Form No. J(1)

IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

Present:-

The Hon'ble Justice Rajasekhar Mantha
And
The Hon'ble Justice Ajay Kumar Gupta

MAT No. 2420 of 2023
RAJAN KUMAR PRASAD & ORS.
Vs
NEW TOWN DEVELOPMENT AUTHORITY & ORS.
WITH
MAT No. 2477 of 2023
ELITA GARDEN VISTA PROJECT PRIVATE LIMITED
Vs
EGV ASSOCIATION OF APARTMENT OWNERS & ORS.

For the Appellants in MAT 2420 of 2023 : Mr. Sabsyasachi Chowdhury, Ld. Sr. Adv.
Mr. Rajarshi Datta, Adv.
Mr. Shounak Mukhopadyay, Adv.
Mr. Soorja Ganguli, Adv.
Ms. Pooja Chakrabarti, Adv.
Ms. Arti Bhattacharya, Adv.
Ms. Debanshi Prasad, Adv.

For the Appellant in 2477 of 2023 and for the Respondent no. 6 in MAT 2420 of 2023 : Mr. Abhrajit Mitra, Ld. Senior Adv.
Mr. Arindam Banerjee, Ld. Senior Adv.
Mr. Satadeep Bhattacharya, Adv.
Mr. Saptarshi Datta, Adv.
Mr. Abir Lal Chakraborty, Adv.
Mr. Samriddha Sen, Adv.
Mr. S. Ghosh, Adv.
Mr. Pourush Kanti Pal, Adv.
Mr. Debdut Hore, Adv.

For the addition of parties (in CAN 2 of 2025) : Mr. Anirudha Chatterjee, Adv.
Mr. Rahul Karmakar, Adv.

Mr. Abirlal Chakraborty, Adv.

For the State : Mr. Biswabrata Basu Mallick, Ld. AGP

For the NKDA : Mr. Anirban Roy, Ld. Sr. Adv.
Mr. Debashish Ghosh, Adv.
Ms. Munmun Ganguly, Adv.

Hearing concluded on : 18th August, 2025

Judgment on : 29th August, 2025

Rajasekhar Mantha, J

1. The present appeals are directed against a judgment and order dated 18th October 2023, passed by a Single Judge of this Court in writ petition being WPA 15903 of 2018. By the said judgment, the Single Bench dismissed the writ petition, refusing to pass any order of demolition in respect of the 16th tower, which was constructed as per the revised sanction plan granted by the New Town

Kolkata Development Authority (NKDA) of the year 2015 (The original sanction plan was of the year 2007).

A. FACTS OF THE CASE

2. The facts relevant to the case are that sometime in the year 2007, one M/s. Keppel Magus Pvt. Ltd. (original developer) published brochures for the construction of a residential complex comprising about 15 towers, each having about 23 stories and containing 1278 flats. The complex known as "Elita Garden Vista" (EGV) was to contain several facilities like gardens, wide open areas, a swimming pool, water bodies, clubhouses, shopping areas and other comfort living facilities. There were 1688 car parking spaces. The plinth area of construction was 37,369.74 sq. mtrs. The total area of land allotted by the WBHIDCO for the project was 99,983 sq. meters situated and lying at Plot AAIII in New Town under Rajarhat P.S. on the outskirts of the city of Kolkata.

3. The undivided share attached to each flat/apartment unit owner was 0.1% of the land constructed upon and in the common areas. The original building plan for the entire project was sanctioned by the New Town Kolkata Development Authority (NKDA) on 10th September, 2007.

4. The appellant no. 1, inter alia, on 7th January, 2010, entered into an agreement for the sale of units in the property along with several persons in respect of the 15 towers. Final conveyances were thereafter executed by the developer with several flat owners, including the appellant/writ petitioners.

5. On or about 19th December 2012, the apartment owners filed a declaration under Form A in terms of Section 2, read with Section 10 of the *West Bengal Apartment*

Ownership Act of 1972 (W.B. Act of 1972). The said Form was contemplated under Section 10 of the Act of 1972, and Rules 3(1) and 5(1) of the *West Bengal* Apartment Ownership Rules of 1973 (Rules of 1973). The said Form-A was statutorily required and came to be registered with the concerned Registrar of Assurances.

6. Upon registration, the names and extent of the rights of the apartment owners and their undivided share in the land, the respective car-parking spaces and theextent of share in common areas came to be finally defined and demarcated.

7. 1278 apartment owners were recognised in the said declaration in the aforesaid Form A that was filed by the original promoters and the flat owners before the Competent Authority under the WB Act of 1972. On 9th February 2013, deeds of conveyance in respect of the flat units of the appellants in block/tower 5 were registered, and possession was handed over by the developer to the appellants on 8th January 2015.

8. On 21st January, 2015, a partial occupancy certificate was issued by the NKDA in terms of the original sanction plan of September 2007.

9. Sometime in 2014, the original developers sold and transferred their rights and interests, in the said project, in favour of the Respondent No. 6, M/s. Elita Garden Vista Projects Pvt. Ltd.

10. Without the knowledge or consent or concurrence of the existing land and flat owners, the new promoter i.e. respondent no. 6 on 20th August, 2015, applied for and obtained a revised sanction plan from the NKDA for construction of an additional tower comprising of 26 floors, on the western side of the said

apartment complex in a part and portion of an open landscape area. Sanction was also obtained for the construction of a new commercial complex within the said building complex.

11. The appellant/writ petitioners claim that although construction had started on the said new 16th tower, they were still under the impression that it might be part of the original sanction plan dated 10th September, 2007.

12. It is only on 10th January 2017, when Form B was proposed to be filed by the developers before the Competent Authority under the WB Act of 1972, that they came to know of the revised sanction plan dated 20th August, 2015, issued by the NKDA permitting construction of the additional 16th tower (numbered 8) and the commercial complex, within the original project.

13. In the proposed Form B, the revised complex was now stated to have 16 towers containing 1588 apartments. Sanction for a commercial plot was also applied for and obtained from the NKDA by the respondent No.6 without the consent of the appellants. Consequently, the proportionate share, in the common areas, of each apartment unit owner came to be reduced from 0.1% to 0.08%. The pathways came to be reduced by 600 sq. mtrs., and the landscape and open areas consequently came to be substantially reduced. The major and significant changes that have been brought about in the revised sanction plan, compared to the original sanction plan, are tabulated hereunder:-

Sl. No.	**Description**	**Original Sanctioned Plan**	**Revised Sanctioned Plan**
1.	Total Towers	15	16
2.	Total Flats	1,278	1,511

3.	Car Parking	1,688	1,947
4.	Plinth Area	37,369.74 Sq. Meters	66,531 Sq. Ft.
5.	Road Pathway	99,983 Sq. Meters	93,981.74 Sq. Meters
6.	Common Area	0.1%	0.08%
7.	Landscape and open area	Substantially more	Substantially less

14. The writ petitioners filed an objection before the Competent Authority to the form B proposed to be filed by the new promoter. It was indicated that the modified sanction plan was surreptitiously obtained by the promoter on 20th August 2015, without the knowledge, concurrence or consent of the appellants. The new 16th tower has the effect of interfering with the light and airflow into the apartments of the original 15 towers of the appellants, which they had originally obtained under their respective deeds of conveyance. They also complained that the respondent developer cannot be allowed to file Form B to modify the original Form A. The appellants also addressed a communication dated 19th April, 2015, to the NKDA to stop the illegal construction under the modified sanction plan and revive the original sanction plan dated 10th September, 2007.

15. One of the appellants filed an application under the RTI Act 2005, asking for copies of the original sanction plan and application made by the promoter for the modified sanction plan, on 17th July, 2017. The NKDA, vide a communication dated 27th July, 2017, refused to furnish the information in question.

16. By an order dated 11th April, 2018, the Competent Authority under the Act of 1972 rejected the amendment application filed by the promoter under Form B.

An appeal by the promoter before the Appellate Authority was also rejected by an order dated 18th August, 2022.

17. By communications dated 19th April, 2018 and 20th May, 2018, the appellants, represented before the NKDA, objected to the modified sanction plan and also asked for the stoppage of the illegal construction thereunder. The NKDA or the Respondent No.6 refused to respond to the same.

18. W.P. No. 15903 of 2018 was then filed by the apartment owners of the original 15 Towers, under the original sanction plan, against the promoter, the NKDA and the State, thereafter inter alia praying for the following reliefs:

> a) Writ(s) and/or order(s) and/or direction(s) of and or in the nature of *Certiorari* be issued directing the respondent no. 1 to transmit the records of and pertaining to the impugned decision communicated by the letter dated September 27, 2023, being Annexure 'P-26' hereto, to this Hon'ble Court and to certify the same such that the same may be quashed and conscionable justice be done;
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> b) Writ(s) and/or order(s) and/or direction(s) of and or in the nature of *Mandamus* be issued quashing, setting aside and/or canceling the impugned decision communicated by the letter dated September 27, 2023, being Annexure 'P-26' hereto;
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> c) Writ(s) and/or order(s) and/or direction(s) of and or in the nature of *Mandamus* be issued commanding the respondent no. 1 to act in accordance with law and to grant the petitioners a fresh hearing before taking a decision in respect of the purported rights of the flat owners of Tower no. 8 in the housing complex 'Elita Garden Vista' to participate in the election in respect of the office bearers and/or Board of Managers of the petitioner no. 1.
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> d) Writ(s) and/or order(s) and/or direction(s) of and or in the nature of *Mandamus* be issued commanding the respondent no. 1, and/or its men, servants, agents and/or assigns, from giving any effect and/or further effect to the impugned decision communicated by the letter dated September 27, 2023, being Annexure 'P-26' hereto;

e) Writ(s) and/or order(s) and/or direction(s) of and or in the nature of *Mandamus* be issued commanding the respondent no. 1, and/or its men, servants, agents and/or assigns, from including the purported flat owners of Tower no. 8 in the housing complex 'Elita Garden Vista' in the electoral roll in the election in respect of the office bearers and/or Board of Managers of the petitioner no. 1;

f) Rule *nisi* in terms of the prayers above and in the event no cause and/or sufficient cause is shown, to make the said Rule absolute;

g) Interim order of and/or in the nature of injunction be passed restraining the respondent authorities, and each of them, their men, servants, agents and/or assigns, from allowing the purported flat owner of Tower no. 8 in the housing complex 'Elita Garden Vista' to participate in the election in respect of the office bearers and/or Board of Managers of the petitioner no. 1;

h) Stay of operation of the impugned decision of the respondent no. 1 as contained in the letter dated September 27, 2023, being Annexure 'P-26' hereto;

i) *Ad interim* orders in terms of the prayers (g) and (h) above;

j) Costs of and/or incidental to this application be borne by the respondents; and

k) Such further and/or other order(s) and/or direction(s) as Your Lordships may deem fit and proper."

19. Some apartments in the newly constructed 16th Tower had already been sold by the promoter to the private respondents and were impleaded as party respondents at the fag end of the hearing of this appeal.

20. Upon the writ petition being moved, a Single Bench of this Court, in its order dated 5th September, 2018, found that the appellants have made out a prima facie case as regards the illegality of the revised sanction plan issued by the NKDA dated 20th August 2015, as well as the illegality of the construction of the 16th tower in the apartment complex.

21. The Single Bench, however, found that the balance of convenience was not in favour of restraining further construction, as three years had elapsed since the modified sanction plan and the fact that 15 floors (out of 26) had been constructed in the new 16th tower.

22. The Single Bench, however, to balance equities, directed that the construction, in terms of the revised sanction plan, would abide by the result of the writ petition. Each purchaser, present and future, in the new 16th building tower (under construction) was directed to be put on notice by the promoter that the construction made by the 6th respondent would have to abide by the result of the writ petition. It was further recorded that the 6th respondent undertook to demolish any construction made pursuant to the revised sanction plan dated 20th August, 2015, if it were found to be in violation of the provisions of law and also to compensate the persons affected thereby. Affidavits were directed to be exchanged in the writ petition.

23. The hearing of the writ petition was nowhere in sight. Since the construction was going on unabated and the promoter was continuing to sell apartments in the new 16th tower, CAN 1 of 2019 was moved by the writ petitioners, and injunction was sought to restrain the NKDA from issuing any occupancy or completion certificate in respect of the construction carried out by the respondent no. 6.

24. Another Single Bench, by order dated 1st April, 2022, once again refused to interfere with the construction, noting that the conditions in the earlier order dated 5th September, 2018, were sufficient to notify the promoter inter alia of demolition of the construction made under the revised sanction plan if it were

finally found illegal. The Court reiterated that innocent buyers would be compensated by the promoter in the event the appellants succeeded in the writ petition.

25. In the year 2023, the writ petitioners filed CAN 4 of 2023, praying to restrain the private respondents from constructing a G+8 structure in the said complex to be used for commercial purposes. The said construction was in the initial stages. The 6th respondent, NKDA, indicated to the Court that the G+8-storied commercial complex was part of the revised sanction plan dated 20th August, 2015. The Single Bench, by order dated 5th September 2018 in WPA 15903 of 2018, directed that all intending purchasers of the G+8 commercial complex must be notified by the 6th respondent of the pendency of the instant writ petition and orders passed thereunder.

B. <u>THE FINAL DECISION OF THE SINGLE BENCH IN THE WRIT PETITION</u>

26. The learned Single Bench finally heard the main writ petition after receiving affidavits from all parties. The Single Bench held that the non-obstante clause under Section 184 of the NKDA Act 2007 created an overriding effect over the Act of 1972. The authorities under the NKDA Act cannot administer the provisions of the Act of 1972. The Act of 1972 does not have provisions akin to Sections 4 and 31(1) of the UP Apartment (Promotion of Construction, Ownership and Maintenance) Act of 2010, and hence the dicta of the Supreme Court in the case of ***Supertech Limited v. Emerald Court Owner Resident Welfare Association and Ors.*** reported in ***(2021) 10 SCC 1.***

27. The NBC guidelines of mandatory distance between buildings etc., were held to be mixed questions of fact and law and cannot be summarily decided by the writ court. It was also held that the interpretation of the conveyances to support the claim of the writ petitioner that the promoter cannot change the undivided share in the land can only be decided in a civil proceeding. Such a clause in the conveyance cannot deprive the promoter under the 2007 Act of applying for the sanction of a revised sanction plan. The new promoter/respondent no. 6 was an "Applicant" within the meaning of the NKDA Act of 2007.

28. According to the Single Bench, the NKDA does not and cannot enter into the question of the title of the applicant. The filing of Form A under the Act of 1972 cannot restrain a promoter from applying for a revised sanction plan. The chairman, NKDA, was directed to conduct an inspection and enquiry into the allegation of violation of NBC guidelines and the 2009 NKDA Rules in the process of sanctioning of revised sanction plan. The writ petition was dismissed.

C. <u>THE ARGUMENTS OF THE PARTIES BEFORE THIS COURT</u>

29. Mr. Sabyasachi Chowdhury, Learned Senior counsel for the appellant, argued as follows:-

a) The entire construction made by the promoter under the revised sanction plan is illegal and without the consent of the owner or persons who bought apartments in terms of the original sanction plan, and is therefore liable to be revoked. All constructions made under the revised sanction plan are liable to be demolished. All purchasers of the 16th tower and any construction arising under

the revised plan are liable to be compensated appropriately by the 6th respondent, i.e. the promoter.

b) By reason of the rejection by the Competent Authority, of Form B filed by the promoter/respondent no. 6, under the Act of 1972, sub-clause (f) of Section 75 of the New Town Kolkata Development Authority (NKDA) Act, 2007 (Act of 2007), the respondent no. 1 NKDA ought to have invoked powers under Section 81 of the Act of 2007 to cancel/revoke the modified sanction plan for violation of Section 75 of the Act of 2007. The NKDA has failed in its statutory responsibilities to act in terms of Section 81 read with Section 75(f). The modified sanction plan could not have been granted in view of the rejection of the Form B by the Competent Authority and under the Act of 1972.

c) The learned Single Judge erred in holding that there was no provision shown to the Court under the Act of 2007 restricting the power of the promoter to make any alterations in the original plan and specifications, after registration of the deed of conveyance in favour of the apartment owners.

d) At paragraphs 15 and 16 of the judgment, the Single Judge duly recorded submissions of Counsel for the respondent no. 1 that a sanction of a building plan or modification thereof can only be refused on the grounds specified in Clauses a–g of Section 75 of the Act of 2007. The respondent no. 1 accepted that Section 81 of the Act of 2007 permits the NKDA to revoke and cancel any sanction plan obtained in violation of the provisions of the Act of 2007 and/or any other statute. The Single Judge did not apply the provisions to the facts of the case.

e) Section 3(a) of the Act of 1972 defines “apartment”. Section 3(d) defines “common areas and facilities”, 3(h) defines “declaration”, 3(k) defines property. He has then placed sections 5, 10, and 12 of the Act of 1972.

f) It is submitted that Form A was approved by the Competent Authority under the Rules of 1974, indicating 1278 flats in the property with 1688 car parking areas and a share of 0.1% to each apartment owner in the common areas and the land in question. The promoter thereafter could not have applied for a modified sanction plan of the project without the consent and concurrence of the appellants.

g) It is next submitted that the Competent and Appellate Authority under the Act of 1972 rejected the application of the promoter to file Form B under the Act of 1972.

30. Mr. Choudhury has placed reliance upon a decision of the Supreme Court in the case of ***Supertech Limited v. Emerald Court Owner & Welfare Association and Ors.*** reported in ***(2021) 10 SCC 1***.

31. Mr. Choudhury placing the said decision, submitted that statutes similar to the NKDA Act and the Rules framed thereunder, namely, The Noida Building Regulations and Directions (NBR) Act, 1986 modified by the NBR 2006 and further modified by the NBR 2010 and the UP Apartment Ownership Act of 1975 and the UP Apartment Ownership Act of 2010 as contained, provisions similar to the Act of 2007 and the Act of 1972, were subject matter in the decision.

32. Paragraphs 52, 141, 143-145 of the ***Supertech judgement (Surpra)*** clearly demonstrate a similarity between the provisions of the Act of 2007 and the Act

of 1972 with the UP Apartment Ownership Act of 1975 and the Act of 2010 and the conclusions arrived at Para 153, 156.3, 167, 168, 171.3, 171.4, 171.7, 172.1 and 172.6 must be applied for determining the reliefs to the appellants. It is therefore argued that the 16th tower and commercial areas under the revised sanction plan are illegal and are liable to be demolished. The purchasers of the apartments in the 16th tower and the commercial complex are liable to be compensated by the respondent no. 6.

33. The Respondents are threefold. The New Developers, Purchasers of the Apartments in the newly constructed Tower No. 8 and the NKDA. Their counsels have submitted as follows:-

34. Mr. Anirban Roy, learned Senior Counsel for the NKDA, argued as follows:-

a) The appellants have participated in the hearing before the NKDA conducted in compliance with the directions of the Learned Single Judge contained in the impugned order. It was directed that the NKDA authorities shall adjudicate on the alleged violation of the distance restriction between two towers, by reason of the construction of the 16th Tower. The appellants, having participated in the said hearing, have acted in terms of the impugned order and thus should be understood to have accepted the same. Hence, they have lost the right to challenge the said impugned order.

b) The appellants have not pointed out that the revised sanction plan has violated any provisions of the NKDA Act. The West Bengal Apartment Ownership Act 1972 has no manner of application to the facts of the case;

therefore, any violation thereof if there is any at all, will not vitiate the revised sanction plan.

c) Since the arguments of the appellants appear to have given rise to the need for interpreting various sections of the NKDA Act, the same may be referred for the opinion of the State in terms of section 180 of the NKDA Act.

35. Mr. Abhrajit Mitra, Learned Senior Counsel for the new Promoter/respondent no. 6, argued as follows:-

a) It was provided in the agreement between the appellants and the promoter that the latter would be entitled to effect further construction in the clubhouse and common areas after handing over possession of the apartments. Reference is made to Clauses d, e, and g and paragraphs 18, 19, and 20 of Schedule G of the Conveyance, dated 7th January 2010, entered into between the Promoter and one Chhayabrita Majhi. Based on the said clauses, it is argued that the writ petitioners had agreed to the additional construction in the project to be made by the developer. Reliance is placed on the case of ***RSIDIC v. Diamond & Gem Development Corp. Ltd.*** reported in ***(2013) 5 SCC 470,*** paragraph 23 thereof.

b) Even if it is assumed, for the sake of argument, that the promoter may have breached any law or agreement between the parties, the inordinate delay in the writ petitioners approaching the Court to challenge the actions of the promoter would disentitle them to any relief. Notice of commencement of Construction was given by the promoter to the NKDA in August 2015.

c) The petitioners had admitted in the Writ Petition at paragraph 16 that they came to know that the promoter had applied for and obtained a revised sanction plan in November 2016. The petitioner issued a notice of demand to the promoter, through their advocates, on 6th June 2017. They made an application under the NKDA Act on 7th July 2017 about any modified sanction plan in respect of the building. They approached the Competent Authority under the Act of 1972 on 8th February 2017 against the application of the promoter to file Form B on 8th February 2017. The promoter's application was rejected on 11th April 2018. The appellate authority confirmed the order of the competent authority on 18th August 2022.

d) It is therefore submitted that the appellants have allowed the construction to go on unabated and 3rd party rights to be created. The appellants have thus accepted and acqueisced to the actions of the promoter in constructing the 16th Tower. They are not entitled to any relief in these proceedings. Reliance is placed on the decisions of a co-ordinate bench in the case of ***Smt. Rinkoo Mitra v. State of West Bengal and Ors*** reported in ***(2000) SCC Online Cal 311,*** paragraphs 19, 30, 31, and 32 thereof, and the case of ***Javed Ahmed Khan v. Union of India*** reported in ***MANU/WB/0351/2007,*** particularly paragraphs 16,17, 18 and 19 thereof.

36. Mr Aniruddha Chatterjee, Learned Senior Counsel for the purchasers of the Units in the 16th Tower, submitted as follows:-

a) The revised sanction plan of September, 2015 has not only permitted the construction of Tower No. 8, but also reduced the plinth areas of Tower Nos.

6, 7, 8, 9, 10, 11, 12, and 13. There are other facilities brought in by the revised plan that have not been mentioned by the appellants. The appellants/writ petitioners are therefore guilty of suppression of material facts in the revised plan. They are thus not entitled to any relief in the appeal.

b) There are 1511 flats in the project. About 811 flats were constructed under Phase II. Despite construction starting in 2015 only 46 flat owners have complained about the infringement of the common areas. The revised plan has reduced only 1823 sq.ft. of common areas, which is minuscule. Apart from the 46 appellants, no other flat owner has complained against the promoter. The writ petition is the result of an ego clash between the 46 appellants and the promoters. The challenge to the action of the promoters should not be entertained.

c) The arguments of the appellants under Section 5 of the Act of 1992 fall flat in the light of Clauses 31, 33, 43(d), 18, 19, 20 under Schedule G to the agreements between the parties. The said Clauses are a binding consent of the appellants in favour of Section 5(2) of the WB Act of 1972.

d) Section 5 does not prohibit additional construction by the promoter. Clauses in agreement cannot be construed as an act of contracting a way out of the statute.

e) Several common area facilities have accrued to the appellants by the increase of common facilities, by the construction of an additional clubhouse and a bridge between the towers. The writ petition is an ego issue of the appellants.

f) Section 5 of the Act of 1972 does not prohibit additional constructions or modifications of the common areas. It can be done with the prior approval of the appellants. Such approval has been given in the consent clauses in the agreements between the parties.

g) The appellants have participated in the process of the NKDA arriving at the decision dated 30th December, 2023, following the order dated 30th December, 2023. Without challenging the said order, the appeal is barred.

h) Form A could not have been submitted by the appellants as no occupancy certificate has been issued by the NKDA, and the minimum number of occupants are not themselves in the building. Form A, as per Section 10 of the Promoters Act, 1993 filed by the appellants, was illegal. Section 10 is an enabling provision, and Rule 2A of the Rules of 1974 was only introduced in 2016.

i) If two views are possible and the Single Bench has taken one view, the Division Bench cannot substitute its views on the Single Bench. There is no palpable infirmity shown in the order of the Single Bench.

j) The original writ petitioners are 46 in number, now reduced to 37.

k) On the proposition that "a Division Bench does not interfere with the order of a Single Bench mainly because another view is possible", Mr. Chatterjee has relied upon 3 judgments, namely, ***State of UP v. Raja Ram Jaiswal*** reported in ***(1985) 3 SCC 131*** (para 16), ***Management Narendra & Co. v. Workmen*** reported in ***(2016) 3 SCC 340*** (para 5) and ***Pradip Kumar Talukdar v. WBHIDW*** reported in ***(2022) SCC OnLine Cal 4575*** (para 70 – 71).

ANALYSIS OF THIS COURT

D. THE SCOPE OF THE PRESENT APPEAL

37. In the present appeal, the appellants inter-alia seek to challenge the portion of the impugned judgment which has held that there is no need for the promoter to obtain the consent of the flat owners of the 15 towers, and the NKDA authority is under no obligation to factor in the West Bengal Apartment Ownership Act 1972 given the non-obstante clause contained in the NKDA Act of 2007.

38. Thus, the scope of the challenge involved in this appeal is different from the alleged violation of the distance restriction, which is stated to have been dealt with by the NKDA by passing the order dated December 30, 2023. The participation of the appellants in the said hearing on the alleged violation of the distance restriction does not stand in the way of the appellants from pursuing and maintaining the present appeal.

39. The reference to Section 180 of its Act by the NKDA to argue that the present lis should be referred to the State for adjudication is misplaced. Section 180 empowers the State to intervene in case of any ambiguity or difficulty in the smooth implementation of the NKDA Act. The present judgment seeks to examine the alleged violation of the provisions of the NKDA Act 2007 and the other relevant enactments, having a bearing on the NKDA Act.

40. Section 180 of the NKDA Act is set out below:-

> 180. If any difficulty arises in giving effect to the provisions of this Act, the State Government, may, as occasion may require, by order, not inconsistent with the provisions of this Act, do, or cause to be done, anything which may be necessary for removing the difficulty .
>
> Emphasis Applied

41. In these appeals, admittedly, the flat owners of the 15 towers have never consented to the grant of the revised sanction plan. In fact, the revised sanction plan was obtained without the knowledge of the said flat owners. Further, the original sanction plan of 2007 indicated that there would only be 15 towers to be built on the project land in question. The said flat owners purchased their respective flats believing in and relying upon the sanction plan of 2007.

42. Therefore, the question that needs to be addressed is what is the legal status of the 16th tower in the absence of consent of the flat owners of the 15 towers thereto. To answer the said question, one has to first ascertain whether the consent of the said flat owners was at all required to be obtained by the promoter to build the 16th tower. The application and interpretation of the WB Act of 1972, the Rules framed thereunder, the Promoters Act 1993, and the NKDA Act of 2007 must be examined. The clauses in the agreements between the parties are also required to be interpreted. Section 180 of the NKDA Act is not applicable to the facts of the case.

43. To be precise, the question is whether the revised sanction plan is an issue *inter se* between the NKDA and the promoter, or whether the flat owners of the 15 towers are also entitled to have a say in the application and grant of the revised plan.

E. THE EFFECT OF THE NON-OBSTANTE CLAUSE OF THE NKDA ACT 2007 ON THE WEST BENGAL APARTMENT OWNERSHIP ACT, 1972

44. The Learned Single Judge has ruled out the application of the WB Apartment Ownership Act 1972 upon the NKDA authorities by placing reliance on section

184, being the non-obstante clause of the NKDA Act, 2007. Thus, it was held that the NKDA authority is not obliged to factor in the objections raised against the revised sanction plan by the flat owners of the 15 towers. Indeed, it is true that a Municipality or Development Authority cannot enter into the question of the title of any person applying for the sanction of a building construction plan.

45. To test the above finding, one needs to consider the non-obstante clause in Section 184 of the said Act in the context of the other relevant provisions of the NKDA Act and the Act of 1972.

46. The non-obstante clause, contained in section 184 of the NKDA Act 2007, is as follows:-

> "184. The provisions of this Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force or any judgment, decree, or order of any court, tribunal other authority."
>
> Emphasis applied.

47. A non-obstante clause gives overriding effect to the statute, over other statutes only when the subject matter of the latter is different from the former, and the latter interferes with the operation of the former. Therefore, to invoke the overriding effect of one statute over the other, it is necessary to first establish that the provisions of the West Bengal Apartment Ownership Act 1972 and the NKDA Act, 2007 are different from each other to the extent that the application of one over the other will give rise to a 'material inconsistency'.

48. The preamble of the Act of 1972 is set out under:-

> An Act to provide for the ownership of an individual apartment and to make such apartment heritable and transferable property.

> WHEREAS it is expedient to provide for the ownership of an individual apartment and to make such apartment heritable and transferable property;

49. The Act of 1972 thus provides a mechanism by which independent, individual, and separate ownership in respect of an apartment in a multi-apartment building complex is recognised. In most urban areas in the country, an ordinary citizen cannot and generally does not purchase an independent house or building owing inter alia to financial constraints and lack of optimum use. To recognise such individual ownership of apartment units in a building, the State legislature, in its wisdom, enacted the West Bengal Apartment Ownership Act of 1972.

50. Municipal laws like the NKDA Act of 2007 govern the affairs of a Municipal area. Municipal laws do not determine the title to properties. However, Municipal Authorities like the NKDA are required to render services and charge taxes based mostly on ownership. The NKDA Act, like every law governing municipalities, regulates and controls matters entrusted to it, like sanctioning construction plans, providing municipal services like water supply and sewerage and levying taxes or fees, primarily on the incidents that arise from ownership of land. The NKDA is also exclusively empowered to allow the owner of a plot of land to construct a building thereon, to sanction a proposed building plan, levy taxes, and provide municipal facilities to such buildings. For the said purpose, the NKDA authorities are to rely prima facie on documents of ownership, inter alia, recognised under the WB Apartment Ownership Act 1972.

51. One may argue that the NKDA authority can very well refer to the title deeds for ascertaining ownership. The documents of ownership recognised under the Act of 1972 stipulate and lay down the procedure for determining individual ownership of each flat when a building, comprising in several apartment units, is owned by multiple persons via the purchase of respective flats.

52. Form A and B under Rule 3 of the West Bengal Apartment Ownership Rules, 1974, based on Section 10 of the Act of 1972, record the names of the owners inter alia based on the documents in respect of multistoried apartments. The said documents are mandatorily registrable. They are therefore vital and mandatory for the NKDA to consider determining the actual ownership before considering applications for sanction of building plans or modification thereof.

53. The right to construct on a property owned by many proportionately, as in the instant case, can only be determined under the Act of 1972 and the Rules of 1974 framed thereunder. In fact, Forms A and B are mandatorily registerable and hence public documents available for scrutiny by the public, evidencing the title of each apartment owner in the land and the common area. Thus, the Act of 1972 is not inconsistent with, but aids the implementation of the NKDA Act. The non-obstante clause in the NKDA Act 2007 cannot, by any stretch of imagination, bar the application and factoring in of the Act of 1972 and the Rules framed thereunder, or the Act of 1993, by the authorities under the NKDA Act of 2007. The Act of 1972 is therefore not in derogation of the Act of 2007.

54. The definition of 'Apartment' under the NKDA Building Rules and that present in the West Bengal Apartment Ownership Act, 1972, is an indication of the fact

that the NKDA Act is not inconsistent with the Act of 1972. The Definition of "apartment" under the NKDA building of 2014 rules is as follows:-

> "2. (b) "apartment" means an independent dwelling unit with a kitchen or kitchenette or Pantry, sanitary toilet, ablution and washing spaces or part of a property having a direct exit to a street or a passage or to a common area leading to such street or passage which together with its undivided interest in the common areas and facilities forms an independent unit;"

55. The definition of "apartment" under the Act, 1972 is as follows:-

> 3. (a) "apartment" means part of a property having a direct exit to a road, street or highway or to a common area leading to such road, street or highway which together with its undivided interest in the common areas and facilities forms an independent[residential] unit and includes a flat.

56. On the argument of 'material inconsistency' between two statutes, where one of the two has a non-obstante clause, the decision of the Supreme Court in the case of ***Forum for People's Collective Efforts v State of West Bengal*** reported in ***(2021) 8 SCC 599*** is of relevance. The said decision struck down the WB HIRA 2017, which was enacted in WB as a substitute to the RERA 2016. The former was struck down for being inconsistent with and hence in a legislative field occupied by the RERA 2016, also under the Concurrent List. The RERA 2016 was, however, held to be subject to several local State, Municipal and other laws. After setting out various definitions under the RERA 2016 from para 134 it was held at paragraph 144 as follows:-

> **"144.** The above provisions of the RERA are indicative of the fact that Parliament was conscious of the position that diverse activities relating to construction projects are governed by municipal and local legislation. There is an existence in the States of various regimes of town and country planning governed by State enactments and regulations have been framed under them. Likewise, municipal and local laws govern diverse aspects of construction activity in real estate projects including the application for development, nature and extent of permissible development on land, issuance of commencement certificates allowing the promoter to begin development of an immovable property, completion certificates certifying the completion of the construction

> project in accordance with the sanctioned plans and the grant of occupation permission to occupy the constructed areas."

57. The single bench has therefore erred in holding that the Non-obstante clause in the NKDA Act bars the operation of the WB Apartment Ownership Act of 2007.

58. Having thus established that the West Bengal Apartment Ownership Act aligns with the NKDA Act, we may now proceed to examine whether the NKDA itself requires the application of the provisions of the West Bengal Apartment Ownership Act in respect of granting a sanction plan/revised sanction plan.

F. JUDICIAL DICTA CITED BY THE PROMOTER TO DEMONSTRATE THAT NKDA IS NOT REQUIRED TO ENSURE COMPLIANCE WITH OTHER ENACTMENTS

59. Before moving to the next head of discussion on the NKDA Act, we may briefly advert to the 5 decisions of this Court namely, ***Shelter Projects Limited & Others v. Kolkata Municipal Corporation & Others***, reported in ***2021 (3) ICC 654,*** particularly 32-33, 35, 37, and 40; ***Calcutta Metropolitan Development Authority v. Smt. Ratna Banerjee and Others*** reported in ***(1995) 1 CHN 383,*** particularly paragraphs 19 and 20; ***West Bengal Properties Limited v. State of West Bengal***, reported in ***AIR 1994 Cal 82***, particularly paragraph 7; ***Bojoy Raj Jain*** reported in ***AIR 1995 Cal 216,*** particularly paragraphs 86-91); ***Acquet Trading Co. Private Limited &. Another v. State of West Bengal*** reported in ***(2006) 3 CHN 424,*** particularly paragraphs 6-12, cited by Mr.Mitra for the Promoter to argue that the NKDA was constituted to enforce only the provisions of the NKDA Act, and Rules made thereunder, and it cannot seek the compliance with any other law as a condition precedent for grant of a revised plan.

60. The common thread that connects the 5 decisions (supra) is that in such cases, the Municipal Authority insisted on the obtaining of a no-objection certificate from another 3rd authority for the grant of a sanction plan.

61. An illustration from one of the aforementioned cases is that a no-objection certificate was insisted upon by the Municipal Authority to be obtained from the competent authority under The Urban Land (Ceiling & Regulation) Act, 1976, declaring that the land where the construction is proposed to be made, has not been vested in the State by the operation of the said Act.

62. This Court has held ***Shelter Projects (Supra)*** and ***West Bengal Properties (Supra)***, that the KMC Act does not mandate any certificate from the authorities under the Urban Land Ceiling Act 1976. In ***Ratna Bannerjee (Supra), Bojoy Raj Jain (Supra)*** and ***Acquet Trading (Supra)***, it was held that the CMC Act did not conceive of any prior permission from KMDA or the CIT for sanction of a Plan. The Courts have consistently held that when the provisions under Municipal Acts do not call for a no-objection or approval from a competent authority constituted by and under a different statute, the compliance with the latter cannot be insisted upon by the Municipal Authority.

63. The ratio of such decisions is that when such a statute does not have any consequence on the Municipal Act in question, the violation of such a statute will not amount to a consequent violation of the Municipal Act. Hence, it was held that a Municipal authority can and shall only seek the compliance with a provision of a different statute, the violation whereof will find the Municipal Authority in default under the concerned Municipal Act.

64. Further, the promoter on this point has also relied on the decision of the Hon'ble Supreme Court in ***Vikas Singh v Government of NCT of Delhi and Others*** reported in ***2022 SCC Online SC 1207.*** The Court was dealing with a situation where the South Delhi Municipal Corporation refused to grant a revised plan on the ground that the person concerned had not obtained a fire clearance certificate, which is to be mandatorily obtained for a high-rise building.

65. It was the specific finding of the Court in ***Vikas (supra)*** that the proposed building does not qualify as a high-rise one. Thus, the clearance sought for is not a prerequisite for the grant of a revised plan.

66. The Supreme Court, however, did observe in ***Vikas (supra)*** that the South Delhi Municipal Corporation can independently seek fire clearance in its discretion since every building being howsoever high or low in height, must have adequate firefighting and protection mechanisms in place. However, on the non-furnishing of the clearance by the Fire Services Authority, the revised plan cannot be refused. Hence, the Court in ***Vikas (supra)*** dealt with a non-mandatory and directory provision.

67. In the present case, however, consent of the existing flat owners is made pre prerequisite for the construction of an additional tower. The additional tower, i.e. the 16th tower, cannot be dealt with by the competent authority under the WB Apartment Ownership Act. It is only the NKDA under the NKDA Act and its Rules that can and shall have to deal with the additional tower. Therefore, a violation of section 7 of the Act of 1972 cannot be addressed under the WB Apartment Ownership Act, but under the NKDA.

68. Further, a subtle but crucial distinguishing feature of the decisions above is that in the said cases, no-objection certificate or approval were insisted to be obtained from an Authority different from the Municipal Authority, which led to a situation where the Municipal Authority was seeking compliance of a provision of law whose compliance was supposed to have been sought and ensured by a different authority. An impression was created that the Municipal Authority was seeking to encroach upon the occupied field of another authority.

69. However, in the present case, the compliance of Section 7 of the Act of 1972 has been discarded by the NKDA. The existing Flat owners insist on compliance with the same infraction which confers on them the right to contest the revised plan granted without their consent. Section 7 of the Act of 1972 is more fully dealt with hereinafter.

G. THE NKDA ACT *SUO MOTO* FACTORS IN THE APPLICATION OF THE WB APARTMENT OWNERSHIP ACT 1972, AND RULES MADE THEREUNDER:-

70. Rule no.4(a) of the NKDA Building Rules prescribes the forms in which the application for sanction has to be submitted. Schedule 1 is one of the many such forms, relevant items wherefrom are set out below:-

SCHEDULE I
APPLICATION FORM FOR UNDERTAKING ERECTION OF BUILDING
[see rule 4]

(G) Enclosures

(a) Copy of the document showing the **exclusive right to develop the land;**

(r) Mutation / Conversion Certificate along with ULC clearance wherever applicable.

(s) **copy of deed regarding transfer / gift of land, if applicable.**

emphasis applied

71. Thus as per the form, any promoter seeking a sanction plan from the NKDA either has to show by documents of title that he has a contemporaneous exclusive right to construct on a particular plot of land, or that he is authorised by the owners in that regard. Upon the execution of the agreement for sale or conveyance referred to the original sanction plan dated 10th September, 2007, which permitted only the 15 towers to be built, the promoter lost the right to make any further construction in the land, much less the 16th tower. He could have effected further construction only with the express consent of the existing owners. The consent of the existing flat owners was therefore mandatory and imperative under the WB Act, 1972. The NKDA Act calls for the requirement of consent of the flat owners, since it requires the person seeking to construct to establish that he has the exclusive right to make construction on the land in question. The WB Act of 1972 must therefore read into and factor in the application of the NKDA Act of 2007.

H. <u>THE PROVISIONS UNDER THE WB APARTMENT OWNERSHIP ACT, 1972 (WB ACT OF 1972) AND WB APARTMENT OWNERSHIP RULES OF 1974 (RULES OF 1974):</u>

72. At this juncture, an analysis of the provisions of the WB Act of 1972 and its rules is required to determine the role of the consent of the flat owners both for a new construction and a revised construction.

73. Section 2 of the WB Act of 1972 is set out below:-

> **S. 2. Application of the Act**. This Act shall apply to every property having residential units or both residential and commercial units, and the sole owner or all the owners or majority of the owners of every such property shall submit the same, within such period as may be prescribed, to the provisions of this Act by duly executing and

registering a declaration setting out the particulars referred to in section 10].

74. Section 10 of the WB Act of 1972 prescribes as follows:-

10. (1) The Declaration referred to in section 2 shall be submitted in such form and in such manner as may be prescribed and shall contain thc following particulars, namely:-

(a) description of the property:

(b) nature of interest of the owner or owners in the property;

(c) existing encumbrance, if any, affecting the property;

(d) description of each apartment containing its location. '[actual built-up area,] number of rooms, immediate common area to which it has access, and any other data necessary for proper identification;

(e) description of the common areas and facilities;

(f) description of the limited common areas and facilities, if any, stating to which apartments their use is reserved;

(g) value of the property and of each apartment, and the percentage of undivided interest in the common areas and facilities appertaining to each apartment and its owner * * * * * .

(h) such other particulars as may be prescribed.

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

75. Section 10A of Act of 1972 is as follows:-

S. 10A. A declaration or an instrument to be submitted before the Competent Authority and to be dealt with by him.-[(1) Any declaration referred to in section 2 or any amendment thereto or any instrument referred to in sub-section (3) of section 4, shall, in the first instance, be submitted by the sole owner or all the owners or the majority of the owners of the apartments in duplicate, within 30 days from the date of its execution, to the competent Authority along with copies of site plans, building plans and the notice of intention to submit the property to the provisions of this Act, by the majority of owners specified in section 2 to

the remaining owners of the property in such form as may be prescribed when such declaration is made by majority of owners. The remaining owners shall be allowed to submit declaration subsequently, either individually or collectively, in such form as may be prescribed.]

76. Section 7 of the Act of 1972 provides as follows:-

> "7. Certain work prohibited-. No apartment **owner** shall do any work which would be prejudicial to the soundness or safety of the property or **would reduce the value thereof** or impair any easement or hereditament or **shall add any material structure or excavate any additional basement or cellar."**

77. Rule 4 of the Rules of 1974 framed under Section 10 of the Act of 1972 is also set-out herein below:-

> 4. Circumstances in which a Declaration may be amended under sub-section (2) of section 10.-A Declaration made under section 2 may be amended in any of the following circumstances, namely:
>
> (a) when there is any bona fide mistake in the Declaration,
>
> (b) when there is, subsequent to the submission of Declaration, any alteration in the description or nature of the property or any part thereof to which such Declaration relates, or
>
> (c) when subject to the approval of Competent Authority, an amendment is necessary for carrying out the purposes of the Act.

78. Section 3(ia) of the Act of 1972 is set out below:-

> 3(ia) "owner", in relation to any property or part thereof or apartment, includes-
>
> (i) any person owning such property or part thereof or apartment, or
> (ii) any person deemed to be owning such property or part thereof or apartment, or
> (iii) **any promoter**, or
> (iv) a lessee of such property or part thereof or apartment, where the lease is for a period of thirty years or more:
> Provide that any person who has executed an agreement for purchase or for taking lease for a period of thirty years or more, of any property or part thereof or apartment or has paid the consideration or part thereof, shall be deemed

> to be owning such property or part thereof or apartment even though the document for purchase or lease of such property or part thereof or apartment has not been registered;]

79. A plain reading of all the sections and rules afore quoted would establish that a promoter has to take the existing flat owners into confidence before adding any structure, the addition of which would be contrary to the original building plan, granted and shown to the intending purchasers turned flat owners.

80. First in the line of the sections is section 2, which directs a form to be filled up with mandatory particulars enumerated under section 10 of the Act of 1972 for bringing an apartment under the umbrella of the Act of 1974. The registration thereunder carries certain protection and benefits in favour of the apartment owners, giving a right to each of them. The Act of 1972 is aimed at giving a voice to every single flat owner among the many flat owners in a building. The Act is a beneficial legislation and is protective of the rights of an individual flat owner in a metropolitan city.

81. Thereafter, clauses (d) and (h) of Section 10 would indicate that to register an apartment under the WB Act of 1972, one is required to produce the building sanction plan, where the specification of the construction and common areas would be indicated in a drawing format. The said details are required to be filled up and given, in terms of the said clauses. Thus, the WB Apartment Ownership Act must consider and have the building plan granted by the NKDA authority.

82. Section 10A would reinforce the need for the production of the building plan to register an apartment under the Act of 1972, since it says that the form to be submitted for registration shall be accompanied by a copy of the building plan.

Sec 10A further weaves a strong chain of relation between the owners of the 15 towers and the owners of the 16th tower, since the said Section 10A says that while making an application for registration, notice of intention to register under the Act of 1972 is to be given by the applying owners to the remaining owners, who have not applied therefor. Thus, the WB Apartment Ownership Act ensures that no plan or document is obtained and no act is done behind the back of all or any of the owners of an apartment.

83. In the present case, the flat owners of the 15 towers did not and could not have the occasion to give notice to the flat owners of the 16th tower since the tower itself was built post submission of the form by the flat owners of the 15 towers.

84. Rule 4(b) would be relevant to the present case, which allows an amendment in the form submitted for registration when there is a change in the description of the property. Thus, the WB Apartment Ownership Act would have to factor in the revised plan of the NKDA when there is an addition of a tower. Section 10A would again make the notice to change to be mandatorily given to the owners who are not parties to the amendment.

85. Having established that the WB Apartment Ownership Act factors in the NKDA Act, let us now move to section 7 of the Act of 1974 which requires the owner intending to add any structure to seek the consent of the other flat owners in writing to any such addition, meaning thereby now the NKDA Act must correspondingly factor in the 'consent of the other owners ' mandated by and under the WB Act of 1972.

86. An owner, in terms of Section 3(ia) of the Act of 1972, includes a promoter under the NKDA Act is required to demonstrate that he has the exclusive right to construct on the land, which can only be established when the existing flat owners and their concomitant undivided share of land give a no-objection to a proposed addition. Thus the impugned revised sanction plan was required to be routed through section 7 of the Act of 1972, before it could be finally granted to the promoter by the NKDA.

I. <u>THE PROHIBITORY EFFECT OF SECTION 7 OF THE WB APARTMENT OWNERSHIP ACT, 1972.</u>

87. The Learned Single Judge has observed that the requirement of consent to be obtained from the existing owners as mandated under UP Apartment (Promotion of Construction, Ownership and Maintenance) Act of 2010, is not present in the WB Apartment Ownership Act and thus it was held that the dicta in the case of ***Supertech Limited (Supra)*** which dealt with the UP Act, would not apply to the present facts of the case arising in the State of West Bengal. Section 7 of the 1972 Act has missed the notice of the Learned Single Judge.

88. Section 7 of the Act of 1972 is prohibitory and creates a statutory bar against making any alteration in the main structure or constructing an additional structure, inter alia, to the detriment of the other apartment owners' rights, and any violation of Section 7 would attract consequences. It is not necessary that the consequences have to be specified in the Act of 1972. The consequences flowing from the violation of section 7 of the Act of 1972 can also be addressed under the NKDA Act and must be construed as such. An owner includes a

promoter as provided under Section 2(*ia*)/(ii) of the Act of 1972. Therefore, the promoter is also required to obtain the prior consent of all the apartment owners.

89. Section 7 of the Act of 1972 provides that before making any material addition to the building or putting up a new structure, an apartment owner, including a promoter, is required to obtain the consent of all the existing land/apartment owners. The addition of a structure amounts to a material departure from the existing sanction plan, thus necessitating a revised sanction plan.

90. Admittedly, the construction of the 16th Tower is a material addition to and departure from the original sanction plan. Hence, the promoter approached the NKDA for a revised sanction plan. In the light of the discussion hereinabove, the view of the Single Bench, is untenable.

J. THE CONDUCT OF THE PROMOTER ESTABLISHES THAT HE WAS AWARE OF THE REQUIREMENT OF THE CONSENT OF THE FLAT OWNERS TO THE CONSTRUCTION OF THE 16TH TOWER

91. The promoter tried to file Form B under the Rules of 1974, knowing fully well of the requirement of Section 10 of the Act of 1972 and Rules 3 and 5 of the Rules of 1974. 42. The orders passed thereunder by the competent authorities under the Act of 1972 and the Rules of 1974 above, establish that the promoter has sought amendment of the Form-A on the ground that the Form-A filed by the flat owners of the 15 towers required amendment. There was, however, no such requirement. The competent authorities pointed out that after the filing of Form A by the flat owners of the 15 towers, there has been induction of new flat owners, who, however, cannot steal a march over the existing flat owners. The

owners of the flats in the 16th Tower, by seeking a unilateral amendment in collusion with the new promoter, of the form A without the express consent of the existing flat owners, acted fraudulently and illegally. Their application was thus rejected by the first and appellate authorities.

92. Rule 4(b) of the 1974 Rules expressly provides for an amendment of the form when there has been any change in the description or nature of the property, meaning there has been an addition of structure. The promoter, however, did not invoke and refer to Rule 4(b) before the competent authority since the promoter was aware of the requirement for consent of the other existing apartment owners, who had about 90% share in the land in question, for the construction of the 15th Tower. Such consent not having been obtained, the promoter must be deemed to have noticed that the flat owners of 15 towers would never consent to the induction of owners of the 16th tower. The promoter, therefore, clearly defrauded the flat owners of the 15 towers as well as those of the 16th tower.

93. The First Authority under the Act of 1972, in its order dated 11th April, 2018 arrived at the following findings:-

> "This Authority has considered the respective submissions of the parties and examined the materials on record.
>
> At the outset, this Authority would like to emphasise that it is performing the limited function of considering whether the Form B submitted by the promoter should be accepted or not.
>
> Under the said Act Form A, may be submitted by the sole owner of the property. In the year 2012, the promoter submitted Form A as sole owner and it was accepted. Now the promoter wants to amend the Form A by submitting Form B. But presently promoter is not the sole owner of that property. There are a large number of flat owners in the said property by now.

In view of this the Form B in its present form is not accepted. The present owners of the said property jointly may submit Form B afresh secking amendment of Form-A submitted earlier."

94. An appeal from the said order before the Appellate Authority was also rejected by order dated 18th August, 2022 wherein it was observed as follows:-

Government of West Bengal
Housing Department
Apartment Cell
New Secretariat Building,
Block-A, 1st Floor, Room No.-9
Kolkata - 700001

No. 283-H1/H8/23013(ii)/1/2022 Date- 18.08.2022.

ORDER

The promoters of Elita Garden Vista had submitted an application in Form-B under section 10A of the West Bengal Apartment Ownership Act, 1972 in 2015 for amendment of a declaration in Form-A accepted by the Competent Authority under the Act in 2012 on the grounds that the original accepted Form-A contained a number of factual errors or mistakes that needed to be rectified.

The application was challenged by 41 flat owners of the property who contended that after selling off the flats to individual owners, the promoters had no right to submit an application for such amendment and that the later Form-A submitted for amendment in effect altered the percentage of undivided interest of the apartment owners in the common area and facilities of the property made in the earlier declaration. They prayed the application in Form-B to be rejected by the Competent Authority.

After hearing both sides through their advocates, the Competent Authority passed an order on 11.04.2018 stating-

"Under the said Act Form-A may be submitted by the sole owner of the property. In the year 2012, the promoter submitted Form-A as sole owner and it was accepted. Now the promoter wants to amend the Form-A by submitting Form-B. But presently promoter is not the sole owner of that property. There are a large number of flat owners in the said property by now.

In view of this the Form-B in its present form is not accepted. The present owners of the said property jointly may submit Form-B afresh seeking amendment of Form-A submitted earlier."

Records of the case have been placed before me.

> Aggrieved with the order of the Competent Authority the promoters of Elita Garden Vista submitted an appeal petition on 10.05.2018 under section 10A (3) of the Act before the Appellate Authority within the stipulated period. Thereafter the promoters, being the appellant in this case, and the opposite parties ie. the objecting flat owners were heard by this Authority at length on several dates. Going through their submissions it is found both the parties have stated that the property now consists of 1511 flats. It means there are a commensurate number of owners. There is no sole owner at the time of submission of Form-B Rule 5 of the West Bengal Apfartment Ownership Rules 1974 clearly vests both the right and obligation of submitting an amendment application in Form-B upon all the owners at the time of such submission. It is found that is exactly what the Competent Authority has done. He has directed, "The present owners of the said property jointly may submit Form-B afresh seeking amendment of Form-A submitted earlier" thereby "Not accepting" the Form-B submitted in its present form on above mentioned procedural grounds. It is noted that the competent authority has not "Rejected" the application. He has not dwelt on the substantive part of the application.
> Therefore, an appeal does not lie at this stage. The appellant is instructed to act in compliance of the directions of the Competent Authority. The records of the case are returned to the Competent Authority for further disposal.
>
> Sd/-
> Appellate Authority under
> West Bengal Apartment Ownership Act, 1972

95. Obtaining a revised sanction plan from the NKDA and construction of the 16th Tower in the open landscape areas, without consent and concurrence, violates the mandatory provisions of the Act of 1972 and the Rules framed thereunder. The single judge thus committed in not appreciating the above.

K. WHETHER THE WEST BENGAL PROMOTERS ACT 1993 APPLIES TO THE PRESENT CASE:-

96. Mr Mitra, Learned Counsel for the promoters, has argued that the WB Promoters Act of 1993 is not applicable to the instant Case as it has been repealed by the Real Estate Regulation and Development Act 2016.(RERA) The said Act was brought into force in West Bengal after the Supreme Court struck down the

WBHIRA 2017 in the case of ***Forum for Peoples' Collective Efforts Vs State of West Bengal*** reported in ***(2021) 8 SCC 599.*** It was held in the said decision that the Promoters Act 1993 was repealed by the said RERA Act of 2017. The repeals and savings clause in the said RERA Act at Section 92 must be deemed to have saved all earlier actions and applicability of the provisions under the 1993 Act. This is so as the WBHIRA of 2017 had kept alive the consequences of the violations of the WB Promoters' Act 1993, prior to the former coming into force.

97. Furthermore, the WBHIRA Act came into force in 2017. The RERA came into force in 2016. The WBHIRA 2017 was declared as having been constitutionally inconsistent with the RERA Act 2016 and hence struck down in 2021. The WB Promoters Act and the actions and omissions must therefore be deemed to survive until the commencement of the WBHIRA 2017. The writ petition in the instant case was filed in the year 2018.

L. <u>DUTIES AND LIABILITIES OF A PROMOTER UNDER THE WEST BENGAL BUILDING (REGULATION OF PROMOTION OF CONSTRUCTION AND TRANSFER BY PROMOTERS) ACT, 1993. (HEREAFTER THE PROMOTERS ACT OF 1993) AS ADOPTED BY THE WB APARTMENT OWNERSHIP ACT OF 1972.</u>

98. The WB Act of 1972 adopts the definition of promoter provided under the Promoters Act of 1993. The WB Act of 1972, therefore, has factored in the Promoters Act of 1993, and since the NKDA Act, 2007 has factored in the WB Act of 1972, it would follow that the NKDA Act would also equally factor in the Promoters' Act of 1993.

99. Section 3(l) of the WB Apartment Ownership Act of 1972 is set out below:-

> 3(l). "promoter" means a Promoter as defined in the West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Act,1993.]
>
> Emphasis applied

100. Further, the duties and liabilities of the promoter are more particularly specified under the Act of 1993, but not under the NKDA Act or the Act of 1972. Hence, the former Act binds the latter two Acts insofar as the role and duties of a promoter are concerned.

101. At this stage, the definition of the promoter provided under the NKDA Building Rules and the Promoters Act of 1993 needs consideration. The definition of promoter under both the Acts is pari materia.

102. Section 2(g) of the Promoters Act 1993 is set out below:-

> 2. In this Act, unless the context otherwise requires
> (g) "promoter" means a person **who constructs or causes to be constructed a building on a plot of land** for the purpose of transfer of such building by sale, gift or otherwise to any other person or to a company, co-operative society or association of persons……."

103. Rule no. 2(c) of New Town Kolkata (Building) Rules, 2009 is set out below:-

> a) "applicant" means Owner of the land and includes authorized representative of the owner or **anybody having construction right in accordance with law** and shall also include the transferee;

104. Both the afore-quoted definitions, therefore, define a person eligible to construct as a promoter or owner. The person may come to acquire the exclusive right to construct either in the capacity of the owner of the land or by being conferred with the authority by the owner of the land to make construction.

105. Understandably, the NKDA Building Rules do not use the word 'promoter', but use the word 'applicant' since both an owner or promoter duly authorised can

make an application for sanction of plan. The Promoters Act 1993 uses the word 'promoter' since the subject matter of the Act of 1993 is the duties and liabilities of a promoter in the construction business.

106. Therefore, both the Legislature and the authorities under the NKDA Act framed rules that required the said authorities to mandatorily factor in the Act of 1993, and the statutory obligations of promoters specified therein. The principle that rule-making and law-making authorities are presumed to be aware of the laws in force while making rules and laws comes into play here. The NKDA Act came into force in the year 2009, and the Promoters Act in 1993.

107. The preamble of the Act of 1993 and Section 1(2) of the Act of 1993 mandate the factoring in of the Promoters Act 1993 upon the NKDA authority in the grant of building action plans/revised plans.

108. The Preamble of the 1993 Act is set out below:-

> *An Act to provide for the regulation of promotion of construction and transfer of building by promoters in West Bengal.*
>
> WHEREAS it is expedient in the public interest to provide for the regulation of promotion of construction and transfer of building by promoters in West Bengal;

109. Section 1(2) of the 1993 Act is as follows:-

> Section 1. Short title, extent and commencement-
>
> (2) It <u>extends to the whole of West Bengal</u>

110. Section 16 of the Act of 1993 entitles the state executive to notify that the Act of 1993 will not apply to the construction business carried out in a particular area. In the present case, the State executive has chosen not to exempt the application of the Act of 1993 in the area where the 16th tower has been built. This implies that the state executive has mandated the application of the Act of 1993 over

and above the NKDA Authorities while granting a building plan to the promoters. Section 16(3) of the 1993 Act is as follows:-

> Section 16. Exemption.
>
> (3) Notwithstanding anything contained in the foregoing provisions of this section, if the State Government is of the opinion that the operation of any of the provisions of this Act causes undue hardship, or circumstances exist which render it expedient to do so, it may exempt by a general or special order, any class of persons or areas from all or any of the provisions of this Act, subject to such terms and conditions as it may impose.

111. The Act of 1993 has an inherent public element. It regulates the business of promoting and construction in the state of West Bengal. It mandates and ensures that, before a promoter starts construction, they are authorised by the owner to make construction on the land. A promoter must therefore have and obtain prior consent from the owner for such construction. The Act of 1993 ensures that there is no appropriation of land and the flat owner and or landlord is not victimised by the promoter. The State Government has not exempted the NKDA and the areas governed by it from the operation of the 1993 Act, therefore, Section 1 of the 1993 Act is binding on the NKDA.

112. It follows from the above that the respondent No.6/promoter should have obtained the permission of the competent Authority under the Promoters Act 1993 before construction of the 16th Tower. No such permission appears to have been taken or stated to have been taken by the Promoter in the instant case. The NKDA has failed to ascertain, ensure, and require the prior consent of the existing apartment owners for the revised sanction plan. The said revised sanction permitting the construction of the additional 16th Tower and commercial plaza is thus ex facie illegal.

113. As the Appellants/owners did not grant consent to the promoter for the construction of the 16th tower, the NKDA, on the date of application for the revised sanction plan, did not have any document demonstrating the exclusive right of the promoter to submit the revised plan for further construction. The promoter did not have any document of title in the land where the 16th tower has been constructed, nor did he produce any consent letter from the existing owners of apartments in the 15th tower permitting him to construct thereon. Therefore, the revised sanction plan by the NKDA is illegal and liable to be quashed and set aside.

114. Sections 3 and 8 of the Promoters Act of 1993, specify the duties and liabilities of the Promoter, and its unavoidable application to the NKDA Authorities. Section 3 of the Act of 1993 is set out hereinbelow:-

> **"Section 3. Registration and, permission for construction**
> 3. (1) Every promoter who constructs or intends to construct **in any area in which this Act comes into force** a building for the purpose of transfer of such building by sale, gift or otherwise, shall at least ninety days before the commencement of the construction of such building in such area, make an application to such officer of the State Government (hereinafter referred to as the authorised officer) as the State Government may appoint, for registration of his name **and for permission for construction of such building**. The application shall be in such form, and shall be accompanied by such fee, as may be prescribed:
> (2) Every such application 'shall be accompanied by a statement containing the following particulars and documentary evidences where necessary:—
>
> (b) the nature of the promoter's title to the land (copy of title deed to be annexed);
> (c) details of the agreement between the owner of the land and the promoter **authorising the latter to undertake the construction of building** (copy of registered agreement to be annexed);
> (f) sanctioned plan for the construction of building under **any law for the time being in force** or, where the plan is not sanctioned at the time of making the application under subsection (1), an undertaking by the

applicant to the effect that the plan will be submitted by him as soon as it is sanctioned:
Provided that the name of the applicant shall not be registered, and the applicant shall not be granted permission to construct the building, under sub-section (5) until the sanctioned plan is submitted;
(g) detailed specification of the construction of building as approved by any competent authority under any law for the time being in force;

(3) **Every promoter shall make a separate application** for the construction of building on separate plot of land or **for the construction of separate building:**

Provided that no such application shall be entertained **where the promoter has no title to the land** unless the agreement between the owner of the land and the promoter, **authorising the promoter to undertake the construction of building, is duly registered:"**

115. The Act of 1993 not only regulates the registration of a promoter but also prescribes the mandatory conditions to be fulfilled to permit a promoter to carry out the construction. Irrespective of whether a promoter has a sanction plan from the Municipal/Developmental Authority, a promoter cannot start the construction work unless permitted by the Competent Authority under the 1993 Act.

116. A promoter, in terms of the Act of 1993, has to furnish a sanction plan along with his documents of title for the land where the construction would be effected. The promoter is required to produce a document to show that he has been authorised by the owner to construct when the land is sold.

117. The promoter, in terms of the said Act of 1993, is required to make a separate application seeking permission to make further construction even after obtaining the sanction plan from the prescribed authority and is mandatorily required to obtain permission to carry out the construction from the Competent Authority constituted thereunder.

118. Under the proviso to section 3(3) of the said Act of 1993, before a promoter starts making further construction, he has to demonstrate before the competent Authority under the Act of 1993 that either he has title to the land on which further construction is to be carried out or he has been authorised by the owner thereof to carry out further construction.

119. Section 3 declares that the Act of 1993 will apply to every area regardless of who the Sanctioning authority is, by the use of the expression- **in any area in which this Act comes into force.** Hence, the NKDA is bound by the terms of the Promoters Act 1993 while sanctioning a construction plan applied for by a promoter.

120. The proviso to section 3(3) clearly applies to the present case. After the execution of sale deeds in favour of the flat owners in those 15 Towers, the promoter lost title in the land, and hence was required to take prior consent, inter alia the appellants to make a further entry on the land, which he has not obtained. The construction of the 16th tower and the commercial areas in the complex is ex facie illegal and is liable to be demolished.

121. Section 8 of the Promoters Act of 1993 is set out below:-

> **Section 8. Alteration or addition without consent of transferee and rectification of defect.**
> 8. (1) No promoter shall, after he has been granted under sub-section (5) of section 3, permission to construct a building and after an agreement under section 7 has been entered into by him with any person who intends to purchase a flat, make, **without prior consent of such person**
> I) any alteration in the structure of such flat; or
> II) make any alteration in the structure of a building or construct any additional structure:
> Provided that every alteration in the structure of such flat or building or every construction of such additional structure shall be done with the prior permission of the authority which sanctioned the original plan of such flat or building and with due regard to the detailed

> specifications of the construction of building as approved by the competent authority under any law for the time being in force.
>
> (2) Subject to the provisions of sub-section (1), a building shall be constructed and completed in accordance with the plan referred to in clause (f), and the specifications referred to in clause (g), of subsection (2) of section 3. If any defect in the construction of the building or in the material used or **if any unauthorised change in the construction of the building** is brought to the notice of the promoter by the person or persons taking possession of the building within a period of one year from the date of taking such possession, **it shall either be rectified, wherever possible, by the promoter without charge to the person or persons who agreed to purchase any flat or flats or such person** or **persons shall be paid a reasonable compensation for such defect or change.**
>
> **(Emphasis added)**

122. Section 8 has two components. The first part prohibits the promoter from making any construction, without the consent of the intending purchaser or the owner and contrary to the sanction plan, related to such purchasers in conveyance or agreement for sale. The following are the works that the promoter cannot carry out without the consent of the flat owners:-

> any alteration in the structure of such flat; or
>
> make any alteration in the structure of a building or construct any additional structure:

123. The second part mandates that when the promoter has effected an unauthorised change (i.e., not authorised by a sanction plan) while constructing the building, wherein a purchaser owns a flat, such change has to be either rectified by the promoter or, if it cannot be rectified, reasonable compensation has to be paid by the promoter to the flat owner. A one-year period of limitation has been fixed for the flat owners to point out the said deviation to the promoter. The said period commences from the date the apartment owner takes possession of the flat. The second part does not apply to the present case since the change here has not

been effected in the 15 towers, but a change/deviation has been effected on the land surrounding the 15th Tower. What, however, can be taken from the second part is that the promoter will be liable to compensate the flat owners if unauthorised construction has been made by him.

124. Thus, there is a remedy provided under section 8(2) where either the defect is removed or remedied by the promoter or compensation for the defect, or compensation is paid by him. There is, however, no remedy provided when an additional structure is built by the promoter. The expression used is 'If any defect in the construction of the building or in the material used or **if any unauthorised change in the construction of the building'**.

125. The legislature, therefore, has expressly ruled out the rectification or payment of compensation as an alternative means to remedy the construction of an additional structure done by the promoter without the consent of the flat owners. Thus, the promoter cannot retain the 16th tower by a payment of compensation to the flat owners of the 15 towers.

126. The promoter in the instant case has clearly acted in violation of Section 8(1) (ii) of the Act of 1993 in illegally and surreptitiously obtaining sanction of the modified plan for the Construction of the said 16th Tower without the consent and concurrence of the appellants.

M. THE JUDICIAL DICTA ON THE REQUIREMENT OF THE CONSENT OF OWNERS BEFORE BRINGING UP ADDITIONAL STRUCTURE:-

127. Section 8 of the WB Promoters Act and section 7 of the WB Apartment Ownership Act mandate that the promoter obtain prior consent of the flat owners before

putting up an additional structure. The 16th Tower qualifies as an additional structure. Thus, the consent of the flat owners is a statutory consent, which requires to be sought for.

128. A useful and interesting reference may be made to the **Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963,** which came up for consideration before the Supreme Court in ***Jayantilal Investments v. Madhuvihar Coop. Housing Society*** reported in ***(2007) 9 SCC 220***. The facts of the case were that before the amendment of Section 7 of MOFA, it included the expression '***construct any additional structures'*** to prohibit a promoter from constructing an additional structure without the prior consent of the flat owners

129. Based on Section 7, the Bombay High Court held that the promoter is to obtain consent of the flat owners before building an additional structure, and in absence of the said consent, demolition was directed for. The Maharashtra Legislature intervened with an amendment by deleting the said expression. The amendment was considered by the Supreme Court in ***Jayantilal Investments v. Madhuvihar Coop. Housing Society,*** reported in ***(2007) 9 SCC 220***, where it was held that the deletion of said expression does not grant an exemption to the promoter from disclosing the configuration of the entire project, to be developed by him, to an intending purchaser. It was held that when an additional structure is not contemplated in the sanction plan shown to an intending purchaser, consent has to be obtained by the developer before constructing an additional

structure. A promoter is not at liberty to deviate from the sanctioned plan shown to an intending purchaser.

130. The said decision is useful in the facts since it lays down a principle of law that nothing could be done by the promoter which was not informed by him to an intending purchaser at the time of purchase. Para nos. 15, 18, 19 of ***Jayantilal Investments (supra)*** are set out below**:-**

> 15. The judgment of the Bombay High Court in Kalpita Enclave case [1986 Mah LJ 110 : (1987) 1 Bom CR 355] *was based on the interpretation of unamended Section 7 of MOFA. Consequently, it was held that a promoter was not entitled to put up additional structures not shown in the original layout plan without the consent of the flat takers. Thus, consent was attached to the concept of additional structure. Section 7 was accordingly amended. Section 7-A was accordingly inserted by Maharashtra Amending Act 36 of 1986. Section 7-A was inserted in order to make the position explicit, which according to the legislature existed prior to 1986, implicitly. Section 7 of MOFA came to be amended and for the purpose of removal of doubt, additional Section 7-A came to be added by Maharashtra Act 36 of 1986. By this amendment, the words indicated in the parenthesis in the unamended Section 7(1)(ii), namely,* ***"or construct any additional structures"*** came to be deleted and consequential amendments were made in Section 7(1)(ii). Maharashtra Act 36 of 1986 operated retrospectively. Section 7-A was declared as having been retrospectively substituted and it was deemed to be effective as if the amended clause had been in force at all material times. Further, it was declared vide Section 7-A that the abovequoted expression as it existed before commencement of the amendment Act shall be deemed never to apply in respect of the construction of any other additional buildings/structures, constructed or to be constructed, under a scheme or project of development in the layout plan, notwithstanding anything contained in the Act or in any agreement or in any judgment, decree or order of the court. *Consequently, reading Section 7 and Section 7-A, it is clear that the question of taking prior consent of the flat takers does not arise after the amendment in respect of any construction of additional structures. However, the right to make any construction of additional structures/buildings would come into existence only on the approval of the plan by the competent authority. That, unless and until, such a plan stood approved, the promoter does not get any right to make additional construction. This position is clear when one reads the amended Section 7(1)(ii) with Section 7-A of MOFA as amended.*

Therefore, having regard to the Statement of Objects and Reasons for substitution of Section 7(1)(ii) by Amendment Act 36 of 1986, it is clear that the object was to make legal position clear that even prior to the amendment of 1986, it was never intended that the original provision of Section 7(1)(ii) of MOFA would operate even in respect of construction of additional buildings. In other words, the object of enacting Act 36 of 1986 was to change the basis of the judgment of the Bombay High Court in Kalpita Enclave case [1986 Mah LJ 110 : (1987) 1 Bom CR 355] . By insertion of Section 7-A vide Maharashtra Amendment Act 36 of 1986 the legislature had made it clear that the consent of flat takers was never the criteria applicable to construction of additional buildings by the promoters. The object behind the said amendment was to give maximum weightage to the exploitation of development rights which existed in the land. Thus, the intention behind the amendment was to remove the impediment in construction of the additional buildings, ***if the total layout allows construction of more buildings,*** subject to compliance with the building rules or building bye-laws or Development Control Regulations. ***At the same time, the legislature had retained Section 3 which imposes statutory obligations on the promoter to make full and true disclosure of particulars mentioned in Section 3(2) including the nature, extent and description of common areas and facilities. As stated above, sub-section (1-A) to Section 4 was also introduced by the legislature by Maharashtra Act 36 of 1986 under which the promoter is bound to enter into agreements with the flat takers in the prescribed form. Under the prescribed form, every promoter is required to declare FSI available in respect of the said land. The promoter is also required to declare that no part of that FSI has been utilised elsewhere, and if it is utilised, the promoter has to give particulars of such utilisation to the flat takers. Further, under the pro forma agreement, the promoter has to further declare utilisation of FSI of any other land for the purposes of developing the land in question which is covered by the agreement.***

18. The above clauses 3 and 4 are declared to be statutory and mandatory by the legislature because the promoter is not only obliged statutorily to give the particulars of the land, amenities, facilities, etc., he is also obliged to make full and true disclosure of the development potentiality of the plot which is the subject-matter of the agreement. The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at the stage of layout plan to declare whether the plot in question in future is capable of being loaded with additional FSI/floating FSI/TDR. In other words, at the time of execution of the agreement

> with the flat takers the promoter ***is obliged statutorily to place before the flat takers the entire project/scheme, be it a one-building scheme or multiple number of buildings scheme. Clause 4 shows the effect of the formation of the Society.***
>
> 19. ***In our view, the above condition of true and full disclosure flows from the obligation of the promoter under MOFA vide Sections 3 and 4 and Form V which prescribes the form of agreement to the extent indicated above. This obligation remains unfettered because the concept of developability has to be harmoniously read with the concept of registration of society and conveyance of title. Once the entire project is placed before the flat takers at the time of the agreement, then the promoter is not required to obtain prior consent of the flat takers as long as the builder puts up additional construction in accordance with the layout plan, building rules and Development Control Regulations, etc.***
>
> Emphasis Applied

N. ABSENCE OF PRIOR CONSENT OF THE APPELLANTS VIOLATES THE NEW TOWN KOLKATA DEVELOPMENT AUTHORITY ACT OF 2007. (NKDA OF 2007).

131. Section 71 of the NKDA Act:-

> 71. Every person who intends to erect or re-erect a building shall first submit an application with a building plan in such Form, accompanied by such plans and specifications, ***and containing such information***, together with such fees and for such purposes, as may be prescribed.

132. Section 81 of NKDA Act is set out below:-

> 81. If, at anytime, the Development Authority is satisfied that such sanction has been given in consequence of any **material misrepresentation or fraudulent statement** contained in the plans, elevation sections or specifications of land or **any material particulars submitted in respect of such building**, **it may cancel such sanction,** and any work done thereunder, shall be, deemed to have been done without sanction.

133. The promoter has not provided the information as required under section 71 in the application for a modified sanction plan. Section 81 addresses the consequences of suppression of material facts by the promoter. The promoter is

guilty of suppressing that he did not have the exclusive right to construct. The absence of prior consent amounts to the violation of sections of the NKDA Act and the NKDA building rules. The modified sanction plan dated 20th August, 2015, is hit by section 81 and is liable to be cancelled.

134. Sections 75, 81, and 82 of the NKDA Act 2007 are set out hereinbelow:-

> "**75**. The sanction of a building plan may be refused on any of the follow grounds
> (a) that the approval of the building site has not been obtained as required under the provision of this Act and the rules and the regulations there under;
> (b) that the ground plan, elevation, section or specification contravene any of the provisions, of this Act or the rules or regulations made there under or any other law for the time being force;
> (c) that the application with building plan does not contain the necessary particulars and has not been prepared in the manner as required under the rules and the regulations made in this behaviour;
> (d) that any information or document required, by, the Development Authority in this behalf has not been duly furnished;
> (e) that the building or the work would be an encroachment on Government land or land, Nested in the Development Authority;
> (f) that for the use of the building for non-residential purposes, if an license or permission has not been obtained for such use as required under the provisions of this Act or any other law for the time being force:
> Provided that a provisional sanction may be given in this regard for erect or re-erection of a Building which may be continued by final sanction upon production of necessary license or permission from the Development Authority or the Government or the appropriate statutory body, as the case may be.
> **81**. If, at anytime, the Development Authority is satisfied that such sanction has been given in consequence of any material misrepresentation or fraudulent statement contained in the plans, elevation sections or specifications of land or any material particulars submitted in respect of such building, it may cancel such sanction, and any work done thereunder, shall be, deemed to have been done without sanction.
> **82.** Order for demolition or alteration of buildings in certain cases (1) If the Development Authority is satisfied that
> a)the erection of any building
> (i) has been commenced without obtaining sanction or permission under this Act, or
> (ii) is being carried on or has been completed otherwise than in accordance with the sanction accorded, or the permission has been lawfully withdrawn, or
> (iii) is being carried on, or has been completed in contravention of any provision of this Act or the rules or the regulations made thereunder, or,

> (b) any building or projection exists in violation of any condition. direction or requisition under any provision of this Act or the rules or the regulations made thereunder, or
> (c) any material alteration of, or addition to, any building has been commenced, or is being carried on, or has been completed, in breach of any provision of this Act or the rules or the regulations made thereunder,"

135. The promoter had initiated the proceeding for obtaining the revised sanction plan with the violation of Section 7 of the Act of 1972 and the Rules of 1974 as he had not obtained the prior consent of the apartment owners of the 15 towers. This would have been the first step in the proceedings of the grant of the revised plan. Hence, the Act of obtaining from and granting a revised sanction plan by the NKDA was, and is ex facie illegal. The NKDA could not have sanctioned any modified plan without the express consent of the flat owners of the 15 towers, in writing. The promoter has suppresed material facts of the joint ownership of the property with the appellants. The promoter has misled the NKDA into sanctioning a modified plan in the year 2015. The said modifed sanction plan is liable to be cancelled in terms of Section 81 of the NKDA Act, and the construction made pursuant thereto is liable to be demolished.

136. Mr. Mitra, appearing for the promoter has argued that Section 75 covers the pre-sanction cases, therefore when any illegality in the sanction plan has been pointed out in post-sanction times, Sec 75 is not applicable. Section 75 of the NKDA Act is set out below:-

> "**75.** The sanction of a building plan may be refused on any of the follow grounds
>
> (a) that the approval of the building site has not been obtained as required under the provision of this Act and the rules and the regulations there under;
>
> **********

> (c) that the application with building plan does not contain the necessary particulars and has not been prepared in the manner as required under the rules and the regulations made in this behaviour;
>
> (d) that any information or document required, by, the Development Authority in this behalf has not been duly furnished;

137. Section 75(a) deals with the integrity of the process by which a plan is obtained. When the integrity of the process is vitiated, the sanction plan should be refused. In the present case, the promoter has adopted a corrupt practice to obtain the sanction plan by suppressing that it no longer has the exclusive right to construct.

138. Clauses (c) and (d) of section 75 of the NKDA Act indicate that when necessary particulars have not been provided by the applicant for sanction, the sanction may be refused. In the present case, the promoter has not furnished the consent of the owner, and hence it should have been refused.

139. Section 75 enumerates the requirements to be fulfilled in the application for a sanction plan since it lays down certain grounds based on which the application for a sanction plan may be refused.

140. The case of the appellants/owners of the flats in the 15 Towers is that the necessary information has not been provided to the NKDA authority while obtaining the revised sanction plan. Item No. G under Schedule I of the NKDA building rules requires the production of documents from the applicant, proving their exclusive right to construct. The promoter did not have the exclusive rights to construct and has admittedly not obtained consent of the owners. No such consent was given by the appellants. The arguments of Mr. Mitra, therefore, cannot be accepted.

O. INTERPRETATION OF THE EXPRESSION- '***Any Other Law For The Time Being Force'*** BY APPLYING THE PRINCIPLE OF EJUSDEM GENERIS

141. As already seen, the revised plan violates various provisions of the NKDA Act. Thus, the reference made by the appellants to sub-clause (b) of Section 75 to argue that the expression 'any other law' factors in the WB Apartment Ownership Act, and thus a violation thereof will also attract sub-clause (b) also, may not require any consideration.

142. However, since the promoter has contested the said interpretation, we deem it appropriate to lay down the law as regards the sub-clause b of Section 75.

143. Sub Clause (b) of Sec.75 of the NKDA Act is set out below:-

> 75. The sanction of a building plan may be refused on any of the follow grounds:-
>
> (b) that the ground plan, elevation, section or specification contravene ***any*** of the provisions, of this Act or the rules or regulations made there under or of ***any other law for the time being force;***
>
> Emphasis Applied

144. Mr. Mitra has pointed out that the expression 'any other law for the time being in force' is preceded by some specific words, namely Ground Plan, Elevation, Section, or Specification. The expression 'any other *law* for the time being in force', therefore, should be understood to be the law that regulates the technical configuration and modalities of a construction. Therefore, the WB Act of 1972, being a legislation *not* dealing with 'Ground Plan, Elevation, Section, or Specification', will not be the law contemplated in 'any other law for the time being in force'.

145. As shown above, the NKDA Act and Rules mandate that an applicant has to demonstrate that he has an exclusive right to construct before the grant of the sanction plan. Therefore, a plan that is granted to a person who does not have, and

thus has not demonstrated their exclusive right to construct, will be hit by the NKDA Act and Rules themselves.

146. Therefore, the reference made to the NKDA Act and Rules in Section 75 (b) includes the mandate of law that a sanction plan may be granted only after the exclusive right to construct has been proved. As a sequel, the expression 'any other law for the time being in force' will include a legislation that deals with and provides for the exclusive right to construct. Section 7 of the WB Apartment Ownership Act is one of those, since it enables a person to apply and obtain the exclusive right to construct in a situation where persons have come to own undivided and proportionate shares in land, where the construction is proposed to be made.

147. The expression 'any' *in 'any of the provisions, of this Act or the rules or regulations'* indicates that the plan in question has to pass the test of every provision of the NKDA Act and its Rules. Therefore, the expression law in '*any other law for the time being force'* cannot be confined to those laws only, which deal with the engineerical technicalities of the construction. The law therein is expansive, and therefore will include every piece of legislation that deals with the exclusive right to construct, which is made a condition precedent for the grant of a sanction plan under the NKDA Act and its Rules.

148. The doctrine of ejusdem generis factors in all similar laws and objects, the indication whereof is provided in the section itself. Thus, as noted above, the provisions of the NKDA Act referred to under Section 75(b) include the mandate to prove the exclusive right to construct. Hence, the expression 'any other law for the time being in force', as an obvious consequence, will also include section 7 of the

WB Apartment Ownership Act and section 8 of the WB Promoters Act, which enable the promoter to engage with the existing flat owners with the object of securing the consent for constructing an additional tower.

P. THE JUDICIAL DICTA ON THE PROVISIONS FOR SANCTION FOR CONSTRUCTION AND PRIOR CONSENT OF THE OWNERS UNDER THE KMC ACT AND NKDA ACT.

149. A coordinate bench of this Court in ***Dev All (P) Ltd. v. Kolkata Municipal Corpn.,*** reported in ***2024 SCC OnLine Cal 2528*** held that the prior consent of an owner has to be taken when further construction is proposed to be made on his apartment/flat or any area where he has the right. In the absence of such prior consent, the revised sanction plan for the said construction is invalid, and consequently, demolition will follow. Relevant paragraphs of the said decisions are as follows:-

> *"16……The respondent/writ petitioner (Larica), was given right of roof, over the completed building, appears to be baseless, as neither the building was completed on the date of purchase of property by Larica, i.e, May 18, 2005, nor there was any contemplation of further construction over there, on the said date. Instead, it appears that the said respondent/writ petitioner (Larica) had purchased the same, along with other portions of the building, by dint of the said deed and had subsequently recorded its name as against the said property, by way of mutation. It has also remitted taxes. Thus evidently its right over the same has become absolute.*
>
> *17. A further deed came to be executed on July 11, 2009. The same is the basis for grant of sanction to the additional plan of construction, by the respondent Corporation. There is no record to show that the name of the applicants, who had sought for sanction of additional building plan, was mutated before such sanction, with respect to the portion of the building, where the additional construction was proposed to be made. Instead, recording of the name of the writ petitioner (Larica), with respect to the property purchased vide conveyance deed dated May 18, 2005, is an admitted fact in this case……There has not been any challenge, during all these period either to the ownership, mutation, enjoyment or tax payment by —Larica, as regards the said portion of the property, purchased by it vide the deed of conveyance dated May 18, 2005.*

19. ***Therefore, it is apparent that sanction of the additional building plan dated May 3, 2011, was done by the respondent Corporation, without considering all these aspects, relating to the matter. As a matter of fact, the appellant, who has been a party to the said agreement, has suppressed the connected material facts, while applying for sanction of the additional building plan.*** *In such view of the things, submissions made on behalf of the respondent/—Larica appears to be appropriate that, the Corporation has erred in not initiating a procedure under section 397 of the Kolkata Municipal Corporation Act, 1980, even after receipt of letter of complaint by the said respondent, dated September 7, 2011. It would be beneficial to see what the said statutory provision has laid down. (Emphasis applied)*

> ***"397. Sanction or provisional sanction accorded under misrepresentation.-*** *If, at any time after the communication of sanction or provisional sanction to the erection of any building or the execution of any work, the Municipal Commissioner is satisfied that such sanction or provisional sanction was accorded in consequence of any material misrepresentation or any fraudulent statement in the notice given or information furnished under section 393 or section 394 or section 395,* ***he may, by order in writing, cancel, for reasons to be recorded, such sanction or provisional sanction****, and any building or any work commenced, erected or executed shall be deemed to have been commenced, erected or executed without such sanction and shall be dealt with under the provisions of this Chapter:*
>
> *Provided that before making any such order, the Municipal Commissioner shall give a reasonable opportunity to the person affected as to why such order should not be made."*

Concurring View

4. It appears that subsequently Larica came to know that an additional building plan dated May 3, 2011, had been sanctioned by KMC for making construction on the roof of the 3rd floor of the building in question. Claiming to be 50% undivided owner of the said roof, Larica approached the learned Single Judge with the case that without Larica's consent, no plan could have been sanctioned by KMC for construction on the said roof since Larica was the 50% owner of the roof.

8. The appellants argued that disputed questions of title being involved, the learned Single Judge ought to have refused to exercise writ jurisdiction. I do not find such argument to be acceptable and the same has been rightly rejected by the learned Judge. Firstly, there is no absolute rule of law that disputed questions of fact cannot be gone into by the writ Court. However, normally, the High Court declines to entertain a writ petition when seriously disputed facts are involved. Writ proceedings are summary in nature, decided on affidavits. Resolution of factual disputes normally requires witness action. Hence, as a

> *rule of self-restraint, disputed questions of fact are not normally entertained by the writ Court In the present case no disputed question of fact is involved. The registered conveyance dated July 11, 2009, executed in favour of Larica, has not been called in question by any of the appellants. The learned Single Judge rightly held that Larica's case is based solely on such registered deed of conveyance which made it 50% owner of the concerned roof. The learned Judge was not required to decide any factual dispute.*
>
> *10. On an overall consideration of the facts and circumstances of the case, I am of the considered view that the appellants, surreptitiously and in a clandestine manner, behind the back of Larica, obtained sanctioned plan from KMC for raising construction on the concerned roof of the building in question. This may or may not have been in connivance with the concerned KMC officers. I need not enter into that question. What is absolutely clear is that the KMC could not have sanctioned the additional building plan on the concerned roof without the consent of Larica.*

(Emphasis Applied)

150. Section 81 of the NKDA Act and section 397 of the Kolkata Municipal Corporation Act are pari materia. Both sections provide for the cancellation of the plan, on the sanctioning authority finding that the sanction plan has been obtained through misrepresentation. In ***Dev All (supra)***, the revised plan was obtained from the KMC by misrepresenting the ownership of the plot of land, and the demolition of the construction as per the plan obtained by misrepresentation.

151. The KMC Act also does not expressly provide for the requirement of prior consent; however, the Coordinate Bench in ***Dev All (supra)*** directed the demolition of the construction made on the basis of the revised plan obtained without the consent of the owner.

152. Both the Kolkata Municipal Corporation and the North Kolkata Development Authority require the applicant to apply for a sanction plan to prove that he has the exclusive right to construct. Hence, when a promoter wishes to make further construction on a plot owned by others, he has to obtain their prior consent and

has to place that before the KMC for issuance of a valid revised plan. The same principles must also be followed in the case of NKDA, as mandated in ***Dev All (supra)***.

153. Rule 4(3) of the KMC Building Rules is as follows:-

> "4. Notice for erection or alteration of a building
> (3) The notice shall be accompanied by copies of **documents showing that the applicant has exclusive right** to erect, re-erect or alter any building or portion thereof upon the land."

154. Under both legislations (KMC Act & NKDA), the operative provision prescribes that the applicant shall have the exclusive right to construct, which can only flow from ownership. Therefore, to make any construction on the land owned by others, or any person having an interest therein, their prior consent must be obtained by the promoter.

155. Both Schedule I of the KMC Building Rules and the NKDA Building Rules require the applicant to attach ownership documents with the form for sanction, meaning the Sanctioning Authority must be satisfied with the existing exclusive right of the applicant to construct. The document recording the prior consent of the owner is one such document, which will throw light on the status of the applicant to construct. Schedule I from the KMC Building Rules is set out below:-

> SCHEDULE I
> [See rule 4(2)]
> Notice for erection / re-erection / addition to or alteration of a building
>
> 20. **Proof of ownership (whether by Deed of Conveyance/Gift/Lease/Record of Rights (Parcha)/Partition/ Exchange/ Will** (duly probated)/other documents and mutation certificate issued by (KC): Please give particulars."

156. Therefore, the requirement of prior consent flows from the provision of the requirement of exclusive right to construct, which needs to be proved before the sanctioning authority for obtaining a sanction plan. Thus, despite there being an absence of an express provision requiring prior consent for obtaining a revised plan in the KMC Act, this Court in ***Dev All (supra)*** held that, sans prior consent, no revised plan can be granted, and if granted, the construction made will be demolished. This is based on the principle that the vested right of a person cannot be affected without his consent.

Q. PROMISSORY ESTOPPEL DOES NOT APPLY TO THE FACTS PRESENT.

157. There is an arbitration clause in the sale agreements between the appellants and the promoter. Thus, there is no need for us to pronounce on the clauses in the agreements. We however are inclined to examine the point of promissory estoppel since the promoter seeks to argue that the flat owners of the 15 towers have relinquished their right to an undivided and proportionate share in the land at the discretion of the promoter, and thus there has been a waiver of right under the law on part of the said flat owners to question the coming up of the 16th tower.

158. Mr Mitra would advance the plea of promissory estoppel to overcome the uncomfortable admitted position that the promoter has not obtained the prior consent of the flat owners of the 15 towers before building the 16th tower. He would refer to several clauses of the agreement to impress upon us that the flat owners of the 15 towers have relinquished their right to object to the construction of the 16th tower by rendering a deemed consent to the promoter

for any future construction which may be made by the promoter beyond the original sanction plan of 2007.

159. We are not inclined to accept the plea of promissory estoppel for more than one reason. The said principle is applied by the Courts to provide relief in equity to the parties. The principle of equity cannot be applied to one party at the cost of the other.

160. It would be grossly inequitable, apart from being illegal, if it were held that the flat owners of the 15 towers have subjected their undivided share in the land to the discretion of the promoter. The purchase of the flats not only creates rights in the nooks and corners of the flat, but also in the proportionate share of land. It would be inconsistent to say that while the square feet of the flats remained in the control of the flat owners, the control over the concomitant proportionate share in the land stood transferred by the same agreement to the promoter.

161. The precondition for the invocation of the doctrine of promissory estoppel, as espoused by the promoter, is that there must be a promise from the existing flat owners. The seal of approval on the application of the principle in a given case would, however, depend on whether permitting the promisor to refuse the performance of his promise would cause inequity to the promisee. Reference is made to the decision in ***State of Jharkhand v. Brahmputra Metallics Ltd.,*** reported in ***(2023) 10 SCC 634*:-**

> 29. The requirements of the doctrine of promissory estoppel have also been formulated in Chitty on Contracts [Hugh Beale, Chitty on Contracts, (32nd Edn., Sweet & Maxwell 2017).] ("Chitty"):
> "4.086. For the equitable doctrine to operate there must be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that he will not enforce against the other his strict legal rights arising out of that relationship; an intention on the part of the former party that

> the latter will rely on the representation; and such reliance by the latter party. Even if these requirements are satisfied, ***the operation of the doctrine may be excluded if it is, nevertheless, not "inequitable" for the first party to go back on his promise***.
>
> 33. This Court has given an expansive interpretation to the doctrine of promissory estoppel in order to remedy the injustice being done to a party who has relied on a promise. In Motilal Padampat [Motilal Padampat Sagar Mills Co. Ltd. v. State of U.P., (1979) 2 SCC 409 : 1979 SCC (Tax) 144] , this Court viewed promissory estoppel as a principle in equity, which was not hampered by the doctrine of consideration as was the case under the English law. This Court, speaking through P.N. Bhagwati, J., (as he was then), held thus : (SCC p. 430, para 12)
> "12. ... having regard to the general opprobrium to which the doctrine of consideration has been subjected by eminent jurists, we need not be unduly anxious to protect this doctrine. against assault or erosion nor allow it to dwarf or stultify the full development of the equity of promissory estoppel or inhibit or curtail its operational efficacy as a juristic device for preventing injustice. ... We do not see any valid reason why promissory estoppel should not be allowed to found a cause of action where, in order to satisfy the equity, it is necessary to do so."
>
> emphasis applied

162. Even assuming that all flat owners of the 15 towers have made such a promise to the promoter (though they have not in fact done so), the flat owners should be permitted to opt out of such a promise. It is seen that the enforcement of such a promise would amount to the promoter justifying his illegality and unjustly enriching himself, and that too contrary to law.

163. The said clause, if any, would violate Section 7 of the WB Apartment Ownership Act. In ***Waman Shriniwas Kini v. Ratilal Bhagwandas and Co.*** reported in ***1959 SCC OnLine SC 120,*** it was held as under:-

> 13..... Assuming that to be so and proceeding on the facts found in this case the plea of waiver cannot be raised because as a result of giving effect to that plea the Court would be enforcing an illegal agreement and thus contravene the statutory provisions of Section 15 based on public policy and produce the very result which the statute prohibits and makes illegal. In Surajmull Nargoremull v. Triton Insurance Co. [(1924) LR 52 IA 126 128] Lord Sumner said:
> "No Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a

> Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset : Nixon v. Albion Marine Insurance Co. [(1867) LR 2 Ex 338] . The enactment is prohibitory. It is not confined to affording a party a protection of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases for which a penalty is exigible."
>
> In the instant case the question is not merely of waiver of statutory rights enacted for the benefit of an individual but whether the Court would aid the appellant in enforcing a term of the agreement which Section 15 of the Act declares to be illegal by enforcing the contract the consequence will be the enforcement of an illegality and infraction of a statutory provision which cannot be condoned by any conduct or agreement of parties. Dhanukudhari Singh v. Nathima Sahu [(1907) II CWN 848, 852] . In Corpus Juris Secundum Vol. 92 at p. 1068 the law as to waiver is stated as follows:
> "... a waiver in derogation of a statutory right is not favoured, and a waiver will be inoperative and void if it infringes on the rights of others, or would be against public policy or morals...."
>
> In Bowmakers Ltd. v. Barnet Instruments Ltd. [(1945) I KB 65, 72] the same rule was laid down. Mulla in his Contract Act at p. 198 has stated the law as to waiver of an illegality as follows:—
> "Agreements which seek to waive an illegality are void on grounds of public policy. Whenever an illegality appears, whether from the evidence given by one side or the other, the disclosure is fatal to the case. A stipulation of the strongest form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the contamination reaches, it destroys."
>
> emphasis applied

149. Further, it should be noted that the power to make additional construction sans the consent of the flat owners, as claimed to have been provided and agreed to under the sale agreements, can only be done when the NKDA authority directs the promoter to effect such a change to comply with the rules and regulations.

150. In any event, the clauses in the agreement cited by Mr. Mitra must be read in the context of the original sanction plan. The discretion conferred on the promoter to allot additional space to some flat owners must be read in harmony with the rest of the agreement. The right to construct over common areas must be limited to minor additions and alterations necessary to keep them in

conformity with the main sanction plan. The said clauses by no stretch of imagination can be said to entitle the promoter to construct a new 26 storied Tower in an open landscape area of the project.

R. THE APPELLANTS HAVE NOT WAIVED THEIR STATUTORY RIGHT TO CHALLENGE THE LEGALITY OF THE 16TH TOWER

164. As to whether there has been or there could be any waiver of statutory rights, worth a brief reference.

165. A statutory right can be waived, however, the same is based on two settled factors. One being that when there is a mandatory duty or prohibition codified by the law, the parties are prohibited from contracting out of such mandate. Second being when the statute has not expressly prohibited or mandated the performance of an act, the parties may waive that act either way. However, the court is required to see whether the mandate or prohibition is imposed in furtherance of a public interest, meaning whether the prohibition introduced by the statute is for individual protection or the protection of the public at large. In ***All India Power Engineer Federation v. Sasan Power Ltd.*** reported in ***(2017) 1 SCC 487***, it was held as follows:-

> 22. In Lachoo Mal v. Radhey Shyam [Lachoo Mal v. Radhey Shyam, (1971) 1 SCC 619] it was held : (SCC pp. 621-22, para 6)
> "6. The general principle is that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maxim which sanctions the non-observance of the statutory provision is cuilibet licet juri pro se introducto renuntiare. (See Maxwell on Interpretation of Statutes, Eleventh Edn., pp. 375 and 376.) <u>If there is any express prohibition against contracting out of a statute in it then no question can arise of anyone entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy."</u>

> 23. In Indira Bai v. Nand Kishore [Indira Bai v. Nand Kishore, (1990) 4 SCC 668] it was held : (SCC p. 672, para 5)
>
> "5. ... The test to determine the nature of interest, namely, private or public is whether the right which is renunciated is the right of party alone or of the public also in the sense that the general welfare of the society is involved. If the answer is latter then it may be difficult to put estoppel as a defence. But if it is right of party alone then it is capable of being abnegated either in writing or by conduct."
>
> 25. It is thus clear that if there is any element of public interest involved, the court steps in to thwart any waiver which may be contrary to such public interest.

166. The mandate of section 7 is not for a private benefit but to further the public interest where the state ensures that between unequals, the lesser resourceful should have a effective bargaining power. The flat owners who have already purchased flats or have entered into an agreement for sale will have the right to bring the promoter to the table saying that you need to take our consent before adding any structure.

167. This Court can take judicial notice of the unequal bargaining power between the flat owner and the promoter. It is the promoter who ordinarily drafts the clauses of the agreement in his favour. The potential flat purchasers in moribund search for accommodation unwillingly and willingly have to consent to the agreement. The fact that when one puts his signature on the agreement, it shall be understood that he has read and understood all the ramifications arising from the clauses therein should not be made strictly applicable to the agreements between the resourceful promoters and the less privileged apartment owners/purchasers.

168. The upshot of the above discussion embedded in reality will persuade us to hold that section 7 is enacted in furtherance of public interest, and therefore cannot be waived out by the agreement between the parties.

169. Further, the flat owners herein do not seek the enforcement of the clauses of the agreement. It is rather their case that mandatory provisions of the statutes under consideration have been violated. It was held in ***Murlidhar Aggarwal v. State of U.P.*** reported in ***(1974) 2 SCC 472,*** that by agreement, the landlord cannot deprive the tenant of a beneficial provision of a statute. The court should be unconcerned about the agreement between the parties when the law stares the agreement in the face. Paragraphs 17, 20, 25 and 33 of ***Murlidhar Aggarwal (supra)*** are set out below:-

> 17. Now, the landlord and the tenant cannot, by their agreement, bind the District Magistrate. In spite of the lease, the District Magistrate may treat the accommodation as vacant and evict therefrom the tenant who is in occupation of the accommodation without an allotment order. This is his statutory obligation. But the appellants would be estopped from denying that the respondent is a tenant. The Act makes a distinction between a tenant by virtue of an allotment order and a tenant otherwise than by virtue of an allotment order. In most of the sections of the Act the word 'tenant' alone is used. If the word 'tenant' in Section 3 is construed as "tenant under an allotment order", then the tenants who have been occupying an accommodation without an allotment order will be deprived of several material privileges conferred upon them by the Act. Having regard to the definition clause and the scheme of the Act, we are of opinion that the respondent is a tenant under Section 3 even though he is occupying the accommodation without an allotment order. It follows that the respondent would get the protection under Section 3 and that the appellants' suit was, therefore, liable to be dismissed as it was found that it was instituted without the permission of the District Magistrate.
>
> 20. The Act was passed inter alia to prevent the eviction of tenants from their accommodations. The language of Section 3(1) is imperative and it prohibits the institution of the suit without the permission. If any landlord institutes a suit for eviction of the tenant without the permission of the District Magistrate, he commits an offence and is punishable under Section 15 of the Act. The object of Section 3 is to give protection to a tenant from eviction from an accommodation. The policy of the Act seems to be that a responsible authority like the District Magistrate should consider the claim of the landlord and the needs of the tenant before granting permission. There was alarming scarcity of accommodation. The object of legislature in enacting the law was to protect tenants from greedy and grasping landlords, and from their resorting to court for eviction of tenants without reasonable grounds.
>
> 25. So, the question is, whether Section 3 was enacted only for the benefit of tenants or whether there is a public policy underlying it which precludes a tenant from waiving its benefit. There can be no doubt that the provision has been enacted for protecting one set of men from another set of men, the one from their

> situation and condition are liable to be oppressed and imposed upon. Necessitous men are not free men.
>
> 33. We think that Section 3 is based on public policy. As we said, it is intended to protect a weaker section of the community with a view to ultimately protecting the interest of the community in general by creating equality of bargaining power. Although the section is primarily intended for the protection of tenants only, that protection is based on public policy. The respondent could not have waived the benefit of the provision.
>
> Emphasis Applied

170. In ***Sasan Power Ltd (supra),*** it was held that as to whether there has been a waiver, the party claiming the same shall be able to point out the exact terms under which the waiver has been made by the other party. The promoter herein has not been able to point out any clause of the agreement which said that the 16th tower will be built by him and the flat owners have no option but have consented to it under the agreement. In the absence of the same, there cannot be any waiver in the first place. Reference in this regard may be made to the decision in ***All India Power Engineer Federation (Supra),*** particularly at paragraph 21, wherein it was held as follow:-

> 21. Regard being had to the aforesaid decisions, it is clear that when waiver is spoken of in the realm of contract, Section 63 of the Contract Act, 1872 governs. But it is important to note that waiver is an intentional relinquishment of a known right, and that, therefore, unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to waive it. But the matter does not end here. It is also clear that if any element of public interest is involved and a waiver takes place by one of the parties to an agreement, such waiver will not be given effect to if it is contrary to such public interest. This is clear from a reading of the following authorities.

171. We may elevate our discussion from a statutory violation to a constitutional violation by referring to the mandate of Article 14 of the Constitution of India. The NKDA authority has not seriously participated in the proceedings before this Court. They have filed their written notes, but have not pointed out whether the promoter has demonstrated his exclusive right to construct before obtaining the

revised plan. The drift of the argument of the NKDA indicates that there is no need to take the consent of the flat owners of the 15 towers, as evident from its assertion that the WB Apartment Ownership Act does not bind the NKDA. The NKDA, therefore, wants to avoid an answer as to whether there was evidence before the NKDA that the promoter had the exclusive right to construct the 16th tower. Will the NKDA adopt the same approach towards other promoters vis-à-vis the existing flat owners?

172. Assuming that the flat owners of the 15 towers have given consent for the construction of the additional tower, will that give a license to the NKDA to abdicate their statutory duty of ascertaining whether the promoter has the exclusive right to construct? If so done by the NKDA, as done in the present case, the same would amount to a violation of Article 14 of the Constitution of India. This reasoning has been tested in ***Basheshar Nath v. CIT***, reported in ***1958 SCC OnLine SC 7,*** and it was held that the surrender by the citizen of his right does not give a license to an Art 12 authority to also act in breach of its obligation in performance of which it is supposed the enforce the surrendered right of the citizen.

> 15. Such being the true intent and effect of Article 14 the question arises, **can a breach of the obligation imposed on the State be waived by any person? In the face of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a person tells the State that it may do so? If the Constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that "true, you directed me not to deny any person equality before the law, but this person said that I could do so, for he had no objection to my doing it". I do not think the State will be in any better position than the position** in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as was that of Adam who pleaded that the woman had tempted him and so he ate

> the forbidden fruit. It seems to us absolutely clear, on the language of Article 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State."

S. DELAY IN APPROACHING THE COURT IS NOT FATAL WHEN RIGHT UNDER 300A OF THE CONSTITUTION IS INVOLVED .

173. In ***Urban Improvement Trust v. Smt. Vidhya Devi And Ors.*** reported in ***2024 INSC 980,*** it was held as follows**:**-

> *"48. The aforesaid view has also been reiterated by this Court in Sukh Dutt Ratra v. State of Himachal Pradesh reported in (2022) 7 SCC 508 wherein the court* ***opined that there cannot be a 'limitation' to doing justice.*** *The relevant observations are reproduced below:*
>
> > *—16. Given the important protection extended to an individual vis-a-vis their private property (embodied earlier in Article 31, and now as a constitutional right in Article 300-A), and the high threshold the State must meet while acquiring land, the question remains –* ***can the State, merely on the ground of delay and laches, evade its legal responsibility towards those from whom private property has been expropriated?*** *In these facts and circumstances, we find this conclusion to be unacceptable, and warranting intervention on the grounds of equity and fairness.‖*
> >
> > *[Emphasis applied]*
>
> *51. The decisions of this Court have consistently held that the right to property is enshrined in the Constitution and requires that procedural safeguards be followed to ensure fairness and non arbitrariness in decision-making especially in cases of acquisition by the State.* ***Therefore, the delay in approaching the court, while a significant factor, cannot override the necessity to address illegalities and protect right to property enshrined in Article 300A.*** *The court must balance the need for finality in legal proceedings with the need to rectify injustice.* ***The right of an individual to vindicate and protect private property cannot be brushed away merely on the grounds of delay and laches."***

174. In ***Rajendra Kumar Barjatya v. U.P. Avas Evam Vikas Parishad*** reported in ***2024 INSC 990,*** it was held as follows:-

> *"19. In a catena of decisions, this Court has categorically held that illegally of unauthorized construction cannot be perpetuated. If the construction is made in contravention of the Acts / Rules, it would be construed as illegal and unauthorized construction, which has to be necessarily demolished.* ***It cannot be legitimized or protected solely under the ruse of the passage of time or citing inaction of the authorities or by taking recourse to the excuse that substantial money has been spent on the said construction.*** *The following decisions are of relevance and hence cited herein below to drive home the point that unauthorized constructions must be dealt with, with an iron hand and not kid gloves.*
>
> *19(iv) In Esha Ekta Apartments Coop Housing Society Limited v. Municipal Corporation of Mumbai15, it was observed by this Court that the courts are expected to refrain from exercising equitable jurisdiction for regularisation of 15 (2013) 5 Supreme Court Cases : (2013) 3 Supreme Court Cases (Civil) 89 24 illegal and unauthorised constructions and the relevant passage of the said decision is extracted below:*
>
> *56. We would like to reiterate that no authority administrating municipal laws and other similar laws can encourage violation of the sanctioned plan. The courts are also expected to refrain from exercising equitable jurisdiction for regularisation of illegal and unauthorized constructions else it would encourage violators of the planning laws and destroy the very idea and concept of planned development of urban as well as rural areas."*

175. The passage of time cannot regularise an illegal construction. The consequences flowing from the violation of the sanction plan while making construction, and construction made without any plan, will depend on the very many factors. In this case, the sanction plan is the outcome of fraud. The present case is not one where, while effecting construction, due to bona fide mistake, the revised plan has been violated. Hence, this case is equivalent to a no-sanction case.

176. Three important principles are laid down in the judgments above:-

i. When a party seeks to enforce their right to property under Article 300A, delay in approaching the court has to be considered leniently, since ousting the petitioner may lead to perpetuation of illegalities.

ii. There is no limitation to do justice when it comes to the powers of the writ court, since there is no limitation in filing a writ petition.

iii. A complaint of unauthorised construction passage of time does not lend legality and sanctity to an unauthorised construction.

177. Reference must also be made to the decision of the Hon'ble Supreme Court in ***Mrinmoy Maity v. Chhanda Koley*** reported in ***2024 SCC OnLine SC 551,*** where it was held that whether the party is to be ousted for delay is to be decided in exercise of the discretion of the Writ Court with reference to the peculiar facts of the case. It was held that delay will be fatal when the cause of action has drifted away or has become dead. Relevant portions of ***Mrinmoy Maity (Supra)*** are set out below:-

> ***"9.....****An applicant who approaches the court belatedly or in other words sleeps over his rights for a considerable period of time, wakes up from his deep slumber ought not to be granted the extraordinary relief by the writ courts. This Court time and again has held that delay defeats equity. Delay or latches is one of the factors which should be born in mind by the High Court while exercising discretionary powers under Article 226 of the Constitution of India. In a given case, the High Court may refuse to invoke its extraordinary powers* ***if laxity on the part of the applicant to assert his right has allowed the cause of action to drift away and attempts are made subsequently to rekindle the lapsed cause of action.***
>
> > ***10.*** *The discretion to be exercised would be with care and caution. If the delay which has occasioned in approaching the writ court* ***is explained which would appeal to the conscience of the court, in such circumstances it cannot be gainsaid by the contesting party that for all times to come the delay is not to be condoned. There may be myriad circumstances which gives rise to the invoking of the extraordinary jurisdiction and it all depends on facts and circumstances of each case, same cannot be described in a straight jacket formula with mathematical precision. The ultimate discretion to be exercised by the writ court depends upon the facts that it has to travel or the terrain in which the facts have travelled."***

178. The Learned Single Judge, in the impugned final judgment, has considered the matter on its merits. This court is of the clear view that a serious injustice will be caused to all the parties if this court in 2025 dismisses the appeal on the ground that the petitioners have approached the court belatedly. It would be a gross injustice to the parties who have been litigating since 2017 if today they

are told that their case was filed belatedly. To dismiss the case on the ground of delay in 2025 amounts to putting the clock back and refusing to examine the alleged illegalities vis-à-vis Article 300A of the Constitution. The interim orders dated 5th September 2018 and 1st April 2022 have put the promoters and all purchasers on notice that any illegality in the actions of the respondents would result in the demolition of the 16th tower.

179. The ***Rinkoo Mitra decision (Supra)*** cited by Mr Mitra for the promoter is distinguishable on the facts. In the said case, the appellant had purchased a portion of the ground floor of the said premises. She was specifically denied any rights in the roof, and the same was reserved exclusively by the Landlord of the premises. It is in that context that a Coordinate bench held that the appellant's consent was not required for the purpose of applying for a sanction for construction on the roof of the building, applied by the landlord. The dicta of the said case has no manner of application to the facts of the instant case.

180. The decision of ***Jawed Ahmed Khan (Supra)*** was also rendered in the peculiar facts of the case. In the said case, the appellant was himself a member of the Municipal Council when the sanction for the number of buildings was granted. He filed a public interest litigation that was based on a political and personal agenda to challenge the construction of high-rise buildings in South Calcutta. The construction of most of the buildings in South Calcutta was completed by the time the PIL was filed. The petitioner was neither a co-owner nor did he have any interest in the buildings. It is in that context that the delay in approaching

the Court was considered. The issue of delay was not the main issue in the lis. The said case, therefore, cannot assist the Respondents.

181. Mr Anirudhha Chatterjee, Senior Advocate for the purchasers of the 16th Tower has argued that this Court would substitute the opinion of the NKDA authorities if it examines the legality of the revised plan and passes an order of demolition. This would be contrary to law. Reference is made to para 16 of the ***State of U.P. v. Raja Ram Jaiswal,*** reported in ***(1985) 3 SCC 131.*** In the said case, it was found by the SC that the High Court has decided on behalf of the District Magistrate, which it cannot do while ordering mandamus. A direction to grant a license, as was the case in the said, is not an obvious consequence that follows after quashing an executive order, refusing to grant a license.

182. However, in the instant case where the revised plan is found illegal, the construction made based on that is also rendered illegal. The obvious consequence that follows therefrom is an order of demolition. The ***Raja Ram case (supra),*** therefore, cannot be applied to the facts of the instant case.

183. The next argument of Mr. Chatterjee is that under Section 5 of the WB Act of 1972, permission under or dilutions of rights under the undivided share of the appellants in the common area need not be separately obtained since the consent therefor has already been taken and given, as recorded in the purchase deeds. Section 5 of the WB Apartment Ownership Act is set out below:-

> **5. Common areas and facilities.**
> (1) Each apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the Declaration.
>
> The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the Declaration shall not be altered without the written consent of all the apartment owners, additions or alterations, if any, is to be expressed subsequently in an amended Declaration

> duly executed and registered as provided in this Act. 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.***
>
> Emphasis applied

184. As has already been held hereinabove, the clauses of the agreement cannot take away the statutory rights of the appellants to challenge the revised plan, and thus, it also cannot take away any of the rights and interests, which have been diluted by the revised plan. Hence, the argument above is misplaced.

185. Section 5(ii) takes the undivided interest beyond the vagaries of the clauses of the sale agreements. It says an owner's undivided interest in the common areas, even if not specified in his purchase deed, shall be deemed to have been conveyed to him. Thus, there can be no clause in the sale agreement that can record a deemed consent to any dilution of the undivided interest in the common areas.

186. Mr. Chatterjee argues that the West Bengal Apartment Ownership Act does not apply to the facts of the case since the Form A filed is illegal. The promoter could have only filed the FORM A under Section 10 of the Promoter Act, 1993. It has already been held earlier herein that Section 10 of the 1993 Act outlines the duty of the promoter when a minimum number of flat owners as specified under the WB Act of 1972, have purchased the Apartments/flats. The WB Act of 1972 aims to give a voice to existing flat owners, rather than those who earn a living by selling the flats, enabling them to apply for registration under it.

187. The flat owners of the 15 towers registered themselves under the protective umbrella of the Act of 1972 in pursuance of Section 2, read with Section 10 of

the Act of 1972. Section 10 of the Promoters Act, 1993, does not prohibit the flat owners from taking an independent decision to register under the Act of 1972. The argument that the flat owners can only rely on the Promoter to register under the Act of 1972 is misconceived, given Section 2 thereof enables the flat owners to apply by filling a form under Sec 10.

188. Mr Chatterjee has lastly argued that a letters patent appeal is only maintainable when there is palpable infirmity in the decision of the Single Judge. Reference is made to the decisions of ***Management of Narendra & Co Pvt Ltd v. Workmen*** reported in ***(2016) 3 SCC 340*** (para 5) and the case of ***Prabir Kumar Talukdar v WBHIDCO and Ors.*** reported in ***(2023) 3 CHN 447*** (Para Nos. 70 and 71).

189. The Supreme Court in the ***Narendra Case (supra)*** held that a finding of fact returned by the Single Judge cannot be disturbed by the Division Bench without first holding that the finding is perverse. In the present case, the question of law raised is whether the Single Bench took note of the relevant legal position, and this Court has found that the Learned Single Bench could not appreciate that the revised plan violates the right to property of the flat owners under Article 300A of the Constitution of India. There are several other grounds already discussed above that show that the Single Bench committed error.

190. In ***Pradip Kumar Talukdar (Supra)*** a coordinate bench has approved the submission of the counsel that there must be a palpable infirmity in the decision of the Single Bench for the Division Bench to entertain a letter patent

appeal. Non-consideration of a relevant provision of law that has a bearing on the right to property, which is not only a constitutional right, but also a human right, renders a decision palpably infirm.

191. The purchasers of the 16th tower seek to challenge the FORM-A in these collateral proceedings to overcome the mischief of the prior consent, imposed by the Act of 1972. Whereas the promoter seeks to overcome prior consent requirement and its omissions under the WB Promoters Act 1993 by citing the **Forum Case (RERA Case)**, neither the promoter nor Mr. Chatterjee's clients have challenged the Form A filed by the appellants before the competent authority under the WB Act of 1972.

192. Taking the best case for the promoter and the purchasers of the 16th tower that neither WB Act of 1972 nor WB Promoters Act 1993 is applicable here, one must note that the flat owners of the 15 towers have admittedly come to own the undivided share in land and common areas, based on the sanction plan of 2007, which showed that only 15 towers are to be built on the said premises. Article 300A of the Constitution is clearly attracted to protect the undivided share and interest of the flat owners, which has been diluted without any authority of law.

T. THE CONCEPT OF MITIGATING & AGGRAVATING CIRCUMSTANCES AS APPLICABLE TO THE DEMOLITION OF A BUILDING:-

193. The concept of the regularisation of the construction that is not made as per the law can be said to be relatable to life imprisonment awarded instead of the death penalty and can be referred to as an alternative to demolition.

194. Section 82 of the NKDA Act lists out the circumstances under which the demolition may be ordered. This Court of the view that such circumstances shall be understood as aggravating circumstances leaning in favor of demolition.

195. There are no mitigating circumstances indicated under the NKDA act which may save a construction which is not as per the law. However, the use of the expression 'may' in Section 82 with reference to the power of the NKDA authority to either order a demolition or hold back the same, indicates mitigating circumstances which could be considered by the NKDA authority while retaining a construction which is not quite as per the law.

196. This court cannot lay down a set of mitigating circumstances since it falls within the policy domain of the State, and given the fact that regularisation of illegal construction has been discouraged by the Courts. We may, however, indicate that considering the pros and cons of a demolition of a construction may be relevant when there is a sanction plan. However, a challenge has been thrown to the process by which the sanction plan has been obtained, and the construction so permitted by the sanction plan affects the rights of the interested parties. In this regard, reference may be made to Section 75 of the NKDA Act, which says that if the sanction plan has been obtained in furtherance of misrepresentation/suppression of information, the NKDA authority may withdraw the sanction plan, and it shall be deemed that there has been no sanction plan at all granted for the construction made.

197. In the above backdrop, let us now consider the mitigating circumstances, pointed out by the Promoter before this Court:-

a. A long passage of time has elapsed. Money has been invested. Rights are created.

b. 16th Tower has a sanction plan. The structural validity is completely unchallenged by the flat owners in the 15 towers. The only allegation is that the distance between Tower No. 8 (16th tower) and Tower No. 7 has a gap of 8 meters. It ought to be 9 meters as per the National Building Rules.

c. The sale agreements enable the promoter to make further constructions without the consent of the existing flat owners.

198. The first circumstance cannot be termed as mitigating, given the dicta of the Supreme Court in ***Rajendra Kumar Barjatya (supra)*** where it was held that inaction over a passage of time does not legitimize an illegal construction.

199. Whether the second circumstance qualifies as mitigating one has to be considered with reference to the reduction of the undivided share of the flat owners of the 15 towers, and a consequent violation of the right under Art 300A of the Constitution, and not with reference to the structural validity of tower no.16.

200. Article 300A enables the State to deprive a person of his property, provided that the State is authorised by a statute in that regard. The NKDA Act does not empower the NKDA to deprive a person of his land by allowing a promoter to make construction thereon.

201. The Single Bench has observed that the NKDA Act has not made the prior consent of the owners a condition precedent for the grant of a revised plan. The

SB, based on the said absence, held that the revised plan is valid. This is incorrect and erroneous, as demonstrated above.

202. The grant of a revised plan for construction on land, not owned by the applicant, without the consent of the original owners thereof, amounts to the acquisition of the land without notifying the original owners. The decision of the full bench of the Kerala High Court in the case of ***Elizabeth Samuel Aaron v. State of Kerala,*** reported in ***AIR 1991 Ker. 162 (FB)*** is relevant here:-

> *"—The legislative history behind the deletion of Article 31 and the introduction of Article 300-A eloquently shows that Parliament intended to do away with the concept of a just equivalent or adequate compensation in the matter of deprivation of property, and to provide only a limited right, namely that no person shall be deprived of his property save by authority of law.* ***In other words, the limited constitutional protection intended to be continued (not as a fundamental right) was only that there should be a law authorising and sustaining any deprivation of property, and that none shall be so deprived by mere executive fiat...****……."*

203. In the case of ***Kolkata Municipal Corpn. v. Bimal Kumar Shah,*** reported in ***(2024) 10 SCC 533***, it was held that Article 300A contains many sub-rights, one of which is the right of the owner to have notice of the acquisition proceedings initiated against his property. We therefore hold that an owner of land, regardless of whether he has a proportionate or undivided share in the land, is required to be notified by every Municipal/Development Authority about the application for a building plan made for construction thereat. If no consent to the said application is given by the owner, the Municipal Authority cannot grant the sanction plan.

204. Paragraphs 30 and 31 of ***Bimal Kr. Shaw (Supra)*** are as follows***:-***

> *"30. What then are these sub-rights or strands of this swadeshi constitutional fabric constituting the right to property? Seven such sub-rights can be identified, albeit non-exhaustive. These are:*

> (i) *The duty of the State to inform the person that it intends to acquire his property —* ***the right to notice,***
>
> (ii) *The duty of the State to hear objections to the acquisition — the right to be heard,*
>
> (iii) *The duty of the State to inform the person of its decision to acquire — the right to a reasoned decision,*
>
> *(vi) The duty of the State to demonstrate that the acquisition is for public purpose — the duty to acquire only for public purpose,*
>
> (v) *The duty of the State to restitute and rehabilitate — the right of restitution or fair compensation,*
>
> (vi) *The duty of the State to conduct the process of acquisition efficiently and within prescribed timelines of the proceedings — the right to an efficient and expeditious process, and*
>
> (vii) *The final conclusion of the proceedings leading to vesting — the right of conclusion.*
>
> *31. These seven rights are foundational components of a law that is tune with Article 300-A, and the absence of one of these or some of them would render the law susceptible to challenge. The judgment of this Court in K.T. Plantation [K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1 : (2011) 4 SCC (Civ) 414] declares that the law envisaged under Article 300-A must be in line with the overarching principles of rule of law, and must be just, fair, and reasonable. It is, of course, precedentially sound to describe some of these sub-rights as "procedural", a nomenclature that often tends to undermine the inherent worth of these safeguards. These seven sub-rights may be procedures, but they do constitute the real content of the right to property under Article 300-A, non-compliance of these will amount to violation of the right, being without the authority of law."*

205. Further, the revised sanction plan is no sanction in the eyes of the law since it is obtained without the promoter demonstrating before the NKDA that the same is having exclusive right to construct on the land in question, which could have only been demonstrated by presenting the consent of the flat owners of the 15 towers who have come to own the land before the commencement of the construction of tower no. 16; thus, the 16th Tower and the commercial plaza have

been affected without any lawful sanction. The 16th tower has deprived the flat owners of the 15 Towers of their undivided interest and common facilities and violated their right to property under Art 300A.

206. The flat owners of the 15 Towers have Article 300A in their favour, whereas the flat owners of the 16th Tower have no such right since the 16th Tower was illegally built on muscle power. The only refuge of the flat owners of the 16th Tower is the equity. Unfortunately, equity cannot be invoked against a gross statutory illegality. Equity cannot be taken advantage of by the people who have used their muscle power to build the 16th Tower. Paragraphs 161-162 & 164-165 of the ***Supertech Ltd. decision (supra)*** are set out hereinbelow:-

> ***"161.*** *The judgments of this Court spanning the last four decades emphasise the duty of planning bodies, while sanctioning building plans and enforcing building regulations and bye-laws to conform to the norms by which they are governed. A breach by the planning authority of its obligation to ensure compliance with building regulations is actionable at the instance of residents whose rights are infringed by the violation of law.* ***Their quality of life is directly affected by the failure of the planning authority to enforce compliance. Unfortunately, the diverse and unseen group of flat buyers suffers the impact of the unholy nexus between builders and planners. Their quality of life is affected the most. Yet, confronted with the economic might of developers and the might of legal authority wielded by planning bodies, the few who raise their voices have to pursue a long and expensive battle for rights with little certainty of outcomes. As this case demonstrates, they are denied access to information and are victims of misinformation. Hence, the law must step in to protect their legitimate concerns.***
>
> ***162.*** *In K. Ramadas Shenoy v. Town Municipal Council, Udipi [K. Ramadas Shenoy v. Town Municipal Council, Udipi, (1974) 2 SCC 506] , A.N. Ray, C.J. speaking for a two-Judge Bench of this Court observed that the municipality functions for public benefit and when it "acts in excess of the powers conferred by the Act or abuses those powers then in those cases it is not exercising its jurisdiction irregularly or wrongly but it is usurping powers which it does not possess". This Court also held : (SCC p. 513, para 27)*
>
> > *"27.... The right to build on his own land is a right incidental to the ownership of that land. Within the Municipality the exercise of that right has been regulated in the interest of the community residing within the limits of the Municipal Committee. If under pretence of any authority which the law*

does give to the Municipality it goes beyond the line of its authority, and infringes or violates the rights of others, it becomes like all other individuals amenable to the jurisdiction of the courts. If sanction is given to build by contravening a bye-law the jurisdiction of the courts will be invoked on the ground that the approval by an authority of building plans which contravene the bye-laws made by that authority is illegal and inoperative. (See Yabbicom v. R. [Yabbicom v. R., (1899) 1 QB 444]).”

This Court held that an unregulated construction materially affects the right of enjoyment of property by persons residing in a residential area, and hence, it is the duty of the municipal authority to ensure that the area is not adversely affected by unauthorised construction.

164. *In Friends Colony Development Committee v. State of Orissa [Friends Colony Development Committee v. State of Orissa, (2004) 8 SCC 733] ,* ***this Court dealt with a case where the builder had exceeded the permissible construction under the sanctioned plan and had constructed an additional floor on the building, which was unauthorised. R.C. Lahoti, C.J., speaking for a two-Judge Bench, observed : (SCC p. 744, para 24)***

“24. Structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building.”

Noting that the private interest of landowners stands subordinate to the public good while enforcing building and municipal regulations, the Court issued a caution against the tendency to compound violations of building regulations : (Friends Colony Development Committee case [Friends Colony Development Committee v. State of Orissa, (2004) 8 SCC 733] , SCC p. 744, para 25)

“25. … The cases of professional builders stand on a different footing from an individual constructing his own building. ***A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future.*** *It is common knowledge that the builders enter into underhand dealings. Be that as it may, the State Governments should think of levying heavy penalties on such builders and therefrom develop a welfare fund which can be utilised for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions.”*

165*…..The Court lamented that the earlier decisions on the subject had not resulted in enhancing compliance by developers with building regulations. Further, the Court noted that if unauthorised constructions were allowed to stand or are “given a seal of approval by Court”, it was bound to affect the public at large. It also noted that the jurisdiction and power of courts to*

indemnify citizens who are affected by an unauthorised construction erected by a developer could be utilised to compensate ordinary citizens.

207. The 16th tower has reduced the undivided interest of the flat owners of 15 towers. Such reduction by the Respondent No.6/promoter without the express consent of the owners of the existing 15 towers is ex facie illegal. In ***Supertech decision (supra),*** it was held as follows:-

> ***"149.****In terms of the third revised plan which was sanctioned on 2-32012, the height of T-16 and T-17 was sought to be increased from twenty-four to forty (or thirty-nine, as the case may be) floors. As a result, the total number of flat purchasers would increase from 650 to 1500.* ***The clear implication of this would be a reduction of the undivided interest of the existing purchasers in the common areas****……*
>
> ***150.*** *Flats were sold on the representation that there would be a garden area adjacent to T-1. The garden adjacent to T-1 is clearly depicted in the first revised plan of 29-12-2006.* ***It is this garden area which was encroached upon when the second revised plan was sanctioned on 2611-2009.***
>
> ***151****……*
> ***The above letter puts forth the case that T-16 and T-17 have been constructed as a separate project over the area which was obtained under the supplementary lease deed, and that it has separate provisions for all amenities and infrastructure****. In fact, it indicates that the facilities of the older buyers were shown in the brochure but that representation was ―clarified‖ to be a ―mistake‖, which had been amended.*
>
> ***152.****As such, it becomes important to refer to the supplementary lease deed, which was granted in favour of the appellant on 21-6-2006.* ***The supplementary lease deed makes it clear that the demised premises admeasuring 6556.51 sq m would form a part of the originally allotted plot.***
>
> ***153. Hence, it is abundantly clear that the construction of T-16 and T17 in accordance with the second revised plan and the third revised plan reduced the value of the undivided interest held by each individual flat owner in the common areas and facilities, thereby violating Section5 of the U.P. Act, 1975 and Section 5 of the U.P. Apartments Act, 2010,since the flat owners' consent was not sought.*** *Further, the third revised plan encroached upon the garden area in front of T-1, thereby resiling from the representation that had been made to the flat owners at the time when they purchased the apartments in T-1, without their consent. Therefore, it constituted a violation of Section*

4(1) read with the proviso to Section 4(4) of the U.P. Apartments Act, 2010."

(Emphasis applied)

208. In ***Supertech Ltd. (Supra)***, the promoter/appellants argued that the construction had been effected as per the revised plan on a plot that had been leased to them by a supplementary lease deed. The court found that the plot, which was leased by the supplementary deed formed part of the original allotment. The original allotment did not contemplate the construction made subsequently as per the revised plan. The court held that thus the further construction reduced the undivided interest of the original owners, which is exactly the case here.

209. At this juncture, we take serious exception to the argument advanced by the Promoter, being respondent no. 6, in his written notes of argument on page no. 16-17. To justify the reduction of the undivided share in the open area, which stood reduced by 1823.86 sq feet, under the revised plan, the promoter points out that there has been an increase in the number of common facilities, with the common area increasing by 23877.30 sq feet under the revised plan.

210. The above justification seeks to bargain undivided share in the land by an increase in the common facilities. The flat owners of the 15 towers have lost their undivided share in the land. Instead, they have not been provided any land, but an increase in the number of common facilities, which cannot compensate for the reduction of their share in the land and particularly in the open common areas. Exchanging the land with an increase of common area, if at all can be done, ought to have been done with the due consent of the flat owners of the 15 towers.

211. Hence the existence of the revised sanction plan in support of the 16th tower is not a mitigating circumstance since the same is instrumental in the reduction of the undivided share of the flat owners of the 15 towers and has led to the indirect acquisition of such share by the promoter on the active connivance of the NKDA, without even notifying the flat owners of 15 towers, who lost their undivided share as a result of the revised plan.

212. The third circumstance cannot also be accepted as a mitigating circumstance given the dicta of the Supreme Court in ***Jayantilal Investments (supra)*** where it was held that the Promoter is bound to disclose to the intending purchaser about the entire project, and in the present case the promoter did not notify the flat owners of the 15 towers that there will be a 16th tower. Further, the said circumstance cannot enure to any benefit to the promoter and flat owners of the 16th tower. The said circumstance is hit by Section 11 of the TP Act, which is set out below:-

> *"11. Restriction repugnant to interest created.—Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest* ***as if there were no such direction.****"*

213. Hence, the transfer cannot put a transferee on terms. The transfer made cannot be conditioned. Interest arising from the transfer shall be unconditionally enjoyed by the transferee. It has been declared by section 11 that any direction affecting the interest arising from the transfer shall be deemed to have never been passed.

214. Therefore, the clauses in the agreement that additional Constructions can be effected by the promoter are hit by Section 11 and void under Section 23 of the Contract Act, set out below:-

> *23. What consideration and objects are lawful, and what not—The consideration or object of an agreement is lawful, unless—*
>
> ***it is forbidden by law; or***
>
> ***is of such a nature that, if permitted, it would defeat the provisions of any law; or***
>
> ***is fraudulent; or involves or implies, injury to the person or property of another; or***
> *the Court regards it as immoral, or opposed to public policy.*
>
> *In each of these cases, the consideration or object of an agreement is said to be unlawful.* ***Every agreement of which the object or consideration is unlawful is void.***

U. <u>COMPENSATION IS NOT THE ANSWER TO THE DEPRIVATION OF LAND.</u>

215. The Supreme Court in ***Bimal Kr. Shaw (Supra)*** held as follows:-

> *"The right to property: A net of intersecting rights*
> *a. There is yet another aspect of the matter. Under our constitutional scheme, compliance with a fair procedure of law before depriving any person of his immovable property is well entrenched. We are examining this issue in the context of Section 352 of the Act which is bereft of any procedure whatsoever before compulsorily acquiring private property. Again, assuming that Section 363 of the Act provides for compensation, compulsory acquisition will still be unconstitutional if proper procedure is not established or followed before depriving a person of their right to property.* ***We find it compelling to clarify that a rather undue emphasis is laid on provisions of compensation to justify the power of compulsory acquisition, as if compensation by itself is the complete procedure for a valid acquisition.***
>
> *b. While it is true that after the 44th Constitutional Amendment [the Constitution (44th Amendment) Act, 1978], the right to property drifted from Part III to Part XII of the Constitution, there continues to be a potent safety net against arbitrary acquisitions, hasty decision-making and unfair redressal mechanisms. Despite its spatial placement, Article 300-A [300-A of the Constitution:—300-A. Persons not to be deprived of property save by authority of law.—No person shall be deprived of his property save by authority of law.‖] which declares that —no person shall be deprived of his property save by authority of law‖ has been characterised both as a constitutional and also a*

> *human right [LachhmanDass v. Jagat Ram, (2007) 10 SCC 448; Vidya Devi v. State of H.P., (2020) 2 SCC 569 : (2020) 1 SCC (Civ) 799] .* ***To assume that constitutional protection gets constricted to the mandate of a fair compensation would be a disingenuous reading of the text and, shall we say, offensive to the egalitarian spirit of the Constitution."***
>
> *(Emphasis applied)*

216. The promoter, with the active connivance of the NKDA, has deprived the flat owners of the 15 towers of their right to the land. The Promoter has also fraudulently obtained a modified sanction plan from the KMDA by suppression of facts, a misstatement thereof. In fact, the modified sanction plan obtained by the promoter is void ab initio.

217. A private citizen cannot be permitted to deprive their fellow citizen of their right to property. The NKDA also acted illegally in depriving the flat owners of the original 15 towers of their land by granting a revised plan for construction to be made on their land by a third party/ Promoter without their consent.

218. The only solution is the demolition of the 16th Tower, with compensation to be paid to the flat owners of the 16th Tower.

V. CONCLUSIONS

219. The WB Promoter Act, 1993, applies in the facts of the case, both to the sanction plan of 2007 and the revised plan of 2015.

220. The NKDA Act of 2007 does not override the WB Apartment Ownership Act 1972, or the Promoters Act of 1993, on the requirement of consent of the existing owners in granting sanction of a building plan or a revised building plan.

221. Sections 7, 10, and 10A of the WB Act of 1972 read with Rule 4 of the Rules of 1974 mandate the requirement of prior consent of the apartment owners of the first 15 towers before effecting any material addition to the construction or

addition of a structure, after the originally sanctioned by the plan dated 10th September, 2007.

222. The authorities under WB Apartment Ownership Act 1972 and NKDA Act 2007 are required to factor in the compliance of the provisions of the WB Promoters Act, 1993, by the promoter.

223. There being no demonstrable or material inconsistency between the NKDA Act 2007 on the one hand, and WB Apartment Ownership Act 1972, and the WB Promoters Act, 1993 on the other, the non-obstante clause of the NKDA Act does not stand in the way of the application of the latter two acts to the sanction plans granted under the former Act.

224. The revised sanction plan dated 20th August, 2015, was obtained by fraud and suppression of material facts by the respondent no. 6. Various other provisions of the NKDA Act have been violated by the promoter, consequent upon violations of the WB Apartment Ownership Act and WB Promoters Act. The said revised plan dated 20th August, 2015, is therefore illegal and is liable to be revoked/cancelled under Section 81 of the NKDA 2007 and is hereby cancelled.

225. The Promoter, without establishing his exclusive right to construct before the authorities under the NKDA, has obtained the revised sanction plan, in 2015. The NKDA Act, which mandates the proof of exclusive right to construct as a condition precedent for obtaining any sanction plan or revision thereof for making construction. Thus, the revised plan militates against the very root of the said act.

226. The interim orders dated 5th September 2018 & 1st April 2022 passed in the writ petition specifically provided that the 16th tower (Tower No. 8) would be demolished if the writ petition succeeded.

227. The clauses in the sale agreements between the writ petition/appellants cannot and have not extinguished the statutory right of the flat owners to question the legality of the 16th Tower.

228. Section 7 of the WB Apartment Ownership Act 1972 and Section 8 of the WB Promoter Act 1993 are mandatory in nature, tenor and application. The same are enacted in public interest to render effective the rights of the existing flat owners against the promoter as regards the latter's conduct in making further construction in the existing structures.

229. There is no alternative to demolition when an additional structure is constructed without the consent of the existing flat owners of the 15 towers. Further, the situation has leaned in favour of demolition of the 16th tower, given that the original sanction plan of 2007 permitted only the construction of 15 towers, based on which the aggrieved flat owners/appellants purchased their respective flats.

230. The reduction of the undivided share of the flat owners of the 15 towers has violated their right under Article 300A of the Constitution of India. The said reduction amounts to a surreptitious acquisition of land by the promoter/non-state actor with the active connivance of the NKDA. The said acquisition, apart from being impermissible in law has been effected without the consent of the flat owners of the 15 towers who owned such undivided shares in the land. The

demolition of the 16th tower is necessary for the restoration of such undivided shares in favour of the said flat owners.

231. The Authorities under the NKDA Act 2007 have failed to discharge their statutory duties despite specific notice of the illegality committed by the 6th respondent/promoter and general notice in the writ petition.

232. The obstruction of the free flow of light, air and ventilation to the existing 15 towers, as a consequence of the illegal 16th tower, cannot be compensated in terms of money.

233. The impugned judgment dated 18th October, 2023, is found erroneous and is hereby set aside, and the appeals are allowed.

W. DIRECTIONS

234. The 16th tower, numbered 8 in Elita Garden Vista, shall be demolished by the promoter and, in default, by the NKDA, at the cost of the promoter. The demolition shall be carried out within 2 months from date. The purchasers and occupiers of the 16th tower shall be permitted to remove their effects from the 16th tower within a month from date.

235. The purchasers of the apartment in the 16th tower and the commercial plaza shall be refunded the purchase price of each apartment or as paid by them to the promoter, together with interest @ 7% per annum.

236. The Engineers who have signed the revised sanction plan, and all the officers of the NKDA and their promoter and their men and agents who were involved in the process of the Grant of the revised sanction plan, for the 16th tower shall inquired into and be proceeded against both departmentally and under the

criminal laws for acts of omission and commission after such inquiry is conducted by the State Vigilance Commission.

237. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties with all requisite formalities.

(RAJASEKHAR MANTHA, J.)

I agree.

(AJAY KUMAR GUPTA, J.)

After the judgment is dictated in open court, learned counsel for the promoter/ 6th respondent seeks stay of operation of the judgment. The same is considered and refused.

(RAJASEKHAR MANTHA, J.)

(AJAY KUMAR GUPTA, J)