

(2019) 08 DEL CK 0341

In the Delhi High Court

Case No : First Appeal From Order (OS) No. 137 Of 2019, Civil Miscellaneous Application No. 34043 Of 2019

M/S Ardee Housing Pvt Ltd & Anr

APPELLANT

Vs

Vijay Building Apratment Owners Association

RESPONDENT

Date of Decision : 19-08-2019

Acts Referred:

Delhi Apartment Ownership Act, 1986 — Section 3(j), 4, 4(3), 4(4), 4(5), 4(6)

Citation : (2019) 08 DEL CK 0341

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Ravi Gupta, Mohit Sharma, B. Shekhar, Sandeep Agarwal, Rama Shanker

Final Decision : Dismissed

Judgement

Vipin Sanghi, J

1. The appellant has preferred this intra court appeal to assail the order dated 23.07.2019 passed by the learned Single Judge in I.A. No.9496/2015 (for stay) and I.A. No.1196/2019 (to seek clarification of order dated 18.12.2018). The respondent - Vijay Building Apartment Owners Association has filed the civil suit being CS (OS) 1261/2015, inter alia, to seek a decree of declaration and permanent and mandatory injunction against the defendant in the said suit. The appellant is a defendant in the said suit.

2. In brief, the appellant claims to have entered into a collaboration agreement with the owners of property No.17, Barakhamba Road, New Delhi. Under the said collaboration agreement, the appellant acted as the builder to raise construction of a multi-storeyed building. The built up portions were to be shared between the parties in terms of the collaboration agreement with the owners. The collaboration agreement provided, and so did the subsequently entered flat buyers agreements- in terms of the Delhi Apartment Ownership Act, 1986 that,

eventually, a society would be formed by the owners who shall take over the management of the multi-storeyed building. Pertinently, the appellant charged the owners/flat buyers money for formation of the said society. However, the said society was not formed for decades. The appellant continued to realise money towards maintenance charges and was also charging for parking. The appellant states that so far as provision of power backup is concerned, the said facility was licensed out to a third party, which, admittedly, is a private limited company-whose directors are common with the directors of the appellant.

With the passage of time, the majority of owners raised the clamour since the appellants were collecting charges towards maintenance etc. without furnishing any justification for the rates, and without providing any accounts. Eventually the respondent/plaintiff association was formed by the majority of flat owners, which sought to take over the management. Since there was dispute between the parties, the respondent preferred the aforesaid suit and moved the aforesaid I.A. No.9496/2015.

The impugned order shows that the learned Single Judge made various attempts to arrive at a settlement between the parties but to no avail. The impugned order also shows that the learned Single Judge dealing with the suit appointed two Local Commissioners at different points of time to firstly, report with regard to the condition of and defects in the building, as well as mismanagement of the building -for which the appellant was responsible, and secondly, to ascertain the views of the flat owners, and to find out as to where the majority opinion lay.

3. After taking into consideration the decision of Division Bench of this Court in O.S. Bajpai vs. The Administrator (Lt. Governor of Delhi), 172 (2010) DLT 442, which was subsequently followed in Kundan House Flat Owners Welfare Association (Regd.) vs. Gurucharan Singh Bhasin & Anr., CS (OS) 845/2014, dated 26.05.2015, and also after taking into account the clauses of the collaboration agreement-in particular Clauses 20 to 23; the amounts charged by the appellant, inter alia, towards Electric Station, contribution for formation of society, and; the opinion of the flat owners/buyers, the learned Single Judge allowed the aforesaid application preferred by the respondent/plaintiff. The relevant extract from the impugned order reads as follows:

35. Thus, over the years the Builder has collected large sums from the owners/occupiers. Amounts collected includes for "formation of a Society" which remained in an embryonic state. The Plaintiff-Association has been formed since 2012 and has addressed multiple notices to the Defendants - only to fall on deaf ears.

42. The notice was also published in the Hindustan Times dated 4th October, 2018. Photographs of the various places where the notice was affixed in the building, have also been filed by the Local Commissioner. As per the notice, the flat/apartment owners were to assemble on the ground floor of the building on 6th October, 2018. The Defendants raised objections to the consent form, which

the Local Commissioner had proposed. The Commissioner has placed on record several photographs, which showed the manner in which the meeting on 6 th October, 2018 was carried out. The Commissioner collected a total of 149 consent forms and a list was prepared and was supplied to both the parties. Some suggestions made by the Defendants were also incorporated by the Commissioner. In respect of each of the floors, the Commissioner tabulated the space. Finally, the Commissioner concluded as under:

Consent forms accepted and considered for voting (Envelop - A {Part-1, Part-2 & Part-3})

Options

As per Super Area (s. ft.)

As per No. of consent forms

Supporting Vijaya Building Apartment Owners' Association (Plaintiff)

1,21,650

162

Supporting Ardee Housing Pvt. Ltd. (Defendant No.1)

37,787

19

Any other option

0

0

Consent forms not considered for voting (Envelop - B)

Options

As per Super Area (s. ft.)

As per No. of Consent forms

Supporting Vijaya Building Apartment Owners' Association (Plaintiff)

1,168,60

5

Supporting Ardee Housing Pvt. Ltd. (Defendant No.1)

2,999

5

Any other option

0

0

45. Broadly this Court has considered the reports and objections to both the Local Commissioner's reports. A perusal of the reports shows prima facie that the Builder has committed several defaults. The Builder had an obligation to form the association/society/company, which it failed to do. The Court has, at the prima facie stage, ascertained the wishes of the flat owners. The fact that the occupiers may have maintenance agreements with the Defendants, out of compulsion, does not vest any rights with the Defendants, inasmuch as, if the Association starts providing the maintenance, the occupiers who are only either tenants or lessees of the owners, can avail of the same from the Association. As per the second Local Commissioner's report, the clear conclusion is that out of the total of approximately 1,59,437 square feet super area, owners of 1,21,650 square feet area have supported the Plaintiff-Association. The Defendants may be owning some parts of the building and would be entitled to become members of the Association and enjoy voting power as contained in the collaboration agreement i.e. one vote for every square meter. The wishes of the majority cannot be ignored by the Court. Further, the intention behind the legislations such as the Delhi Apartment Ownership Act, 1986; Real Estate (Regulation and Development) Act, 2016 and other recent reforms in the real estate sector, cannot be ignored.

48. On a broad conspectus of the facts narrated above it is clear that the Builder had a binding obligation to form a society to represent the interests of the flat buyers. This obligation was contained in the initial collaboration agreement as also in each of the flat buyers agreements. This obligation was clearly violated by the Builder. To make things worse, the Builder created a maintenance agency, under the same management for giving maintenance and collected huge sums of moneys both from the flat owners and the occupiers - without accounting for the same. The Plaintiff association came to be formed after many years and despite repeated notices, the Builder did not cooperate. The maintenance agency Ardee has no right at all whatsoever as it is just an agent of the Builder. Some of the occupiers may have been forced to agree for maintenance being provided by the Builder and its maintenance agency. However, this does not constitute a legal right to claim that the defendants can continue to provide maintenance against the wishes of the Plaintiff which represents the majority of the flat owners. Whenever the Association or the owners have taken any drastic steps, they have faced harassment in enjoying the basic facilities such as electricity back up and air conditioning - in a building located in the centre of the capital city. This has led to police interventions and orders by the Court. The court cannot ignore these happenings.

49. The Local Commissioners have both reported the situation of the building on ground and the arbitrariness with which the Builder is unilaterally collecting the fees/monies under various heads from the residents/owners and or occupiers.

The wishes of the flat owners have been totally ignored. Repeated notices by the Plaintiff association have elicited no reasonable reply by the Builder. The Association has a right to prevent the Builder and its maintenance agency from continuing to interfere in providing maintenance and other services to the building.

50. Under these circumstances, the Defendants are restrained from preventing the Plaintiff-Association from carrying out the maintenance of Vijaya Building, 17, Barakhamba Road, New Delhi-110001 and are further restrained from interfering, disturbing or obstructing the Plaintiff/Association and/or its employees/their agents from looking after, taking care of the maintenance of the building, common areas, common services, parking areas including the genset, power backup, fire services, etc. The Defendants are further restrained from causing any harassment to the flat owners/occupiers for a period of 30 days by disconnecting any of the maintenance services including electricity, water, gensets, power backup, lift services, air conditioning etc., During the said period, the Plaintiff can make whatever arrangements it needs to make for ensuring that all the services are duly provided by it to the flat owners and the occupiers of the building. I.A. 9496/2015 is disposed of accordingly." (emphasis supplied)

4. Mr. Gupta, learned Senior counsel for the appellants, has firstly submitted that the appellants has been providing maintenance services without any grievance with regard to the quality of the services. He submits that there was no cause for formation of the respondent/plaintiff association and for transfer of management to the said association. He submits that the association could not be earlier formed by the appellants/defendants since no authority was notified under the Delhi Apartment Ownership Act. He submits that, in any event, all the basements including basements at levels 2 and 3 fall to the share of the appellant under the collaboration agreement, and the appellant has the exclusive right to run the business of providing the parking and charging parking fee under the collaboration agreement. Mr. Gupta submits that as far as the genset installed for the purposes of providing the power backup is concerned, the same is not owned by the owners. The right to carry on the said business had been parted with by the appellant in favour of M/s Hoover Services Pvt. Ltd. and it is M/s Hoover Services Pvt. Ltd. which has been entering into agreements with the occupants for providing them the power backup.

5. On the other hand, Mr. Agarwal, learned Senior counsel for the plaintiff/respondent, firstly disputes the submission that the flat owners and occupiers have no grievance with regard to the maintenance carried out by the appellant/defendant. He has referred to the plaintiffs' grievances raised in the suit and before the Ld. Single Judge. He submits that the ownership of the basements does not lie exclusively with the appellant. In this regard our attention has been drawn to one of the collaboration agreements entered into between the appellant and one of the co-owners, which specifically provides that the co-owner would have 1/6th undivided share in basements at levels 2 and 3. Mr. Agarwal submits

that similar agreements exist with the other co-owners. These are five different collaboration agreements with the five co-owners. The other agreements have not been placed before Court by either of the parties.

6. Reference has also been made to the definition of "common areas and facilities" contained in Section 3(j) of the aforesaid Act, which reads as follows:

"3 (j) "common areas and facilities", in relation to a multi-storeyed building, means -

(i) the land on which such building is located and all easements, rights and appurtenances belonging to the land and the building;

(ii) the functions, columns, girders, beams, supports, main walls, roofs, halls corridors, lobbies, stairs, stairways, fire escapes and entrances and exits of the building;

(iii) the basements, cellars, yards, gardens, parking areas, shopping centres, schools and storage spaces;

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

(v) installations of central services, such as, power, light, gas, hot and cold water, heating, refrigeration, air condition, incinerating and sewerage;

(vi) the elevators, tanks, 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 prescribed; and

(viii) all other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use;" (emphasis supplied)

7. Reference is also made to Section 4(3) to 4(6) of the said Act which read as follows:

"4. Ownership of apartments. (1)....

(2)

(3) Every person who becomes entitled to the exclusive ownership and possession of an apartment under sub-section (1) or sub-section (2) shall be entitled to such percentage of undivided interest in the common areas and facilities as may be specified in the Deed of Apartment and such percentage shall be computed by taking, as a basis, the value of the apartment in relation to the value of the property.

(4) (a) The percentage of the undivided interest of each apartment owner in the common areas and facilities shall have a permanent character, and shall not be altered without the written consent of all the apartment owners.

(b) The percentage of the undivided interest 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 other instrument.

(5) 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, and any covenant to the contrary shall be void.

(6) Each apartment owner may use the common areas and facilities in accordance with the purposes for which they are intended without hindering or encroaching upon the lawful rights of the other apartment owners." (emphasis supplied)

8. Mr. Agarwal submits that the learned Single Judge has prima facie found that the appellant has collected crores of rupees towards maintenance without furnishing any accounts therefor. He submits that the balance of convenience is not in favour of the appellant or in favour of disturbing the interim arrangement directed by the learned Single Judge. The detailed interim order was passed by the learned Single Judge after hearing the parties and upon consideration of the overall situation.

9. Having heard learned Senior counsel and given our consideration to the matter, we are not inclined to interfere with the impugned order in the present intra-Court appeal. To persuade us to interfere with the impugned order-which is an interim arrangement arrived at by the learned Single Judge keeping in view the prima facie case in favour of the respondent/plaintiff, as well as the balance of convenience, it was essential for the appellant to point out the serious illegality in the impugned order. However, none has been pointed by the appellants. The collaboration agreements were entered into post the enactment of the Delhi Apartment Ownership Act. The agreement, as noticed above vests 1/6th share in the owner in the basements at levels 2 and 3. Only one such agreement has been filed on record. We have no reason to assume that the agreements with the other co-owners would not be similarly worded. In any event, even if one or some of the co-owners have an undivided right in the said basements at levels 2 and 3, the Appellants cannot claim exclusive rights thereto. The said claim is also doubtful in view of the definition of "common areas and facilities" defined in the aforesaid Act. This claim also appears to be in the teeth of Section 4 of the aforesaid Act.

10. The submission that the electricity generator installed for the provision of electricity back up is not owned by the Apartment Owners, and they have not contributed for the setting up of the same also does not appear to be correct inasmuch, as, the flat buyers agreement provides in Clause 30 that a Generator is proposed to be installed in the premises, and that the cost of the Generator and the wiring etc. for emergency lighting system would have to be borne by various occupiers in approximate proportion of the area of the premises, and will

be paid to the builder for installation. Thus, the onus to prove and establish that the appellant has not levied the said charge on the owners/occupiers lies on the appellant, since the appellant had been raising all other charges. At this stage, prima facie this Court cannot accept the position that the appellant has not levied the said charge. The plea that there is no deficiency in, or complaint with regard to the maintenance services, is completely contrary to the record.

11. Thus, we do not find any error in the impugned order passed by the learned Single Judge. We are of the view that the appellant's interest can be sufficiently safeguarded by requiring the respondent association to maintain the accounts and to furnish the same on periodical basis. Mr. Agarwal, on instructions, states that the respondent association would maintain the accounts and furnish the same on quarterly basis by filing copies thereof in the suit proceedings with copies to the appellant. This statement is taken on record and the respondent association shall abide by it.

12. The appeal is dismissed.