

A.F.R.**Neutral Citation No. - 2023:AHC:146395****RESERVED****Court No. - 1****Case :- MATTERS UNDER ARTICLE 227 No. - 4923 of 2023****Petitioner :- Chaudhary Chandra Veer Singh And Another****Respondent :- President Ark City Residents And Another****Counsel for Petitioner :- Kunal Shah, Suvansit Kumar Jaiswal, Sr.
Advocate, Vipul Raj Gautam****Counsel for Respondent :- Ajay Kumar Singh, Ashish Kumar Singh****Hon'ble Jayant Banerji, J.****1. In the aforesaid petition, the array of parties is as under:-**

“1. Chaudhary Chandra Veer Singh, aged about 70 years son of Sumeer Singh, Resident of Ward No.0, Daurala (Rural), Meerut, District Meerut.

2. Chaudhary Vivek Ahlawat, son of Chaudhary Chandra Veer Singh, Resident of Ward No.0, Daurala (Rural), Meerut, District Meerut

..... Petitioner/Plaintiff

Versus

1. President Ark City Residents Welfare Association, Ark City, N.H. 58, Kankerkheda, Meerut, District Meerut.

2. Secretary Ark City Residents Welfare Association, Ark City, N.H. 58, Kankerkheda, Meerut, District Meerut.

.....Respondent/Defendant”

2. This petition impugns the order dated 28.02.2023, corrected on 09.03.2023 passed by the Additional District Judge, Court No.5, Meerut in Misc. Appeal No.27 of 2020 (President Ark Society vs. Chandra Veer Singh), whereby the appeal has been allowed and the order of temporary

injunction granted by the trial court on 15.01.2020 has been set aside. It may be mentioned at the outset that though the order of correction dated 09.03.2023 has been mentioned to have been filed along with the impugned order of 28.02.2023, however, the same is not enclosed. In any view of the matter, the order of correction has not been referred to by learned counsel for the petitioners.

3. The petitioners claim to be tenure-holders being bhumidhar with transferable rights over Plot No.291 admeasuring about 0.6070 hectares of land located in Village-Dayampur, District Meerut which land is stated to have been purchased by them by means of a registered sale-deed of 11.08.2016. It is stated that the petitioners are the owners in possession of the aforesaid Plot No.291 and to the north of the petitioners' land is located a Housing Society by the name of Ark Society. It is stated that the respondents are members of the said Housing Society. It is alleged that to the north of the petitioners' land is a common 12 meters (40 feet) wide path/road¹ which goes through the Society and leads into the petitioners' land. That the predecessor-in-interest of the petitioners as well as the petitioners have been using the 40 feet road in question for their entry into the aforesaid Plot No.291 and that there is no other approach road. In view of a dispute between the petitioners and residents of the respondent-Society regarding use of the path in question, it was resolved by the intervention of Ark City Welfare Association², a Society duly registered under the Societies Registration Act, 1860³ and which, as per the provisions of the Uttar Pradesh Apartment (Promotion, Ownership and Maintenance) Act, 2010⁴, is authorised to manage the affairs in relation to the apartments and the properties appurtenant thereto and common areas and facilities, to permit use of the 40 feet road by the petitioners. It is alleged that in this regard, on 11.12.2016, the Welfare Association issued a No Objection Certificate⁵ in favour of the petitioners whereby the

1 40 feet road

2 Welfare Association

3 Societies Act

4 Apartment Act

5 NOC

petitioners were permitted to use the 40 feet road as also the sewerage and electricity lines of the Society.

4. It is alleged that when on 04.07.2019, objections were raised and hurdles were created, the petitioners instituted a civil suit for permanent injunction before the court of the Civil Judge (Senior Division), Meerut, being Original Suit No.73 of 2019. An application for temporary injunction was also filed. On 06.09.2019, the trial court granted an *ad-interim ex-parte* temporary injunction to the petitioners. Thereafter, the respondents, who were the defendants in the aforesaid suit, filed objection to the application for temporary injunction. On an application moved by the petitioners, the trial court appointed an Amin Commissioner to carry out an inspection. The Amin Commissioner made his inspection and submitted a report on 11.11.2019 enclosing therewith a site map. The petitioners also filed their reply to the objections raised by the respondents to the application for temporary injunction. The petitioners filed photographs on 18.12.2019 to evince that no boundary wall of Ark City exists to the north of the gate of Plot No.291, which is the land of the petitioners. They also filed an affidavit dated 16.12.2019 of one Sudhir Verma, who was alleged to be a former President of the Welfare Association, stating that the NOC was issued by the then office bearers of the Welfare Association and the signatures appended by him on that NOC, in capacity of the President are, in fact his signatures. By an order dated 15.01.2020, the trial court granted temporary injunction in favour of the petitioners. Against that order of temporary injunction, the respondents filed an appeal being Misc. Case No.27 of 2020 alongwith a stay application. The petitioners filed objections against the application of the respondent seeking stay of temporary injunction.

5. It is further alleged that when the respondents violated the order of temporary injunction, an application under Order XXXIX Rule 2-A of the Code of Civil Procedure, 1908⁶ was filed and an Amin Commissioner was appointed who is stated to have submitted his spot inspection report on

6 CPC

14.12.2020. By an order dated 17.12.2021, the trial court rejected the application filed by the petitioners under Order XXXIX, Rule 2-A of the CPC. Against that rejection, the petitioners filed a revision before the District Judge, which is stated to be pending.

6. By the order impugned dated 28.02.2023, the aforementioned appeal filed by the respondents was allowed and the order of temporary injunction dated 15.01.2020 passed by the trial court was set aside.

7. The contention of Shri Kunal Shah, learned counsel for the plaintiff-petitioners, is that the predecessor-in-interest of the petitioners had a permissive right of usage of the 40 feet road and the petitioners came to acquire an easementary right of usage of the 40 feet road, by way of an express grant dated 11.12.2016 made by the Welfare Association. It is stated that the reliance placed by the appellate court on the layout plan of the Ark City sanctioned by the Meerut Development Authority⁷ disclosing the presence of a boundary wall on the northern side of the petitioners' land, is by no means the actual factual position as would be existing at the spot. Learned counsel has referred to the report of the Amin Commissioner dated 11.11.2019 in which it was stated that to the north of Plot No.291, both, Ark City as well as the 40 feet road are located, and that he reached the site for inspection using that path and had used the same path while returning. It is stated that the 40 feet road is not a public road or a chak road but an internal path over which the petitioners have easementary right of usage which they came to acquire by way of an express grant dated 11.12.2016. It is alleged that the layout plan which was sanctioned on 29.01.2010, logically cannot contain the description of the 40 feet road.

It is next contended by the learned counsel that the appellate court did not consider the Amin Commissioner's report dated 11.11.2019 on the ground that the said report had not been proved and confirmed before the trial court, which is an error in law, inasmuch as under Order XXVI, Rules 9 and 10 of the CPC, the report of the Commission is not required

⁷ Development Authority

to be proved or confirmed for it to be treated as evidence as juxtaposed to the report of the Commissioner prepared under Order XXVI, Rule 14 of the CPC for purposes of making partition. It is stated that in view of the observations of the appellate court regarding the report of the Amin Commissioner, the appellate court ought not to have relied on the report reflecting that the petitioners have two alternative access to Plot No.291 on its west and southern side. It is stated that the finding recorded by the appellate court regarding alternative routes to Plot No.291 is manifestly perverse as the unpaved road mentioned on the western side of the petitioners' land leads nowhere. It is stated that the appellate court has been swayed by the fact that easementary right with regard to the 40 feet road has not been expressly claimed in the suit, whereas in view of the settled law, easement by way of an express grant can be adduced by implication. It is contended that it is not appropriate for the appellate court to hold a mini trial at the stage of grant of temporary injunction, when the fact was that *prima facie* case regarding easementary right of the petitioners was established. It is stated that it is not open to the appellate court to reassess the material and reach a conclusion different from the one reached by the trial court if the one reached by the trial court was reasonably possible on the basis of material on record. In support of his contentions, learned counsel for the petitioners has relied upon the following decisions :-

1. **Wander Ltd. & Anr. vs. Antox India Pvt. Ltd.**⁸
2. **Dalpat Kumar & Anr. vs. Prahlad Singh & Ors.**⁹
3. **Anand Prasad Agarwalla vs. Tarkeshwar Prasad & Ors.**¹⁰
4. **Zenit Mataplast Pvt. Ltd. vs. State of Maharashtra & Ors.**¹¹
5. **Misrilal Ramratan & Ors. Mansukhlal & Ors. vs. A.S. Shaik Fathimal & Ors.**¹²
6. **Santosh Dubey & Anr. vs. Lala Ram Pal @ Lalloo Pal**¹³

8 1990 (Supp) SCC 727

9 (1992) 1 SCC 719

10 (2001) 5 SCC 568

11 (2009) 10 SCC 388

12 1995 Supp (4) SCC 600

13 Second Appeal No.955 of 2019, decided on 13.09.2019

7. **Levi Strauss & Co. vs. Rajesh Agarwal**¹⁴
8. **ML Brother LLP vs. Maheshkumar Bhuralal Tanna**¹⁵
9. **Hero Vinoth (Minor) vs. Seshammal**¹⁶
10. **Mathai vs. Jordi Poulouse @ Jordi**¹⁷
11. **Bhagwan Sahai vs. Narsingh Sahai**¹⁸
12. **Wasudeo & Anr. vs. Shri Ashok**¹⁹
13. **Ram Swarup Gupta vs. Bishun Narain Inter College & Ors.**²⁰

8. Shri Ashish Kumar Singh, learned counsel appearing for the respondent-Welfare Society, has stated that the Amin Commissioner's report of 11.11.2019 itself reflects the presence of two alternative access roads to Plot No.291 on its western and southern sides. It is stated that the trial court completely overlooked this aspect of the matter and only relied upon the statement in the report regarding the 40 feet road existing on the north of plot no.291 which the Amin Commissioner had used to reach and leave plot no.291. It is emphatically stated that the Amin Commissioner's report is not a report under Order XXVI, Rule 9 of the CPC but a report submitted by the Amin Commissioner, who is an employee of the court, to conduct an inspection under Order XXXIX, Rule 7 of the CPC for purposes of consideration of the aforesaid application for temporary injunction. Learned counsel has placed reliance on the order of the trial court dated 07.12.2021, which was passed on the application for the petitioners moved under Order XXXIX, Rule 2-A of the CPC alleging violation of the order of temporary injunction, to contend that the trial court has observed therein that no amendment application was filed by the petitioners to amend their plaint seeking mandatory injunction which renders the statement by the petitioners suspicious that the respondents are obstructing the path of the petitioners by creating the wall and, therefore, the trial court observed that no direction can be issued for police assistance in removing the wall. It is contended that it has also been

14 (2018) SCC OnLine Del 6421

15 (2022) SCC OnLine Del 1452

16 (2006) 5 SCC 545

17 (2011) SCC OnLine Ker 3970

18 (1909) ILR 31 ALL 612

19 Second Appeal No.60 of 2010, decided on 17.01.2020

20 AIR 1987 SC 1242

observed in the order that the report of the Amin Commissioner dated 11.11.2019 has not been approved. It is stated that the case of the petitioners claiming easementary right is completely false and has been made only for purpose of gaining unauthorised access to the Plot No.291 by using the wide road of Ark City. It is stated that due to this fraudulent claim by the petitioners, the interest and security of the residents of Ark City would be jeopardized. In support of his contentions, learned counsel has relied on the following judgments:-

1. **Anand Prasad Agarwalla** (supra)
2. **Prataprai N. Kothari vs. John Braganza**²¹
3. **Tamil Nadu Hosing Board vs. A. Viswam**²²

9. A perusal of the plaint dated 06.09.2019 filed by the plaintiff-petitioners that is enclosed as Annexure-3 to the petition reveals that plot No.291 is an agricultural land which had been purchased by means of a sale-deed dated 11.08.2016. Allegations have been made therein regarding usage of the 40 feet road by the predecessors of the plaintiff-petitioners, and that when objection was raised by the defendant-respondents with regard to road usage, then on the plaintiff-petitioners' request, the defendant-respondents issued the NOC. It has been stated that the defendant-respondents are well read and rich people who keep threatening the plaintiff-petitioners. Other than the 40 feet road there is no means of ingress and egress to and from Plot No.291. It is stated that in case the plaintiff-petitioners are restrained from using the 40 feet road, they will suffer irreparable harm and the crops grown by the plaintiff-petitioners for their sustenance would be destroyed which cannot be compensated in future.

10. The contents of the alleged NOC provide a *carte blanche* to the plaintiff-petitioners not only to use the road but also to use the drain, the sewer and the electricity of Ark City and the admitted purpose being that

21 (1999) 4 SCC 403

22 (1996) 8 SCC 259

the plaintiff-petitioners would demarcate plots on Plot No.291 and sell it to the third party. But on the contrary, the plaint case, despite reference to the NOC in paragraph no.4 of the plaint, is that the plaintiff-petitioners are growing crops for their sustenance. The plaint case is repeated in the affidavit filed in support of the application for temporary injunction.

11. On 06.09.2019, an ad interim *ex-parte* injunction order was granted in favour of the plaintiff-petitioners and, on an application (paper No. 16 Ga-2) moved by the plaintiff-petitioners before the trial court, a direction was issued to the Court Amin to furnish a report with regard to the situation on the spot in respect of the property in dispute in the light of the application 16-Ga-2.

12. The objection to the application for temporary injunction was filed on 30.10.2019 by the defendants-respondents in which it was denied that any farming activity is being carried out by the plaintiff-petitioners and it was stated that as per the information available with the defendants-respondents, the plaintiff-petitioner may carry on plotting activities over the aforesaid plot. To reach the aforesaid Plot No. 291, they are paving the existing road on the western side of the plot. It was denied that the plaintiff-petitioners have any concern with the 40 feet road and its usage by the plaintiff-petitioners was denied. The issuance of NOC was denied and it was alleged that the NOC is misleading and prepared in a fraudulent manner and that neither the defendants-respondents nor any previous President or Secretary of the Welfare Association had issued any such NOC. It was stated that the plaintiff-petitioner no.1 is a former Member of Legislative Assembly and keeps threatening the residents of the Colony managed by the Welfare Association. It was stated that the plaintiff-petitioners had satisfied themselves with regard to the existence of a road on the western side of plot No. 291 prior to its purchase for ingress and egress, but only to harass the defendants-respondents, they are attempting to use the 40 feet road by breaking the boundary wall of the Ark City. It was stated that Ark City is an approved colony of the Development Authority and the plaintiff-petitioners are seeking to mislead by stating

that plot No. 291 is also part of Ark City and thus, with *malafide* intention, is trying to jeopardize the existence of Ark City. It was stated that the plaintiff-petitioners have deliberately not shown the path on the western side of plot no. 291 in the plaint map. In the month of August 2019, there was an altercation with the plaintiff-petitioners with the residents of Ark City residing near the 40 feet road, in respect of which proceedings under Sections 107/116 of the Code of Criminal Procedure were initiated. It was stated that the boundary wall of Ark city exists and the plaintiff-petitioners are on the lookout for demolishing it to use the 40 feet road.

13. It was denied that the 40 feet road was ever used by the plaintiff-petitioners or their predecessors and in case the boundary wall does not exist on the road, the security of the residents of Ark City would be jeopardized. It was stated that Ark City is an approved colony and the plaintiff-petitioners are attempting to set up an illegal colony in plot No. 291 whose road they want to create through Ark City. It was stated that when attempt was made by the plaintiff-petitioners to demolish the boundary wall forcibly, the defendant-respondents filed a complaint against the plaintiff-petitioners and an FIR was lodged under the provisions of Section 147, 427, 506 IPC. It was stated that the names of the President and Secretary of the defendants-respondents, who keep changing from time to time, have not been stated in the plaint.

14. On 11.11.2019, the Court Amin submitted his report alongwith a map, as follows:-

"माननीय न्यायालय सिविल जज (सी०डि०), मेरठ।

मूलवाद सं०- 735 सन् 2019

चौ० चन्द्रवीर सिंह आदि बनाम अध्यक्ष आर्क सिटीरैजिडेन्स आदि

रिपोर्ट अमीन कमीशन

श्रीमान जी,

माननीय न्यायालय के आदेश का पालन करने के लिए दिनांक 11.11.2019 नियत की गयी थी जिसकी सूचना वादी अधिवक्ता महोदय को व्यक्तिगत रूप से तथा प्रतिवादीगण को रजि० डाक द्वारा पूर्व में दे दी गयी थी। नियत

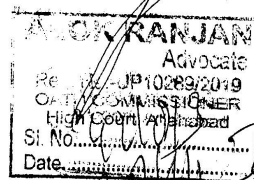
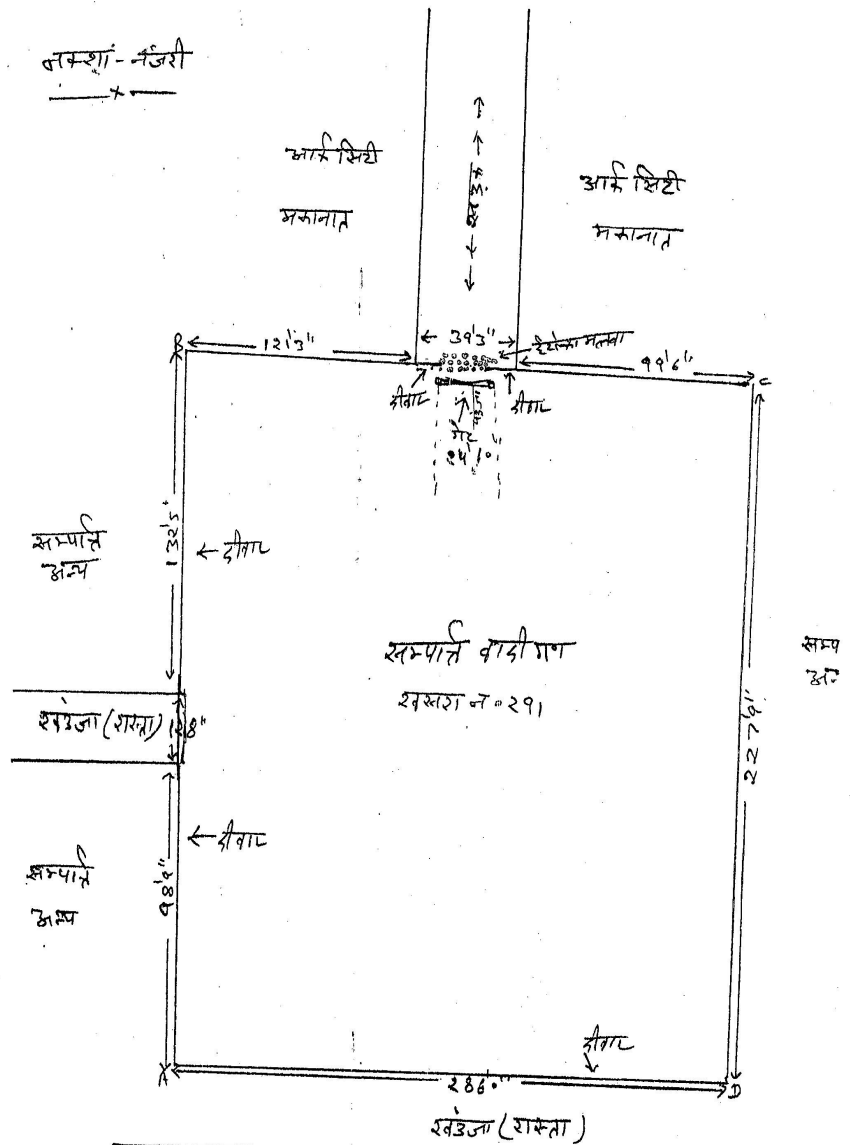
दिनांक पर वादी अधिवक्ता महोदय उपस्थित हुए, किन्तु प्रतिवादी की ओर से कोई उपस्थित नहीं हुआ, तो मैं न्यायालय अमीन वादी अधिवक्ता महोदय के साथ ग्राम दायमपुर जिला मेरठ पहुंचा। जहां पहुंचकर प्रतिवादीगण के बारे में मालूमात की, तो वहां उपस्थित व्यक्तियों ने अपना परिचय श्री सोमपाल, सुनील कुमार, अमरीश त्यागी तथा इलम सिंह कोषाध्यक्ष आर्क सिटी के रूप में दिया। मैंने पक्षकारों को अपना परिचय देते हुए माननीय न्यायालय के आदेश से अवगत कराया तथा विवादित स्थल तथा उसके आस-पास का निरीक्षण कराने का अनुरोध किया, तो पक्षकारों ने मुझे विवादित स्थल व उसके आस-पास का निरीक्षण कराया। मैंने निरीक्षण करते हुए उसका नक्शा नजरी ए,बी,सी,डी, तैयार किया जो इस रिपोर्ट का अंग है।

श्रीमान जी निरीक्षण के दौरान पाया कि वादी की सम्पत्ति खसरा नं०-291 जिसे नक्शा नजरी में अक्षर ए,बी,सी,डी से दिखाया गया है। इस सम्पत्ति के उत्तर में आर्क सिटी तथा सड़क, पश्चिम में रास्ता (खड़जा) व सम्पत्ति अन्य, दक्षिण में रास्ता (खड़जा), पूरब में सम्पत्ति अन्य की स्थिति बतायी गयी। वादी की सम्पत्ति में उत्तर की तरफ एक लोहे का गेट लगा हुआ है। गेट के उत्तर में ईंटों का मलबा पड़ा है। मलबे के बाद एक सड़क उत्तर की तरफ को गयी है जो आर्क सिटी से होते हुए बाहर चली जाती है। ईंटों के मलबे के पश्चिम व पूरब में बिना पलास्तर की दीवार बनी है। इसी सड़क से होकर मैं विवादित स्थल तक पहुंचा तथा वापिस आया जिस स्थान पर ईंटों का मलबा पड़ा है वह स्थान नक्शा नजरी में लाल रंग से दिखाया गया है।

श्रीमान जी वादी अधिवक्ता महोदय ने बताया कि हमारी सम्पत्ति खसरा नं०-291 स्थित दायमपुर, मेरठ के हम मालिक व काबिज है जिसका एक मात्र रास्ता उत्तर की तरफ बनी सड़क जो आर्क सिटी से होकर बाहर निकल जाती है किन्तु प्रतिवादीगण हमारे लोहे के गेट के आगे दीवार लगा कर हमारा रास्ता बन्द करने की धमकी दे रहे हैं, जबकि उन्हें हमारा रास्ता बन्द करने का कोई अधिकार नहीं है जबकि मौके पर मौजूद प्रतिवादी के लोगों ने बताया कि यह सड़क आर्क सिटी की है तथा वादी का कोई वास्ता इस रास्ते से नहीं है तथा बताया कि वादी के गेट के आगे दीवार बनी थी जिसे वादी ने आज ही गिराया है जिसकी शिकायत हमने 100 नम्बर पर की थी। मौके पर पड़ी ईंटें उसी दीवार का मलबा बताया गया। अन्य कोई बात मौके पर नहीं बतायी गयी।

श्रीमान जी परवाना कमीशन रिपोर्ट अमीन मय नक्शा नजरी के उचित आदेश हेतु दाखिल माननीय न्यायालय किया जाता है।

तैयारकर्ता
ह०अप०
11/11/2019
वीरेन्द्र कुमार
(कोर्ट अमीन) सिविल कोर्ट, मेरठ"



१
न्यायालय
V. K. M.
॥ ॥ ॥ ॥
वीरेंद्र कुमार
(कोर्ट अमीन)
सिविल कोर्ट, ५

15. A rejoinder affidavit was filed by the plaintiff-petitioner no.2 on 18.12.2019, in which it was stated that the defendants-respondents are not lawful President and Secretary of the so-called Society and neither is the management committee duly registered and, therefore, they are not eligible to object or oppose the suit. In paragraph 4 of the rejoinder affidavit, the plaintiff-petitioners changed their stand which they professed in their plaint and affidavit. It was stated that initially after purchase of plot No. 291, farming was started. Thereafter, the plaintiff-petitioners stopped farming activities and created a boundary wall and they are using the 40 feet road for ingress and egress and there is no road on the western side of plot no. 291 and neither are plaintiff-petitioners paving road on the western side. It was stated that the former President and Secretary of the Welfare Association had given NOC which has not been cancelled and is still in effect.

16. It was stated that in the report of the Amin, the agricultural land of the plaintiff-petitioners and the road to and from Plot No.291 has been shown, and the 40 feet road was used by the Amin to reach the site and even at that point of time, there was no wall in front of the iron gate of Plot No.291. It was stated that in five other places in Ark City, roads were open with no boundary walls through which people from nearby villages pass. Alongwith the rejoinder affidavit, the information received by the plaintiff-petitioners pursuant to an application filed by them under the Right to Information Act from the Deputy Registrar, Firms, Societies and Chits, Meerut Division, Meerut²³ dated 30.10.2019 was also enclosed in which it was stated that the present Board of the Welfare Association is not registered under Section 4(1) of the Societies Act. An affidavit dated 16.12.2019 allegedly sworn by a former President of the Welfare Association was also enclosed in which he affirmed the execution of the NOC.

17. While allowing the application for temporary injunction, the trial court refers to the NOC issued in favour of the plaintiff-petitioners and the

²³ Deputy Registrar

affidavit executed by the former alleged President of the Welfare Association. Also referred by the trial court are several documents filed by various other persons of the Board of the Welfare Association in which it was denied that any NOC was issued in 2016 regarding usage of the road belonging to Ark City in favour of the plaintiff-petitioners. The trial court observes that in case a wrong NOC was issued, then the defendant-respondents have not demonstrated what proceedings were initiated against the former President of the Welfare Association. It is observed that conflicting affidavits have been filed with regard to the NOC pertaining to the usage of the road and, therefore, the facts can be determined after evidence. It is then observed that at present the NOC supports the case of the plaintiff-petitioners. The trial court states that there is no Society working with regard to Ark City and some persons of the colony are opposing the usage of the road due to their self-interest. The information supplied by the Deputy Registrar is referred to. The trial court goes on to observe that without registration, the present Board has no authority to question the issuance of NOC by the former President of the Welfare Association. The trial court notices that both parties had filed photographs and in some photographs, a wall is reflected on the 40 feet road and in some photographs it is shown as open and that without evidence, it could not be held that which photographs are correct.

18. With regard to the Amin report, the trial court observes that neither party had filed any objection to that report. It is stated that a perusal of the Amin report makes it clear that on the north side of the Plot No.291, there is a road going through Ark City and a gate is also shown on the 40 feet road from which it can be guessed that the plaintiff-petitioners use that road for coming to their plot from Ark City. It is stated that in his report, the Amin has show brick 'malba' (debris) on the north of the gate and has also said about the existence of the 40 feet road. The trial court observes that the defendant-respondents have said that the plaintiff-petitioners' land is surrounded by boundary wall and goes on to state that definitely after getting assurance from Welfare Association, the plaintiff-petitioners got a boundary wall constructed on their land and constructed a gate on the

north side of that plot for usage of the 40 feet road but at present the defendant-respondents are opposing its usage even though they have not got their Board registered. It is stated that contrary to that, the plaintiff-petitioners had got consent of the Welfare Association to use the 40 feet road as a result of which they got a gate constructed on the 40 feet road and have been using that path to reach and leave their property. It is stated that since the former Board of the Welfare Association had issued an NOC which has not been rescinded by any other Board, therefore, there is a *prima facie* case in favour of the plaintiff-petitioners. It is further held that irreparable injury would be caused to the plaintiff-petitioners if they are not permitted to use the 40 feet road. Accordingly, the temporary injunction was granted that during pendency of the suit, neither the defendant-respondents nor any representative, employee, associate, supervisor or anti-social elements would interfere in the usage of the 40 feet road by the plaintiff-petitioners.

19. Challenging the aforesaid order of temporary injunction, the defendant-respondents filed the appeal. After considering the reply of the plaintiff-petitioners, the appellate court allowed the appeal and set aside the order dated 15.01.2020 passed by the trial court. The appellate court observed that Plot No.291 is stated to have been owned and occupied by the plaintiffs on the basis of the sale-deed dated 11.08.2016 and the said plot has been shown in the site-map attached with the plaint. Plot No. 291 and Ark City to the north of this land, are separate plots. Plaintiffs have not stated in their application that they have any right/ownership over the property of Ark City, but only in the maps displayed at the end of the plaint it has been stated that they use the 40 feet road located in Ark City. It is observed that according to the plaintiffs, the former owner of Plot No. 291 was also using the 40 feet road. From perusal of a certified copy of the sale-deed dated 11.08.2016 which was filed by the plaintiffs in the trial court, the appellate court observed that the subject matter of the said sale-deed is Plot No. 291 measuring 0.6070 hectares which is agricultural land whose description is mentioned on the page no. 14 of the deed, and that there is no path shown to the north of the said land and nor such path

has been mentioned anywhere in the entire sale-deed. It is observed that the sale-deed available on the trial court's record alongwith the revenue map also does not show any such path on the north side of plot no. 291. Contrary to this, the defendants have stated that Ark City is a colony approved by the Development Authority and the wall of Ark City has been constructed on the disputed site, the map of which is approved by the Development Authority. It was stated by defendants that the boundary walls are for the convenience of the residents of Ark City. The appellate court further observed that a copy of the map approved by the Development Authority was filed alongwith the counter-affidavit on the record of the trial court in which the side boundary of Ark City has been shown in the map, from which it appeared that the 40 feet road ends at the side boundary of the Ark City, that is, it appears to be restricted for the use of the residents of Ark City. It is noted that in the Amin report with map, a brick paved path has been shown to the south of Plot No. 291, from west to east. It is observed by the appellate court that although, the Amin report was available in the trial court's file, the same had not been confirmed, but it is evident from the Amin Report and the map that brick paths are situated to the south and west of plot No.291. Therefore, the statement made by the plaintiffs in paragraph No.5 of the application for temporary injunction, that other than the disputed route, there is no other path to reach Plot No. 291, is *prima facie* not acceptable. It is observed by the appellate court that from the perusal of the file of the trial court, it is also evident that there is no mention of the rights/ground in the application, as to on which basis the plaintiffs are demanding the right of way on the land of the defendants, which does not belong to the plaintiffs, for the gainful use of the land owned by them in Plot No. 291. Whereas, the right to an easement on the path situated in the colony of the defendants, had not been claimed by the plaintiffs. Merely on the ground that the 40 feet road has been used or is stated to have been used by the former owner and that the 40 feet road is also stated to have been used by the plaintiff himself, it is a question of evidence and *prima facie* evidence of any such 40 feet road had not been placed before the trial court by the

plaintiffs. It is observed by the appellate court that as far as the NOC is concerned, in this regard, the defendants have clearly denied to have given any such NOC. Then in such a situation, the evidence of the parties is yet to come in relation to the said NOC. Merely on the basis of the NOC having been issued on the letter pad, *prima facie* no case is found to exist in favour of the plaintiffs and the balance of convenience was also not in favour of the plaintiffs. An FIR against the plaintiffs had been lodged. It is observed by the appellate court that the impugned order of the trial court has been passed mainly on the basis of the NOC and report of the Amin, whereas the evidence of the parties regarding the NOC in question is yet to come before the trial court. It is held by the appellate court that the order of the trial court had been passed on the basis of possibilities contrary to the evidence available on record of the trial court, which is not sustainable. The appeal was accordingly allowed.

20. The contents of the NOC are as under :-

"अनापत्ति प्रमाण पत्र

समिति द्वारा 'आर्कसिटी' कालोनी स्थित ग्राम नंगलाताशी व दायमपुर, दिल्ली-रूढ़की बाईपास रोड, मेरठ का रख रखाव/मैन्टीनेन्स किया जा रहा है। उक्त कालोनी आर्कसिटी मेरठ विकास प्राधिकरण, मेरठ द्वारा स्वीकृत कालोनी है, जिसका स्वीकृत मानचित्र नम्बर 12/09 दिनांक 29.01.2010 है। कालोनी आर्कसिटी के दक्षिण में खसरा नम्बर 291, ग्राम दायमपुर, परगना व तहसील व जिला मेरठ की भूमि है, जिसके स्वामी श्री चन्द्रवीर सिंह पुत्र श्री सुमेर सिंह व श्री विवके अहलावत पुत्र श्री चन्द्रवीर सिंह निवासीगण डी-137, साकेत, मेरठ शहर है आर्कसिटी के दक्षिण में स्थित में स्थित उक्त खसरा नम्बर 291 की भूमि को उसके स्वामी विकसित करना चाहते हैं तथा उसमें प्लाट्स बनाना चाहते हैं। आर्कसिटी कालोनी का 12 मीटर चौड़ा मुख्य रास्ता कालोनी के दक्षिण में स्थित अन्तिम प्लाट्स संख्या ए-85 व बी-41 के बीच जाकर समाप्त हो जाता है, जहां पर आर्कसिटी कालोनी की बाउण्ड्रीवाल और उसके उपरान्त दक्षिण में उक्त श्री चन्द्रवीर सिंह आदि की खसरा नम्बर 291 की भूमि है। आर्कसिटी स्थित उक्त 12 मीटर चौड़े रास्ते व उसके साथ बनी नालियों व सीवर लाईन को उक्त चन्द्रवीर सिंह अपनी भूमि से जोड़ना चाहते हैं जिसके लिए उन्होंने आर्कसिटी के डवलैपर्स से अनुरोध किया है। तो उन्होंने कहा कि तुम लोग स्वयं इस का निर्णय करोगे इस आधार पर हमने सभी की सहमति से रास्ता प्रदान कर दिया यदि आर्कसिटी कालोनी का 12 मीटर चौड़ा रास्ता दक्षिण स्थित श्री चन्द्रवीर सिंह आदि की भूमि खसरा नम्बर 291 से जोड़ा जाता है जो कभी किसी भी अन्य आदेश पर रास्ता बन्द नहीं किया जायेगा क्योंकि उनका कोई अन्य आने जाने का रास्ता नहीं है तथा उन्हें उक्त रास्ते से आने जाने की सुविधा प्रदान की जाती है तथा रास्ते के साथ लगे सीवर व नाली व बिजली के प्रयोग की अनुमति चन्द्रवीर सिंह आदि को दी जाती है, तो इसमें समिति को कोई आपत्ति नहीं हो और न ही भविष्य में होगी।

चन्द्रवीर सिंह विवके अहलावत द्वारा जो प्लॉट्स जिन लोगों को विक्रय किये जायेंगे वह कोई अन्य सोसाईटी नहीं बनायेंगे इसी सोसाईटी से अपना रजिस्ट्रेशन करायेंगे।

दिनांक:- 11.12.2016

हस्ताक्षर अध्यक्ष समिति:

हस्ताक्षर सचिव समिति:"

21. In the NOC it is stated that the plaintiff-petitioners want to develop Plot No.291 and to build certain plots thereon; that the plaintiff-petitioners want to join their land to the 12 meters wide road situated in Ark City and also with the drains and sewer lines for which they requested the developer of Ark City, who then said that decision may be taken by them; on that basis, with the consent of all, the 40 feet road has been provided and the 40 feet road would not be closed by means of any other order because the plaintiff-petitioners have no other path and they are being provided with the benefit of using the 40 feet road and permitted to use the sewer, the drains and electricity, and, in this regard, the Welfare Association would have no objection in the present or in future. It is further mentioned in the NOC that in respect of the plots which would be sold by the plaintiff-petitioners, those third parties will not form any other society but would be registered in the Welfare Association itself.

22. It is not in dispute that the 40 feet road is part of the sanctioned plan of the Development Authority in respect of Ark City. The plaintiff-petitioners are claiming their right of its usage on the basis of an alleged grant that flows from the NOC. Given the dispute being raised by the defendant-respondents, the grant has to be proved by evidence before the court can give its imprimatur to the existence of the alleged easement by grant.

23. Learned counsel for the plaintiff-petitioners has relied upon the judgment of the Supreme Court in the case of **Hero Vinoth** (supra), to contended that an easement by way of grant does not get extinguished even though another passage is available to the dominant owner. However, in that case, the Supreme Court was considering a Civil Appeal that arose from a judgment of a High Court in second appeal, that is to

say, after the trial and regular first and second appeals had concluded, and not a matter arising out of an application for temporary injunction. The Supreme Court has observed as follows:-

“25. In the case at hand the High Court found that the approach of the trial court and the first appellate court was erroneous inasmuch as they proceeded on the basis as if it is a case of easement of necessity. **Had the trial court and the first appellate court considered the evidence in the light of the respective stands of the parties and then concluded one way or the other, the position would have been different.** When the approach was fundamentally wrong the High Court cannot be faulted for having gone into the question as to what was the proved intention of the party as culled out from the partition deed. The relevant (translated) portion reads as follows:

“Aravamutha Chettiar commonly enjoy the well situate on the portion allotted to Purushothaman Chettiar, likewise Purushothaman Chettiar commonly enjoy the lane situate on the portion allotted to Aravamutha Chettiar. Well is the exclusive property of Purushothaman Chettiar and lane is the exclusive property of Aravamutha Chettiar.”

26. Though an attempt was made by learned counsel for the appellant to contend that the quoted portion was only the preamble and not the intention of the parties, the same is clearly untenable. Earlier to the quoted portion it has been noted as follows:

“As per the above arrangement we decided to enter into the partition deed and hence we are writing this partition deed. We should take possession of our respective shares and enjoy the same uninterruptedly forever.”

27. Therefore, there is no manner of doubt that the intention was clear that it was a grant and not an easement of necessity which could be extinguished.

28. The question whether an easement is one acquired by grant (as contrasted from an easement of necessity) does not depend upon absolute necessity of it. It is the nature of the acquisition that is relevant. Many easements acquired by grant may be absolutely necessary for the enjoyment of the dominant tenement in the sense that it cannot be enjoyed at all without it. That may be the reason for the grant also. But easement of grant is a matter of contract between the parties. In the matter of grant the parties are governed by the terms of the grant and not by anything else. Easement of necessity and quasi-easement are dealt with in Section 13 of the Act. The grant may be express or even by necessary implication. In either case it will not amount to an easement of necessity under Section 13 of the Act even though it may also be an absolute necessity for the person in whose favour the grant is made. Limit of the easement acquired by grant is controlled only by the terms of the contract. If the terms of the grant restrict its user subject to any condition the parties will be governed by those conditions. Anyhow the scope of the grant could be determined by the terms of the grant between the parties alone. When there is nothing in the term of the grant in this case that it was to continue only

until such time as the necessity was absolute; in fact even at the time it was granted, it was not one of necessity. If it is a permanent arrangement uncontrolled by any condition, that permanency in user must be recognised and the servient tenement will be recognised and the servient tenement will be permanently burdened with that disability. Such a right does not arise under the legal implication of Section 13 nor is it extinguished by the statutory provision under Section 41 of the Act which is applicable only to easement of necessity arising under Section 13.

29. An easement by grant does not get extinguished under Section 41 of the Act which relates to an easement of necessity. An easement of necessity is one which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one where dominant tenement cannot be used at all without the easement. The burden of the servient owner in such a case is not on the basis of any concession or grant made by him for consideration or otherwise, but it is by way of a legal obligation enabling the dominant owner to use his land. It is limited to the barest necessity however inconvenient it is irrespective of the question whether a better access could be given by the servient owner or not. When an alternate access becomes available, the legal necessity of burdening the servient owner ceases and the easement of necessity by implication of law is legally withdrawn or extinguished as statutorily recognised in Section 41. Such an easement will last only as long as the absolute necessity exists. Such a legal extinction cannot apply to an acquisition by grant and Section 41 is not applicable in such case.”

(emphasis supplied)

24. As noted above, in view of the objections filed by the defendant-respondents to the application for temporary injunction, the very existence of the NOC, which document, the plaintiff-petitioners are claiming to be a grant of an easementary right, is under a cloud and it is matter of evidence whether there was a valid grant. Therefore, no benefit of that judgment can be derived by the plaintiff-petitioners.

The alleged NOC reflects permission for usage of the 40 feet road, the sewer, drain and electricity lines but the plaint case is that plot no.291 is being used for agriculture purposes and there is no averment therein of any proposed or existing plotting activity, despite the NOC being mentioned in the plaint.

25. Learned counsel for the plaintiff-petitioners has relied upon several judgments to contend that for want of any objection to the Amin Commissioner's report by the opposite parties, it cannot be said that the courts erred in relying upon the report of the Amin Commissioner. It is

noted that the Amin was a court Amin who was appointed by the court pursuant to an application for the purpose moved by the plaintiff-petitioners. Moreover, the Amin Commissioner's report is yet to be proved. It may always be open to the parties to file objection to the Amin Commissioner's report unless it is at a belated stage and would be subject to any order of the trial court. It does not appear that a written statement has been filed by the defendant-respondents. It is an early stage in the suit.

26. Be that as it may, the plaintiff-petitioners are relying on the report of the Amin Commissioner. In the case at hand, as is evident from the order of the trial court, the trial court has selectively referred to one part of the report of the Amin Commissioner, that is to say with regard to the 40 feet road existing on the north side of Plot No.291 and has, strangely, not referred to the paths shown as existing on the west and south side of the Plot No.291. The map enclosed with the Amin Commissioner's report reflects a path and an access from the western side of Plot No.291 that is shown perpendicular to the boundary wall of Plot No.291 marked as A, B. It also reflects a path existing on the south side of Plot No.291 that is alongside the boundary wall of Plot No.291 marked as A, D. With regard to the contention of the learned counsel for the plaintiff-petitioners that the path shown on western side of plot no.291 leads nowhere, it is noted that neither is there any such averment in the plaint nor in the affidavits filed by the plaintiff-respondents. The plaint is completely silent about the existence of any alternate routes which are reflected in the report of the Amin Commissioner. The aforesaid report also shows brick debris lying on the north side of plot no.291 in front of an iron gate belonging to the plaintiff-petitioners.

27. It is not disputed by the plaintiff-petitioners that the provisions of the Apartment Act are applicable to Ark City, which is managed by a Welfare Association, and the plans of Ark City are sanctioned by the Development Authority. In the Apartment Act, the following terms, inter alia, are defined in Section 3, which are :-

“....

(b) “**apartment**” means a part of any property, intended for any type of independent use, including enclosed spaces located on one or more floors or any part or parts thereof, in a building to be used for residential or official purposes or for the purpose of practicing any profession, or for carrying on any occupation, trade or business (excluding shopping malls, multiplexes and commercial complexes which are maintained as single unit by the promoter or the maintenance agency) or for such other use as may be prescribed, and with a direct exit to a public street, road or to a common area leading to such street, road and includes any Parking space, or room (whether or not adjacent to the building in which such apartment is located) provided by the promoter for use by the owner of such apartment for parking or, as the case may be, for the residence of any domestic aide employed in such apartment;

.....

(d) “**apartment owner**” means 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;

(e) “**association of apartment owners**” means all the owners of the apartments therein, acting as a group in accordance with the bye-laws;

(f) “**board**” means the Board of Management of an Association of Apartment Owners elected by its members under the bye-laws;

(g) “**building**” means a building constructed on any land, containing four or more apartments, or two or more buildings in any area designated as a block, each containing two or more apartments with a total of four or more apartments in all such buildings;

Provided that an independent house constructed in a row with independent entry and exit, whether or not adjoining to other independent houses, shall not constitute a building.

(h) “**bye-laws**” means the bye-laws made under this Act;

(i) “**common areas and facilities**” means—

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

(ii) the foundations, columns, girders, beams, supports, main walls, roofs/terraces and halls of common use, corridors, lobbies, stairs, stairways, fire-escapes and entrances and exits of the building.

(iii) The basements (area of common use only), cellars, yards, parks, gardens, community centers and common parking areas;

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

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

vi) the elevators, tanks, pumps, motors, fans, cable pipe line (TV, gas, electricity etc.) rain water harvesting system, compressors, ducts and in general all apparatus and installations existing for common use;

(vii) such other common areas and community facilities as may be specified in the bye-laws; and;

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

.....

(l) "**competent authority**" means any person or authority authorised by the government by notification to perform the functions of the competent authority under this Act for such areas as may be specified in the notification;

.....

(x) "**property**" means the land, the building, and all improvements and structures thereon, and all easements, rights and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith, which have been, or are intended to be submitted to the provisions of this Act;"

28. Chapter III of the Apartment Act deals with the rights and obligations of the apartment owners. Sections 5 and 6 read as under:-

“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 the 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 the 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 the 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 the 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 of any of the common areas or facilities therein, or accessible there from, or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to any other apartment or apartments.

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 the 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 the 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.”

29. Chapter VI of the Apartment Act deals with an association of apartment owners and bye-laws for the registration of the affairs of such association. Section 14 reads as under:-

“14. Association of apartment owners and bye-laws relating thereto. - (1) There shall be an Association of Apartment Owners

for the administration of the affairs in relation to the apartments and the property appertaining thereto and for the management of common areas and facilities :

Provided that where any area has been demarcated for the construction of buildings, whether such area is called a block or pocket or by any other name, there shall be a single Association of Apartment Owners in such demarcated area.

(2) It shall be the joint responsibility of the promoter and the apartment owners to form an Association. The Promoter shall get the Association registered when such numbers of apartments have been handed over to the owners which are necessary to form an association or 60% of apartments, whichever is more, by way of sale, transfer or possession, provided the building has been completed along with all infrastructure services and completion certificate obtained from the concerned local authority:

Provided that in case of an independent area or and independent commercial area the promoter may form a separate Association for its management, if required.

(3) In a case, where an association of the apartments owners of a building has not been formed, on the intended date of execution of a deed of apartment in favour of prospective apartment owner, it shall be obligatory for a prospective apartment owner to become member of the association within a period of 4 weeks on receipt of a written intimation about the formation of such association.

(4) Where an association of an apartment owners exist on the intended date of transfer of an apartment, it will be obligatory for the prospective apartment owner to become member of such association before execution of a deed of an apartment in his favour.

(5) On formation of the Association of the Apartment Owners under sub-section (2) above, the management of the affairs of the apartments 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:

Provided further that the amount collected by the promoter towards interest free maintenance security shall be transferred to the association at the time of handing over the common areas and facilities.

(6) The Government may by notification in the gazette frame model bye-laws in accordance with which property referred to in subsection (1) shall be administered by the Association of Apartment Owners and the Association shall, at its first meeting, make its byelaws in accordance with the model bye-laws so framed, and in making its bye-laws the Association of Apartment Owners shall not make any departure from, variation of, addition

to, or omission from, the model bye-laws aforesaid except with the prior approval of the competent authority.

(7) The model bye-laws framed under sub-section (6) shall provide for the following, among other matters, namely:

- (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;
- (d) the powers and duties of the Board;
- (e) the honorarium, if any, of the members of the Board;
- (f) the method of removal from office of the members of the Board;
- (g) the powers of the Board to engage the services of a Manager;
- (h) delegation of powers and duties of the Board to such Manager;
- (i) method of calling meetings of the Association of Apartment Owners and the numbers of the members of such Association of Apartment Owners;
- (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;
- (k) election of a Secretary to the Association of Apartment Owners from among the apartment owners, who shall be an *ex-officio* member of the Board and shall keep two separate minutes books, one for the Association of the Apartment Owners and the other for the Board, pages of each of which shall be consecutively numbered and authenticated by the President of the Association of the Apartment Owners, and shall record, in the respective minutes books, the resolutions adopted by the Association of the Apartment Owners or the Board, as the case may be;
- (l) election of a Treasurer from among the apartment owners, who shall keep the financial records of the Association of Apartment Owners as also of the Board;
- (m) maintenance, repair and replacement of the common areas and facilities and payment therefor;
- (n) manner of collecting from the apartment owners or any other occupant of the apartments, share of the common expenses;
- (o) resignation and removal of persons employed for the maintenance, repair and replacement of the common areas and facilities;
- (p) restrictions with regard to the use and maintenance of the apartments and the use of the common areas and facilities, as may be necessary to prevent unreasonable interference in the use of each apartment and of the

common areas and facilities by the several apartment owners;

(q) any matter which may be required by the Competent Authority to be provided for in the bye-laws for the proper or better administration of the property;

(r) such other matters as are required to be, or may be, provided for in the bye-laws.

(8) The bye-laws framed under sub-section (6) may also contain provisions, not inconsistent with this Act:

(a) enabling the Board to retain certain area of the building for commercial purposes and to grant lease of the areas so retained, and to apply the proceeds of such lease for the reduction of the common expenses for maintaining the building, common areas and facilities, and if any surplus is left after meeting such expenses, to distribute such surplus to the apartment owners as income;

(b) relating to the audit of the accounts of the Association of Apartment Owners and of the Board, and of the administration of the property;

(c) specifying the times at which and the manner in which annual general meetings and special general meetings of the Association of Apartment Owners shall be held and conducted;

(d) specifying the time at which and the manner in which, the annual report relating to the activities of the Association of Apartment Owners shall be submitted;

(e) specifying the manner in which the income derived and expenditure incurred by the Association of Apartment Owners shall be dealt with or as the case may be, accounted for.”

30. Chapter VIII of the Apartment Act deals with miscellaneous matters and Section 24 reads as under:-

“24. Act to be binding on apartment owners, tenants etc. - (1)

All apartment owners, tenants of owners, employees of owners and tenants, or any other person who may, in any manner, use the property or any part thereof to which this Act applies, shall be subject to the provision of this Act and the bye-laws and the rules made thereunder :

Provided that, nothing contained in this sub-section shall effect the right, title or interest acquired by any allottee or other person in common areas and facilities from any promoter on or before the date of commencement of this Act.

(2) All agreements, decisions and determinations lawfully made by the Association of Apartment Owners in accordance with the provisions of this Act and the bye-laws shall be deemed to be binding on all apartment owners.”

31. The control of the State Government for the efficient administration of the Apartment Act is provided in Section 27 thereof. Sections 31 of the Apartment Act reads as follows:-

“31.Overriding effect of this Act.- (1) The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

(2) Save as otherwise, expressly provided in sub-section (1) the provisions of this Act, shall be in addition to, and not in derogation of any other law for the time being in force.”

32. Thus, an association of apartment owners is required to be constituted under the provisions of the Apartment Act and would remain subject to the provisions of the Apartment Act. However, registration of association of apartment owners is governed by the provisions of the Societies Act as held by two division bench decisions of this court in:- (i) **M/s. Designarch Infrastructure Pvt. Ltd. and another v. Vice Chairman, Ghaziabad Development Authority and others**²⁴, and, (ii) **Management Board, Windsor Park Residents Welfare Association v. State of U.P. and others**²⁵.

33. As is evident from the definition of 'common areas and facilities' existing in clause (i) of Section 3, the definition is wide enough to cover the 40 feet road. Sub-section (2) of Section 24 of the Apartment Act provides for all agreements, decisions and determinations **lawfully made** by the association of apartment owners in accordance with the provisions of the Apartment Act and the bye-laws shall be deemed to be binding on all the apartment owners.

34. The various rights of the apartment owners specified in Section 5 of the Apartment Act include entitlement to such percentage of undivided interest in the common areas and facilities as may be specified in the deed of the apartment. The percentage of the undivided interest of each apartment owner in the common areas and facilities shall have a

²⁴ 2013 (9) ADJ 594 (DB)

²⁵ 2019 (4) ADJ 140 (DB)

permanent character, and shall not be altered without the written consent of all the apartment owners and approval of the competent authority. The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains and shall be deemed to be conveyed or encumbered with the apartment, even though such interest is not expressly mentioned in the conveyance or other instrument. 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. 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.

35. In the present case, the plaintiff-petitioners are claiming the right of permissive usage of the 40 feet road by way of a grant. Therefore, for such a decision to be binding on all apartment owners, it has to be demonstrated that the decision was taken by the association of apartment owners in a regularly summoned meeting in accordance with the Apartment Act and bye-laws and after due deliberation, the resolution having carried through. This would assume importance in view of the strong denial made by the defendant-respondents in their objections filed to the temporary injunction. And, particularly, in the light of the undivided interest of each apartment owner in the common areas and facilities that are mandated to have a permanent character, and which shall not be altered without the written consent of all the apartment owners and approval of the competent authority.

36. At this stage, it is relevant to quote the provisions of Section 2 of the Indian Easements Act, 1882²⁶, which are as under :-

“2. Saving.- Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from--

(a) any right of the Government to regulate the collection, retention and distribution of the water of rivers

²⁶ Easements Act

and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation;

(b) any customary or other right (not being a license) in or over immovable property which the Government, the public or any person may possess irrespective of other immovable property; or

(c) any right acquired, or arising out of a relation created, before this Act comes into force.”

(Emphasis supplied)

37. Given the opening line of the aforesaid Section 2 of the Easements Act, its provisions would not affect any law that is in force. Therefore, the Apartment Act would not be affected by the Easements Act. Thus, the provisions of the Easements Act would have no bearing on the statutory rights of apartment owners under the provisions of the Apartment Act and the rules and bye-laws made thereunder. In any view of the matter, given the provision of Section 31 of the Apartment Act, which provides for its overriding effect, any inconsistencies in the Easements Act with the Apartment Act, would stand overridden by the provisions of the Apartment Act. The provisions of sub-section (2) of Section 31 of the Apartment Act would not inure to the benefit of the plaintiff-petitioners in respect of any claim they may set up under the Easements Act which is inconsistent with the Apartment Act.

38. The decision of the trial court noted above, is fraught with illegalities and arbitrariness. Instances include the fact that a part of the Amin Commissioner's report has been relied upon for purpose of grant of injunction and the other parts have been overlooked. Further, the trial court has referred to the affidavit filed by the alleged former President, Sudhir Verma, and has observed that in case a wrong NOC was issued by the former President, then what action was taken against him has not been specified by the defendant-respondents. The trial court was apparently searching for weaknesses in the case of defendant-respondents to grant temporary injunction to the plaintiff-petitioners, rather than considering the own case of the plaintiff-petitioners set up in the application for

temporary injunction. The trial court seems to have lost sight of the fact that the property of Ark City is distinct from plot no.291 having separate ownership.

39. Further, the trial court has referred to the documents procured by the plaintiff-petitioners under the Right to Information Act from the office of the Deputy Registrar, Firms, Societies and Chits, which allegedly show that the Board of the Welfare Association is not registered and, therefore, the present Board has no authority to question the NOC issued in favour of the plaintiff-petitioners. In my opinion, such an observation is completely arbitrary and illegal, as on coming to such a finding, the first question that ought to have arisen was whether the suit would be defeated for non-joinder of necessary parties.

40. It is pertinent to mention here that, apparently, the plaintiff-petitioners have not obtained any sanctioned lay-out plan from the Development Authority for carving out plots over plot no.291 for selling to third parties. But, they are demanding access to the amenities and facilities of Ark Society including membership of third parties in the Welfare Association on the basis of the alleged NOC that purports to provide all facilities and amenities to the plaintiff-petitioners in aid of plotting and sale of the plot No.291. Such a conduct cannot entitle the plaintiff-petitioner to any indulgence of this court in exercise of equity jurisdiction.

41. The aforesaid discussion on the Apartment Act and the Easements Act, and the interplay of these enactments has been necessitated in the facts and circumstances of the present case.

42. The impugned order passed by the appellate court dated 28.02.2023 is based on cogent reasons and deserves no interference under the facts and circumstances of the case. The defendant-respondents are entitled to maintain the boundary wall of Ark City in accordance with the plan sanctioned by the Development Authority.

43. In view of the facts and circumstances mentioned above, the impugned order of the appellate court dated 28.02.2023 calls for no interference in this petition.

44. This petition is, accordingly, **dismissed**.

Date : 24.07.2023

SK

(Jayant Banerji, J)