SUPERTECH LIMITED

v.

EMERALD COURT OWNER RESIDENT WELFARE ASSOCIATION AND OTHERS

(Miscellaneous Application No. 1572 of 2021)

In

(Civil Appeal No. 5041 of 2021)

OCTOBER 04, 2021

[DR. DHANANJAYA Y CHANDRACHUD AND B. V. NAGARATHNA, JJ.]

Judgment – Modification of – Applicant sought modification of the judgment and order of the Supreme Court dated 31.08.2021 – Earlier, the Division Bench of the High Court had directed the demolition of Towers 16 and 17 by NOIDA constructed by the applicant – The Judgment of the High Court was affirmed by the Supreme Court – Applicant submitted that since the minimum distance required under the relevant Building Regulations was not complied with and there was violation of the requirement of maintaining a green area under the relevant Building Regulations – The applicant would meet the above two findings by slicing a portion of Tower 17, while retaining Tower 16 so as to ensure compliance of the above two findings – Held: The attempt in the present miscellaneous application was to seek a substantive modification of the Judgment of the Supreme Court – Such an attempt is not permissible in a miscellaneous application – Application u/Or.LV, Rule 6 of the Supreme Court Rules, 2013 cannot be inverted to bypass the provisions of review in Or.XLVII in the Rules 2013 – The miscellaneous application is an abuse of the process – A judicial pronouncement cannot be subject to modification once the judgment has been pronounced, by filing miscellaneous application – Thus, the miscellaneous application is accordingly dismissed.

Delhi Administration vs Gurdip Singh Uban and Others **(2000) 7 SCC 296 : [2000] 2 Suppl. SCR 496;** *Ram Chandra Singh vs Savitri Devi and Others* **(2004) 12 SCC 713 : [2004] 12 SCR 713 – relied on.**

A *Supertech Limited vs Emerald Court Owner Resident Welfare Association and Other* **(2021) SCC Online SC 648;** *Vijay Kurle and Others* **(2020) SCC Online SC 711;** *Meghmala vs G Narasimha Reddy* **(2010) 8 SCC 383 : [2010] 10 SCR 47;** *Parbhani Transport Co-operative Society Ltd. vs The Regional Transport Authority, Aurangabad & Others* **AIR (1960) SC 801 : [1960] SCR 177 - referred to.**

B *Nazir Ahmed vs King Emperor* **(1936) L.R. 63 IndAp 372 – referred to.**

C **Case Law Reference**

[2000] 2 Suppl. SCR 496	**relied on**	**Para 5**
[2004] 12 SCR 713	**relied on**	**Para 5**
[2010] 10 SCR 47	**referred to**	**Para 12**
D **[1960] SCR 177**	**referred to**	**Para 13**

CIVIL APPELLATE JURISDICTION: Miscellaneous Application No.1572 of 2021.

In

E Civil Appeal No.5041 of 2021.

From the Judgment and Order dated 11.04.2014 of the High Court of Judicature at Allahabad in Writ Petition (Civil) No.65085 of 2012.

Mukul Rohatgi, Sr. Adv., Mahesh Agarwal, Anshuman Srivastava, Rishabh Parikh, E. C. Agrawala, Advs. for the Appellant.

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Jayant Bhushan, Ravindra Raizada, Sr. Advs., Anish Agarwal, Ms. Vanshika Gupta, Ms. Meenakshi Garg, Ketan Paul, Tushar Bhushan, Amartya Bhushan, Bhakti Vardhan Singh, Ravindra Kumar, Ravi Prakash Mehrotra, Rajeev Kumar Dubey, Ashiwan Mishra, Kamlendra Mishra, Tarun Gupta, Ms. Prachi Mishra, Chaitanya Bansal, Tushar Bathija, Arjun G Garg, Advs. for the Respondents.

The following Order of the Court was passed :

ORDER

1. A miscellaneous application has been filed by Supertech Limited H seeking modification of the judgment and order of this Court dated 31

August 2021. The reliefs which are sought in the Miscellaneous Application read thus:

"(a) Modify the Judgment dated 31.08.2021…to the extent that the Applicant may demolish a part of tower T-17 as stipulated in paragraph 6 hereinabove;

(b) Pass an order of status quo in respect of Towers 16 & 17 in Emerald Court, Plot No. 4, Sector 93A, NOIDA till final orders are passed in the present application."

2. A Division Bench of the High Court of Judicature at Allahabad directed the demolition of Towers 16 and 17 by the third respondent, New Okhla Industrial Development Authority, in Emerald Court constructed by the applicant and situated on Plot No 4, Sector 93A, NOIDA. While affirming the judgment of the Division Bench, this Court has recorded the following conclusions in its judgment, which is reported as ***Supertech Limited vs Emerald Court Owner Resident Welfare Association and Others***[1]:

"185. To summarize our findings, the documentary materials referred to and analyzed in this judgment indicate that:

(i) The land allotted to appellant under the original lease agreement and the supplementary lease deed constitute one plot;

(ii) The land which was allotted through the supplementary lease deed forms a part of original Plot No 4, and would be governed by the same terms and conditions as the original lease deed;

(iii) The sanction given by NOIDA on 26 November 2009 and 2 March 2012 for the construction of T-16 and T-17 is violative of the minimum distance requirement under the NBR 2006, NBR 2010 and NBC 2005;

(iv) An effort was made to get around the violation of the minimum distance requirement by representing that T-1 together with T-16 and T-17 form one cluster of buildings in the same block. This representation was sought to be bolstered by providing a space frame between T-1 and T-17. The case that T-1, T-16 and T-17 are part of one block

[1] 2021 SCC OnLline SC 648

A is directly contrary to the appellant's stated position in its representations to the flat buyers as well as in the counter affidavit before the High Court. The suggestion that T-1, T-16 and T-17 are part of one block is an after-thought and contrary to the record;

B (v) After realizing that the building block argument would not pass muster, another false case was sought to be set up with the argument that T-1 and T-17 are dead end sides, thereby obviating the need to comply with the minimum distance requirements. This argument is belied by the comprehensive report submitted by NBCC. The sides of T-1 and T-17 facing each other are not dead end sides since both the sides have vents/egresses facing the other building;

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(vi) By constructing T-16 and T-17 without complying with the Building Regulations, the fire safety norms have also been violated;

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(vii) The first revised plan of 29 December 2006 contained a clear provision for a garden area adjacent to T-1. In the second revised plan of 26 November 2009, the provision for garden area was obliterated to make way for the construction of Apex and Ceyane (T-16 and T-17). The common garden area in front of T-1 was eliminated by the construction of T-16 and T-17. This is violative of the UP Apartments Act 2010 since the consent of the flat owners was not sought before modifying the plan promised to the flat owners; and

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(viii) T-16 and T-17 are not part of a separate and distinct phase (Phase-II) with separate amenities and infrastructure. The supplementary lease deed stipulates that the they are part of the original project. Hence, the consent of the individual flat owners of the original fifteen towers, individually or through the RWA, was a necessary requirement under the UP Apartments Act 2010 and UP 1975 Act before T-16 and T-17 could have been constructed, since they necessarily reduced the undivided interest of the individual flat owners in the common area by adding new flats and increasing the number from 650 to 1500; and

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(ix) The illegal construction of T-16 and T-17 has been achieved through acts of collusion between the officers of NOIDA and the appellant and its management.

186. For the reasons which we have indicated above, we have come to the conclusion that:

(i) The order passed by the High Court for the demolition of Apex and Ceyane (T-16 and T-17) does not warrant interference and the direction for demolition issued by the High Court is affirmed;

(ii) The work of demolition shall be carried out within a period of three months from the date of this judgment;

(iii) The work of demolition shall be carried out by the appellant at its own cost under the supervision of the officials of NOIDA. In order to ensure that the work of demolition is carried out in a safe manner without affecting the existing pleadings, NOIDA shall consult its own experts and experts from Central Building Research Institute Roorkee;

(iv) The work of demolition shall be carried out under the overall supervision of CBRI. In the event that CBRI expresses its inability to do so, another expert agency shall be nominated by NOIDA;

(v) The cost of demolition and all incidental expenses including the fees payable to the experts shall be borne by the appellant;

(vi) The appellant shall within a period of two months refund to all existing flat purchasers in Apex and Ceyane (T-16 and T-17), other than those to whom refunds have already been made, all the amounts invested for the allotted flats together with interest at the rate of twelve per cent per annum payable with effect from the date of the respective deposits until the date of refund in terms of Part H of this judgment; and

(vii) The appellant shall pay to the RWA costs quantified at Rs. 2 crore, to be paid in one month from the receipt of this judgment."

A 3. Mr Mukul Rohatgi, learned senior counsel appearing on behalf of the applicant submitted that:

(I) The applicant does not seek a review of the judgment of this Court, which is the reason for filing an application for modification;

B (ii) The basis of the judgment of this Court is that:

(a) The minimum distance required under the relevant Building Regulations has not been complied with; and

(b) There is a violation of the requirement of maintaining a green area under the relevant Building Regulations; and

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(iii) The applicant would seek to meet the above two findings which have been arrived at in the judgment of this Court by slicing a portion of Tower 17, while retaining Tower 16 so as to ensure compliance with the minimum distance requirement and the green area requirement under the relevant Building Regulations.

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4. Learned senior counsel submitted that the proposal may be examined by the planning authority, if the Court so directs.

E 5. Mr Jayant Bhushan, learned senior counsel appearing on behalf of the first respondent has raised a preliminary objection to the maintainability of such a miscellaneous application, based on the decisions of this Court in ***Delhi Administration vs Gurdip Singh Uban and Others***[2] ("***Gurdip Singh Uban***"), ***Ram Chandra Singh vs Savitri Devi and Others***[3] ("***Ram Chandra Singh***") and ***Rashid Khan Pathan (Applicant) – In Re: Vijay Kurle and Others***[4] ("***Rashid Khan Pathan (Applicant) – In Re: Vijay Kurle***"). Apart from this, it has been submitted on behalf of the first respondent that the miscellaneous application proceeds on the misconceived basis that the only two objections which were noticed in the judgment of this Court to the legality G of the two structures are the ones which have been submitted on behalf of the applicant (minimum distance and green area). In addition to the violation of the distance requirement and the requirement of a green

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[2] (2000) 7 SCC 296

[3] (2004) 12 SCC 713

H [4] 2020 SCC OnLine SC 711

area, it has been urged that this Court has, as a matter of fact, adverted to various other violations, including: *(i)* the non-compliance with the provision of the UP Apartments Act 2010 Act[5]; and *(ii)* a reduction of the undivided interest of the flat purchasers in the common areas without their consent. On the non-compliance with the provisions of the 2010 Act, Mr Bhushan placed reliance on the following findings contained in paragraphs 153 and 154 of the judgment of this Court, namely:

> "153. Sub-Section (4) of Section 4 contains the following stipulations:
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> > "(4) After plans, specifications and other particulars specified in this section as sanctioned by the prescribed sanctioning authority are disclosed to the intending purchaser and a written agreement of sale is entered into and registered with the office of concerned registering authorities. The promoter may make such minor additions or alterations as may be required by the owner or owners, or such minor changes or alterations as may be necessary due to architectural and structural reason's duly recommended and verified by authorized Architect or Engineer after proper declaration and intimation to the owner:
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> > Provided that the promoter shall not make any alterations in the plans, specifications and other particulars without the previous consent of the intending purchaser, project Architect, project Engineer and obtaining the required permission of the prescribed sanctioning authority, and in no case he shall make such alterations as an not permissible in the building bye-laws."
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> 154. Under clause (c) of sub-Section (1) of Section 4, a promoter who intends to sell an apartment is required to make a full disclosure in writing to an intending purchaser and to the competent authority of the plans and specifications approved or submitted for approval to the local authority, of the building of which the apartment is a part. Similarly, under clause (d), a disclosure has to be made in regard to the common areas and facilities in accordance with the approved lay-out plan or building plan. Once such a disclosure has been made, sub-Section (4) stipulates that upon the execution of a written agreement to sell, the promoter may make minor additions or alterations as

[5] the "2010 Act"

A may be required or necessary due to architectural and structural reasons duly authorized and verified by authorized Architects or Engineers. Apart from these minor additions or alterations which are contemplated by sub-Section (4), the proviso stipulates that the promoter shall not make any alterations in the plans, specifications and other particulars "without the B previous consent of the intending purchaser". Mr. Vikas Singh's submission, that this provision will apply to intending purchasers of Apex and Ceyane and not to the persons who had purchased apartments in the existing fifteen towers, cannot be accepted. The above proviso is evidently intended to protect persons to C whom the plans and specifications were disclosed when they were the "intending purchasers". Further, a construction to the contrary will run against the grain of the intent and purpose of the statute as well its express provisions."

6. Similarly, in respect of the reduction of the undivided interest in D the common areas without the consent of the residents, reliance has been placed on the following findings of this Court:

"145. However, the application of clause II(h) cannot be brushed away on this basis, particularly since the sentence imposing the application of the UP 1975 Act on the lessee/sub-lessee must E bear some meaning and content. In this context, during the course of his submissions, Mr. Jayant Bhushan, learned Senior Counsel appearing on behalf of the RWA, has placed on the record a copy of the registered sub-lease executed on a tripartite basis by NOIDA, with the appellant as the lessee and the flat buyer as the sub-lessee. Some important provisions of this deed of sublease F are:

(i) Clause 16 contemplates that the occupant of the ground floor would be entitled to use a "sit-out area but the right of user shall be subject to the provisions of the UP Ownership Flat Act 1975";

G (ii) Clause 17 recognizes the right to user of the occupant of the dwelling unit on the top floor, subject to the provisions of the same enactment; and

(iii) Clause 27 envisages that all clauses of the lease executed by NOIDA in favour of the appellant on 16 March 2005 H shall be applicable to the sub-lease deed as well.

146. In the backdrop of this provision, "more particularly, clause II(h) of the lease deed which was executed by NOIDA in favour of the appellant on 16 March 2005, the appellant was duty bound to comply with the provisions of the UP 1975 Act. By submitting before this Court that it is not bound by the terms of its agreement or the Act for want of a declaration under Section 2, the appellant is evidently attempting to take advantage of its own wrong.

[…]

157. In terms of the third revised plan which was sanctioned on 2 March 2012, 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. As a matter of fad, it has also been submitted on behalf of the first respondent that the additional lease rent paid to NOIDA was also sought to be collected from the existing flat purchasers at the rate of Rs.190 per sq. foot. A statement to that effect was also contained in an affidavit filed before the High Court on behalf of the first respondent. The purchase of additional FAR by the appellant cannot be used to trample over the rights of the existing purchasers."

Hence it has been urged that in any event, the proposal will not ensure compliance with the judgment of this court.

7. The judgment of this Court dated 31 August 2021 has affirmed the direction which was issued by the Division Bench of the Allahabad High Court for the demolition of Tower 16 and Tower 17. This is evident from the ultimate conclusions and directions contained in paragraph 186(i) to (v) of the judgment. In essence, what the applicant seeks in the present application is that the direction for the demolition of Tower 16 and Tower 17 should be substituted by the retention of Tower 16 in its entirety and slicing of a portion of Tower 17. Clearly, the grant of such a relief is in the nature of a review of the judgment of this Court.

8. In successive decisions, this Court has held that the filing of applications styled as "miscellaneous applications" or "applications for clarification/modification" in the guise of a review cannot be countenanced. In ***Gurdip Singh Uban*** (supra), Justice M Jagannadha Rao, speaking for a two-Judge Bench of this Court observed:

A "17. We next come to applications described as applications for "clarification", "modification" or "recall" of judgments or orders finally passed. We may point out that under the relevant Rule XL of the Supreme Court Rules, 1966 a review application has first to go before the learned Judges in circulation and it will be for the Court to consider whether the application is to be rejected without giving an oral hearing or whether notice is to be issued.

B *Order XL Rule 3 states as follows*:

"3. Unless otherwise ordered by the Court, an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party…."

C In case notice is issued, the review petition will be listed for hearing, after notice is served. This procedure is meant to save the time of the Court and to preclude frivolous review petitions being filed and heard in open court. However, with a view to avoid this procedure of "no hearing", we find that sometimes applications are filed for "clarification", "modification" or "recall" etc. not because any such clarification, modification is indeed necessary but because the applicant in reality wants a review and also wants a hearing, thus avoiding listing of the same in chambers by way of circulation. Such applications, if they are in substance review applications, deserve to be rejected straight away inasmuch as the attempt is obviously to bypass Order XL Rule 3 relating to circulation of the application in chambers for consideration without oral hearing. By describing an application as one for "clarification" or "modification", — though it is really one of review — a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open court. What cannot be done directly cannot be permitted to be done indirectly. (See in this connection a detailed order of the then Registrar of this Court in *Sone Lal* v. *State of U.P.* [(1982) 2 SCC 398] deprecating a similar practice.)

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G 18. We, therefore, agree with the learned Solicitor General that the Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the application is in substance one for review. In that event, the Court could either reject the application straight away with or without costs or permit

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withdrawal with leave to file a review application to be listed initially in chambers." A

9. The same view has been expressed in a subsequent decision in ***Ram Chandra Singh*** (supra) wherein another two-Judge Bench of this Court observed as follows:

"15. In *Gurdip Singh Uban* [(2000) 7 SCC 296] the law has been laid down in the following terms: B

"*17*. … This procedure is meant to save the time of the Court and to preclude frivolous review petitions being filed and heard in open court. However, with a view to avoid this procedure of 'no hearing', we find that sometimes applications are filed for 'clarification', 'modification' or 'recall' etc. not because any such clarification, modification is indeed necessary but because the applicant in reality wants a review and also wants a hearing, thus avoiding listing of the same in chambers by way of circulation. Such applications, if they are in substance review applications, deserve to be rejected straight away inasmuch as the attempt is obviously to bypass Order 40 Rule 3 relating to circulation of the application in chambers for consideration without oral hearing. By describing an application as one for 'clarification' or 'modification', — though it is really one of review — a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open court. What cannot be done directly cannot be permitted to be done indirectly." C D E

16. In *Common Cause* [(2004) 5 SCC 222] Lahoti, J. (as the learned Chief Justice then was) speaking for a Division Bench observed: F

"*2*. … We are satisfied that the application does not seek any clarifications. It is an application seeking in substance a review of the judgment. By disguising the application as one for 'clarification', the attempt is to seek a hearing in the open court avoiding the procedure governing the review petitions which, as per the rules of this Court, are to be dealt with in chambers. Such an attempt on the part of the applicant has to be deprecated." G

17. Recently in *Zahira Habibullah Sheikh* v. *State of Gujarat* [(2004) 5 SCC 353 : 2004 SCC (Cri) 1613] referring to Order 40 Rule 3, this Court opined: H

A "*6*. As noted by a Constitution Bench of this Court in *P.N. Eswara Iyer* v. *Registrar, Supreme Court of India* [(1980) 4 SCC 680], *Suthendraraja* v. *State* [(1999) 9 SCC 323 : 2000 SCC (Cri) 463], *Ramdeo Chauhan* v. *State of Assam* [(2001) 5 SCC 714 : 2001 SCC (Cri) 915] and *Devender Pal Singh* v. *State, NCT of Delhi* [(2003) 2 SCC 501 : 2003 SCC (Cri) 572] notwithstanding the wider set of grounds for review in civil proceedings, it is limited to 'errors apparent on the face of the record' in criminal proceedings. Such applications are not to be filed for the pleasure of the parties or even as a device for ventilating remorselessness, but ought to be resorted to with a great sense of responsibility as well.

7. In *Delhi Admn.* v. *Gurdip Singh Uban* [(2000) 7 SCC 296] it was held that by describing an application as one for 'clarification' or 'modification' though it is really one of review, a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open court. What cannot be done directly cannot be permitted to be done indirectly. The court should not permit hearing of such an application for 'clarification', 'modification' or 'recall' if the application is in substance a clever move for review."

E 10. More recently, another two-Judge Bench in ***Rashid Khan Pathan (Applicant) – In Re: Vijay Kurle*** (supra) held as follows:

"9. In a country governed by the rule of law, finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment. Permitting the parties to reopen the concluded judgments of this Court by filing repeated interlocutory applications is clearly an abuse of the process of law and would have far-reaching adverse impact on the administration of justice."

11. The attempt in the present miscellaneous application is clearly to seek a substantive modification of the judgment of this Court. Such an attempt is not permissible in a miscellaneous application. While Mr Mukul Rohatgi, learned senior counsel has relied upon the provisions of Order *LV* Rule 6 of the Supreme Court Rules 2013, what is contemplated therein is a saving of the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the Court. Order *LV* Rule 6 cannot be inverted to bypass the

provisions for review in Order *XLVII* in the Supreme Court Rules 2013. The Miscellaneous application is an abuse of the process.

12. The hallmark of a judicial pronouncement is its stability and finality. Judicial verdicts are not like sand dunes which are subject to the vagaries of wind and weather[6]. A disturbing trend has emerged in this court of repeated applications, styled as Miscellaneous Applications, being filed after a final judgment has been pronounced. Such a practice has no legal foundation and must be firmly discouraged. It reduces litigation to a gambit. Miscellaneous Applications are becoming a preferred course to those with resources to pursue strategies to avoid compliance with judicial decisions. A judicial pronouncement cannot be subject to modification once the judgment has been pronounced, by filing a miscellaneous application. Filing of a miscellaneous application seeking modification/clarification of a judgment is not envisaged in law. Further, it is a settled legal principle that one cannot do indirectly what one cannot do directly ["*Quando aliquid prohibetur ex directo, prohibetur et per obliquum"*].

13. Further, there is another legal principle which is applicable in the present case. It is that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden[7]. Hence, when a statute requires a particular thing to be done in a particular manner, it must be done in that manner or not at all and other methods of performance are necessarily forbidden[8]. This Court too, has adopted this maxim[9]. This rule provides that an expressly laid down mode of doing something necessarily implies a prohibition on doing it in any other way.

14. For the above reasons, there is no substance in the miscellaneous application.

15. The Miscellaneous Application is accordingly dismissed.

Ankit Gyan Miscellaneous Application dismissed.

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[6] See *Meghmala v G Narasimha Reddy, (2010) 8 SCC 383*
[7] *Taylor vs Taylor*, 1875 (1) Ch D 426
[8] *Nazir Ahmed vs King Emperor*, (1936) L.R. 63 IndAp 372
[9] *Parbhani Transport Co-operative Society Ltd. vs The Regional Transport Authority, Aurangabad & Others*, AIR 1960 SC 801