

(2023) 05 KL CK 0193

In the High Court Of Kerala

Case No : Regular Second Appeal No.331 Of 2020

Vijayan V . John

APPELLANT

Vs

Poulachan Maniamkot

RESPONDENT

Date of Decision : 25-05-2023

Acts Referred:

Kerala Apartment Ownership Act, 1983 — Section 2, 3(g), 3(g)(iii)
Kerala Municipality Building Rules 1999 — 10, 17, 17(1), 22, 34, 34(2), 143

Citation : (2023) 05 KL CK 0193

Hon'ble Judges : M.R.Anitha, J

Bench : Single Bench

Advocate : P.Sanjay, A.Parvathi Menon, Biju Meenattoor, Paul Varghese, P.A.Mohammed Aslam, Kiran Narayanan, Prasoon Sunny, Rahul Raj P., M.P.Ramnath, P.Viswanathan, Sobhan George, G.Rajagopal, S.V.Balakrishna Iyer, M.Jithesh Menon, P.Rajesh, Ajith Viswanathan, M.Varghese Varghese, K.J.Sebastian, S.Sandhya, Bepin Paul, Shalu Varghese, S.Deepak, Antony Tharian, P.B.Krishnan, Manu Vyasana Peter, Sabu George, B.Anusree, P.B.Subramanyan, S.Leelalakshmi, K.Indu, P.G.Maheshkumar, R.Brijesh

Final Decision : Disposed Of

Judgement

M.R.Anitha, J

1. RSA No.331/2020 has been filed by the 4th defendant and RSA No.78/2021 has been filed by defendants No.1 & 2 in O.S. No.70/2009 on the file of Munsiff's Court, Ernakulam. (Parties would hereafter be referred as per their status before the trial court).

2. Plaintiff filed the suit for permanent prohibitory injunction as well as for mandatory injunction. 1st defendant is a partnership firm engaged in the business of building construction in the name and style 'Skyline Builders'. Plaintiff purchased duplex flat in the multistoried apartment 'Skyline Topaz' at Kathrikadavu, Kadavanthra. As per the approved plan the total car parking area provided is 123 . But defendants 1 and 2 allotted car parking space different

from the plan given to the plaintiff. Many common free space shown in the earlier plan were sold for car parking, for which defendants have no manner of right. As per the approved plan obtained from the Corporation on application by the plaintiff it has come out that many free space shown in the earlier plan is converted to parking space in the approved plan. Each car parking is selling for Rs.2 lakhs. Defendants have no right to sell more than 123 car parking space. But the defendants 1 and 2 are trying to sell more than 123 car parking area by converting the common area into car parking in violation of the approved plan. The defendants 1 and 2 are preparing a revised plan for converting free area in the approved plan to parking area. There are 96 apartments in the plaint schedule 'Skyline Topaz'. So the suit was filed seeking for a permanent prohibitory injunction for restraining the defendants 1 and 2 and their men from converting and selling common free space shown in the approved plan No.KRP 2/122/05 of the plaint schedule property and violating the conditions of the approved plan and restraining the 3rd defendant Corporation from approving any revised plan which will convert common free space for any other purpose.

3. Subsequently, plaint was amended alleging that after the institution of the suit, defendants made 9 car parking in the plaint 'A' schedule property violating the approved plan converting free space to car parking and sold to apartment owners. The defendants 1 & 2 have no right to sell common free space. 9 car parking made violating the approved plan shown in the sketch attached in the commission report is separately scheduled as 'B' schedule. Direction is further sought to restore the free space converted into car park by a mandatory injunction. A declaration is further sought to the effect that conversion and sale of common free space in 'A' schedule property is illegal.

4. Defendants 1 and 2 filed written statement as well as additional written statement contending that as per the approved plan the total car parking area provided for the project is 123 in number. The specification and amenities are provided in the agreement executed between the plaintiff and 1st defendant on 20.09.2006. On completion of the construction, the plaintiff purchased the apartment 13A and 13B on 13th floor of the building including the proportionate share in the common area together with one car parking area as per sale deed No.3550/2009 of SRO, Ernakulam. Plaintiff was allotted one covered car parking area as per the sale deed. Subsequently, he demanded additional car parking area and preferred a car parking adjacent to parking already allotted to him. Accordingly he was allotted 7 and 7A in the ground floor. The plaintiff initially refused to accept the allotted car parking and subsequently accepted the same. So the suit is filed to coerce the defendants to accede with his demand for allotment of car parking according to his convenience. The defendants are not making any construction in variation of the approved plan. They have no intention to convert common areas and sell the same as alleged. The allegation that the defendants made 9 car parking in the common area and sold after the institution the suit is denied.

5. Though defendants 3 to 5 appeared through counsel, no written statement seen filed. No vakalath or written statement has been filed on behalf of defendants Nos.6 to 11 also.

6. PW1 examined and Ext.A1 marked from the side of the plaintiff. DW1 to DW3 were examined and Exts.B1 to B8 were marked from the side of the defendants. Exts.C1(a) and C1(b) were also marked.

7. The trial court on appreciating the facts circumstances and evidence found that the plaintiff failed to produce any document to show that free space in the ground floor and 1st floor are common free space. It is also found that the parking area in the building cannot be held as common area. It is further found that plaintiff failed to prove that the free space shown in yellow colour in Exts.C1(a) and C1(b) plans submitted by the Commissioner is common free space. It is further found that mere fact that the defendants shifted the position of car parking space cannot be termed as violation of condition of building permit. There is no evidence to show that the shifting of the parking area will reduce the space of the parking area required for the building. It is further found that if there is any violation of the condition of the Building Rules, the Secretary of the Corporation is the authority to take action against the violations. Hence, equally efficacious remedy is available to the plaintiff. In view of the above findings, it was found that plaintiff is not entitled to get mandatory injunction and ultimately the suit is decreed partly restraining the defendants 1 and 2 from selling more than 123 parking space in 'Skyline Topaz' apartments.

8. Aggrieved by the same the plaintiff filed A.S.No.92/2013 before the District Court, Ernakulam. During the hearing of the appeal to ascertain whether yellow shaded portion Ext.C1(a) are in addition to 123 car parking slots and also to see whether 123 car parking slots is in tune with the approved plan, the same commissioner who filed report and plan was appointed and the report and plan are accepted and marked as Ext.C2, C2(a) and C2(b). The 1st Appellate Court on re appreciation of evidence already adduced and also the additional evidence found that the apprehension of the plaintiff regarding conversion of the car parking slots turned out to be real and builder had sold a few of the common areas. It has been directed to be restored by way of mandatory injunction and it is also made specific that 123 parking slots should be at location marked in the approved plan and the builder cannot create and sell the allotted number of parking slots anywhere in the ground floor and 1st floor. Accordingly, the appeal allowed and the suit was decreed in part restraining the defendants 1 and 2 anybody under them from converting and selling free common spaces shown in the approved plan. Defendants 1 and 2 were also directed by a mandatory injunction to restore the free spaces converted into car parking slots described in plaint B schedule back to their original position as common free spaces.

9. Against the judgment and decree of the 1st Appellate Court the defendants 1 and 2 as well as the 4th defendant approaches this Court in second appeal.

10. At the time of admission of R.S.A.No.331 of 2020, the following substantial questions of law have been formulated:

(i) Whether the lower appellate court was justified to grant a mere mandatory injunction to dispossess the appellant by ignoring and overriding the effects of a registered document without a prayer in the suit to declare the said document illegal and therefore liable to be set aside?

(ii) Whether the non-filing of written statement by the 4th appellant ought to have been considered as crucial before the learned appellate court in the light of the finding that 'admissions would have to be read along with first proviso to order 8 rule 5(1) of the Code and the court may call upon the parties relying on such admissions to prove its case independently' [(2010) 4 SCC 753] and when the suit stood dismissed as the first respondent herein as plaintiff could not prove his case independently?"

11. At the time of admission of R.S.A.No.78 of 2021, the following substantial questions of law have been formulated:

(i) Whether the lower appellate court erred in interpreting Rule 17 and Rule 10(ix) of the Kerala Municipality Building Rules with the facts of the case and thereby granting the mandatory injunction against the defendants 1 and 2?

(ii) Whether the defendants 1 and 2 have already handed over the plaint schedule property to the apartment owners association as alleged?

12. The learned counsel for the defendants 1 and 2 would vehemently contend that the 1st Appellate Court thoroughly went wrong in adopting Section 3(g) of Kerala Apartment Ownership Act, 1983 (in short the 'Act') which defines common areas and facilities. As per Section 2 of the Act it applies only to properties, the sole owner or all of the owners of which submit the same to the provisions of the Act by duly executing and registering a declaration as provided therein. According to him, the plaintiff has no case that the scheduled property was submitted to the provisions of the Act. The learned counsel also placed reliance on Rule 10, Rule 17, Rule 22 as well as Rule 34 of the Kerala Municipality Building Rules, 1999 (in short the 'Rules') to contend that no permit is required for changing the position of the parking areas and it is also his contention that more than 123 car parking areas have not been sold by defendants 1 and 2. It is also his contention that as per Rule 34 there is no specific area prescribed for car parking. Change of car parking areas as per Exts.C2, C2(a) and C2(b) are not in violation of Rule 34. To substantiate the contention the learned counsel placed reliance on Santha V.M. And Others V. Kozhikode Corporation [2009 (4) KHC 70 : 2009 (4) KLT 150]. It is also his contention that I.A. No.3375/2016 has been filed by the defendants 1 and 2 for receiving additional documents and objection to Exts.C2, C2(a) and C2(b) has been filed by the defendants which were not considered by the 1st Appellate Court and that has caused great prejudice to them.

13. The learned counsel for the 4th defendant/appellant in RSA No.331/2020 endorse the argument advanced by the learned Senior Counsel appearing for defendants 1 and 2 and further contended that plaintiff has equally efficacious alternate remedy available before the Tribunal for local Self Government Institutions for his redressal and hence the relief sought by him through the civil court is not maintainable. But admittedly no written statement was filed and no contest was made by the 4th defendant. So, at the second appellate stage such a contention of maintainability can not be entertained. The learned counsel also would stick to the stand that defendant Nos 1 and 2 have not sold more than 123 car parking area.

14. The learned Senior Counsel for the 10th defendant would contend that the defendants 4 to 10 purchased apartments even before the plaintiff. Even at the time of purchase of apartments by the plaintiff, these car parking areas alleged to have been additionally constructed are already there and he filed the suit only in the year 2009. Hence, the acquiescence on the part of the plaintiff also disentitle him to get mandatory injunction sought for and awarded by the 1st Appellate Court. But it is to be noted that no written statement has been filed by these defendants and no contest was made by them. So at the second appellate stage they can not raise the defence of acquiescence with out any pleadings and proof.

15. The learned counsel for the 6th defendant endorse the argument advanced by the counsel for the 4th and 10th defendants.

16. The learned counsel for the plaintiff on the other hand would contend that DW1 during evidence has no case that they have changed the car parking. Ext.C1, C1(a) and C1(b) would clearly prove that additional car parking has been provided in the ground floor and in the 1st floor deviating from the approved plan. Ext.A1 the title deed of the plaintiff would clearly confers the right of the plaintiff over plaint 'C' schedule property and 1.16% undivided share of the land described in C schedule which is described as D schedule.

17. Based on the above, the following points are raised for consideration:

(1) Whether there is violation of the Building Rules in respect of the construction of parking slots with respect to 'Skyline Topaz' building at the instance of defendants 1 and 2?

(2) What as to reliefs and costs?

Point No.1

18. The suit was filed initially by the plaintiff seeking for an injunction for restraining the defendants 1 and 2 from converting and selling common free space shown in the approved plan. Subsequently, the plaint was amended alleging that five car parking space were constructed in the ground floor and four in the first floor converting the common free space of plaint 'A' schedule property. Plaint 'A' schedule property is total 124.297 cents comprised in 415/1 & 415/2 in

Ernakulam Village. The plaint was amended by including 'B' Schedule which is a part and parcel of plaint A schedule property, which is shown as common free area in the approved plan of the ground floor and first floor converting into five car parking in the ground floor and four car parking in the 1st floor shown in the yellow colour in the approved plan submitted with the commission report. In Ext.C1 report the Advocate Commissioner reported that there are 96 allottees and 123 car parking as per the approved plan. During examination of DW1 copy of the approved plan issued by the 3rd defendant with respect to ground floor and 1st floor of the apartment and complex is produced and marked as Exts.B7 and B7(a). DW1 admitted during cross examination that the area shown in yellow colour in Exts.C1(a) and C1(b) are not included in car parking. In Ext.C1 report also the Commissioner was asked to report as to whether allotment of car parking is in accordance with the approved plan and the Commissioner categorically reported that there are 96 allottees and 123 car park, except 9 other parking allotted as per the approved plan. The Commissioner was further asked to draw sketch showing the violation of the approved plan regarding the allotment of car parking. The Commissioner reported the violation of approved plan as shown by the expert with yellow shades in the ground floor and 1st floor are common area which has to kept common and seen occupied. The Commissioner was examined as DW2 from the side of the defendants. The Commissioner stick to the report filed. During examination questions were put to the Commissioner to challenge the report in demarcating yellow shaded portion as common free space by asking whether any document were seen to conclude that it is common free space and the Commissioner answered that no document was seen. It is also questioned as to whether the entire ground floor and 1st floor are not car parking. Then the Commissioner categorically answered that car parking area has been specifically shown in the plan. During cross examination it was brought out that yellow colored portion in Exts.C1(a) and C1(b) were not assigned with any number. The expert who prepared the plans Exts.C1(a) and C1(b) was examined as DW3. The expert also reported that 123 car parking space was seen at the time of inspection and it was numbered also. During cross examination the expert stated that excluding the yellow shaded portion in the plan there are 123 car parking. So evidence of DW1 to DW3, Exts.C1, C1(a) and C1(b) will leave no room for doubt to conclude that apart from 123 car parking as per Ext.B7 and B7(a), approved plan produced from the side of the defendants, additional 9 car parking also have been demarcated by the defendants.

19. The findings of the trial court is also to the effect that defendants 1 and 2 has already sold the free space in the ground floor and 1st floor as parking space to defendants 4 to 7. It is also found that the sale of free space probabilise the case of the plaintiff that defendants are trying to sell more parking space than that is shown in the approved plan. It is also found that as per the approved plan there are only 123 car parking space to the building. Accordingly, injunction was granted from selling more than 123 car parking space.

20. The contention of the learned counsel for the plaintiff that the parking area comes within the definition of the common area and facilities as per Section 3(g) of the Kerala Apartment Ownership Act, 1983 is not accepted by the trial court since, plaintiff has no case that they have submitted to the provisions of the Act by executing declaration as contemplated under Section 2 of the Act. So the trial court held that the parking area in the building cannot be held to be a common free area. The 1st Appellate Court on the other hand adopted the definition of common area as per Section 3(g)(iii) of the Act.

21. The trial court found that because some free space was shown in approved plan and that space was not ear marked for any purpose, it cannot be held that those are common free space. It is also found that plaintiff failed to produce any documents to show that free space in the ground floor and 1st floor is common free space. Whether the said finding is correct or not is the moot question for determination.

21. Ext.A1 is the title deed by which the plaintiff purchased the apartment. The rights and liabilities of the parties has been specifically provided in Ext.A1. In page 3 of Ext.A1 it has been provided that the 2nd defendant on behalf of the 1st defendant sold 1.16% undivided share of the land described in plaint 'C' schedule attached to Ext.A1 ie. plaint 'A' schedule property in the plaint which is total 111.757 cents of property comprised in survey 415/1 and 415/2 of Ernakulam Village together with the entire right, title and interest over the property to the extent as detailed in schedule 'D' of Ext.A1 which is 1.16% undivided share in respect of the land described in 'C' schedule and the right to construct apartment described in 'E' schedule ie. 13A having super built up area of 2542 sq.ft together with one covered car parking allotted to the apartment including the proportionate share of all common areas and facilities in the multi storied building named Skyline Topaz apartments as per sanctioned plan and permit No.KRP-2/122/05 dated 16.05.2005, subject of course to the burden of the said property to bear all easement and privileges including the liabilities to afford all sorts of support to the structures to be put as well as the adjoining structures free from all claims and demands of the vendor etc. The covenant in Ext.A1 in page No.3 further stipulates that in addition to obtain rights as owned the property as detailed in 'E' schedule, the purchaser has become clothed with benefit to enjoy licenses, privileges and easements attached to the possession of 'E' schedule property, in and over the entire property detailed in C and D schedule attached to Ext.A1 including the common benefits and other amenities as envisaged when construction of the entire structure is completed in consonance with the approved plan including the right to have the use of the stair case/lift and the right to have access leading to the stair case and all and every other common other benefits and amenities therein.

22. So there is specific covenant as per Ext.A1 directing the defendants to complete the construction in consonance with the approved plan. The approved plan contemplates only 123 car parking. So the rest of the area in the 1st and

2nd floor is left in common and can only be treated in common parlance as common area. Since the approved plan does not empowers the defendants 1 and 2 to make any construction than 123 car parking space provided in the approved plan, naturally the remaining area would be common area and the builder cannot claim any right over the area left out after the ear marked parking space. So the findings of the trial court that the plaintiff did not produce any documents to show the free space in the ground floor and 1st floor is common free space is without properly analyzing Ext.A1 sale deed executed between defendants 1 and 2 and the plaintiff. When there is clear evidence as discussed earlier to prove that 9 parking space marked in yellow color in Exts.C1(a) and C1(b), there is no reason why the 1st Appellate Court again sent the same Commissioner and obtained Exts.C2, C2(a) and C2(b).

23. Learned counsel for the 4th defendant would also contend that there is only demarcation of parking area without any construction and hence the alleged additional car parking cannot be taken as a building. It is relevant in this context to extract definition of the term building as per Rule 2(I) of the Rules which reads thus:

“building means any structure for whatsoever purpose and of whatsoever material constructed and every part thereof whether used for human habitation or not and includes foundations, plinth, walls, floors, roofs, chimneys, plumbing and building services, verandah, balcony, cornice or projections, part of a building or anything affixed thereto or any wall enclosing or intended to enclose any land or space and signs and outdoor display structures;”

On going through the above, it could be seen that the term building under the Rules includes any structure or any part whether used for human habitation or not and it includes floors, walls, part of building or any space and signs and outdoor display structures. The Commissioner's report would clearly indicate about the conversion of free space to parking area. Rule 34 of the Rules also would indicate that there is specific direction with regard to providing of parking space as per the Rules. So, reading Rule 34 coupled with Rule 2(I) would leave no room for doubt to conclude that the parking space provided under the Rules also will come within the definition of building. Hence the contention to the contra advanced by the learned counsel is not acceptable.

24. The learned counsel for the defendants 1 and 2 has got a specific contention that they have filed a detailed objection to Exts.C2, C2(a) and C2(b) Commissioner's report and plan but without adverting to that the 1st Appellate Court accepted the report. However, Ext.C2 series seems to have been marked without objection. In Exts.C2(a) and C2(b), the Commissioner noted certain parking slots as guest parking. The attempt of the counsel for the defendants 1 and 2 is to contend that they have not sold more than 123 parking slots and there is no deviation from the approved plan and attempt was also made by the counsel for the defendants 1 and 2 to contend that the defendants 1 and 2 have submitted a revised plan before issuing the occupancy certificate and mistakenly

Ext.B7 and B7(a) have been produced from their side as the completion plan. In Ext.C2 report, Commissioner reported that there are 70 slots for car parking in the approved plan in the ground floor and in the first floor there are 53 slots as the approved car parking. It is also reported that car parking slots in the ground floor is 78 in numbers and it is further described that the area marked as corporation free space is converted into car parking (5 Nos.) and three additional car parking marked by the builders in the ground floor is also shown in orange colour in Ext.C2(a) plan. It is further reported that the first floor parking area available as per the approved plan is 53 and four numbers of car parking is provided by converting free space. Hence, altogether there are 57 (53 + 4) parking slots in first floor. Obviously, there are more than 123 parking slots.

25. The learned counsel also bring to my attention I.A. No.3375/2016 filed by them to receive additional documents. He would also contend that without considering that petition the appeal was disposed of. On perusing the case records and verifying I.A. No.3375/2016, it is seen that the said I.A. has been closed on 16.12.2019 but the appeal has been disposed of on 10.12.2019. So that would indicate that apart from filing that petition the defendants 1 and 2 were not taking any follow up action and it was also not brought to the attention of the court prior to the disposal of the appeal. Moreover, even in the written statement defendants did not have any contention of filing any separate completion plan than Ext.B7 and B7(a) before the issuance of the occupancy certificate which is marked as Ext.B8. So filing of I.A. No.3375/2016 and claim of filing a revised plan before the issuance of occupancy certificate is only an afterthought. The learned counsel for the plaintiff in this context has got a contention that plaintiff has filed a petition before the corporation under the Right to Information Act seeking to issue the alleged revised plan and reply was received stating that apart from Ext.B7 and B7(a) no other plan was submitted. However, those documents obtained under Right to Information Act has also not been brought in evidence. Though a petition was filed as I.A. No.5832/2016 to receive the additional document that I.A. also seems to have been closed on 16.12.2019, after the disposal of the appeal. It is to be noted that the closing of the petition after the disposal of the appeal would indicate that apart from filing such a petition to receive additional documents from the side of the parties, they did not prosecute the said petition before the disposal of the appeal. If at all there was any wilful laches on the part of the court in not disposing the petition, the appellant could have resorted to other remedies for getting disposal of that petition. Hence, the closure of the petitions after the disposal of the appeal itself would indicate that the appellant was least bothered about the additional document said to have been produced by them along with that petition. So the appellant cannot seek any benefit on the basis of the disposal of I.A.No.3375/2016 as closed after disposal of the appeal.

26. So also, the contention raised by the defendants 1 and 2 that they have filed revised plan prior to the issue of occupancy certificate itself would strengthen the case of the plaintiff regarding some additional construction or deviation from the

approved plan. Though contentions were advanced from the side of the counsel for the defendants to the effect that they have not constructed more than 123 parking space admittedly by them in addition to 123 parking space they have provided guest parking. Kerala Municipality Building Rules, 1999 do not make any such classification as guest parking or owners parking. When the approved plan provides 123 parking space, that has to be complied with while completing the construction.

27. Learned counsel for the appellants further raised an argument to the effect that they have made only some changes with respect to the parking spaces and when a parking space is shifted from the space provided in the approved plan and is relocated to another place the original parking space will again lie as an open space and in effect there is no change in the total area of free space or the parking space.

28. On a glance through Ext.C1(a) it could be seen that the yellow shaded portion which were demarcated as parking space, two of them are near the duct attached to the lift and the other three are near the stair case. The counsel for the plaintiff has got a specific contention that when articles are bought in vehicles to have an easy access to the stairs providing car parking in those areas will cause inconvenience to the occupants.

29. In Exts.C1 report, Commissioner reported that in the ground floor and 1st floor, there are five and four common free spaces respectively which are shown in yellow colour in the plan. It is also reported that there are 123 car park and except nine the other car parking allotted are as per the approved plan. It is also reported that violation to the approved plan is shown in yellow shades in Exts.C1(a) and c1(b) and those areas are common areas as per the approved plan and they are seem occupied at the time of inspection.

30. The learned counsel would also content that as per Rule 10 of the Rules, no building permit is necessary for shifting or interchanging car parking. Rule 10 of the Rules is relevant in this context to be extracted which reads thus:

"Permit not necessary for certain works – Notwithstanding anything contained in these rules, no building permit shall be necessary for executing the following works which do not otherwise violate any provisions regarding general building requirements, structural stability and fire safety requirements of the rules, namely:-

- (i) Providing or removing of windows or doors or ventilators;
- (ii) Providing inter-communication doors:
- (iii) Providing for removing of partitions:
- (iv) Gardening excluding any permanent structures;
- (v) White or colour washing:

- (vi) Painting
- (vii) Petty repairs to the building and pitched roof
- (viii) Plastering and patch work; and
- (ix) Interior decoration without any structural alterations:
- (x) Changing of the location of the building or construction within the plot.”

31. Sub Rule (x) is highlighted by the learned counsel to contend that changing the location of car parking within the plot ear marked for car parking ie. ground floor and 1st floor will not require any building permit.

32. Rule 17 was also relied on by the learned counsel which reads thus:

“Deviation during construction and power of Secretary to require alteration in work- (1) The applicant shall, if he intends to make any deviation from the approved plan or specification during the execution of any development or redevelopment of land or construction or reconstruction or alteration of any building, submit revised plans and drawings showing the deviation and obtain revised permit:

Provided that no permit is necessary for effecting minor deviations such, as shifting the position of access to plots in the case of layouts and shifting that position of rooms, stairs, lifts, windows, doors, or ventilators and their sizes in the case of building constructions if they do not conflict with these rules:

Provided further that the deviations mentioned in the above proviso shall be incorporated in the completion plan and submitted along with completion certificate.

(2) Where it comes to the notice of the Secretary that a work-

(a) is not in accordance with the plans or specifications approved;

(b) is in contravention of any of the provisions of the Act these rules, bye-law or declaration made there under; he may, by notice, require the person for whom such work is done-

(i) to make such alterations as may be specified in the notice with the object of bringing the work in conformity with the plans or specifications approved or the provisions so contravened; or

(ii) to show cause why such alterations should not be made; within such period as may be specified in the notice:

Provided that any construction carried out in deviation of the approved plan or specific conditions shall not be required to be altered if such construction does not violate the provisions or specific conditions contained in the Act or these rules.

(3) Where the person to whom the notice under sub-rule(2) is issued does not show cause as aforesaid, he shall be bound to make the alterations specified in such notice.

(4) Where the person to whom the notice under sub-rule(2) is issued shows sufficient cause as aforesaid the Secretary may, cancel the notice and in other cases, by order confirm or modify the notice.”

33. But on going through the above, it is clear that second proviso to Sub Rule 1 of Rule 17 expressly provides that the deviation mentioned in the proviso shall be incorporated in the completion plan and submit along with completion certificate. In *Santha V.M. and Others v. Kozhikode Corporation* [2009 (4) KHC 70 : 2009 (4) KLT 150] relied on by the learned counsel, the learned Single Judge while dealing with Rule 34(2) held that floor area ratio of the building as covered by the building permit has no bearing on the determination on the question as to whether the land available within the plot could be utilised for the purpose of parking space. But the dictum laid down in the above decision arose in different context. It was not a case where the petitioners constructed more parking slots than the approved plan. The shifting of parking space from one space to another space may not cause any violation of the rules and could have been included within first proviso to Sub Rule 1 of Rule 17. But here the facts are different and it has come out that defendants 1 and 2 have constructed more parking areas than provided in the approved plan. That is a deviation from the plan approved by the Corporation and defendants 1 and 2 ought to have furnished revised completion plan since it is in deviation from Ext.B7(a) and B7(b), the approved plans. So the modified decree passed by the 1st Appellate Court is to be confirmed though for reasons different from that has been found by the 1st Appellate Court.

Point No.2

34. At the time of hearing the second appeal it is submitted that interlocutory application has been filed by the association of the apartment owners to get it impleaded as additional respondent. It is contended by the learned Senior Counsel for the defendants 1 and 2 that the building was entrusted to the apartments owners association way back on 23.2.2010 and hence the association is a necessary party. But it is to be noted that the judgment of the trial court was passed only on 28.02.2013. No reason is forthcoming for not raising such a contention in the written statement by the defendants 1 and 2 or at least at the first appellate stage. At this stage end of the second appellate stage defendants 1 and 2 cannot raise such a contention also. However, the learned counsel for the defendants bring to my attention to a clause in page No.4 of Ext.A1 which is relevant in this context to be extracted which reads thus:

“the purchasers along with other allottees will have to form an allottees association and make rules and regulations for common enjoyment of the schedule C and D property (description of 'C' and 'D' has been stated already).

Purchasers shall become a member and continue as such fully abiding by the rules and regulations framed by the association from time to time.”

35. It is contended by the counsel for the defendants that there is an association of apartment owners in Skyline Topaz and plaintiff is also a member and all the changes and modifications are made by the association with the consent of all the apartment owners except the plaintiff. Now the dispute is with regard to the additional parking space provided in the building. It has come out in evidence that plaintiff has also obtained one more car parking at his request.

36. Taking the above factors into account by exercising the powers vested with this Court under Article 227 of the Constitution of India, an option is given to the defendants 1 and 2 to file an application for regularization of the additional parking spaces constructed by them as per Rule 143 of Kerala Municipality Building Rules, 1999 within a period of one month starting from this date. On receipt of said application the Secretary of the 3rd defendant shall dispose the same within a period of three months from the date of receipt of the application for regularization. If the Secretary of Corporation finds that the constructions cannot be regularized as per law the plaintiff can execute the decree passed by the 1st Appellate Court as confirmed by this Court. R..S.A.No.331/2020 and 78/2021 are disposed of accordingly. In the facts and circumstances, parties shall bear their respective costs.