

(2013) 11 AHC CK 0154

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No"s. 33826, 46099 of 2012, 15782 of 2010 and 12110 of 2013

M/s. Designarch Infrastructure Pvt. Ltd. and Another

APPELLANT

Vs

Vice Chairman, Ghaziabad Development Authority and Others

RESPONDENT

Date of Decision : 14-11-2013

Acts Referred:

Citation : (2013) 9 ADJ 594

Hon'ble Judges : Sunil Ambwani, J;Bharat Bhushan, J

Bench : Division Bench

Advocate : P.K. Jain, Himanshu Tiwari, Navin Sinha and Kunal Ravi Singh, for the Appellant; A.K. Mishra and Rajesh Kumar Singh, for the Respondent

Final Decision : Disposed Of

Judgement

1. We have heard Shri P.K. Jain assisted by Shri Himanshu Tiwari and Shri Navin Sinha assisted by Shri Kunal Ravi Singh for the petitioners. Shri A.K. Mishra and Shri Rajesh Kumar Singh appear for the Ghaziabad Development Authority. The U.P. Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010 (in short the U.P. Apartment Act, 2010) was enacted by the State Legislature to provide for the ownership of an individual apartment in a building, of an undivided interest in the common areas and facilities appurtenant to such apartment; to make such apartment and interest heritable and transferable, and for matters connected therewith or incidental thereto. The Act received the assent of the Governor on 18.3.2010 and was published in the U.P. Gazette dated 19.3.2010. The U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Rules, 2011 (in short the U.P. Apartment Rules, 2011) were made by the State u/s 30 of the U.P. Apartment Act, 2010 and were enforced after one year and eight months by notification published in the Official Gazette of the State of U.P. dated 16.11.2011. The Model Bye-Laws to be adopted by every association of apartment owners in its first meeting made under sub-section (6) of Section 14 of the U.P. Apartment Act, 2010 were also notified in the Official

Gazette on the same day on 16.11.2011. The provisions of the U.P. Apartment Act, 2010 and the U.P. Apartment Rules, 2011 have, however, largely remained unenforced delaying the objects of enactment. In these writ petitions the petitioners as promoters, apartment owners and the Resident Welfare Associations of the apartment owners have prayed for declaration, interpretation and enforcement of the provisions of the U.P. Apartment Act, 2010 and the U.P. Apartment Rules, 2011 for protection of the rights of apartment owners and promoters and consequential reliefs.

2. The statement of objects and reasons for which the U.P. Apartment Act, 2010 was enacted quoted in the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Bill, 2010 is as follows:

STATEMENT OF OBJECTS AND REASONS

Housing is a basic human necessity and the quality of the house as well as of its environment plays an important role in the growth of individuals, both physically and mentally. The widening gap between the rising urban population and the housing stock added every year has gradually reached such a critical stage that the problem of providing proper shelter and desirable standard of living seems very difficult of be solved. Moreover, majority of the citizen of urban areas of the State cannot thinks in terms of owing houses on individual basis because of the shortage of land in the urban areas. The efforts made by the Government as well as different agencies have not made much dent into the housing problem.

Uttar Pradesh is predominantly an agricultural State; it is not advisable to use fertile lands more and more for housing purposes which ultimately will affect the production of food grains. An essential investment should be observed, for which Group Housing development will have to be promoted. With a view to promoting the Group Housing, it has been decided to make a law to provide for the ownership of an individual apartment in a building of an undivided interest in the common areas and facilities appurtenant of such apartment and to make such apartment and interest heritable and transferable.

The Uttar Pradesh Apartment (Promotion of Construction Ownership and Maintenance) Bill, 2010 is introduced accordingly.

3. Brief facts giving rise to the writ petitions, the prayers made thereunder and the questions raised in each of the writ petitions are summarised as follows:

Writ Petition No. 33826 of 2012

M/s. Designarch Infrastructure Pvt. Ltd. and another v. Vice Chairman, Ghaziabad Development Authority and others

4. The petitioner No. 1 is a company registered under the Companies Act, 1956 having its office at 31, Shankar Vihar, Vikas Marg, Delhi-92 and is engaged in the business of designing, construction and development. The petitioner No. 2 is the Managing Director of the company. The petitioner was allotted plot No. GH-6,

Sector-5, Vaishali, Ghaziabad measuring 6250 sq. mtr. by the Ghaziabad Development Authority (GDA) vide allotment letter dated 2.1.2006 and for which a sale-deed was executed transferring the land to the petitioner on 17.3.2006, for construction of a group housing project. The building plan was sanctioned on 28.6.2006. The petitioner has constructed buildings consisting of two towers namely "Labernum" and "Orchid" for sale of the flats/dwelling units and allotted the flats to various intending buyers in terms of separate allotment agreements. The completion certificate of the building was issued by the GDA on 6.10.2010. The buildings were awarded "The Outstanding Building of the year 2010", awarded by the Indian Concrete Institute, Western U.P. Centre.

5. It is stated that some flat owners and some other persons formed a Residents Welfare Association with the name and style of "Designarch Homes Resident Welfare Association" (in short RWA) and sought registration from the Registrar of Firms, Societies and Chits and got the society registered with byelaws in violation of the U.P. Apartment Act, 2010. The registration certificate was issued on 21.6.2010. It is alleged that registration was obtained without informing or taking consent of the petitioner as developer of the apartments, which according to the petitioner is a condition precedent for formation of the apartment owners association. The Deputy Registrar, Firms, Societies and Chits has not confined the membership only to the apartment owners. After registration the members of the RWA particularly those, who are not apartment owners have started creating disturbance in the building complex and have started exerting pressure on them to join the association. As many as 66 apartment owners out of 124 apartment owners have complained to the Deputy Registrar, Firms, Societies and Chits against the illegal formation of the society. On these complaints the Deputy Registrar, Firms, Societies and Chits by his order dated 24.7.2010 cancelled the registration of the society against which an appeal has been filed by the RWA before the appellate authority (Commissioner), who by his order dated 16.1.2012 has remanded the matter back to the Deputy Registrar of the Firms Societies and Chits.

6. It is stated that the Deputy Registrar by his order dated 13.4.2012 directed that since the tenure of the office bearers of the RWA has expired and directed governing body to hold fresh elections. On 27.5.2012 the RWA has conducted elections of the governing body in which Mr. Harsh Wardhan was elected as General Secretary and Shri Bhupan Singh was elected the Vice President of the society, who is not eligible to become member as both of them are not apartment owners in the building. They have started interfering in the ownership and possession of the unsold properties and are threatening the employees and staff of the petitioner. They opened locks of the notice boards of the Maintenance Committee forcibly and have put their lock on it, on which the petitioner has filed Civil Suit No. 207 of 2012, Designarch Infrastructure Pvt. Ltd. v. Designarch Homes Residents Welfare Association in the Court of Civil Judge (SD), Ghaziabad and in which ex parte injunction was granted on 31.1.2012. A first information report has been lodged registering Case Crime No. 303 of 2012 at P.S.

Indirapuram by the petitioner against these persons under Sections 342, 447, 323, 504, 506 IPC and an application for contempt has been filed in the Civil Court.

7. It is further stated that a notice was issued by the Chief Architect and Town Planner, GDA, Ghaziabad on 19.4.2012 directing the petitioner to appear before him, on the complaint made by RWA. On 1.5.2012 the Chief Architect and Town Planner, GDA directed the Managing Director of the petitioner company, in relation to the meeting of RWA and developer on 26.4.2012 to hold elections expeditiously and to hand over common facilities to apartment owners under the U.P. Apartment Act, 2010. The petitioner filed a copy of injunction order of Civil Court in GDA on 1.6.2012. On 12.6.2012 the Special Officer authorised by the competent authority of the GDA, heard both the parties and passed orders on 26.4.2012 and 30.5.2012, directing the petitioners to submit declaration under the provisions of U.P. Apartment Act, 2010 within a week. He further directed that parties should inform him after completing proceedings of handing over common areas and facilities and its maintenance upto 30.6.2012, failing which the common areas and facilities will be deemed to be transferred to the RWA. Aggrieved the petitioner filed this writ petition challenging the orders. On 18.7.2012 this Court had stayed the operation of the order.

8. In this writ petition following questions of law have been raised to be considered and decided by this Court:

(i) Whether the developer can deny submission of "declaration" to give effect to the "deemed" handing over of the management and ownership of "common areas and facilities" as per Section 4(6) of the 2010 Act by citing alleged violation of Section 14(6) by the Association of apartment owners?

(ii) Whether the content of the "declaration" u/s 12 of 2010 Act is required to be verified by the "Competent Authority" through credible independent party to certify its correctness?

(iii) Whether the "model by-laws" framed under the 2010 Act is deemed applicable to all Associations operating in buildings having more than 4 apartments with effect from date of its notification?

Writ Petition No. 46099 of 2012

Abhinav Jain v. State of U.P. and others

9. The petitioner is allottee of an apartment in the group housing society named as "Meadows Vista", developed by "Value Infracom India Pvt. Ltd.", 715, Naurang House, 21, K.G. Marg, Cannaught Place, New Delhi-respondent No. 4, of which building plans were sanctioned by the GDA in the year 2007. He was allotted an apartment bearing No. D-065 on 6th floor area 1270 sq. feet for total price of Rs. 21.75 lacs including basic sale price of Rs. 18.83 lacs vide builder buyer agreement/purchase agreement dated 25.4.2009.

10. The building plans were sanctioned under GDA Byelaws 2000, applicable at the relevant time, which made it mandatory for every housing scheme to have a Community Centre and "Free To FAR" area of 400 sq. mtrs. for building community facilities; a car parking area in the prescribed ratio of 1.25 parking (ECS) per 1000 sq. mtrs. of built up area; 15% green area in the scheme; (35% of the plot area to be covered under the project, and rest 65% to be open area); stilt area to be used for parking area, which cannot be converted into apartment.

11. It is stated in the writ petition that initially the advertisement and sale brochure was supplied with copies of sanctioned building plan of GDA dated 21.12.2007, with the sale documents and other relevant papers. The buyers were informed about the modern and technically superior architecture, sewerage system with power backup, and water supply, walk ways, open park area with ample green area and open space and other amenities like club, swimming pool, open and close parking area, play area for different groups. The building plans duly approved by the GDA in accordance with the National Building Code and GDA Building Byelaws were sanctioned under the total permissible Floor Area Ratio at 1.5. The FAR is defined in the Regulations as: "FAR Means the Quotient Obtained by Dividing Total Covered Area, Plinth Area on all Floors, by the Area of the Plot".

12. It is stated that the building project was inordinately delayed beyond the promised date of completion in April, 2010. The respondent did not share in details of the project status and handing over schedule with the respective buyers, putting them under the burden of paying rent for the accommodation hired by them. In or around 2010 Value Infracon India Pvt. Ltd. The developer secretly applied for amendment of the Group Housing Scheme Plan 2007, without demanding written consent of the intending purchasers proposing constructions of additional floors, additional buildings and parkings in the open and common areas shown in the original plans. The amended plans were released in April, 2010 after the U.P. Apartment Act, 2010 came into force, which prohibits amendment in original plan after the original plans have been released and constructions permission have been issued.

13. The petitioner made a detailed representation to the Vice Chairman, GDA on 11.5.2012 enquiring about the legalities of the proposed additional constructions and the plots besides issuing the NOC and the completion certificate to which no reply was given. The petitioner obtained an amended plan from GDA, wherein extra floors were to be added to the 10 storied building without re-enforcing the old foundation in areas, which is earthquake prone.

14. The petitioner relies upon the provisions of Section 4(4) of the U.P. Apartment Act, 2010, which prohibits promoter to make any alteration in the plan specification and other particulars without previous consent of the intending purchaser, architect, project engineer and obtaining required permission by prescribed sanctioning authority, and Section 5(3)(b) of the U.P. Apartment Act, 2010, which provides that the percentage of undivided interest in the common

areas and facilities shall not be separate from the apartment to which it pertains and shall be deemed to be conveyed or encumbered with the apartment even though such interest is not expressly mentioned in conveyance or other instrument.

15. It is stated in the writ petition that the amended plan enabled the promoter to encroach upon the common undivided open park areas for construction of new building. The undivided open park area comes under the definition of the common areas and facilities. Extra floors and extra building have been added to original sanctioned plans in the declared group housing society, which is not permissible. The developer is under statutory obligation to disclose the details of the common areas and facilities in the declaration. The petitioner has relied upon the judgment of the Supreme Court in *Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Ltd.*, in support of his submissions and has prayed for quashing the revised plan dated 1.4.2010 approved by GDA for construction of new building/extra floor/building, not to release any further building plans in respect of group housing society and for direction to quash the allotment of 33% purchasable FAR to the promoter.

16. The following questions of law arise for consideration in this writ petition:

1. Whether the alteration permitted by GDA in the "common park area" original sanctioned plan without the prior consent of the petitioner/allottee is liable to quashed?
2. Whether the GDA is required to demand a NOC from the petitioner and other allottees before allowing any alteration in the building plan?
3. Whether additional FAR provided on the basis of the plot size is the common property of the allottees?

Writ Petition No. 15782 of 2010

Sun Tower Residents Welfare Association v. Ghaziabad Development Authority and others.

17. The petitioner is group housing society named as "Sun Tower Residents Welfare Association" registered on 30.8.2008 with more than 100 members, who are owners and residents of the apartments constructed by GDA and Shipra Estate Ltd.-respondent Nos. 1 and 6 respectively with its registered office at D-32, Laxmi Nagar, Main Vikash Marg, Delhi. The GDA Housing Project in 10, Vaibhav Khand did not do well due to lack of civic amenities. The entire Indira Puram Colony was reeling under sewer power cuts and erratic water supply. The GDA, therefore, found it appropriate to hand over its project to private developer for which it invited tenders. The Shipra Estate Ltd.-respondent No. 6 submitted a tender on 29.3.2000 for purchasing plot for sale for the purpose of developing group housing scheme at 10, Vaibhav Khand, Indira Puram, Ghaziabad of plot area of approximately 2,43,242.63 sq. mtrs. An area of 370 sq. mtrs. of "Mazar" was left out from the allotment. The MOU between respondent Nos. 1 and 6

safeguards the interest of prospective buyers and RWA. The original plan submitted by the builder was subsequently sanctioned by GDA on 3.10.2002, with a condition that the allotted land can only be used for residential purposes with small percentage of shops to help the residents to sustain themselves in the plot. It could not have been used for commercial purpose like corporate marketing office or sample flats on other plots.

18. The advertised group housing scheme promised a number of incentives and allotments were made accordingly. The sale brochure was supplied to prospective buyers with the approval of GDA alongwith copies of MOU. The buyers were promised modern and technically superior electrification, sewerage system and 100% power backup and water supply, well defined concrete roads and walk ways, 100 acres of apartment land with ample green and open space, parks, amenities like Community Centre, Swimming Pool, Primary and High Schools, open and basement parking area, play area for different groups. The sanctioned plan proposed fixed number of units and blocks and blocks of Types A, B, C, D and E besides Commercial Centre (G+3), Shopping Centre (G+2), High School (G+3) and Nursery/Primary School with permissible floor area ratio at 1.5 i.e. 35% of plot area.

19. It is stated in the pleadings in the writ petition that the GDA Building Bye-laws 2000 and National Building Code, 1983 as amended in 1997, laid down extra conditions to be followed for building plans and constructions for multistoried buildings apart from general requirements. The MOU and Regulations may clearly mention all the social facilities, common amenities, open area ratio to population, placement of DG set and transformers, fire fighting equipments and other safety features for sanctioning. The original building plans were amended by GDA on 6.1.2005 on the alleged subsequent permission allowed for better utilisation of the plot with existing building. The permission enhanced number of floors, site, office transformers and generator rooms encroaching upon common areas. The amendment far exceed the permissible FAR of 1.5.

20. It is submitted that the GDA in collusion with Sun Shipra Suncity Phase-2 flouted the building byelaws to the detriment of the residents, the details of which are given in the writ petition as follows:

(2) 2005 (First Modified Plan) FAR utilized 2.0:

- * Sizeable part of open area inside both the parks were taken away to install transformer and DG sets.
- * Extra blocks of both Type-A and Type-B were sanctioned in designated open area and area meant for DG sets and transformers.
- * One extra building of G+33 at SITE-2 has been proposed
- * TYPE-E (G+15) has been raised to G+33

- * TYPE-C (G+20 residential cum shopping) has been converted into a commercial cum residential cum Hotel complex.
- * One new (G+33 residential building) has been proposed in place of parking area (Open) for shopping complex.
- * A big marketing office in the garb of site office was sanctioned to carry out booking and marketing for all projects of developer in a large part of the open park area.
- * FAR way beyond the 1.5 limit set in the MOU.

Additional structures

- * More blocks of Type-A and Type-B
- * 18 extra floors sanctioned in Block-E
- * 13 extra floors sanctioned in Block-C
- * Parking area meant for shopping complex converted into G+33 residential building proposed.
- * Position of Shopping center shifted for creating space for new buildings.
- * Hotel and commercial space created in the residential plot against the terms of MOU.
- * Open area reduced to almost half.
- * Marketing office is made in the open park area.
- * Present FAR exceeds the 1.5 allowed in the MOU & GDA bylaws.
- * Gensets are placed in close proximity to residential flats in designated drive way.

21. It is submitted that the GDA permitted changes in the original plan to accommodate the developer, which amounts to colourable exercise of power. New blocks were allowed to be added including encroachment of park area and designated open area for commercial office, hotel and transformers for commercial gains and saving expenditure. The facilities provided in MOU namely high school and primary school, swimming pool, health centre and community centre have not been provided and constructed either because flats were sold long back without obtaining the mandatory completion certificate with promise to complete the building. The promoter has overshot permissible FAR of 1.5 thereby taking advantage of the valuation of land and subsequent costing of flats for which full payments were accepted after completion of formalities in the year 2003-04 itself. These violations have put the life and property of the apartment owners at risk. The adjoining roads and other infrastructure of the plot is not capable of handling constructions and density of population beyond 1.5 FAR. Even after 9 years of signing the MOU the respondent Nos. 1 and 6 have failed to

complete the project and provide for social facilities. The residents are facing serious hardships on account of acute shortage of open area, security problems, and absence of fire fighting equipments.

22. The petitioners have prayed for directions to GDA to strictly enforce the terms of MOU and original site plan, to quash all amendments made to the initial sanction plan directing GDA to install common assets like sound proof DG sets, electrical cables, water pipelines, water storage tanks for Ganga water, sewer line, fire fighting equipments, to stop commercial use and handover the site office and 3 sample flats blocks as space for social facilities and to collect all fines from the developer for not completing the Sun Towers and the whole project within time. The petitioners have also prayed for directions to GDA to extend the tenure of lease of respective flat owners to compensate the period when full facilities could not be availed and for making available maintenance corpus as fixed deposit with the RWA in separate account to cover the extra maintenance cost of the project and other reliefs. The Writ Petition was filed on 22.3.2010, when the U.P. Apartment Act, 2010 had not come into force.

23. In the short counter-affidavit of Shri Ravindra Pal Singh, Asstt. Officer of Shipra Estate Ltd. it is submitted that respondent Nos. 1 to 5 permitted respondent No. 6 to give possession of the residential flats in high rise building without obtaining necessary completion certificate is not correct. Shipra Sun City was developed in 61 acres. The area had to be developed on behalf and for GDA in phases. The possession order given after completion of civil work/constructions including common facilities. Individual apartments have been furnished except fitting in bathrooms to avoid thefts and to be completed before delivery of possession. The flats were transferred on behalf of GDA. The allotment letter of Flat No. STC-702 at 7th floor dated 9.11.2004 has been annexed in proof thereof.

24. It is further stated in the short counter-affidavit that under the arrangement with the buyers of the apartments, the buyer paid maintenance charges and agreed to contribute 1/2% of the price of the flat per year towards a Reserved Fund, for major repairs, replacement of machinery and equipments of the building with interest liability of 21% for defaults and delays. The sale-deed of Flat No. STC-803 in favour of Anjan Kumar Sinha and Mala Sinha have been filed to establish the arrangement of payment of maintenance charges with complaint that most of the flat owners are not paying maintenance charges for which they had agreed. The completion certificate was issued by the GDA on 29.1.2010. No objection certificate was issued by the Fire Officer on 12.6.2009. It is stated that building or flats have been raised after obtaining sanction plan and have been constructed strictly in accordance with the approved plans.

25. In the counter-affidavit filed by Shri Virendra Prasad Pandey, Chief Fire Officer, Ghaziabad it is stated that building was inspected by team of officers including Chief Fire Officer, Meerut, Fire Station Officer, Ghaziabad and Fire Station-II Officer, Ghaziabad, who found fire fighting system in accordance with

the norms fixed by the National Building Code of India, 2005 and as such no objection certificate was issued on 11.6.2008. It was renewed on 12.6.2009. An inspection was made on 8.3.2010 by the Fire Station Officer, Ghaziabad in which some deficiencies were found in fire fighting system for which a notice was given on 27.3.2010. The directions given in the notice are being monitored for compliance and that the building will be maintained in accordance with the fire safety and fire fighting norms.

26. In the counter-affidavit of Shri Pramod Kumar Sharma-II, Assistant Engineer on behalf of Ghaziabad Development Authority, it is stated that the writ petition on behalf of the petitioner is not maintainable as disputed questions of law cannot be decided in the writ petition. A Writ Petition No. 73453 of 2005, Suditta Kumar Pal & 14 others v. GDA, was disposed of on 5.12.2005 directing the GDA to consider the objections, in pursuance thereof the representation has been decided by the GDA considering the complaints and giving satisfactory reply to all the objections regarding open areas, DG sets, transformers, construction of buildings with reference to the directions, which have been given to Shipra Estate Ltd. to make constructions strictly in accordance with the plans and all other building norms including the safety features for fire fighting. A partial completion certificate was issued on 6.10.2008 for the partial completion in accordance with the building plans sanctioned on 27.8.2004, according to which Type AK 70 Block, Type B 89 Block Shopping Centre and Site Office were completed. Site at 10 Vaibhav Khand, Indirapuram with directions to obtain completion certificate on completion of the entire constructions and to comply with the conditions of MOU and the directions issued by the Chief Fire Officer in his NOC. The GDA also informed Shipra Estate Ltd. that it will be responsible for structural safety and safety of other equipments for maintenance.

Writ Petition No. 12110 of 2013

Olive County Apartment Owners" Association v. State of U.P. and others

27. In this writ petition filed on 2.3.2013, the RWA of Olive County consisting of 16 towers (A-1 to A-8), (B-1 to B-4) and (C-1 to C-4) it is stated that on 20.5.2012 a sizable number of persons owing apartments approached the builder/developer for forming an association of apartment owners of Olive County in compliance with Section 14(2) of the U.P. Apartment Act, 2010. On receiving a representation the developer, who has not been impleaded as party respondent asked for some time to discuss the matter. On 17.6.2012 the petitioner received letter dated 15.6.2012 issued on behalf of M/s. ABA Builders consenting to form an association, with suggestion that the association should be formed in conformity with the notification dated 16.11.2011 issued by the Chief Secretary, Government of U.P., who has made model byelaws, notified u/s 14(6) of the Act to be adopted in its first meeting. A notice was issued on 18.6.2012 to convene meeting on 8.7.2012 and 15.7.2012 requesting all apartment owners to discuss the draft and to frame byelaws. In these meetings discussions were held. The minutes of meeting signed by office bearers and members of newly

established body of RWA verify the resolutions to get the memorandum of association and byelaws registered, on which the President, the office bearers and members of RWA approached the office of Deputy Registrar, Firms, Societies and Chits, Mohan Puri, Meerut (Deputy Registrar), and applied for registration.

28. In the meantime, the petitioner received a notice/letter dated 6.8.2012 issued by the Registrar with that a group of persons namely Olive County Residents Welfare Association has applied for registration of RWA using the word Olive County without following U.P. Apartment Act, 2010, and taking consent of the promoter. The respondent No. 4 instead of participating in the process of formation of association has formed a body of their close group with dishonest intention to capture the maintenance and other affairs of the Olive County. The petitioner filed objections on the application for registration of respondent No. 4-association on 23.8.2012, on which a letter was received from the Deputy Registrar on 31.8.2012 inviting further comments of both the parties. In compliance thereof the petitioner has submitted his comments.

29. The petitioner has prayed for directions to the Deputy Registrar, Firms, Societies and Chits, Mohan Puri, Meerut to provide immediate hearing to the petitioner as well as respondent No. 4 on their pending applications for registration of RWA and to decide the application of the petitioner association in accordance with the provisions of the U.P. Apartment Act, 2010.

The U.P. Apartment Act, 2010 and the Rules of 2011

30. The U.P. Apartment Act, 2010 replaced U.P. Flat Act, 1975 on 18.3.2010, and has been notified on 19.3.2010, giving special rights of ownership of individual apartment in a building and of an un-divided interest in the common areas and facilities appurtenant to such apartments to the apartment owners. The U.P. Apartment Act, 2010 has completely changed the legal status of apartment owners, giving them inalienable rights in the common areas and facilities appurtenant to the apartments fixing duties and liabilities of promoters including general liabilities in Section 4(a) of true and additional disclosure in writing of the intending purchaser, the rights and title to the land and the building in which the apartments are proposed to be constructed, all encumbrances, if any, on such land or building and any right, title, interest or claim of any person over such land and building. The promoter under sub-clause (c) of Section 4 of U.P. Apartment Act, 2010 is under liability to disclose in writing the plans and specifications approved by or submitted for approval to the local authority of the entire building of which such apartment forms part; the details of all common areas and facilities as per the approved lay out plan or building plan; the details of the design and specifications of works or and standards of the material etc. Sub-section (4) of Section 4 casts an obligation on the promoter not to alter the plans, specifications and particulars, after its sanction and disclosure to intending purchaser, without disclosing it to intending purchaser and a written agreement of sale is registered with the office of registering authority except minor changes and alterations that are required and are necessary due to architectural and

structural reasons duly recommended and verified by authorised Architect or Engineer after proper declaration and intimation to the owner and will not make such alterations without their previous consent. In no case such alterations will be made which are not permissible in the building by laws. Sub-section (4) of Section (4) of the U.P. Apartment Act, 2010 is quoted as below:

(4) After plans, specifications and other particulars specified in this section as sanctioned by the prescribed sanctioning authority are disclosed to the intending purchaser and a written agreement of sale is entered into and registered with the office of concerned registering authority, the promoter may make such minor additions or alterations as may be required by the owner or owners, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by authorised Architect or Engineer after proper declaration and intimation to the owner:

Provided that the promoter shall not make any alterations in the plans, specifications and other particulars without the previous consent of the intending purchaser, project Architect, project Engineer and obtaining the required permission of the prescribed sanctioning authority, and in no case he shall make such alterations as are not permissible in the building bye-laws.

31. The rights and obligations of apartment owners are provided in Section 5 of the U.P. Apartment Act, 2010, apart from exclusive ownership and possession of an apartment. The apartment owners also have been given special rights under sub-sections (1), (2), (3), (4) and (5) of Section 5 as follows:

CHAPTER III

RIGHTS AND OBLIGATIONS OF APARTMENT OWNERS

5. Rights of Apartment Owners.--(1) Every person to whom any apartment" is sold or otherwise transferred by the promoter shall subject to the other provisions of this Act, be entitled to the exclusive ownership and possession of the apartment so sold or otherwise transferred to him.

(2) Every person who becomes entitled to the exclusive ownership and possession of all apartment 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 area of the apartment in relation to the aggregate area of all apartments of the building.

(3) (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 and approval of the competent authority.

(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 apartment, even though such interest is not expressly mentioned in the conveyance or other instrument.

(4) The common areas and facilities shall not be transferred and 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.

(5) 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.

(6) The necessary work relating to maintenance, repair and modification or relocation of the common areas and facilities and the making of any additions or improvements thereto, shall be carried out only in accordance with the provisions of this Act and the bye-laws.

(7) The Association of Apartment Owners shall have the irrevocable right, to be exercised by the Board or Manager to have access to each apartment from time to time during reasonable hours for the maintenance, repairs or replacement or any of the common areas or facilities therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to any other apartment or apartments.

32. The obligation of the apartment owners in Section 6 in the same Chapter-III provided as follows:

6. Obligation of Apartment Owners.--(1) Each apartment owner shall comply strictly with the bye-laws and with the covenants, conditions and restrictions set forth in the Deed of Apartment, and failure to comply with any of them shall be a ground for action to recover sums due for damages, or for injunctive relief, or both, by the Manager or Board on behalf of the Association of Apartment Owners or in a proper case, by an aggrieved apartment owner.

(2) No apartment owner shall do any work which would be prejudicial to the soundness or safety of the property or reduce the value thereof or impair any easement or hereditament or shall add any material structure or excavate any additional basement or cellar or alter the external facade without first obtaining the consent of all the apartment owners.

Explanation: In this section, reference to apartment owners shall be construed, in relation to a building in any block, pocket or other designated area, the apartment owners of the concerned building in such block, pocket or other designated area.

33. The ownership, heritability and transferability of apartment is provided in Chapter-IV in Sections 7 to 11 as follows:

CHAPTER TV

OWNERSHIP, HERITABILITY AND TRANSFERABILITY OF APARTMENTS

7. Apartment to be heritable and transferable.--Each apartment, together with the undivided interest in the common areas and facilities appurtenant to such apartment, shall, for all purposes constitute a heritable and transferable immovable property within the meaning of any law for the time being in force, and accordingly, an apartment owner may transfer his apartment and the percentage of undivided interest in the common areas and facilities appurtenant to such apartment by way of sale, mortgage, lease, gift, exchange or in any other manner whatsoever in the same manner, to the same extent and subject to the same rights, privileges, obligations, liabilities investigations, legal proceedings, remedies and to penalty, forfeiture or punishment as any other immovable property or make a bequest of the same under the law applicable to the transfer and succession of immovable property.

Provided that where the allotment, sale or other transfer of any apartment has been made by any group housing co-operative society or association in favour of any member thereof, the transferability of such apartment and all other matters shall be regulated by the law; which may provide a transfer fee at a maximum rate of 2 percent but not less than 1 percent in any case of the sale value, applicable to such group housing co-operative society or association whosoever maintains the common areas and facilities. The transfer fee shall not be leviable in case of heritability.

8. Ownership of apartment shall be subject to conditions.--Where any allotment, sale or other transfer of any apartment has been made, whether before or after the commencement of this Act, in pursuance of any promise of payment, or part payment, of the consideration thereof, the allottee or transferee, as the case may be, shall not become entitled to the ownership and possession" of that apartment or to a percentage of undivided interest in the common areas and facilities appurtenant to such apartment until full payment has been made of the consideration thereof together with interest, if any due thereon, and where any such allottee or transferee has been inducted into the possession of such apartment or any part thereof in pursuance of such allotment or transfer, he shall, until the full payment of the consideration has been made continue to remain in possession thereof on the same terms and conditions on which he was so inducted into possession of such apartment or part thereof. There shall not be any hidden charges. All sale consideration shall be fixed either at the time of agreement IU sale or when the purchases are made final in writing as per provisions of this Act;

9. Right of re-entry.--(1) Where any land is given on lease by a person (hereafter in this section referred to as the lessor) to another person (hereafter in this section referred to as the lessee-which term shall include a person in whose favour a sub-lease of such land has been granted)-and any building has been constructed on such land by the lessee or by any other person authorised by him or claiming through him such lessee shall grant in respect of the land as many

subleases as there are apartments in such building and shall execute separate deeds of sub-lease in respect or such land in favour of each apartment owner before handing over the possession of apartment in such building to him. The lessor shall be duty bound to supply the plans and other legal documents to the lessee.

Provided that no sub-lease in respect of any land shall be granted except on the same terms and conditions on which the lease in respect of the land has been granted by the lessor and no additional terms and conditions shall be imposed by the lessee except with the previous approval of the lessor.

(2) Where the lessee has any reason to suspect that there had been any breach of the terms and conditions of the sub-lease referred to in sub-section (1), he may himself inspect the land on which the building containing the concerned apartment has been constructed, or may authorise one or more persons to inspect such land and make a report as to whether there had been any breach of the terms and conditions of any sub-lease in respect of such land and, if so, the nature and extent of such breach and for this purpose, it shall be lawful for the lessee or any person authorised by him to enter into, and to be in, the land in relation to which such breach has been or is suspected to have been committed.

(3) Where the lessee or any person authorised by him makes an inspection of the land referred to in sub-section (1), he shall record in writing his findings on such inspection [a true copy of which shall be furnished to the apartment owner by whom such breach of the terms and conditions of sublease in respect of the land appurtenant to the apartment owned by him has been committed (hereinafter referred to as the defaulting apartment owner)] and where such findings indicate that there had been any breach of the terms and conditions of the sublease in respect of such land, the lessee may, by a notice in writing, require the defaulting apartment owner to refrain from committing any breach of the terms and conditions of the sublease in respect of such land-or to pay in lieu thereof such composition fees as may be specified in the notice in accordance with such scales of composition fees as may be prescribed.

(4) The defaulting apartment owner who is aggrieved by any notice served on him by the lessee under sub-section (3) may, within thirty days from the date of service of such notice, prefer an appeal to the Court of the District Judge having jurisdiction (hereinafter referred to as the District Court), either challenging the finding of the lessee or any person authorised by him or disputing the amount of composition fees as specified in the notice, and the District Court may, after giving the parties a reasonable opportunity of being heard, confirm, alter or reverse those finding or may confirm, reduce or increase the amount of composition fees or set aside the notice.

(5) Where, on the breach of any terms and conditions of any sub-lease in respect of any land, any composition fees become payable, the defaulting apartment owner shall be deemed to have been guilty, of such breach and in default of

payment thereof it shall be lawful for the lessee to recover the amount or the composition fees from the defaulting apartment owner as arrears of land revenue.

(6) Where any composition fees are paid whether in pursuance of the notice served under sub-section (3) or in accordance with the decision of the District Court or a higher Court on appeal, no further action shall be taken by the lessee for the breach of the terms and conditions of the sublease in respect of the land in relation to which payment of such composition fees has been realised.

(7) If the defaulting apartment owner omits or fails to refrain from committing any breach of the terms and conditions of the sub-lease in respect of the land or, as the case may be, omits or fails to pay the composition fees in lieu thereof

(i) in accordance with the notice issued by the lessee under sub-section (3); or

(ii) where the finding of the lessee or the person authorised to inspect the land about any breach of the terms and conditions of any sublease in respect of the land or the amount of composition fees specified in the notice issued by the lessee are altered by the District Court on appeal or by any higher Court on further appeal, in accordance with the decision of the District Court or such higher Court, as the case may be; the lessee shall be entitled,

(a) where no appeal has been preferred under sub-section (4), within sixty days from the date of service of the notice under sub-section (3), or

(b) where an appeal has been preferred under sub-section (4), within sixty days from the date on which the appeal is finally disposed of by the District Court or, where any further appeal is preferred to a higher Court, by such higher Court, to exercise the right of re-entry in respect of the undivided interest of the lessee in the land appurtenant to the apartment owned by the defaulting apartment owner, and where such right of re-entry cannot be exercised except by the ejectment of the defaulting apartment owner from his apartment, such right of re-entry shall include a right to eject the defaulting apartment owner from the concerned apartment:

Provided that no such ejectment shall be made unless the defaulting apartment owner has been paid by the lessee such amount as compensation for such ejectment as may be determined in accordance with the prescribed scales of compensation.

(8) No appeal preferred under sub-section (4) shall be admitted, unless twenty-five per cent of the composition fees specified in the notice served on the defaulting apartment owner has been deposited to the credit of the District Court in savings bank account to be opened by the District Court in any branch of an approved bank:

Provided that the District Court may, on sufficient cause being shown, either remit or reduce the amount of such deposit, and the interest accruing on such deposit, shall ensure to the credit of defaulting apartment owner by whom such

deposit has been made:

Provided further that the amount of such deposit together with the interest due thereon shall be distributed by the District Court in accordance with the decision in such appeal, or where any further appeal has been preferred against such decision, in accordance with the decision in such further appeal.

(9) The defaulting apartment owner, who is aggrieved by the amount offered to be paid to him under the proviso to sub-section (7) as compensation for ejectment from his apartment may. Within thirty days from the date of such offer, prefer an appeal to the District Court and the District Court may, after giving the parties a reasonable opportunity of being heard,. Maintain, increase or reduce the amount of compensation.

(10) On the ejectment of the defaulting apartment owner from the apartment under sub-section (7), the lessee by whom such ejectment has been made may make a fresh allotment of the concerned apartment to any other person on such terms and conditions as he may think fit.

(11) Where any lessee omits or fails to take any action either in accordance with the provisions of sub-section (2) or sub-section (3) or sub-section (7) the lessor may, in the first instance, require the lessee by a notice in writing to take action against the defaulting apartment owner under sub-section (2) or sub-section (3) or, as the case may be, under sub-section (7), within a, period of ninety days from the date of service of such notice, and in the event of the omission or failure of the lessee to do so within such period, the lessor, may himself take action as contained in sub-section (2) or sub-section (3) or sub-section (7), and the provisions of sub-section (4) to sub-section (6) and sub-section (8) to sub-section (10), shall, as far as may apply to any action taken by him as if such action had been taken by the lessee.

(12) for the removal of doubts, it is hereby declared that no work in any apartment by the owner thereof shall be deemed to be a breach of the terms of the sub-lease in respect of the land on which the building containing such apartment has been constructed unless the work is prohibited by sub-section (2) of Section 6.

10. Purchase or person taking lease of apartments from apartment owners to execute an undertaking.--Notwithstanding anything contained in the Transfer of Property Act, 1882 (Act 0.4 of 1882), or in any other law for the time being in force, any person acquiring any apartment from any apartment owner by gift, exchange, purchase or otherwise, or taking lease of an-apartment from an apartment owner for a period of thirty years or more, shall

(a) In respect of the said apartment, be subject to the provisions of this Act: and

(b) Execute and register an instrument in such form, in such manner and within such period as may be prescribed giving an undertaking to comply with the covenants, conditions and restrictions, subject to which such apartment is owned

by the apartment owner aforesaid.

11. Encumbrances against apartments.--(1) the owner or each apartment may create any encumbrance, only against the apartment owned by him by executing an instrument and registering it in the office of the registering authority and the percentage of the undivided interest III the Common areas and facilities appurtenant to such apartment in the same manner and to the same extent as may be created in relation to any other separate parcel of property subject to individual ownership:

Provided that where any such encumbrance is created, the apartment in relation to which such encumbrance has been created shall not be partitioned or subdivided.

(2) In the event of a charge or any encumbrance against two or more apartments becoming effective, the apartment owners of the separate apartments may remove their apartments and the percentage of the undivided interest in the common areas and facilities appurtenant to such apartments from the charge or encumbrance on payment of the fractional or proportional amounts attributable to each of the apartments affected and on such payment, the apartment and the percentage of undivided interest in the common areas and facilities appurtenant there to shall be free of the charge or encumbrance so removed:

Provided that such partial payment shall not prevent the person having a charge or any of the encumbrance from proceeding to enforce the rights, in relation to the amount not so paid, against any other apartment and the percentage or undivided Interest in the common areas and facilities appurtenant to "such apartment."

34. The declaration is defined in Section 3(m) to mean declaration referred to in Section 12. The contents of declaration in Section 12 and the registration of deed of apartment enclosing the true copy of declaration made u/s 12 to such deed of transfer by the promoter to be filed in the office of the competent authority, is the most important provision under the U.P. Apartment Act, 2010. A separate Chapter V provided for declaration of building and deed of apartment as follows:

CHAPTER V

DECLARATION OF BUILDING AND DEED OF APARTMENT

12. Contents of declaration.--(1) The declaration shall be submitted by a promoter in the office of the competent authority in respect of a building constructed after the commencement of this Act in such form, within such period and in such manner as may be prescribed and shall contain full and true particulars of the following, namely:

(a) Description or the land on which the building and improvements are, or are to be located, and whether the land is free hold or lease hold;

(b) Description of the building stating the number of stories and basements, the number of apartments and principal materials or which it is or is to be constructed;

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

(d) description of the common areas and facilities;

(e) description of the common areas and facilities if any, stating to which apartment"s, their use" is reserved;

(f) value of the property and of each apartment, and the percentage of undivided interest in the common areas and the facilities appertaining to each apartment and its owner, for all purposes, including voting;

(g) particulars of encumbrances, if any, on the property of apartment and its undivided interest at the date of the declaration;

(h) such other particulars as may be prescribed.

(2) The declaration referred to in sub-section (1) may be amended under such circumstances and in ouch manner" as may be prescribed.

13. Registration of Deed of Apartment.--No promoter or an apartment owner shall transfer or hand over the, possession of any apartment constructed after the commencement of this Act without executing an appropriate transfer deed and also getting it registered under the provisions of the Registration Act, 1908 and it shall also be incumbent, for such promoter or apartment owner to enclose a true copy of the declaration made u/s 12 to such deed of transfer.

35. The U.P. Apartment Act, 2010 provides for an association of apartment owners and byelaws for the registration of the affairs of such association, for administration of the affairs in relation to the apartments and the property appertaining thereto and for the management of common areas and facilities. Sub-section (2) of Section 14 enjoins joint responsibility of the promoter and apartment owners to form an association. The responsibility of getting the association registered has been given to the promoter to get the association registered, when such number of apartments have been handed over to the owners, which is necessary to form an association or 33% of the apartments, whichever is more by way of sale, transfer or possession provided the building has been completed alongwith all infrastructure services and completion certificate obtained from the local authorities. Sub-section (3) of Section 14 caused an obligation for a prospective apartment owner to become member of the association within four weeks of receipt of the written intimation to the formation of such association. On formation of the association of the apartment owners under sub-section (2), sub-section (5) provides that the management of the affairs of the apartment regarding their common areas and facilities shall be

deemed to be transferred from the promoter to the Association which shall thereupon maintain them; provided that till all the apartments are sold or transferred, the promoter shall proportionately share the maintenance cost of common areas and facilities. The model bye-laws made by the State Government and notified in the gazette under sub-section (6) of Section 14, which provide for (a) the manner in which the Association of Apartment Owners is to be formed; (b) the election, from among apartment owners, of a Board of Management by the members of the Association of Apartment Owners; (c) the number of apartment owners constituting the Board, the composition of the Board and that one-third of members of the Board shall retire annually etc. include in (j) election of a President of the Association of Apartment Owners from amongst the apartment owners, who shall preside over the meeting of the Board and of the Association of Apartment Owners and of Secretary under (i) to be the ex-officio member of the Board to be keeper of the minute books, provided in sub-section (7) and other provisions of bye-laws under sub-section (8) provide for a uniform and standard bye-laws, which have been notified as model bye-laws under sub-section (6) of Section 14 vide Notification No. 3977/8-1-11-115 D.A./02-TC-1 dated 16.11.2011. The amendment to the bye-laws under Bye-law 58 made by the association in a duly constituted meeting for such purpose and no amendment is to take effect unless approved by the owners representing atleast 2/3rd of the total number of units in the building with the prior approval of the competent authority.

36. The contents of declaration and registration of deed of apartment under Sections 12 and 13 are quoted as follows:

12. Contents of Declaration.--(1) The declaration shall be submitted by a promoter in the office of the competent authority in respect of a building constructed after the commencement of this Act in such form, within such period and in such manner as may be prescribed and shall contain full and true particulars of the following, namely:

(a) Description of the land on which the building and improvements are, or are to be located, and whether the land is free hold or lease hold;

(b) Description of the building stating the number of stories and basements, the number of apartments and principal materials of which it is or is to be constructed;

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

(d) description of the common areas and facilities;

(e) description of the common areas and facilities if any, stating to which apartment's, their use is reserved;

(f) value of the property and of each apartment, and the percentage of undivided

interest in the common areas and the facilities appertaining to each apartment and its owner, for all purposes, including voting;

(g) particulars of encumbrances, if any, on the property of apartment and its undivided interest at the date of the declaration;

(h) such other particulars as may be prescribed.

(2) The declaration referred to in sub-section (1) may be amended under such circumstances and in such manner" as may be prescribed.

13. Registration of Deed of Apartment.--No promoter or an apartment owner shall transfer or hand over the, possession of any apartment constructed after the commencement of this Act without executing an appropriate transfer deed and also getting it registered under the provisions of the Registration Act, 1908 and it shall also be incumbent, for such promoter or apartment owner to enclose a true copy of the declaration made u/s 12 to such deed of transfer.

37. The U.P. Apartment Act, 2010 and the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Rules, 2011 (The Rules of 2011) notified on 16.11.2011 provide for a complete code for regulating the rights, duties and liabilities of the promoters and apartment owners. The formation of an association, resolution of disputes, offences and penalties with the ultimate control vested in the State Government u/s 27 of the Act. The Act has been given overriding effect u/s 31 notwithstanding anything inconsistent therewith contained in any other law for the time being enforced. Section 29 provides for removal of doubts that the provisions of the Transfer of Property Act, 1882 shall in so far as they are not inconsistent with the provisions of the Act apply to the transfer of any apartment, together with its undivided interest in the common areas and facilities appertaining thereto made by the owner of such apartment, whether such transfer is made by sale, lease, mortgage, exchange, gift or otherwise as they apply to the transfer of any immovable property. Section 28 exempts the application of Section 25 and 26 of the Act relating to offences and offences of companies, if the promoter is local authority, or any other statutory body constituted for the development of land or housing or a company or a body wholly owned or controlled by the Government created for the development of land or housing or promotion of industry and in such case no suit, prosecution or legal proceedings shall lie against Government or any officer or other employee of the Government in respect of anything which is in good faith done or intended to be done by or under the Act, with further power u/s 32 to exempt if the Government is of the opinion that the operation of any provisions of the Act cause any undue hardship, by a general or special order, any class of person or areas from the provisions of the Act.

38. The U.P. Apartment Rules, 2011 provide for a form of declaration under Rule 3 to be submitted on Form-A giving all the requirements, which are necessary to be provided under the Act for the benefit of the promoter and the apartment owners regarding common areas and facilities, u/s 3(1) of the Act, limited

common areas and facilities u/s 3(s) of the Act and independent areas as defined in Section 3(p) of the Act. The amendment of declaration under Rule 4 is permitted for any clerical or arithmetical mistake or error arising therein from any accidental slip or omission under Rule 4(a) or when the amendment is necessitated by reason of any revision in the sanction plan of the building in (b) or where the proposed amendment is just and reasonable under (c) provided the amendment shall not violate the building bye-laws, sanctioned building plan or the contractual obligation of the promoter. A written application in this behalf has to be moved specifying reasons to the competent authority under sub-rule (2) and on the receipt of such application a written notice will be given to the association of the apartment owners by the competent authority under sub-section (3) inviting objections and also publication of a public notice in two daily newspapers circulating in that locality. The amendment shall be considered by the competent authority under sub-rule (4) after hearing the objector, association of apartment owners and promoter and after passing such order as it deems fit and expedient with copy of the order under sub-rule (5) to be sent by the competent authority to the promoter, association or apartment owners or the objector as the case may be.

39. The contents of declaration on Form-A under Rule 3 not only provides for details of the property in Annexure "A" but also the details of the apartments in Annexure "B", it also contains the details of covered area of apartment and total covered area of common areas and facilities/limited common areas and facilities in Annexure "C". The details of the common area and facilities of the building to which the declaration relates in Annexure "D"; details of the limited common areas and facilities of the building to which the declaration relates in Annexure "E"; the Details of the "Independent Areas" of the building to which the declaration relates as well as Schedule "A" giving specifications of constructions including (1) foundation; (2) flooring; (3) doors; and hardware (4) windows; (5) internal finish; (6) external finish; (7) sanitary ware and fittings; (8) electrical and (9) plumbing and water line. These details have to be furnished alongwith Form "A" by the promoter in the presence of witnesses and is in the form of solemn declaration made by him before the Prescribed Authority.

40. The U.P. Apartment Act, 2010 and the Rules of 2011 have taken care of every detail for providing ownership of an individual apartment, undivided interest in the common areas and facilities, the delineation of common areas and facilities to be provided in the declaration, formation of association and the rights, duties and liabilities of the promoter and apartment owners. Rule 3 of the U.P. Apartment Rules, 2011 provides for formation of declaration under sub-section (1) of Section 12. The declaration shall be submitted by the promoter under sub-section (1) of Section 12 in Form-A appended to the Rules within a period of 12 months from the date of approval of the plans. Where the building has been constructed or is under construction prior to the commencement of these Rules declaration shall be submitted within 90 days.

41. The "competent authority" under Rule 2(c) of the Rules of 2011 means Vice Chairman of the Development Authority in whose development area the building is situated or Collector of the district, where no such development authority exists. Though we find that no specific power has been given to the competent authority to decide any dispute between the apartment owners and promoters or the apartment owners interse, the provisions of the Act namely the prior permission of the competent authority under sub-section (4) of Section 25 in case of any complaint for any offences for the Court to take cognizance, the obligation of the competent authority under sub-section (1) of Section 27 to carry out such directions as may be issued to it from time to time; the lodgment of the declaration with the competent authority u/s 12(1) and any amendment and the resolution of disputes on such amendment under rule 4(4) of the U.P. Apartment Rules, 2011, clearly enjoins that if a dispute or disputes is resolved between the disputants in the meeting of the association of apartment owners of which promoter is necessary member under sub-section (2) of Section 14, the dispute has to be first raised before the competent authority and thereafter to be raised before the State Government under sub-section (3) of Section 27 of the Act, which has control and is accountable for the efficient implementation of the Act and the powers of removal of doubts and removal of difficulties u/s 29 and 33 of the Act.

Issues for Adjudication

42. Following issues have been raised by the petitioners for consideration of the Court:

- (i) Whether the original plan, which was shown to purchasers, could be amended without obtaining previous consent of intending purchasers as stated in proviso to Section 4(4) after 19.3.2010/July 2010?
- (ii) Whether Purchasable FAR of 33% allows the builder to construct new stones in existing building to encroach common areas and facilities?
- (iii) Whether the policy of Purchasable FAR is contrary to the Statute, illegal and liable to be struck down?
- (iv) Whether the builder is entitled to run community center as a private club or claim any part of common areas and facilities as private property? (In some cases the land is freehold)
- (v) Whether Section 14(2) gives any right to the builder to resist/disallow formation of a RWA by the apartment owners in Violation of Article 19(1)(c) of the Constitution of India?
- (vi) Whether intending purchaser u/s 4(4) would also include residents living in the same society who object to amendments in original plan after 19.3.2010/July 2010 with the concurrent reading of Section 41(3) of U.P. Urban Planning and Development 1973?

(vii) Whether the builder can resist (deemed) handing over of common areas and facilities after formation of RWA or after obtaining completion certificate and how does Competent Authority enforce deemed handed over if the builder refuses to honor the law?

(viii) Whether apartment owner would include spouses/major children/family members of apartment owners so as to enable them to become member of RWA or shall it be limited to blood relatives on the basis of SPA or no one can be passed on the power?

(ix) Whether the Deputy Registrar can resist recognition to RWA on the ground that byelaws framed under the Rules can't be implemented without obtaining clarification from Registrar?

(x) Whether declaration as provided under Rules in a mandatory obligation on part of all builder of buildings having more than 4 apartments constructed or under construction in the State of U.P. to be provided to the Development Authority and what consequences would follow for non-compliance?

43. In addition the following issues have also been raised for adjudication in these writ petitions:

Writ Petition No. 33826 of 2012, Designarch Infrastructure Pvt. Ltd. and another v. Vice Chairman, GDA and others

(1) Whether the promoter can resist handing over of society to duly constituted RWA on the pretext that some members are not owners.

(2) Whether the promoter can challenge orders passed by GDA to hand over complex to RWA alongwith maintenance deposit of 9.5 crores.

Writ Petition No. 46099 of 2012, Abhinav Jain v. State of U.P. and others

(1) Whether additional constructions have been made without obtaining consent under the Act by amending the original map which was shown to the intending purchaser.

(2) Whether the promoter has caused encroachment on common undivided open park area by constructing new buildings.

(3) Whether purchasable FAR of 33% can be allotted to builder after allotment of flats and start of construction approving change in original plan.

44. Shri P.K. Jain, Sr. Advocate; Shri Navin Sinha, Sr. Advocate and Shri Kunal Ravi Singh submits that on the enforcement of the U.P. Apartment Act, 2010 on receiving the assent of the Governor on 18.3.2010 and its publication in the U.P. Gazette on 19.3.2010 provisions of the Act came into force and could not have awaited the notification of the Rules on 16.11.2011 and the Model Bye-Laws by notification of the same date on 16.11.2011. The Act is complete code in itself. The definition of competent authority, form of declaration, the amendment of declaration, grant of permission for prosecution and undertaking to be filed by

the person acquiring apartment as well as model bye-laws would not have arrested the application of the provisions of the Act. They submit that as soon as the building containing four or more apartments or two or more building in any area designated as block each containing two ore more apartments with total of four or more apartments as defined in Section 3(g) came into existence and is occupied by the apartment owners. The provisions of the Act become applicable to the building. The declaration of building and the deed of apartment under Chapter V does not depend upon the completion certificate to be given by the local authority and that as soon as such number of apartments have been handed over to the owners, which is necessary to form an association for 33% of the apartments, whichever is more by way of sale, transfer or possession provided the building has been completed alongwith all infrastructure services, the provisions of Chapter-II providing for duties and liabilities of Promoters and Chapter-III providing for rights and obligations of apartment owners become operative. The declaration has to be submitted u/s 12 by the promoter in respect of a building as defined in sub-section (3)(g) after the commencement of the Act. Section 13 providing for registration of deed of apartment after the commencement of the Act is mandatory to be made under the provisions of the Registration Act, 1908, which also provides for promoter or apartment owner to enclose true copy of the declaration made u/s 12 to such deed of transfer. The formation of a association is mandatory under sub-section (2) of Section 14 and is the joint responsibility of the promoter and the apartment owners with the obligation upon the promoter to get the association registered.

45. It is submitted by Shri Kunal Ravi Singh appearing for the petitioners in Writ Petition No. 33826 of 2012, 46099 of 2012 and 15782 of 2010 that the rights and liabilities of the apartment owners, promoters, development authorities/local bodies in the State Government were earlier governed by the U.P. Flat Act, 1975 and Rules of 1984 made thereunder, which had come into effect in October, 2002 and which defined common areas, facilities and restrictions on the partition and sub division of the flats in the undivided interest in common areas and facilities even if such interest is not expressly mentioned in the conveyance or other instruments. Section 5(7) of the U.P. Flat Act, 1975 gave association of owners of flats irrevocable rights vis-a-vis common areas and facilities. The Act provides for common profits and expenses in Section 9; contents of declaration in Section 10, contents of covenants of flats in Rule 9 etc. The Act and the Rules have not been implemented. The last decade has witnessed a boom in the real estate sector. With the cost of land increasing day by day the emphasis in residential sector is on construction and sale of apartments rather than construction of individual houses and bungalows. The construction companies have acquired and have been allotted land for construction of large number of apartments and apartment blocks. In the last ten years thousands of apartments have been constructed in the State.

46. It is further submitted that the U.P. Apartments Act, 2010 does not provide for registration of the association afresh after the enforcement of the Act. The

Societies, which were earlier formed will be governed by the provisions of the Act subject to the changes to be brought about in accordance with Section 14 namely the promoter to be a member of the association under sub-section (2), the obligation of every prospective apartment owner to become member of the association within four weeks of receipt of a written intimation about the formation of the association under sub-section (3) and the adoption of the model bye laws without any departure, variation, addition or omission except with the prior approval of the competent authority. The "apartment owner" is defined u/s 3(d) to mean the person or persons owning an apartment or the promoter or his nominee in case of unsold apartments and an undivided interest in the common areas and facilities appurtenant to such apartment in the percentage specified in the Deed of Apartment and includes the lessee of the land on which the building containing such apartment has been constructed, where the lease of such land is for a period of thirty years or more. The "promoter" is defined in Section 3(w) to mean a person, company, firm, association or co-operative society, as the case may be, by which, or by whom the building has been constructed. The "joint family" is defined in Section 3(q) means a Hindu undivided family, and in the case of other persons, a group or unit, the members of which are by custom, joint in possession or residence. The "association of apartment owners" u/s 3(e) means all the owners of the apartments therein, acting as a group in accordance with the bye-laws. A "person"s defined in Section 3(u) includes a firm and a jointly family, and also includes a group housing co-operative society.

47. Shri Kunal Ravi Singh submits that the definition of the apartment owner, taking into consideration the objects and reasons for which the Act has been enacted, and the rights and liabilities of the apartment owners read with Rules and Model Byelaws do not confine the rights and liabilities in the common areas and facilities and the rights of membership only to the allottees or the purchaser of the flat named in the allotment letter or deeds of transfer. The apartment owner in the context of the object and purpose of the Act taking into consideration the complexities of life will also include the spouse and the immediate family members of the allottee/owner of the apartment.

48. Shri Singh submits that apartment may be allotted/owned by a person individually or jointly or a company, firm, association or a society and in that case the apartment may be legally allowed to occupy by a family members, which would include immediately family member in accordance with the personal law applicable to the person or a lawful tenant of the allottee/owner of the apartment, it will also include officer or employee of the company/firm or association, which owns an apartment under the valid allotment letter and its tenant. It will further include a person holding valid power of attorney of the allottee/owner, whether it is owner either individually jointly or in the case of company/firm/society. An occupier without any right of occupation either as a family member, tenant, employee or person holding power of attorney will not be included in the definition of apartment owner.

49. It is further submitted that the conjoint reading of the provisions of the Act do not make the rights, duties and obligations of the promoter and apartment owners to wait for the completion certificate, which may take a long time for complying the provisions of the Act to the building. It is submitted that original plan, which is shown to the apartment owners and details of which form the contents of declaration u/s 12(1) cannot be amended without the consent of the owners of the apartments and this position has been made much clear after the enforcement of the U.P. Apartment Rules, 2011 notified on 16.11.2011. The declaration has to be given in respect of building constructed after the commencement of the Act and since such declaration is not required to wait for completion certificate, provisions of sub-section (2) of Section 14 become applicable on the formation of an association on the sale, transfer or transfer of 33% of the apartment. The duties and liabilities of the promoter and the rights and obligations of the apartment owners for exclusive ownership and possession of the apartment and such percentage of undivided interest in common areas and facilities as may be specified in deed of apartment, computing the areas of the apartment in relation to carpet area of all apartment of the building and such percentage of undivided interest in sub-section (3)(a) of Section 5 having a permanent character, which cannot be altered without the written consent of apartment owners and approval of the competent authority, means that any benefit extended including purchasable FAR has to be shared with the apartment owners and that the constructions of such purchasable FAR cannot be purchased and utilized by promoter without the sharing in the same and with the approval of the apartment owners.

50. It is further submitted by the counsels appearing for the petitioners that community center is part of common areas and facilities, in which apartment owners of the building have undivided interest in accordance with the percentage prescribed by sub-section (2) of Section 5 of permanent character and thus private club will be included in the word "facilities", which is not defined u/s 3(i) of the Act.

51. It is further submitted that the apartment owner would include spouse, major children/family members and tenants of the apartment owners or employees of the company, if the apartment is owned by the company so as to enable them to become members of the association of apartment owners and to be elected as office bearers including President and Secretary u/s 14(7) of the Act. The Deputy Registrar cannot deny the registration of the apartment owners association on the ground that bye-laws framed under the Rules cannot be implemented without obtaining clarification from the Registrar. It is submitted that Registrar is unnecessarily resisting in registration of the association of apartment owners on frivolous grounds of complying the provisions of the Registration Act, whereas Section 14 is special provision for registration of the society, which has been formed as the share of which is obligatory for every apartment owner/promoter to become member.

52. It is submitted that the Act having conferred inalienable rights of permanent character on the common areas and facilities; promoter cannot make constructions after the building is occupied by apartment owners to the extent of 33% of the building including the promoter. The raising of any constructions or closing the common areas and facilities from excess will take away the rights conferred by the Act. The open areas, parks and ground areas falling in common areas also cannot be encroached nor any further construction be raised on such areas without the consent of the apartment owners.

53. The promoters have been served but have not contested the writ petitions. The Ghaziabad Development Authority is represented by Shri A.K. Mishra and Shri Rajesh Kumar Singh. They have objected to the maintainability of the writ petition without first raising the dispute before the appropriate forum. He submits that in such case a civil suit could be filed by the aggrieved persons to enforce the provisions of the Act. The petitioners have not raised any dispute before the Vice Chairman, Ghaziabad Development Authority, which is the notified competent authority u/s 2(c) of the U.P. Apartment Rules, 2011 nor have raised any grievance with the State Government, which has ultimate control of the efficient administration of the Act. It is submitted that the Act is self-contained code and after its enforcement, the petitioner can seek remedies for enforcement of the right. The writ petition should not be entertained at the first instance for resolution of the disputes.

DISCUSSION

54. With thousands of buildings under construction in the State of U.P. specially in the National Capital Region falling within the areas of State of U.P., it is expedient to clarify the provisions of the Act and to iron out the grey areas for the enforcement of the Act. A large number of disputes may arise, which may flood the Courts with litigation claiming enforcement of the duties and liabilities of the promoters; rights and obligation of the apartment owners and the disputes, between the promoters and apartment owners as well as the apartment owners interest, information, registration and functioning and management of the apartment owner associations. It is also necessary for the Court to interpret the Act in the light of the disputes raised in these writ petitions providing for an effective mechanism for resolution of such disputes as provided under the Act.

55. As discussed above the U.P. Apartment Act, 2010 was enacted and notified to provide for the ownership of an individual apartment in a building of an undivided interest in common areas and facilities appertaining to such apartment and to make such apartment and interest heritable and transferable and for matters connected therewith and incidental thereto. The Act defines allottee, apartment, apartment owner, association of apartment owners, building, common areas and facilities, common expense, common profits, competent authority, declaration, deed of apartment, independent areas, joint family, local authority, limited common areas and facilities, promoter, proprietor, which is necessary for

understanding and appreciating the duties and liabilities of promoters, and rights and obligations of the apartment owners, which have been vested in them and which are not inconsistent with the provisions of Transfer of Property Act, 1882. The Act having overriding effect notwithstanding anything inconsistent in any other law for the time being enforced provides for individual rights and liabilities of the promoters and apartment owners on the construction of a building having more than 3 apartments and in which 33% apartments have been occupied complete with all infrastructure services and completion certificate obtained from the local authority. Since the apartments cannot be left stand alone for its beneficial using and that large number of apartment may remain unsold and common areas and facilities under threat of encroachment or new constructions or new rights having been conferred on the promoters and apartments of such common areas and facilities, it was necessary and that the Act has provided rights and obligations both on the promoters and the apartment owners in protection thereof. It is a matter of common knowledge that except for a few, the promoters having sold the apartment have large common areas, which may be exploited by him or apartment owners have purchased apartment may try to encroach upon in such common areas to the advantage of such apartment owners. A number of disputes may arise on encroachments, on constructions by which common areas and facilities are either encroached or blocked for user by others. The Act, therefore, conceived to provide for rights on such common areas and facilities u/s 5 of the Act and the corresponding obligation on the apartment owners as well as the general liabilities u/s 4 on promoters. The ownership of the apartment is subject to such rights and liabilities, which may also include payment of maintenance charges and tax and fees. The Act has thought it proper to provide for a compulsory formation of an association of apartment owners, by way of a society for administering affairs in relation to the apartment and properties appertaining thereto and for the management of common areas and facilities.

56. The Act and the Rules do not provide for the authority with whom the association of apartment owners will be registered. The model bye-laws notified by the State Government on 16.11.2011, however, provide in the definition clause that the Registrar means the Registrar under the provisions of the Societies Registration Act. On the formation of the association of which obligation has been entrusted on the promoter under sub-section (2) of Section 14, which shall adopt the association of apartment owners shall make its bye-laws at its first meeting, which is also obligatory for every society under the Societies Registration Act. The Model bye-laws made in sub-section (6) of Section 14 provide that every association of apartment owners shall make its bye-laws at its first meeting for the administration of the affairs in relation to apartment and properties appertaining thereto. By its own name, the Model Bye-laws means that these bye-laws has to be adopted by every association of apartment owners, which can be amended under Bye-Law 58 of the Model bye-laws by the association in a duly constituted meeting for such purpose and that no

amendment shall take effect unless approved by owners representing atleast 2/3 of the total number of units in the building with the prior approval of the competent authority, which has been defined under Rule 2(c) of the U.P. Apartment Rules, 2011. By such approval being granted to a valid resolution for amendment of bye-laws by the owners representing atleast 2/3 of the total number of units in the building in the special meeting constituted for such purpose the amendment shall be carried out by the Registrar of Societies. It goes without saying that such amendment has to be in consonance with the U.P. Apartment Act, 2010 and the U.P. Apartment Rules, 2011.

57. Though the apartment owner has been defined to mean; "a person or persons owning an apartment or promoter or his nominee in case of unsold apartment", since there is no restriction on the occupation of the apartment by members of any joint family, which has been defined u/s 2(q) and by the family members of the apartment owner as well as lawful tenant or lawful occupant, who may be authorised by the society/firm/company or any validly recognized association of persons, such lawful occupation will also be included within the meaning of the apartment owner both for the purposes of enjoying rights and obligations and corresponding general liabilities of the promoter, but also for the purposes of becoming members of the association of apartment owners. In case of any dispute on the validity of his membership, it has to be first resolved by the members of the association in an annual meeting or special meeting of the association and in case of any further dispute by the Competent Authority under Rule 2(c) of the U.P. Apartment Rules, 2011 and thereafter before the State Government before it is raised before any Court of law.

58. We are of the view that the requirement of the completion certificate to be obtained from the local authority under sub-section (2) of Section 14 before forming and registration of the association of apartment owners does not mean final completion certificate, as the issuance of the final completion certificate may take long time and that until then rights and liabilities and the corresponding duties are not provided to be under suspension. It may take several years for the promoter, or a promoter may delay the formalities and in applying for issuance of completion certificate to deny the apartment owner to form an association. This would defeat the object of enacting Section 13, which provides for registration of deed of apartment with true copy of declaration made u/s 12 to such deed of transfer. The form of declaration, therefore, to be made within 12 months from the date of approval of the plans or where the building has been constructed or is under construction prior to the commencement of the Rules to be submitted within 90 days from such commencement under Rule 3 of the Rules of 2011 is sufficient for the purposes of forming and registration of the association for bringing for enforcement of the rights and liabilities of the apartment owners and the general liabilities of the promoters under Sections 5 and 6 and Section 4 respectively of the U.P. Apartment Act, 2010.

59. In our view after the enforcement of the U.P. Apartment Act, 2010 no builder,

promoter can resist/or delay the formation of association of apartment owners u/s 14 of the Act. If the promoter does not get the association registered, the apartment owners can get such association registered after a notice giving reasonable period to the promoter, say a month, and to adopting model bye-laws, if they have not adopted earlier. In such case the Registrar of Societies shall not refuse the registration of the association of the apartment owners. The promoter, however, has to be made a member as he is jointly responsible with the apartment owners to form an association. Even if he does not get the association registered and does not join or his authorised agents and subscribe to be a member of the association, he will be deemed to be member of the association for the purposes of enforcement of the Act as the promoter being the member of the association has duties and liabilities under the Act to be enforced.

60. With the aforesaid clarifications, we direct that any dispute or disputes, which have been raised in these writ petitions or may arise in future are to be raised at the first instance in the meetings of the association to be resolved amicably between the promoter and the members of the association of apartment owners, to be called in accordance with the provisions of Model Bye-Laws 2011. If they are unable to resolve the dispute amongst themselves, they will approach for resolution of disputes and for directives of the Competent Authority, thereafter the Court as the case may be. The competent authority, which is defined under Rule 2(c) means the Vice Chairman of the Development Authority in whose development area building is situate, or the Collector of the district, where no such development authority exists. In case of Industrial Development Authority such as NOIDA and GNIDA, the Chief Executive Officer to such development authority in whose development area the building is situate will be treated to be the Competent Authority. Since thousands of buildings are under construction all over the State, we assume that disputes may be raised between the apartment owners and promoters or between the apartment owners themselves, and for which the Competent Authority may not have sufficient time for its hearing and resolution. In order to avoid any delay in the decision making process, we thus find it appropriate to clarify that in such case the Competent Authority will be allowed to delegate his powers to any officer not below the rank of Joint Secretary in the Development Authority or Sub Divisional Magistrate by the Collector in case of any district, where no such development authority exists, for resolution of the dispute. It will also be open to the competent authority to first try to mediate or conciliate the dispute between the parties in an appropriate Mediation/Conciliation center to be established in such authority. It will be obligatory for the Competent Authority or the authority with its delegated powers to first refer the dispute to such Mediation and Conciliation center and in case the parties are unable to reach to a settlement, to resolve such dispute and issue appropriate directions. In case the parties are unable to resolve their dispute and they are still aggrieved by the decision of the competent authority or an authority to which powers may be delegated, they may approach the State Government before they may approach any Court of law. This arrangement,

however, will not be applicable where a complaint is made against the promoter or any person violating the provisions of the Act, including owner of the apartment u/s 25 of the Act for taking cognizance of an offence for contravening the provisions of Section 25(1) and (2), subject to obtaining prior approval of the Competent Authority in such case.

61. *Nahalchand Laloochand (P) Ltd. v. Panchali Cooperative Housing Society Ltd.* (Supra) the Supreme Court was required to consider various provisions of Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963. It was held that the term flat within the meaning of Section 2(a-1) of the Act, 1963 has no uniform meaning. In its natural and ordinarily meaning a flat is self-contained set of premise structurally divided and separately owned for dwelling. A stilt parking spaces would not cease to be a part of common areas and facilities merely because the promoter has not described the same as such in the advertisement and agreement with the flat purchaser. The particulars, which are set out in Section 4(1-A)(a)(i) to (x) of the Maharashtra Act of 1963 has to be incorporated in the agreement with the flat purchaser. The promoter has to apply to the Registrar for registration of the organisation (cooperative societies or company or condominium) as soon as minimum number of persons required to form such organisation have taken flats. For the unsold flats the promoter has to join such organisation although his right to dispose of the unsold flats remains unaffected. More importantly the promoter has to take all necessary steps to complete his title and convey to the organisation his rights, title and interest in the land and building and execute all relevant documents accordingly.

62. The Supreme Court did not accept the arguments that Section 6 of the Transfer of Property Act and Art. 300A of the Constitution restricts the right of the promoter to transfer parking spaces. It was held that if such an interpretation of the counsel for promoter is accepted, the mischief with which the Act intends to deal with would remain unabated and flat purchasers would continue to be exploited indirectly by the promoters. The Maharashtra Act does restrict the rights of the promoter in the block or building constructed for flats or to be constructed for flats to which that Act applies. The promoter has no right to sell any portion of such building which is not "flat" within the meaning of Section 2(a-1) and the entire land and building has to be conveyed to the organisation; the only right remains with the promoter is to sell unsold flats. The promoter thus has no right to sell "stilt parking spaces" as these are neither "flat" nor appurtenant or attachment to a "flat".

63. The Supreme Court interpreting the provisions of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 and the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction etc.) Rules, 1964, which has the same object and purpose as the U.P. Apartment Act, 2010 of which definitions and various provisions are para materia with the U.P. Apartment Act, 2011 held in paragraphs

55 to 66 as follows:

55. It is true that interpretation clause or legislative definition in a particular statute is meant for the purposes of that statute only and such legislative definition should not control other statutes but the parts of the property stated in clauses (2), (3) and (6) of Section 3(f) as part of "common areas and facilities" for the purposes of MAOA are what is generally understood by the expression "common areas and facilities". This is fortified by the fact that the areas which according to the learned senior counsel could be termed as "common areas" in a building regulated by MOFA are substantially included in aforementioned clauses of Section 3(f) of MAOA. Looking to the scheme and object of MOFA, and there being no indication to the contrary, we find no justifiable reason to exclude parking areas (open to the sky or stilted portion) from the purview of "common areas and facilities" under MOFA.

56. It was argued that under MOFA it is for the promoter to prescribe and define at the outset the "common areas" and unless it is so done by the promoter, the parking area cannot be termed as part of "common areas". We are quite unable to accept this submission. Can a promoter take common passage/lobbies or say stair case or RG area out of purview of "common areas and facilities" by not prescribing or defining the same in the "common areas"? If the answer to this question is in negative, which it has to be, this argument must fail.

57. It was also submitted that by treating open/stilt parking space as part of "common areas", every flat purchaser will have to bear proportionate cost for the same although he may not be interested in such parking space at all. We do not think such consideration is relevant for the consideration of term "common areas and facilities" in MOFA. It is not necessary that all flat purchasers must actually use "common areas and facilities" in its entirety. The relevant test is whether such part of the building is normally in common use.

58. Then it was submitted that if a parking space is sold to a flat purchaser, it is to the exclusion of other flat purchasers and, therefore, logically also it cannot be part of "common areas". This submission is founded on assumption that parking space (open/covered) is a "garage" and sellable alongwith the flat. We have, however, held in our discussion above that open to the sky parking area or stilted portion usable as parking space is not "garage" within the meaning of Section 2(a-1) and, therefore, not sellable independently as a flat or alongwith a flat. As a matter of fact, insofar as the promoter is concerned, he is not put to any prejudice financially by treating open parking space/stilt parking space as part of "common areas" since he is entitled to charge price for the common areas and facilities from each flat purchaser in proportion to the carpet area of the flat. MOFA mandates the promoter to describe "common areas and facilities" in the advertisement as well as the "agreement" with the flat purchaser and the promoter is also required to indicate the price of the flat including the proportionate price of the "common areas and facilities". If a promoter does not fully disclose the common areas and facilities he does so at his own peril. Stilt

parking spaces would not cease to be part of common areas and facilities merely because the promoter has not described the same as such in the advertisement and agreement with the flat purchaser.

59. Although there is some merit in the contention of the appellant that High Court erred in placing reliance on the two aspects--namely, that the area of stilt parking space is not included in the FSI and such area is not assessable to the corporation taxes - in reaching the conclusion that stilt parking space is part of "common areas" but in our view even if these two aspects are excluded, in what we have discussed above stilt parking space/open parking space of a building regulated by MOFA is nothing but a part of "common areas" and, accordingly, we answer question No. (iii) in the affirmative.

Re: question No. (iv) - what are the rights of a promoter vis-?-vis society in respect of stilt parking spaces?

60. We have now come to the last question namely--what are the rights of a promoter vis-?-vis society (of flat purchasers) in respect of stilt parking space/s. It was argued that the right of the promoter to dispose of the stilt parking space is a matter falling within the domain of the promoter's contractual, legal and fundamental right and such right is not affected. This argument is founded on the premise, firstly, that stilt parking space is a "flat" by itself within the meaning of Section 2(a-1) and in the alternative that it is not part of "common areas". But we have already held that "stilt parking space" is not covered by the term "garage" much less a flat" and that it is part of "common areas".

61. As a necessary corollary to the answers given by us to question Nos. (i) to (iii), it must be held that stilt parking space/s being part of "common areas" of the building developed by the promoter, the only right that the promoter has, is to charge the cost thereof in proportion to the carpet area of the flat from each flat purchaser. Such stilt parking space being neither "flat" u/s 2(a-1) nor "garage" within the meaning of that provision is not sellable at all.

62. MOFA was enacted by the Maharashtra Legislature as it was found that builders/developers/promoters were indulging in malpractices in the sale and transfer of flats and the flat purchasers were being exploited. The effect of MOFA may be summarized as follows. First, every promoter who constructs or intends to construct block or building of flats in the area to which MOFA applies has to strictly adhere to the provisions contained therein, i.e., inter alia, he has to make full and true disclosure of the nature of his title to the land on which the flats are constructed and also make disclosure in respect of the extent of the carpet area of the flat and the nature, extent and description of the common areas and facilities when the flats are advertised for sale.

63. Secondly, the particulars which are set out in Section 4(1A)(a)(i) to (x) have to be incorporated in the agreement with the flat purchaser. Thirdly, the promoter has to apply to the Registrar for registration of the organization (co-operative society or company or condominium) as soon as minimum number of

persons required to form such organization have taken flats. As regards unsold flats, the promoter has to join such organization although his right to dispose of unsold flats remains unaffected. Fourthly, and more importantly, the promoter has to take all necessary steps to complete his title and convey to the organization his right, title and interest in the land and building and execute all relevant documents accordingly.

64. It was argued by Mr. Tanmaya Mehta, learned counsel for the promoter that in view of the provisions of MOFA, Section 6 of T.P. Act and Article 300A of the Constitution, the right of the promoter to transfer parking spaces is not at all restricted. Relying upon the decisions of this Court in ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, ; Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others, ; Bhikhubhai Vithlabhai Patel and Others Vs. State of Gujarat and Another, , he submitted that the provisions contained in MOFA must be construed strictly and there is no provision either express or by necessary implication in MOFA restricting the sale of stilt or open parking spaces. Mr. Sunil Gupta also argued that promoter continues to have contractual, legal and fundamental right to dispose of the stilt/open parking space in the manner in which he proposes and his consumers accept.

65. We think this argument does not bear detailed examination. Suffice it to say that if the argument of learned senior counsel and counsel for promoter is accepted, the mischief with which MOFA is obviously intended to deal with would remain unabated and flat purchasers would continue to be exploited indirectly by the promoters. In our opinion, MOFA does restrict the rights of the promoter in the block or building constructed for flats or to be constructed for flats to which that Act applies. The promoter has no right to sell any portion of such building which is not "flat" within the meaning of Section 2(a-1) and the entire land and building has to be conveyed to the organisation; the only right remains with the promoter is to sell unsold flats. It is, thus, clear that the promoter has no right to sell "stilt parking spaces" as these are neither "flat" nor appurtenant or attachment to a "flat".

66. In view of the above, it is not at all necessary to deal with the factual submissions advanced by Mr. Tanmaya Mehta. Having regard to the answer to question No. (iv), the finding of the High Court that undertakings are neither binding on the flat purchasers nor the society also warrants no interference.

64. To sum up the conclusions drawn by us are as follows:

(1) The U.P. Apartment Act, 2010 and the U.P. Apartment Rules, 2011 provides for a complete code for regulating the rights, duties and liabilities and for resolving the issues and disputes between the promoters and the apartment owners. The Act has overriding effect u/s 31(1) over all other laws on the subject notwithstanding anything inconsistent therewith contained in any other law for the time being enforced.

(2) The provisions of the Transfer of Property Act, 1882, in view of Section 29 of

the U.P. Apartment Ownership Act, 2010, shall in so far as they are not inconsistent with the provisions of the Act apply to the transfer of any apartment together with its undivided interest in the common areas and facilities appurtenant thereto made by the owner of such apartment, where such transfer is made by sale, lease, mortgage, exchange, gift or otherwise as they are applied to the transfer of any immovable property.

(3) The apartment owner u/s 3(d) will not only the person or persons owning an apartment or the promoter or his nominee in case of unsold apartments with an undivided interest in the common areas and facilities appurtenant to such apartment in the percentage specified in the Deed of Apartment and includes the lessee of the land on which the building containing such apartment has been constructed, where the lease of such land is for a period of thirty years or more; it includes the spouse and children of the apartment owner and a lawful tenant of the allottee/owner of the allotment, which will also include officer or employee of the company/firm or association, which owns an apartment under a valid allotment letter and its tenant. It will also include a person holding valid power of attorney of the allottee/owner of the apartment, where it is owned individually, jointly or in the case of a company/firm/society and occupied without any right of occupation either as family member, tenant, employee or person holding power of attorney will not be included in the definition of apartment owner.

(4) The U.P. Apartment Act, 2010, which has come into force w.e.f. 19.3.2010 is applicable to all the buildings, which have three or more than three apartments intended for any type of independent use including enclosed spaces located on one or more floors to be used for residential or official purposes or for the purpose of practising any profession or for carrying on any occupation, trade or business, excluding shopping malls and multiplexes. The word "apartment" includes any garage or room whether or not adjacent to the building in which such apartment is located, if it has independent access to public street, road or to a common area leading to such street, road, used for parking cars or for residence of any domestic aid. The garage or such rooms, however, do not have any independent status as apartment, to carry with it any rights of common areas and facilities.

(5) Each of the chapters namely Chapter-II Duties and Liabilities of Promoters; Chapter III Right and Obligations of Apartment Owners; Chapter IV Ownership, Heritability and Transferability of Apartment; Chapter V Declaration of Building and Deed of Apartment; Chapter VI Association of Apartment Owners and Bye-laws for the Registration of the Affairs of such Association; Chapter VII Common Profits, Common Expenses and Other Matters, are independent and that the rights and liabilities under these chapters can be enforced independently unless these are essentially depending upon rights and liabilities in other chapters subject to Chapter VIII "Miscellaneous" with the ultimate control of the State Government of which directions have to be carried out by the competent authority as defined in Rule 2(c) of the Rules, 2011.

(6) Chapter V Declaration of Building and Deed of Apartment, carries within it the content, which fulfills the primary objective of the Act. The declaration u/s 12 falling in the said chapter, with which the complete information as provided in Form-A under Rule 3 of the Rules of 2011 with Annexure-A to F and Schedule A, must be enclosed as mandated by Section 13 with the deed of transfer, is mandatory for handing over possession of any apartment constructed after the commencement of the Act and also to get such transfer deed registered under the provisions of the Registration Act, 1908.

(7) u/s 5(1) of the U.P. Apartment Act, 2010 every person to whom any apartment is sold or transferred by the promoter shall subject to other provisions of the Act be entitled to exclusive ownership and possession of the apartment so sold or otherwise transferred. He is under sub-section (2) entitled to the exclusive ownership and possession of apartment and 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 area of the apartment in relation to the aggregate area of all apartments of the building. Such percentage of undivided interest under sub-section (3)(a) 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 and approval of the competent authority, and which shall not be separated from the apartment to which it pertains. It shall be deemed to be conveyed or encumbered with apartment, even though such interest is not expressly mentioned in the conveyance or other instrument. The common areas and facilities under sub-section (4) cannot be transferred and will remain undivided with the apartment. These cannot be partitioned or subject to any division and will be enjoyed by the apartment owner under sub-section (5), without hindrance or encroaching upon the lawful rights of the other apartment owners.

(8) The "limited common areas and facilities", which are specified in writing by the promoter before the allotment, sale or other transfer of any apartment as reserved for use of certain apartment or apartments to the exclusion of the other apartments as defined in Section 3(s) and the "independent areas", which have been declared but not included as common areas for joint use of apartments, and which may be sold by the promoter without the interference of other apartment owners u/s 3(p), must be clearly defined and delineated in the declaration u/s 12, failing which the promoter will not be entitled to claim these common areas and facilities to be limited or independent. Any dispute with regard to common areas and facilities, limited common areas and facilities and independent areas, and for its provisions in the declaration is subject to decision by the competent authority as defined under Rule 2(c) of the Rules of 2011. The failure to submit the declaration and its enclosure with the deed of transfer and its non-registration will disentitle the promoter from claiming common areas and facilities in the property in which the apartments are built to be limited common areas and facilities or independent areas.

(9) The association of apartment owners is to be registered by the Registrar, Deputy Registrar or Sub-Registrar under the Societies Registration Act as amended in the State of U.P. If bye-laws are in conformity with the model byelaws as notified on 16.11.2011, the Registrar/Deputy Registrar/Sub-Registrar cannot refuse to register association on the ground that it contains less than minimum number of members of the society under the Societies Registration Act or that it does not comply with any of the provisions of the Societies Registration Act as amended in the State of U.P. The registration of the association is in compliance with the provisions of the U.P. Apartment Act, 2010, U.P. Apartment Rules, 2011 and model bye-laws. It shall be the joint responsibility of the promoter and apartment owners to obtain the registration. The Registrar/Deputy Registrar/Sub Registrar shall not refuse to register the association, if the promoter does not join even after one month's notice given by the apartment owners or 33% of the apartment owners, whichever is more. It is clarified that the completion of all infrastructure services and completion certificate from local authority will not be a ground to deny the registration, as the issuance of completion certificate depends on the steps to be taken by the promoter. The delay caused by him in obtaining such certificate will defeat the object of formation of the society and the enforcement of the rights and liabilities of the promoter and the apartment owners. In such case the society will be registered provisionally under the certificate to be given by the competent authority as defined in Rule 2(c) of the Act, who will give a time period to the promoter to provide all infrastructure services and to obtain completion certificate, failing which the promoter will invite the punishment for the offence as prescribed u/s 25 of the Act including the punishment of imprisonment u/s 25(1) of the Act.

(10) The "competent authority" within the meaning of Rule 2(c) as defined will include Vice Chairman of the Development Authority in whose notified development area the building is situated or the Collector of the district, where no such development authority exists. In case of the Industrial Development Authority the competent authority shall be the Chief Executive Officer of the Industrial Development Authority. For the purposes of discharging functions and duties and resolving the disputes the competent authority will be entitled to delegate its powers to an officer not below the rank of Joint Secretary including Legal Advisor of the authority and any Sub Divisional Magistrate of the district in case of a district. The competent authority shall set up mediation and conciliation centres in each authority, or the district, which will resolve to mediate the disputes at the first instance between the disputing parties.

(11) Any dispute raised before the competent authority shall be decided by the competent authority or delegatee as provided above or his delegatee as provided above, to be decided by the officer notified by the State Government u/s 27(2) and (3) of the Act, before it is brought before the Court of law.

(12) The competent authority will also be entitled to verify the contents of the declaration u/s 12 of the U.P. Apartment Act, 2010 and to decide any question,

which may arise out of such declaration.

(13) The model byelaws as notified on 16.11.2011 under sub-section (6) of Section 14 of the U.P. Apartment Act, 2010, if not approved and appended to the application for registration, made prior to the enforcement of the Act shall be adopted in the first meeting of the association of apartment owners and will be registered by the Registrar. Any amendment in the model bye-laws will be made in accordance with the Bye Law 58 of the Model Bye-laws to be approved by the owners representing atleast 2/3rd of the total number of units in the building with the prior approval of the competent authority and will thereafter be registered by the Registrar of Societies without insisting upon complying with the provisions of any other Act including Societies Registration Act as amended in the State of U.P. No alteration in the declaration given by the promoter u/s 12 shall be permitted except in accordance with the Act and for which the approval of the development authority or regulating authority in which such property is situate will be necessary and thereafter with the approval of the association of apartment owners by resolution passed by the apartment owners in which vote of promoter shall not be counted. The development authority or regulating authority may in such case demand a NOC from the apartment owners before allowing any alteration in the building plans as a condition for granting approval.

(14) The FAR or any additional FAR is a property, appended to rights in the property on which the building is constructed, and is thus a property in which the apartment owners have interest by virtue of the provisions of the U.P. Apartment Act, 2010. The purchase of additional FAR is not permissible to be appropriate by the promoter without any common benefits to the apartment owners. The consent of the apartment owners obtained by resolution in the meeting of the apartment owners by majority will be necessary for purchasing additional FAR. Its utilization will also be subject to the consent of the apartment owners.

65. With the aforesaid interpretation and clarification of the provisions of the U.P. Apartment Act, 2010, the U.P. Apartment Rules, 2011 and the Model Bye Laws, 2011, ironing out the creases for facilitating the resolutions of the issues, which have been raised in these writ petitions, we dispose of all the writ petitions with directions that the parties to the writ petition with the aforesaid clarifications will get their association of apartment owners registered without any further delay, and thereafter raise the questions or disputes, if any, at the first instance in the meeting of the association of the apartment owners, before such disputes are taken to the competent authority or the authority to which powers may be delegated by the Competent Authority in accordance with the directions issued in the judgment. Considering the number of writ petitions pending and the issues, which are likely to arise, we direct that in view of the provisions of Rule 3 of the U.P. Apartment Rules, 2011 the declaration will be submitted by the promoter under sub-section (1) of Section 12 in Form-A appended to the Rule with its Annexures "A" to "F" and Schedule "A", by all the promoters in the State of U.P., who have completed or partly completed constructions of the buildings with more

than three allotted or occupied apartments, with the Competent Authority within one month from the date of approval of the plans and where the building has been constructed or is under construction prior to the commencement of the Act and Rules, within 90 days, and that in respect of all the buildings where 33% of the apartments have been occupied after its sale transfer or delivery of possession. The apartment owners, if they have not formed the association so far and the promoters shall form an association and get it registered after adopting the model bye-laws as notified by the State Government on 16.11.2011, within a period of 90 days. In case a meeting is not called within reasonable time, say a month, after the notice is given for convening such meeting and/or the dispute is not resolved in the meeting, the apartment owners or the promoter may make a complaint to the competent authority, who will first make an attempt to decide the matter with the help of mediation or conciliation process and thereafter pass reasoned orders after hearing the parties. Any party aggrieved with the decision may, thereafter, approach the Courts for redressal of their grievance. There shall be no order as to costs.