Andhra High Court
Ch. Madan Mohan And Ors. vs Municipal Corporation Of ... on 2 May, 2003
Equivalent citations: AIR 2003 AP 393, 2003 (4) ALD 6
Author: V Rao
Bench: V Rao
ORDER V.V.S. Rao, J.

1. An interesting question as to authority and power of the Municipal Corporation of Hyderabad (MCH) to regulate the parking area and levy parking fee on vehicles parked thereat inside a private commercial complex falls for consideration in these writ petitions. Therefore, all the writ petitions are being disposed of by this common order.

2. The petitioners claim to be agreement holders/licensees for collection of parking fee from the visitors in commercial complexes like Amrutha Mall, Rahmat Complex, Aditya Enclave, Navakethan Building, White House and Divyashakthi Apartments, it is their case that as per the agreement/contract they have exclusive privilege of collecting parking fee from visitors who come to the commercial complex for their business as well as other needs. In most of the cases, it is valid for a period of one to two years and the licensee is entitled to collect parking fee on four wheelers and two wheelers as stipulated in the agreement. It is the case of the petitioners that they have parted with substantial amounts as security deposit and they are required to pay substantial amount as rental. The details as to when various complexes were constructed by a person or organisation or builders; as to when the owners of various shops/units formed into an association and the objectives of such association are not forthcoming in the pleadings.

3. The MCH, the first respondent herein, published a notice informing general public as well as visitors to various commercial complexes that collection of parking fee by the owners of commercial complexes is illegal and contrary to the building plan sanctioned by it, that due to collection of parking fee by the owners of the complexes, all the visitors are parking their vehicles on the outside road margin resulting in traffic problems and that MCH will take appropriate action against those collecting parking fee illegally. The notice was published in the Telugu Newspaper Eenadu dated 6-1-2003. The English translation annexed to W.P. No. 1180 of 2003 reads as under.

It is brought to the notice of Commissioner, Municipal Corporation of Hyderabad that heavy fees are being collected from the public for parking the vehicles in the place meant for parking in commercial/office complexes.

4. The place earmarked for parking in multistoried commercial/office complexes is place meant for parking by public without any fee. Further, as per G.O. Ms. No. 423(MA), dated 31-7-1998 and Zoning Regulations and sanctioned plan of M.CH., the area reserved for parking does not include F.S.I. The collection of such fee amounts to business and against the sanction of M.C.H. for parking. It is the duty of owner of every complex to provide free parking to the people who visit such complex for shopping. If fee is collected the earmarking of parking place in commercial/ office complexes will become futile. People are parking their vehicles in the road margin as complex owners are collecting fee and resulting in traffic problems and accidents. Hence all the concerned are hereby cautioned

that parking fee should not be collected in parking areas in commercial/office complexes. Collection of such fee amounts to violation of sanctioned plan and it will be treated seriously and M.C.H. will take appropriate action against those persons. The general public is also requested to inform the M.C.H. about collection of any such fee to take appropriate action.

5. The further case of the petitioners is that MCH has no power either under Section 586 (5) of the Hyderabad Municipal Corporation Act, 1955 ('HMC Act' for brevity) or the regulations for rationalization of floor area ratio (FAR) issued in G.O. Ms. No. 423, Municipal Administration and Urban Development (MI)(MA) Department, dated 31-7-1998. Under Clause (5) of Section 586 of the HMC Act, MCH is conferred with the power to make bye-laws for regulating and collecting parking fee which belong to them. It has no such power to regulate or restrict the parking of motor vehicles in the areas including commercial complexes which do not belong to MCH. In exhorting public to complain MCH about any such collection of parking fee, the Corporation infringed the right of the owners of various complexes guaranteed under Article 300-A of the Constitution of India and also the right of the licensees/agreement holders under Article 19(1)(g) to carry on occupation for collecting parking fee as per the agreement.

6. In W.P. No. 6218 of 2003, the petitioner is a licensee of M/s. Shalivahana Associates in relation to Minerva House, S.D.Road, Secunderabad and his licence/ contract is valid till 31-3-2004. In W.P. No. 1519 of 2003, the petitioner is Surya Towers Owners Welfare Association. They contend that they are not collecting any parking fee, that Surya Towers consists of eleven floors and two cellars, that cellar parking is fully earmarked for all the 77 flat owners and occupiers and that association itself is collecting parking fee from the visitors at the rate of Rs. 2/- for two wheeler and Rs. 5/- for car. The visitors are permitted to park their cars in the ground floor area. In W.P. No. 7111 of 2003, the petitioner entered into an agreement with Lal Bungalow Commercial Complex Owners Association for collection of parking fee from visitors to the complex. The other averments in these writ petitions are same as in W.P. No. 1183 of 2001.

7. MCH filed a counter-affidavit in W.P. No. 1180 of 2003 through its City Planner. In brief, the contents are as follows. The writ petition is not maintainable. No statutory rule or constitutional and fundamental right is violated. The petitioners have no locus standi to file writ petition questioning the action of the MCH in restricting the owners of the commercial complexes and shopping complex from utilising the area earmarked for parking for commercial purpose without making the same available for the individual owners of the flats and visitors to the complex. The owners or their associations who are prohibited from collecting parking fee have not challenged the action of MCH and, therefore, the petitioners who are collecting licence fee are not entitled to challenge the notification. The parking area is earmarked for the purpose of parking as per the sanctioned plan and no separate parking fee can be collected by the owners or their licensees.

8. It is further stated that as per Rule 12 of the Multi-storeyed Building Rules, 1981 and Zoning Regulations issued in G.O. Ms. No. 423, dated 31-7-1998, it is compulsory for the owners of the commercial/shopping complex to provide regular parking facility for the owners as well as visitors to the complex. The area earmarked for parking is counted for the purpose of floor area ratio while sanctioning the building permit. The owners/builders availed the benefit of extra FAR by including

the area meant for parking and, therefore, it is not open to them to utilise the said parking area as commercial venture and collect fee from the visitors. If the owners/ their licensees are permitted to collect parking fee, the same frustrates the purpose for which parking area is provided. MCH can enforce the law by compelling the owners to stick to the building plan and utilise the areas for the purpose for which they are earmarked. Any such action cannot amount to infringement of Article 19(1)(g) of the Constitution. There is no arbitrariness in the action taken by the respondents in enforcing the provisions of the HMC Act and regulations in G.O. Ms. No. 423, dated 31-7-1998.

9. It is further stated that MCH received several complaints from the general public that parking fee is being collected by commercial complexes at exorbitant rates even though the area itself is earmarked for parking. Such area is earmarked and specified keeping in view the parking requirements of the owners and also the visitors to the complex. Commercial complexes are required to provide large parking area than residential complexes. The parking area in a commercial complex is a public parking place meant for the purpose of the general public and, therefore, MCH issued a public notice stating that it is the duty of the owners to provide free parking to the people who visit the complex. The notification is issued in exercise of powers vested in the Corporation and there is no illegality in issuing the same. Under Section 115 of the HMC Act, the Corporation is empowered to provide for parking place/ public landing place/halting place for vehicles including motor vehicles and levy fees for their use. Parking area in commercial complex is also meant for the general public who visit the complex and, therefore, the power to issue the notification, in any event, vests in the MCH. The statute does not confer any right on the petitioners and, therefore, it is not open to them to collect parking fee. The power to levy parking fee cannot be exercised by any other person. The petitioners are collecting parking fee without authority of law and is illegal.

10. Learned Counsel for the petitioners, S/Sri A. Ramnarayana, C. Ramachandra Raju and P. Gopalakrishna, submit that the Corporation has no power or jurisdiction to prohibit collection of parking fee inside the building complex. They also contend that the power under Section 586(5) of the HMC Act to make bye-laws is limited to parking areas which belong to Corporation and not for private purpose. Lastly, it is contended that the petitioners have entered into an agreement with builders or owners' associations and, therefore, without giving notice their licence cannot be withdrawn.

11. Learned Additional Advocate General, Sri Ramesh Ranganathan, appearing for the MCH, submits that by reason of the activity undertaken by the commercial complexes, they are public places within the meaning of Section 2(44) of the HMC Act. Therefore, by reason of the power vested in the Corporation under Section 115(40) of the HMC Act, the Corporation is competent to regulate parking and levy parking fees even within the building areas. He submits that the power under Section 115(40) is independent of the power under Section 586(5) to make bye-laws regulating parking areas belonging to MCH. He further submits that as per layout rules, building bye-laws and special rules issued in G.O.Ms. No. 423, dated 31-7-1998, every owner of a multi-storeyed building is required to maintain more parking area than in a residential building and the said parking area cannot be leased out and no parking fee can be collected. He also submits that as the owners of complexes have no right to collect parking fee, the petitioners cannot get any better right and hence they have no locus standi to question the notification issued by the MCH.

12. The controversy raised in the writ petitions has to be resolved with reference to the right, if any, of the owners of commercial complexes to collect parking fee and with reference to the right of the MCH to regulate parking areas in commercial complexes.

Authority and Power of MCH

13. A brief reference to relevant provisions of the HMC Act and other relevant statutes necessary here Section 2(44) of the HMC Act defines 'public place' as including any parking area, garden, ground or any other place to which public have or are permitted to have access. The definition being inclusive definition, it is very well settled, has to be given broader meaning while examining whether a place is 'public place'. Chapter III of the HMC Act deals with duties and powers of the municipal authorities and contains Sections 112 to 129-A. Section 115 enumerates matters which may be provided for by the Corporation at its discretion. Clause (40) of Section 115 was inserted by Amendment Act No. 10 of 1987 and the same is to the effect that the Corporation may provide from time to time either wholly or partly for parking places, public landing places, halting places for vehicles of any description including motor vehicles and levy fees for their use. Chapter XVI contains provisions which empower, inter alia, by Section 587 to make bye-laws in relation to matters specified under Section 586(1) to (48). Section 586(5) is to the effect that the Corporation may make bye-laws earmarking, regulating, supervision and use of parking places, public landing places, halting places for all vehicles of any description including motor vehicles, public and private cart stands and the levy of fees for the use of such of them 'as belonging to the Corporation'. Section 586(48) is general power of the Corporation to make bye-laws to carryout the intentions of the Act. A lot of debate centered round Section 115(40) in juxta position with Section 586(5). Learned Counsel for the petitioners commend the view that having regard to Section 586(5), the power of the Corporation is restricted to regulating parking places as belonging to the Corporation which has no manner of right to regulate parking places of any commercial complex. The view commended by the learned Addl. Advocate General is that power conferred under Section 115(40) is an independent power and, therefore, in relation to all public places, the Corporation can provide parking places and also levy fees for their use. It is also submitted that by reason of Section 2(44), all commercial complexes where public have access are public places and, therefore, they come within the purview of Section 115(40).

14. This Court already referred to Section 586(5) and Section 586(48). The power vested in the Corporation to make bye-laws is a broad power subject to only condition that such bye-laws made should not be inconsistent with the provisions of the HMC Act. Therefore, Section 586(5) read with Section 586(48), in my considered opinion, should be given wide amplitude as conferring power on the Corporation to regulate parking places and levy fees for the use of such parking places. Even if stricto senso such public parking places do not belong to the Corporation, what would be the right, if any, of the owners of multi-storeyed building complexes of areas earmarked for parking and common use, would be clear when this Court takes up other questions for consideration. Therefore, Section 586(5) read with Section 586(48) gives ample power to the Corporation to make bye-laws regulating the use of public parking places and levy fees on such parking places.

15. Section 115(40) of the HMC Act casts a duty on the Corporation to provide parking places and levy fees for their use. In view of the definition of public place as noticed hereinabove, all the places to which public have access or public visit are public places and the Corporation has a duty to regulate such parking places. It does not require any elaborate argument to conclude that all the commercial complexes are built and operated either expressly or impliedly for the use of public. A person who constructs a commercial complex and expects public and people to come to the place for various activities cannot be permitted to contend that it is a private place. Having invited the public, the builder/ owner is bound to take all necessary steps to provide proper security to the people visiting the premises. Therefore, parking place or a common area in a multi-storeyed commercial complex is a public place and nobody can claim absolute right to regulate and levy fees for parking at the parking place. This view is further supported by various provisions of the HMC Act, A.P. Apartments (Promotion of Construction and Ownership) Act, 1987, Municipal Corporation Building Bye-laws, Municipal Corporation of Hyderabad (Layout) Rules, 1965 and Multi-storeyed Building Regulations, 1981.

Right of owners/builders within the precincts of the building

16. Blackstone's Commentaries on the Laws of England; Wayne Morrison; Vol.1 - 2001 describes right to property as consisting of free use, enjoyment and disposal of all acquisitions without any control or diminution, save only by the laws of the land.

17. According to Solmond's Jurisprudence the right to immovable property includes (i) a determinate portion of the earth's surface' (ii) the ground beneath the surface down to the centre of the world; and (iii) Possibly, the column of space above the surface ad infinitum. Cujus est solum, ejus est usque ad coelum (He who possesses land possesses also that which is above it, Salmond on Jurisprudence, 12th Edn., pp.416). The right in the land, is however, subject to certain encumbrances, power of eminent domain, which exclusively vests in the soverign. The right in the land is also subject to common law principles as well as the law made by the State. For instance from the maxim Cujus est solum, ejus est usque ad coelum, it follows that "a person has no right to erect a building in his own land, which interferes with the due enjoyment of adjoining premises and occasions damage thereto either by overhanging them or by the flow of water from the roof and caves upon them, unless, indeed, a legal right so to build has been conceded by grant... See Broom's Legal Maxims, 10th Edn., pp 257". Right to enjoy the land, whether it is surface right or subsoil right, either as an owner or holder of a possessory title, does not, however, include the right to invade the legal rights of others. The legal maxim Sicutere tuo ut alienum non laedas, states the principle that "a man must enjoy his own property in such a manner as not to invade the legal rights of his neighbour, Ibid (2) pp 260.

18. The theory of right to ownership and possession of the property absolutely is a myth. At no time in the human civilization, such a right was recognized in common law or by operation of the statute. The doctrine of ownership that the owner is entitled to possess the things which he owns and has a right to use and enjoy the things he owns has been replaced by the collectivist jurisprudence. Hon'ble Sri Justice P.A. Choudary in T. Damodhar Rao v. S.O., Municipal Corporation, Hyderabad, , explained this aspect as under:

Under the common law, ownership denotes the right of the owner to possess the thing which he owns and his right to use and enjoy the thing he owns. That right extends even to consuming, destroying or alienating the thing. Under the doctrine of right to choose the uses to which a owner can put his land belongs exclusively to his choice. The right of use thus becomes inseparable from the right of ownership. The thrust of this concept of individual ownership is to deny communal enjoyment of individual property. This private law doctrine of ownership is comparable in its width and extent to the public law doctrine of sovereignty. .....Into the domain of this doctrine of ownership, it is the collectivist jurisprudence of municipal administration that has made its first in roads.....

19. The HMC Act is an enactment which regulates specified lands in the Corporation area. It is also intended for planned development and optimum utilization of resources like land, regulating trees, common areas, parks, entertainment, business having regard to the health of people in the area. The Act is intended to protect human life from greed and mischief. It is not intended to help builders of multi-storeyed complexes at the cost of residents living in the Corporation area. That municipal administration law is intended for the people living in the area is settled proposition of law. In Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd., (1983) All ER 417, the Court of Appeal considered the nature of municipal administration law or local authority law. It was held that the local authority constituted under municipal administration law owes no duty to care to a person to compel that person to comply with the authority's requirement and thereby prevent such person acting unlawfully to his own detriment. The local authority is under public duty to take all necessary steps that a development project has all necessary amenities and infrastructural facilities. Various provisions of various statutes which regulate the planning, development and construction of buildings in the Corporation area may now be noticed in the background of doctrine of ownership as noticed hereinabove.

Layout Rules

20. In exercise of powers under Section 585(1) of the HMC Act, the Government promulgated Municipal Corporation of Hyderabad (Layout) Rules, 1985. As per Rule 10(2) of these Rules, the layout plan shall satisfy inter alia that the area reserved for roads, parks and playgrounds shall not be less than 40% of the gross area of the land covered by the layout, out of which 20% of the gross area shall be covered by roads. The roads, it is well settled, are intended to pass and re-pass from place to place. They are also intended, subject to certain conditions, for the purpose of parking vehicles. Under Rule 6 of the Layout Rules, if the applicant is a co-operative society, a resolution should be enclosed to the effect that all the roads and open spaces such as parks, play- grounds earmarked as per the Layout Rules are free from encumbrances and all the common areas vest in the Corporation. The applicant who obtains layout cannot claim any right over the common areas like roads, common areas, parks etc., in the layout. Therefore, it is clear that though the applicant who submits layout is absolute owner for the entire land, when once he makes the application for layout 40% of the gross area after approval of the layout vests in the Corporation and the applicant has no manner of right to use the same. By reason of Section 373 of the HMC Act, all the streets vest in the Corporation and are under the control of the Commissioner of the Corporation. Under Section 379, the Commissioner may even prohibit use of all public streets for certain kinds of traffic and it is

the duty of the Corporation to maintain roads properly.

MCH Building Bye-laws

21. A person who owns immovable property, especially a building site cannot claim any absolute right to construct a building in whatever manner he/she likes. Chapter XII of the HMC Act contains building regulations. No person is entitled to construct a house without building permission (Section 428) and no person is entitled to construct a house in deviation of the building plan. The Act itself provides stringent regulations to be followed. In exercise of powers under Section 586 (48), MCH has made Municipal Corporation Building Bye-laws, 1981. They contain elaborate procedure as to the site requirement, height requirements of the building, precautions to be taken etc. Under Bye-law 17.8, the proposed construction shall have to conform to Zoning Regulations as well as other regulations. In relation to such public places like commercial buildings, education buildings or hotels and lodging establishments, assembly building, the regulations are more stringent.

Multi-storeyed Building Regulations, 1981

22. Andhra Pradesh Urban Areas (Development) Act, 1975 is an enactment providing for regulated development of urban areas in the State of Andhra Pradesh. Hyderabad Urban Development Authority (HUDA) was constituted under Section 3 of the said Act. Section 59(1) of the said Act empowers HUDA to make regulations. Accordingly, HUDA has made Multi-storeyed Building Regulations, 1981. A multi-storeyed building, as per Regulation 2(v) means and includes all buildings with more than four floors or whose height is 15 meters or more. Regulation 9 of these Regulations deal with floor area ratio (FAR) and lays down that while determining FAR the maximum possible plot coverage inter alia non-saleable common areas cannot be included. Regulation 10 also provides that there shall be permanent open space forming an integral part of the site around the building. Regulation 12 is important and reads as under:

12. Parking and Parking Facilities :--(i) For the use of the occupants and of persons visiting the premises for the purposes of profession, trade, busihess, recreation or any other work, parking space and parking facilities shall be provided within the site to the satisfaction of the Commissioner, Municipal Corporation of Hyderabad, Vice-Chairman, BDA and conforming to the standards specified in Appendix 'B' to these regulations; and (b) Necessary provision shall also be made for the circulation of vehicles gaining access to and from (i) the parking spaces and facilities and (ii) the premises, into the street;

(ii) The parking spaces and facilities provided under this regulation shall be maintained as such to the satisfaction of Commissioner, MCH, Vice-Chairman, BDA and conforming to any bye-law that may be made by the Corporation/ BDA from time to time in this regard.

23. As seen from the above, the parking space shall be maintained to the satisfaction of the Commissioner of the MCH.

HUDA Zoning Regulations

24. In exercise of powers under Section 59(1) of the A.P. Urban Areas (Development) Act, HUDA has made Bhagyanagar Urban Development Authority Zoning Regulations, 1981. They apply to all developmental works within the limits of MCH and as per Regulation 1.3, they shall be read with building bye-laws issued under Section 586 of the HMC Act. Regulation 9 of the Zoning Regulations provides for open spaces. Group housing is defined at Regulation 2.19 and means the development of housing on a minimum plot size of 1,000 Sq.mtrs. and a covered area of not more than 50% subject to density not exceeding as given in the Regulations. Regulation 11 speaks of parking spaces and mandates that parking spaces as specified therein shall be provided in group housing. Regulation 11.2(ii) stipulates that additional parking place should be provided in non-residential and non-assembly occupancies and that 60% of the area shall be set apart exclusively for cycles. That is to say, the Regulations require more parking space to be provided in non-residential (commercial) buildings/group housing schemes.

A.P. Apartments (Promotion of Construction and Ownership) Act, 1987

25. As seen from the statement of objects and reasons of the Apartments Act, the State of Andhra Pradesh undertook legislation in order to meet increasing pressure in urban land resources due to rapid urbanization and to secure effective mortgageable title to individual buyers of flats. It also deals with rights and liabilities of the builders of apartments and owners of flats. Section 3(d) defines common areas and facilities as under:

(d) "Common areas and facilities" unless otherwise provided in the declaration, means:

(i) the land on which the building is located;

(ii) foundation, columns, girders, beams, supporters, main walls, roofs including terraces, halls, corridors, stairs, stairways, fire-escapes and entrances and exits of the building;

(iii) basements, cellars, yards, gardens, parking areas, children's playground and storage spaces;

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

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

(vi) elevators, tanks, wells and bore-wells, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for common use;

(vii) such other community and commercial facilities as may be provided for in the building plan and declaration;

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

26. Section 31 of the Apartments Act makes it clear that all owners, tenants, employees or any other person who may use the property or any part thereof are bound by the provisions of Chapter III of the enactment. Section 24 which appears in Chapter III prohibits the promoters or owners of the apartment from selling or leasing out or misusing any common areas and facilities. Be it also noted that under Section 9, all the owners in apartments, flats shall be entitled to percentage of undivided interest in the common areas and such undivided common interest shall not be altered without the consent of the apartment owner. It is interesting that Section 9(2) provides that the percentage of undivided interest in the common areas and facilities shall not be separated from the apartment and shall be deemed to be conveyed or encumbered with the apartment even though such interest is not expressly mentioned in the deed of conveyance. As per Section 9(3), each apartment owner has a right to use the common areas and facilities for the purpose for which they are intended without hindering or encroaching upon the lawful rights of the other apartment owners.

Rationalization of Floor Area Ratio (FAR)

27. The Government of Andhra Pradesh has been fixing FAR in relation to commercial complexes and residential buildings from time to time. After holding discussion with various groups like builders, developers, architects, engineers, town planners, representatives of Urban Development Authorities, the Government of Andhra Pradesh issued orders in G.O. Ms. No. 423, dated 31-7-1998. As per the said Government Order, various types of buildings are permitted to have different FAR. All the buildings are required to provide parking. Paragraph 8 of the said Government Order deals with commercial or mercantile buildings. Sub-para (5) of Paragraph 8 deals with parking and provides that all commercial buildings shall have one vehicular parking space of 20 sq.mtrs. area for every 80 sq.mtrs. built up area or fraction thereof. In comparison, if it is an educational building, 20 sq.mtrs of parking space for every 100 sq.mtrs. built up area is sufficient. It shows that a commercial complex is required to provide more parking area. As per Paragraph 4, in calculating FAR, common' area shall be included in the calculation of gross FAR by adding 30% of prescribed FAR in the case of group housing/apartments and in the case of commercial buildings, gross FAR shall be calculated by adding 35% of prescribed FAR. That means, a person or a builder who undertakes commercial complex or a commercial building for mercantile use, is allowed 35% more FAR than residential building because he is required to provide more parking area when compared to other types of buildings.

Conspectus from various legal provisions

28. As per various legal provisions as seen from the above, a builder/owner of a commercial complex could not have got the benefit of more floor area or permission to construct such commercial complex if had not, as a condition precedent, provided the required parking area as per Building Bye-laws, Multi-storeyed Building Regulations, 1981 and the regulations issued in G.O. Ms. No. 423, dated 31-7-1998. A person who, purporting to obey the law; be it statute law or delegated legislation or sub-delegated legislation, has got benefit of more FAR and permission for construction

of commercial building cannot turn around and say that he is also entitled to make money out of the parking area. If he is permitted, it would defeat the very municipal administration law in letter and spirit. A builder could not have constructed a multi-storeyed complex covering the entire plot area without leaving regulation parking area. Therefore, the legal provision requiring a builder to provide parking area acts as an encumbrance on the right to enjoy property and right to possess property. It is no gainsaying to say that right to property includes right to own the land and right to possess the land. In case where common areas are provided as a first step to own, possess and enjoy the area including built up area (other than common area), can it be said that builder or owner continues to be in possession of such common areas? I have already referred to the provisions of the Apartments Act wherein it was laid down that so much percentage of common interest vests in the apartment owner and it cannot be alienated or leased out to any person for any use. Indeed, the right of possession continues for sometime only as long as the act of possession lasts (See Blackstone's Commentaries on the Laws of England; Vol.11). A builder/owner who under law impliedly waives right over common areas including parking areas cannot claim any acts of possession, and hence has no right to possession.

29. Applying the above principle, it must be said that the builder, who has a right to possess a built up area not being common area including parking space cannot be said to have right of possession over the common areas and parking areas. In such an event, having regard to the law governing the construction and ownership of multi-storeyed commercial complexes, a owner cannot be said to have absolute right over the common areas and parking areas. As already found on first question that is considered, a commercial complex is a public place and the Municipal Corporation has a right to regulate parking places in a public place.

30. The upshot of the above discussion may be summarised thus:

1. In the case of a multi-storeyed building complex or group housing scheme where the original owner of the land/ builder parts with title and possession for a valuable consideration and executes sale deeds or other transfer deeds, cannot claim right over the appurtenant land meant for common facilities like staircase, verandahs and electrically operated lifts;

2. Subject to any agreement, the original owner can sell or retain control over common facilities, terrace and appurtenant land for the purpose of maintenance, but the owner cannot charge any amount for providing security to the property of the visitors who go to a public place like commercial complex;

3. In the case of transfer of various units in the multi-storeyed building/group housing, the transfer of title is in relation to the proportionate share of each unit owner in the appurtenant land as well. Such unit owner can enjoy the right in common areas subject to the provisions of municipal administration law;

4. In a multi-storeyed building meant for commercial purpose, if any space is provided for the use of those visiting the complex, in accordance with the building bye-laws of the Municipal Corporation or HUDA, it has to be presumed that the building permit itself was granted subject to such condition

of providing parking space, space for lavatories, greenery, water sump etc., and, therefore, the owner of the land or the unit owners are not entitled to charge any money for parking. If the contra is accepted, that would be against the provisions of the municipal administration law which require a building permit for construction of multi-storeyed building; and

5. Even after completion of the building, it is always permissible for the Municipal Corporation to regulate the use of common areas like parking area, area meant for lavatories, water sump etc. In that direction, the Municipal Corporation has jurisdiction to prohibit the original owner/builder or subsequent purchaser or lessees or licensees from collecting any moneys from the visitors to the premises. The right to ownership of the original owner/builder or subsequent purchaser is circumscribed by principle of municipal law and this has to be given an overriding effect over the common law right of ownership of property.

31. The above principles would show that if the plot area earmarked for parking places or other common facilities is allowed to be put to commercial use by the owner or group of owners of multi-storeyed complexes, the same would amount to fraud on statute. In K.R. Shenoy v. Udipi Municipality, , the municipality granted permission for construction of Kalyana Mandapam-cum-lecture hall imposing conditions that the building constructed must be used only for Kalyana Mandapam subject to the provisions of Madras Public Health Act, 1930 and the scheme framed under Madras Town Planning Act, 1920. Later, an application was made under the Madras Places of Public Resorts Act, 1888 for using the building as a public resort. The applicant also made a representation to the Udipi Municipal Council for licence to use the building for exhibition of cinematographic films. The application was initially rejected by the Chief Officer of the Municipality on the ground that Kalyana Mandampam cannot be converted into cinema theatre. The applicant's appeal was allowed by the Municipal Council which was challenged before the Mysore High Court inter alia on the ground that the Municipality has exceeded its power and if the Kalyana Mandapam is allowed to be converted into cinema theatre it amounts to fraud on statute. The Supreme Court accepted the same and set aside the permission granted to the applicant to convert the Kalyana Mandapam into cinema theatre. In that connection, it was observed:

The Municipality acts for the public benefit in enforcing the Scheme. Where the Municipality 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. 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. King) (1899) 1 Q 444.

It was further observed:

The Municipal Authorities owe a duty and obligation under the statute to see that the residential area is not spoilt by unauthorised construction. The Scheme is for the benefit of the residents of the locality. The Municipality acts in aid of the Scheme. The rights of the residents in the area are invaded by an illegal construction of a cinema building. It has to be remembered that a Scheme in a residential area means planned orderliness in accordance with the requirements of the residents. If the Scheme is nullified by arbitrary acts in excess and derogation of the powers of the Municipality the Courts will quash orders passed by Municipalities in such cases.

32. In view of the above, I must hold that builders/owners of commercial complexes or owners of apartments in a commercial complex have no absolute right to lease out or licence out parking areas to the petitioners. Such leasing or alienation is prohibited by the Apartments Act as well as various rules and regulations. I must, however, hasten to add that in case of residential multi-storeyed buildings, it is always permissible for the associations of apartment owners to regulate, without any extra charges, the enjoyment of common areas and common places by arriving at a consensus and conditions to be complied with by the users for availing such facilities. Insofar as multi-storeyed commercial complexes are concerned, the builder/ owner under law has impliedly accepted by reason of building permission and other provisions to keep parking places for the use by visitors to the complex and hence builders/owners or their licensees cannot charge any fees.

33. In the result, for the above reasons, the writ petitions fail and are accordingly dismissed without any order as to costs. All the interim orders stand vacated.