28 for the purposes of issuance of completion certificate. 23 towers had fallen in the share of respondent no. 2 being towers no. 2, 5, 5, 7, 8, 11, 12, 13, 15, 17, 19, 20, 21, 22, 24, 25, 27, 29, 30, 31, 32, 33 and 34.

15. During the pendency of the writ petitions DDA decided to seal the area measuring 11997.06 sq. mts, comprising of 65 flats, situated in towers no. 5 and 15, and unit no. 601 on the top floor of tower no. 7, measuring 105.75 sq. mts., on the ground that the said area was required to be kept unencumbered and available for demolition if necessary so as to bring the constructed area in consonance with the permissible FAR and pending a decision by the Ministry of Urban Development. On 23.2.2012 respondent no. 2 had undertaken to keep aside 28 flats unencumbered in its possession. The DDA had proceeded to purchase 333 flats out of 790 flats that had originally fallen to the share of respondent no. 2. These flats were spread over 17 towers in the complex. Paras 12 and 13 of the order dated 18.4.2012 read as under:

12. Having regard to the fact that the Court has been assured by both the respondents No. 1 and 2 that reasonable progress has been made in unraveling the knotted issues raised in the present petition for allotting the flats in question to the flat buyers who had applied to the respondent No. 2 for allotment and as respondent No. 1/DDA has confirmed having executed and registered a single conveyance deed in respect of the land beneath 392 flats in the Complex, in favour of the respondent No. 2 and further, in view of the fact that the respondent No. 2 informs the Court that it has already called upon the flat buyers to complete the necessary formalities for the purposes of execution of sale deeds in their favour, it is deemed appropriate to pass a twofold order.

13. Firstly, the respondent No. 1/DDA is permitted to invite tenders/bids through public notice for the disposal of 110 flats situated in Towers No. 1, 9 and 14, in the first phase of sale. Respondent No. 1/DDA shall be at liberty to take all the necessary steps in respect of the aforesaid 110 flats in this regard without any further reference to the Court. However, for any further sale of the remaining flats in its share which shall be by adopting the mode of auction, respondent No. 1/DDA shall seek prior permission from the Court. Secondly, respondent No. 2 shall proceed to execute sale deeds in respect of the 392 flats in favour of the individual flat buyers with reasonable despatch. Before the next date of hearing, respondent No. 2 shall file an affidavit placing on record the details of all the flat buyers in whose favour sale deeds would have been executed by then, while indicating the details of their names, the flat numbers and the Towers where they are located in a tabulated form, with copies to the petitioner as also the respondent No. 2/DDA.

16. Pursuant to the order dated 18.4.2012 110 flats stand sold by the DDA. It may be noticed that the village complex was to be completed by 31.3.2010. On 29.3.2010 an application was filed by Emaar MGF for grant of a completion certificate. A temporary occupancy permit was granted to Emaar MGF on 3.9.2010. Similarly a temporary occupancy permit was granted to the DDA on 3.9.2010 itself.

17. On 20.8.2010 the Building Department of DDA issued a sealing-cum-demolition order with respect to fresh construction in the basement. The order dated 20.8.2010 was set aside by the Appellate Tribunal, MCD, on 26.10.2010 and a direction was issued to the DDA to issue a completion certificate. On an appeal filed by DDA before the Lieutenant Governor the matter was remanded back to the Joint Director (Building) to decide the issue of FAR/completion certificate afresh.

18. On 14.4.2011 as per the order of the Lieutenant Government the site was inspected once again by the concerned Joint Director. Thereafter Emaar MGF made an application on 28.4.2011 for necessary directions regarding voluntary removal of 17 unauthorized flats in the stilt area. This request of Emaar MGF was allowed by the Joint Director (Building), DDA, on 2.5.2011 and the proceedings were closed pursuant to the remand as per the Order dated 7.4.2011.

19. On 10.8.2011 DDA requested Delhi Urban Arts Commission (DUAC) to grant tower-wise completion certificate. Simultaneously on the same date the building department passed a fresh sealing order u/s 31A of the DDA Act in respect of towers no. 5 and 15, and Unit 601 in tower no. 7. According to Emaar MGF this action was taken without issuing the mandatory show cause notice. On 10.8.2011 itself DDA made a request to the Ministry of Urban Development for regularization under MPD 2021 for alleged excess non-compoundable FAR. Against the order dated 10.8.2011 passed by the Joint Director (Building), Emaar MGF filed an appeal before the Appellate Tribunal, MCD, on 29.8.2011 primarily on the ground that DDA had not given any show cause notice. Before the Appellate Tribunal, it was agreed that the order dated 10.8.2011 would be treated as a show cause notice and a hearing would be granted to Emaar MGF. Subsequently on 27.10.2011 the Building Department of the DDA once again passed a fresh sealing order after granting a hearing to Emaar MGF on the ground of excess non-compoundable FAR. It was directed that towers 5 and 15 in Unit no. 601 be sealed. This order of sealing was vacated on 3.11.2011 and 9.11.2011 by the High Court in part and thereafter by ATMCD by Order dated 22.11.2011.

20. In the month of December, 2011, DUAC gave acceptance to the proposal of the DDA to grant tower-wise completion certificate/occupancy certificates. It may be noticed that on 9.2.2012 Ministry of Urban Development called upon DDA to resolve the contractual issues including FAR in accordance with the Master Plan, Building Bye-laws and the Project Development Agreement by obtaining a legal opinion and upon considering the financial implications. The Secretary of Ministry of Urban Development filed an affidavit on 7.3.2012 wherein it was deposed that if the construction has been carried out as per the permissible FAR as asserted by EMAAR MGF, then there was no occasion to seek relaxation. Notwithstanding the same, it was deposed that the DDA had failed to place special circumstances for exercise of power for relaxation of FAR under Clause 4.4.3 B of MPD 2021. Meanwhile the appeal filed by MGF before the Appellate Tribunal was allowed on 14.5.2012. In para 7 of the order the Tribunal held that a pick and chose policy had been followed. A finding was also rendered that the action of sealing was wrong for several reasons and an observation was made that a fresh show cause notice be issued after disposal of the regularization/completion application which was pending.

21. Learned Additional Solicitor General appearing on behalf of the DDA submits that another observation, which was made by the Tribunal, was that the order of the Tribunal dated 26.10.2010 had in fact merged with the order passed by the Lieutenant Governor on 7.4.2011 and the observations of the predecessor, who passed the order dated 26.10.2010 that FAR is within the permissible limit and completion certificate has to be issued by allowing compounding application by the respondent, has been set aside or modified. On 13.7.2012 another show cause notice has been issued by the DDA to Emaar MGF with relation to towers no. 5 and 15, and it is the case of Emaar MGF that this would again amounting to

picking and choosing.

22. In this backdrop the submissions of counsel for the petitioners in the present writ petitions are that the petitioners are not really concerned with the inter se disputes between the Project Developer and the Building Department of the DDA, which is to be decided by the Arbitrator, where the proceedings are pending or before the Appellate Tribunal, MCD, where it is to be adjudicated upon as to whether there is excess FAR or not and, if there is excess coverage of FAR, what is the implication of the same, whether the excess FAR, if any, is compoundable or not and if compoundable on what terms and conditions and who is to pay the compounding charges.

23. It is further the submission of senior counsel for the petitioners that in case there is excess FAR then it is not that the FAR is in excess only in one tower or another but the increase in FAR, if any, is uniformly spread out in all the flats in all the towers, including those towers where the flats have been sold and possession handed over. Thus, the petitioners alone have been put to a great disadvantage both - financially and otherwise - by the respondents by not handing over possession whereas allotments of 429 flats have been made by MGF and allotments of 110 flats, out of 711 flats, have been made by DDA to similarly situated persons. It is next submitted that towers no. 5 and 15 (falling to the share of MGF) where the flats of the petitioners are situated, flat no. 601 and tower nos. 26 and 28 falling to the share of DDA have not been given a completion certificate.

24. The sum and substance of the arguments of senior counsel for the petitioners is that no useful purpose would be achieved in keeping a large number of flats unallotted as not only the allottees are suffering but the conditions of the flats are also deteriorating and moreover DDA is primarily the sufferer as out of 711 flats, which fall to their share, only 110 flats have been sold by them.

25. Another submission of senior counsel for the petitioners is that they have reason to suggest that firstly in case there is any excess in FAR the same is compoundable and upon payment of compounding charges the matter can be resolved and secondly if at all there is requirement of carrying out demolition then no useful purpose is being achieved by keeping large number of flats unallotted while only some of the flats can be kept aside from the share of both the DDA and MGF to take care of such an eventuality in case a final order of demolition is passed.

26. The consistent stand of Emaar MGF before this Court is that there has been no excess coverage and construction has been carried out as per the FAR allowed and under the supervision of DDA.

27. Mr. Arvind Nigam, learned senior counsel appearing for the Project Developer submits that the construction carried out is strictly as per the MPD-2021. It is submitted that on account of factual error, the DDA apprehends that there is excess coverage by the Project Developer, which is beyond compoundable limits.

In support of this submission, Mr. Nigam, submits that according to the DDA, the Project Developer has covered 2,28,23.35 sq. mtrs., wherein factually the FAR achieved by the Project Developer is 2,27,071.72 sq. mtrs. It is next contended that the compoundable limit has been wrongly calculated by the DDA on the basis of 5% of the sanctioned FAR i.e. 2,05,140 sq. mtrs. instead of 5% compounding limit, which is to be calculated on permissible FAR of 2,20,000 sq. mtrs. It is also the case of the Project Developer that the compounding fee/ charges are to be calculated and demanded, as per the rates prescribed in appendix (Q) of the Building Bye-laws. It is in the above circumstances, the case of the Project Developer is that in case DDA were to consider the request of the Project Developer by correcting the basis of computing the FAR achieved by the Project Developer and the compounding limit to be calculated on the permissible FAR and the compounding fee as per appendix (Q), the entire controversy between the parties would not exist and there would be no requirement of the Government to consider relaxation. Ms. Indira Jai Singh, learned Additional Solicitor General appearing for the DDA, Disputes these submissions.

28. It would be in the fitness of thing to reproduce Clause 3.0 of the Development Code, which reads as under:

3(1) to 3(10) xxxx

SANCTION OF PLANS

3(11). Layout Plans/ Site Plans and Building plans shall be approved by the Local Bodies and Authority in their areas of jurisdiction.

3(12). Authority/ Local Body(s) shall be empowered after levying penalty to compound deviations from limits of coverage/ FAR to the extent of 5% of the permissible coverage and FAR, subject to maximum of 13.5 sqm. in building(s)/ premises at the time of considering the completion / occupancy certificate. In Group Housing schemes and Public & semi-public facilities, 5% FAR beyond permissible FAR can be compounded by the authority/ Local Body at the time of considering the completion / occupancy certificate.

29. The submissions of Mr. Nigam, are disputed by learned Additional Solicitor General appearing on behalf of the DDA. Learned Additional Solicitor General submits that a definite finding is yet to be given as to whether there is any excess in FAR or not although the documents placed on record suggest that Emaar MGF has carried out excess coverage and covered excess FAR which may or may not be compoundable and there is a possibility that some part of the towers would have to be demolished.

30. Learned Additional Solicitor General appearing for the DDA, however, submits that whatever compounding could have been done by the DDA has been done and the Project Developer has been informed of the same. Learned Additional Solicitor General further submits that the aforesaid provision does not apply to the facts of the petitioners.

31. It is also the case of the DDA that the question with regard to excess FAR, if any, would firstly lie with the DDA and in case MGF is aggrieved by the order so passed by DDA, before the Appellate Tribunal. It is also the stand of the DDA that in case there is an excess coverage of FAR, the same is non-compoundable and demolition is to be carried out then it would not be feasible structurally or otherwise to carry out demolition in different towers and, thus, it is with this objective in mind that two towers being 5 and 15 were kept aside to meet such an eventuality.

32. Learned senior counsel for the petitioners and Emaar MGF dispute the submission of counsel for the DDA primarily on the ground that since the excess coverage, if any, has been carried out uniformly then there can be no discrimination and more so this would show that DDA continues to follow the pick and chose policy and it is for this reason that towers no. 5 and 15 which have fallen to the share of Emaar MGF was being targeted by them, which has also been observed by the Appellate Tribunal, and the said observations have not been challenged and have thus attained finality.

33. These two matters have been hanging fire since the year 2011. Various orders have been passed from time to time, some of which have been noticed in paragraphs preceding. This Court on the suggestion made by the parties had also directed the Secretary, Ministry of Urban Development, and Vice-Chairman, DDA, to remain present in Court to ascertain as to whether the matter can be amicably resolved or in case the Ministry of Urban Development is willing to consider the request of the petitioners, DDA and Emaar MGF to regularize any excess coverage in exercise of power of relaxation of FAR under Clause 4.4.3 B of the MPD 2021. Since the Vice-Chairman, DDA, was on the verge of retirement, no finality could be achieved. Although all the parties are unanimous on one issue that one way or the other the matter should be decided.

34. The short question which arises for consideration before this Court is to strike a balance between the rights of the flat owners, who admittedly have deposited their hard-earned money with the hope of acquiring property for their benefit, and the amounts stand duly paid to the seller Emaar MGF in the year 2008 onwards. On the other hand it would not be proper to allow the allottees to occupy the flats when no completion certificate has been granted on the ground of coverage of excess FAR. This Court cannot lose track of another factor, i.e. 711 flats have fallen to the share of DDA and DDA has been able to sell only 110 flats on account of a restraint order which was passed as far back as on 24.8.2011. In addition thereto a restraint order has been passed against Emaar MGF also with respect to 28 flats.

35. Learned senior counsel for Emaar MGF has strenuously urged before this Court that firstly there is no excess FAR. Secondly, the entire construction activity was carried out under the direct supervision of the officials of the DDA and in case there is any excess coverage of FAR the DDA should have stopped the construction and put Emaar MGF to notice about the same. It is further

submitted that excess coverage in the basement so brought to the notice of Emaar MGF, a show cause notice was issued. It is also submitted that Emaar MGF made an application without prejudice for voluntary demolition of excess coverage, which was permitted. It is further contended that should such a situation has arisen with regard to towers, which have been construction by them, they would have voluntarily demolished the same in case the DDA was able to satisfy and to show that there was excess coverage. Thus, it is contended that firstly there is no excess coverage and if at all there is any excess coverage the same is compoundable.

36. The stand of the DDA, which has emerged during the course of the hearing of these petitions, is that the construction has been carried out by Emaar MGF and, thus, they alone are liable for the excess coverage, if any. Moreover it is Emaar MGF which changed the internal dimensions of the flats, which has resulted in excess of FAR.

37. Learned counsel for the Emaar MGF submits that in case there is any excess coverage the same is uniform in all the flats whether they fall to the share of the DDA or to the share of Emaar MGF, as also in the common areas and, thus, DDA and Emaar MGF will have to sink and sail in the same boat.

38. Learned Additional Solicitor General appearing for DDA submits that Emaar MGF alone was responsible for the construction activities and they were duty bound to construct only in accordance with the sanctioned plan which was the FAR permissible. Emaar MGF cannot be permitted to shift the burden, which would result in excess coverage be it demolition or financial implication on the DDA, which would squarely fall on the shoulders of Emaar MGF and in any case these issues can only be decided either by the Building Department of the DDA and in case Emaar MGF is aggrieved by the decision then by the Appellate Tribunal, MCD.

39. During the course of arguments it also emerges that in the worst case 11964.7 sq. mts. would have to be demolished in case a finding is arrived at that there is excess coverage and it is non-compoundable. It is pointed out that in towers no. 5 and 15 there are total of 64 flats of which 62 flats have already been sold and in towers no. 26 and 28 there are 62 flats, which are unencumbered. The approximate area of 62 flats comes to 11983 sq. mtrs. and the approximate area of towers no. 5 and 15 of all the flats is 11871.04 sq. meters.; for 26 and 28 the approximate area is 11983 sq. mts.

40. It is also agreed that in the worst case scenario as already pointed out approximately 11900 sq. mts. would have to be demolished. Consequently no purpose would be achieved in keeping four towers available for such an eventuality, two towers which fall to the share of Emaar MGF and two towers falling in the share of DDA. It is pointed out that the rationale behind granting a stay with respect to these four towers was to protect the rights of both the Project Developers and the DDA till such time there is a final adjudication in the

matter.

41. In view of the calculation which has been given hereinabove in my view it is not necessary to keep the four towers available in case at any point of time an order of demolition is passed. I may hasten to add that although the petitioners, Emaar MGF and to some extent DDA is hopeful that a situation may arise where an order of demolition may not have to be passed and the matter in hand is likely to be resolved by payment of compoundable charges. But still without compromising such an eventuality what is required is that the flats of approximately the same area of towers no. 5, 15 or 26 and 28 be kept unencumbered. I am of the view that 28 flats, which have fallen to the share of the Emaar MGF, should remain unencumbered, which are spread out in various towers. Similarly DDA should keep 28 flats unencumbered on the top portions of the towers no. 26 and 28 or such other tower, which they may deem appropriate to meet the remote eventuality in case an order of demolition is passed. The purpose of such an arrangement is to strike a balance as in this way the allottees and unencumbered flats of DDA which are more than 600 would be sold and DDA would be able to derive financial benefit of the same, which they have been deprived of since 24.8.2011. In case an order of compounding is passed the 28 unencumbered flats of Emaar MGF would stand as security for making the payment of compounding charges, if any, subject to the order passed today or in the event of demolition and the proceedings arising out of excess coverage can continue independently unaffected by any observations made in the order passed today.

42. It may be noticed that on 10.08.2011 a reference was made by the DDA to the Ministry of Urban Development for regularization of the project under MPD-2021 of the excess non-compoundable FAR. On 09.02.2012 the Ministry of Urban Development asked DDA to resolve the contractual issues including FAR in accordance with the NPD-2021, Building Bye-laws and the project development agreement by obtaining a legal opinion and considering the financial implications. The Ministry of Urban Development also filed an affidavit in this court on 07.03.2012. In the affidavit it has been deposed that in case the constriction is as per the permissible FAR as contended by the project developer, then there is no occasion to seek relaxation. Another ground for rejecting the request of the DDA was that the DDA had failed to place special circumstances for exercise of power for regularization of FAR under clause 4.4.4 B of MPD-2021.

43. Mr. Rajeeve Mehra, learned Additional Solicitor General appearing for respondent no. 4 submits that the request made by the DDA pursuant to order passed by this court on 19.01.2012, representation dated 10.08.2011, was disposed of for the reason that DDA had failed to place any special circumstance for exercise of power for relaxation of FAR under clause 4.4.3B of MPD-2021 and further on account of the fact in case the coverage was in excess of the permissible FAR, there was no occasion for DDA to seek relaxation.

44. In my view, while considering the request made by the DDA the Ministry of

Urban Development while rejecting the request has laid stress on the contractual issues between the Project Developer and the DDA, which is not the subject matter of these writ petitions, but are pending before the Arbitrator. The DDA was to look into the matter as per the building bye-laws MPD-2021 and the project development agreement. The request for regularization was not considered, taking into consideration the background in the matter. Request of the DDA was turned down on the ground that the DDA was unable to make out a case of special circumstance. However, in my view, at that stage, the Ministry should have taken a holistic view of the matter in the peculiar facts and circumstances of the case. It seems that the Ministry of Urban Development lost track of the fact that Ministry of Urban Development had on 13.04.2007 relaxed some of the conditions of MPD-2021 treating this project as a project of national importance. Once the project had been declared as a project of national importance by the Ministry of Urban Development. The request of DDA should have been considered, keeping this factor in mind, as this by itself is a special circumstances for exercise of power for relaxation of FAR under clause 4.4.3B of MPD 2021. Further it is not the case of the DDA that the Ministry of Urban Development cannot lay down reasonable conditions for regularization having regard to the peculiar facts of this case and the nature of project and number of persons involved to exercise their jurisdiction in the matter. More so, the project developer has consistently been urging that the entire construction has been carried out within permissible limits, there is no excess coverage, there is no coverage which is beyond compoundable limits yet any reasonable solution would be acceptable to them.

45. Ms. Indira Jaisingh, learned Additional Solicitor General appearing for the DDA submits that for the excess coverage by the Project Developer, in case the request for regularization is accepted, the Project Developer will be liable for regularization charges.

46. Meanwhile having regard to the peculiar facts of this case, the nature of project, the aim, objective and purpose for which the games village was constructed this Court is of the view that it is a fit case that DDA should approach the Ministry of Urban Development for Regularization as per Clause 4.4.3 B, [Regulation 3 (12) of Chapter 17 of Development Code) and Regulation 4.4.3B - prescribing maximum FAR as 200 for Residential Group Housing Society] or such other provision which may be applicable, which may be come to the aid and rescue. Such a request will be made to the Ministry of Urban Development within a period of eight weeks from today.

47. It may also be noticed that the prime opposition of DDA in these proceedings was not against the flat owners, nor it is the case of the DDA that the flat-owners are not entitled to the flats which duly stand allotted to them, nor is it in dispute that the payments have not been made with respect to these flats. The stand of the DDA has been that these flats are to be kept apart to enable the DDA to enforce the orders, if any, which may be passed by them in case they or the

Tribunal finally comes to the conclusion that there is construction beyond compoundable limits and cannot be compensated in terms of money and would have to be demolished.

48. Although the sequence of events, brings out that there is every possibility that solution to the problem can be found and demolition would only be a remote possibility in this case. More so, when it is the case of the project developer that if there is excess coverage then there would be uniform excess coverage in every flat in every tower and it would lead to multiplicity of proceedings and in fact it would lead to a chaotic state of affair, and even those flat owners to whom possession has been granted, payments have been received would have to face the threat of demolition of some portion of their flats, despite a completion certificate having been granted.

49. Mr. Nigam, learned senior counsel for the respondent no. 2/ Emaar MGF Construction Pvt. Ltd., points out that there are also inter se disputes between the project developer and the DDA as the developer has handed over possession of 333 flats to the DDA, however, the entire sale consideration has not been received by them, and this amount is lying with the DDA. Learned ASG submits that this issue is a subject matter of an arbitration, which is pending between the parties.

50. It is not for the court to decide the issue with respect to FAR which has been achieved by the Project Developer and on the basis on which the compounding limit is to be calculated and the area on which the compounding limit is to be calculated or the prescribed rates for compounding, for the reason that this is not a subject matter of this writ petition, yet it is expected that DDA which is a statutory body and a limb of the Government of India will act fairly and in a just manner, especially with a view that differences between the Project Developer and the DDA should not have an adverse effect on the rights of flat owners to whom flats have been allotted and payments have been made. If there is a factual mistake in the calculation of the FAR achieved or in case the law permits the compounding limit to be calculated on the permissible FAR, the DDA would grant the necessary relaxation.

51. Having regard to the peculiar facts of this case, to meet the ends of justice and keeping in mind the interest of the petitioners, DDA and the Project Developers, present writ petitions are disposed of with the following directions:

(i) The project developer shall keep 28 flats, which are lying unencumbered in different towers, as per Annexure -A, at page 1119 of the paper book, filed along with an affidavit of Sh. Shellen Bajaj, Vice President of respondent no. 2. As per this affidavit, the aforesaid flats are unencumbered. The affidavit will be treated as an undertaking made to this court and the same is accepted and taken on record. Respondent no. 2 shall remain bound by the undertaking given to this court. In case an order of compounding is passed the 28 unencumbered flats of Emaar MGF would stand as security for making the payment of compounding

charges, if any, subject to the order passed today or in the event of demolition.

(ii) The interim order passed by this court on 24.08.2011 stands vacated, with respect to all the flats in possession of the DDA, except 28 flats. DDA will keep 28 flats or the area equivalent thereto unencumbered, details of which will be made available and will be filed in the court as a compliance report within two weeks with the affidavit of an Executive Engineer/Director, in the form of an undertaking. These 28 flats preferably should be of the top floors of tower(s), so as to make it convenient in case of the remote eventuality of demolition. For the remaining flats, it will be open for the DDA to dispose of the same, in accordance with law and as per their policy.

(iii) All proceedings arising out of the present project relating to the FAR will be kept in abeyance for a period of eight weeks. A request will be made by the DDA to the Ministry of Urban Development to regularize the excess construction at the Common Wealth Village Complex. Prior to the request to the MCD, DDA will give a hearing to the Project Developer and the Project Developer will be entitled to produce supporting documents in the hearing as well as written submission and thereafter the DDA will prepare a note in which the stand of the DDA, the submissions of the Project Developer will be extracted at the first instance and thereafter the recommendations of the DDA which would contain reasons as to why the stand of the Project Developer is unacceptable to them, if it is unacceptable and the conclusion of the DDA. This note which would be submitted to the Ministry of Urban Development will be without prejudice to the rights and contentions of the DDA and without compromising the stand taken by them in the show cause notice dated 13.07.2012, the contents of which shall be kept in abeyance, till final decision by the Ministry of Urban Development.

(iv) The request of the DDA will be accompanied by necessary plans, calculation-sheets, stand of the project developer, which will be submitted by them to the DDA within the stipulated period, and the Ministry of Urban Development will treat this case as a project of national importance, in view of the stand taken by them in the year 2007, when at their instance necessary relaxation was made, with a view to take a holistic view in the matter.

(v) The Ministry of Urban Development will thereafter give a hearing to the DDA and the project developer, to enable them to present their case, permit them to produce further documents which may be necessary and thereafter take a decision/ view in the matter, keeping in mind the peculiar facts and the extent of hardship which may be caused to a large number of flat owners (1168 flat owners) especially in case demolition is to be carried out in each flat, which is likely to affect each family of 1168 flat towers, however, it shall be open to the Ministry of Urban Development, to impose such terms and conditions, which they would be permitted to do in accordance with law.

(vi) Out of 28 unencumbered flats of the Project Developer two (2) flats have not been granted completion certificate, however, completion certificate has been

granted to 26 flats. The completion certificate granted to 26 flats of the Project Developer would stand suspended.

(vii) DDA will not grant completion certificate with respect to 28 flats belonging to DDA which are to be kept encumbered and if already granted the same will also remain suspended.

(viii) For the balance flats a completion certificate will be granted and the petitioners will be given possession on their completion of all formalities by the Project Developer. Similarly it will be open for the DDA to dispose of the flats in their possession and in case any documents are required to be signed by the Project Developer with respect to 333 flats, the same will be signed without prejudice to the rights and contentions of both the parties and subject to final order which may be passed in the arbitration proceedings and subject to inter se pleas raised by the Project Developer and the DDA before the arbitrator.

(ix) All formalities be completed by the DDA for grant of completion certificate within four weeks from today.

(x) Directions made in these writ petitions by this court would have no bearing on the merits of the matters in the inter se dispute between the Project Developer and the DDA either before the arbitrator or in relation to the issue of FAR. Both DDA and the project developer would be at liberty to challenge any decision which may be arrived at in any form with regard to the inter se dispute whether arising out of the project development agreement under the DDA Act or Master Plan and the Bye-laws.

CM NOS. 17702/11, 882/12 & 8385/12 IN W.P.(C) 3703/2011

CM APPL. NOS. 12424/2011, 18293/2011, 829/2012, 3039/2012, 3408/2012, 3835/2012 & 9114/2012 IN W.P.(C) 6161/2011

Applications stand disposed of in view of the order passed in the writ petitions.