BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.57 of 2020

Date of Decision: 22.11.2022

M/s Express Projects Private Limited, 810, Surya Kiran Building, 19, Kasturba Gandhi Marg, Connaught Place, New Delhi.

Appellant

Versus

Shri Sanjay Kumar Saini, 12, Sumeru II, Inter University Accelerator Centre, Aruna Asaf Ali Marg, JNU Post Office, New Delhi.

Respondent

CORAM:

Shri Inderjeet Mehta, Member (Judicial)
Shri Anil Kumar Gupta, Member (Technical)

Argued by: Shri Kamal Jeet Dahiya, Advocate, learned counsel for the appellant.

Shri Sanjay Kumar Saini-respondent with Shri Vivek Sethi, Advocate, learned counsel for the respondent.

O R D E R:

INDERJEET MEHTA, MEMBER (JUDICIAL):

Feeling aggrieved by the order dated 03.10.2019 handed down by Haryana Real Estate Regulatory Authority, Panchkula (hereinafter called 'the Authority'), in Execution/Complaint No.900 of 2019 titled as "Sanjay Kumar

Saini vs. M/s Express Projects Private Limited" and Execution/Complaint No.911 of 2019 titled as "M/s Express Projects Private Limited vs. Sanjay Kumar Saini", vide which the above said execution petitions preferred by both the parties to the present lis, to execute the order dated 28.08.2018, passed by the learned Authority in Complaint No.03/2018 preferred by respondent were disposed of, the appellant M/s Express Projects Private Limited, has chosen to prefer the present appeal.

2. The respondent-allottee had preferred a complaint bearing no.03/2018 titled "Sanjay Kumar Saini vs. M/s Express Projects Private Limited" raising various issues relating to the execution of conveyance-deed and had sought various reliefs in the said complaint. The said complaint preferred by the respondent-allottee was disposed of by the learned Authority vide order dated 28.08.2018 with the following relevant observations:-

> *"4.2. In the given circumstances, the Authority directed the respondent to issue a fresh offer possession of the said unit to the complainant within 30 days. The apartment should be complete in all aspects and all facilities should be running at the time of delivery of possession. The complete possession is*

directed to be handed over by September 30, 2018. Further, the complainant is directed to handover stamp papers to the respondent within 15 days of obtaining possession, with further direction to the complainant to complete the registry of the said unit in the office of Tehsildar within 7 days i.e. by October 25, 2018. The Authority further directed the respondent to issue a fresh statement of Accounts, with separate columns of debit and credit, containing details of the amount to be recovered by the respondent from the complainant and the amount payable by the respondent to the complainant respectively, within a time frame of 30 days. It is expected that the respondent will settle the matter in the same spirit as shown today at the time of proceeding. The Authority further reserves the right of the complainant to approach this Authority in case the complainant still feels aggrieved.

3. To comply with the aforesaid directions of the learned Authority, the appellant had taken appointment from the office of Sub-Registrar, Sonipat, to execute the conveyance-deed and conveyed the timings and schedule to the respondent/allottee with a request to visit the office of Sub Registrar along with the requisite stamp papers etc. on the

scheduled date and time. However, the respondent did not come forward to execute the conveyance-deed. Thereafter, the appellant preferred Execution Petition bearing complaint No.RERA-PKL-911/2019 titled "M/s Express Projects Private Limited vs. Sanjay Kumar Saini". In the meanwhile, the respondent/allottee had also preferred execution petition bearing complaint No.RERA-PKL-900/2019 titled "Sanjay Kumar Saini vs. M/s Express Projects Private Limited" and raised various issues in the said execution which were not raised in the complaint no.03/2018.

4. The learned Authority vide impugned order dated 03.10.2019 disposed of both the aforesaid executions/complaints no.900/2019 and 911/2019 with the following observations:-

> *"4. The Authority had considered the written and oral pleadings of both the parties; observed and ordered as follows:*
>
> *i. the judgment debtor to handover documents mentioned in para no.2 and bring in the court drafts of the conveyance deeds;*
>
> *ii. The policy instructions contained in memo no.LC-2238-JE(S)-2013/30774-775 dated 13.02.2013, issued by Town and Country Planning Department, Haryana, copy of which was placed on record by the complainant,*

mandates that the promoter will be able to charge an allottee for top floor terrace only if two conditions are satisfied, namely (a) such terrace is not being used for common services and (b) exclusive ownership and usage rights in respect of said terrace are assigned to the concerned allottee. The present case is one in which the promoter had laid water tanks, solar panels and installations of other amenities on top floor terrace, which are being used for providing common services to many allottees and not merely to the present complainant. So, the respondent was not entitled to sell the terrace in question and must, therefore, return Rs.2 lakhs with 9 percent interest to the complaint.

iii. *The promoter shall submit a layout plan where on the front parking of the said plot shall be marked properly mentioning the space for car parking of the complainant.*

iv. *The area of the plot i.e. 220.56 sq. mtr and whereas flat area shall be 1350 sq. ft. in case there is any variation then the amount from the complainant be charged accordingly.*

v. *Conveyance deed shall be executed as per agreement made between the parties on a date to be decided by the Authority.*

In compliance of the above-said directions, judgment debtor submitted all the documents relating to possession of the apartment and placed drafts of the

conveyance deed in the court. Moreover, judgment debtor had conceded of charging of Rs.2 lakhs."

5. Appellant felt aggrieved, hence, the present appeal.

6. Learned counsel for the appellant has submitted that the learned Authority has committed grave illegality by passing new directions and observations in the impugned order dated 03.10.2019 and the same are not legally justifiable because the learned Authority was in fact executing its earlier order dated 28.08.2018 and the new observations cannot be made in the execution, which were neither pleaded nor prayed for in the original complaint no.03/2018 preferred by the respondent which was disposed of vide order dated 28.08.2018. Thus, the learned Authority has ignored the basic principle of law by travelling beyond the order dated 28.08.2018. Further, it has been submitted that the observations made by the learned Authority that the appellant had conceded of charging of Rs.2,00,000/- regarding sale of terrace in question, are without any basis and in fact, the appellant never intended to sell the unit to the appellant along with terrace rights.

7. Per contra, learned counsel for the respondent has submitted that the appellant had initially made advertisement regarding the sale of second floor unit along with terrace and

even in the brochure of the appellant company, it was specifically mentioned that second floors were available for sale with terrace. Further, it has been submitted that the respondent had paid an extra amount of Rs.2,00,000/- to have terrace rights exclusively and thus in the conveyance-deed to be executed between the parties this fact has to be specifically mentioned that the respondent has the ownership of the unit on the second floor along with terrace rights.

8. Regarding the observation made by the learned Authority in the impugned order that the appellant had conceded the factum of charging of Rs.2,00,000/-, the appellant had moved an application under Section 39 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act') for rectification of the impugned order in this regard. However, the said application was disposed of by the learned Authority vide order dated 30.04.2021 with the observation that since the captioned complaint matter has already been disposed of by the Authority, therefore, the applicant may file a fresh online review application under the complaint jurisdiction of the Authority. The reference of the factum of moving of the application by the appellant and disposal of the same in the aforesaid manner, has also been duly mentioned in the

interlocutory order dated 09.08.2021 passed by the Tribunal and the respondent has also placed on file the order dated 30.04.2021 passed by the learned Authority. Thereafter, as is explicit from the interlocutory order dated 01.09.2021, learned counsel for the appellant has stated that the appellant had filed afresh complaint bearing no.691/2021, before the learned Authority challenging the observations made in the order with respect to the payment of Rs.2,00,000/-. However, thereafter, no document in this regard or any order passed by the learned Authority has been placed on the file. Thus, in these circumstances, the observations made by the learned Authority that the appellant has conceded of charging of Rs.2,00,000/-, still stand.

9. The bone of contention between the parties to the present lis has been summarized by this Tribunal in its order dated 02.09.2021 and the relevant portion is as follows:-

> *"During the course of arguments, both the parties have very fairly stated that there is no dispute between the parties for execution of the Conveyance-Deed as per terms and conditions of the Allotment Letter/Builder Buyer's Agreement. However, they are at dispute with respect to the payment of Rs.2 lacs. Respondent has alleged that this payment was made for purchase of terrace rights, whereas*

the appellant/promoter has disputed that this amount of Rs.2 lacs was never received by it."

10. For the proper adjudication of the controversy, let us have a thorough look at the policy instructions contained in the Memo No.LC-2238-JE(S)-2013/30774-775 dated 13.02.2013, issued by Town and Country Planning Department, Haryana, regarding registration of independent floors of residential plots, clarification thereof. The relevant portion of this policy which is available on the record is as follows:-

"2. .....To further clarify the issue, it is elaborated that basically the rights of usage of 'top floor terrace' has been left to be decided by mutual negotiation between the transacting parties and its usage as prescribed in the agreement shall be final, e.g.,

i) The sale purchase agreement may designate the entire 'top floor terrace' for services, i.e. for the purpose of placing water tanks, solar water, heating equipments, etc. and thus can designate the entire top-floor terrace as 'common roof' and thus as common area and common facilities'.

ii) Alternately, the sale purchase agreement may designate only part of the top floor terrace for services, i.e. for the purpose of placing water tanks, solar water heating equipments, etc. and

thus designate such part of the top-floor terrace as 'common roof' and the balance part of the top floor terrace can be designed as a segregated enclosure on which the owner of a specific floor gets exclusive usage rights.

iii) Still, in another case, the sale purchase agreement may specify the design of building in a manner that the 'top floor terrace' is not required to be used for common services at all and exclusive ownership and usage rights of the entire top floor terrace is assigned to any of the three independent floor owners, in which case no part of the top-floor terrace gets designated as "common roof".

It is, thus clear that the policy dated 27.3.2009 is clear in this regard and thus each and every 'top floor terrace' which is specified as 'common roof' in the sale-purchase agreement shall be part of common area and facility."

11. The crux of this aforesaid policy is that the sale purchase agreement may designate the entire 'top floor terrace' for services i.e. for the purpose of placing water tanks, solar water heating equipments, etc. and thus can designate the entire top-floor terrace as 'common roof'.

The sale purchase agreement may designate only part of the top floor terrace for aforesaid services and to be used as 'common roof' and the remaining part of the top floor

terrace can be designated a separate enclosure, on which the owner of a specific floor gets exclusive usage rights.

In another case, the sale purchase agreement may specify the design of building in such a way that the top floor is not required for common services at all and exclusive ownership and usage rights of the entire top floor terrace can be assigned to any of the three independent floor owners and no part of the top-floor is designated as "common roof".

12. In view of the policy referred to above, the stipulated terms of the allotment letter/Apartment Buyer's Agreement dated 01.12.2021 entered into between the parties are of utmost importance and have assumed great significance.

13. Before having a thorough glance at the 'Apartment Buyer's Agreement' between the parties, it is pertinent to mention that the respondent/allottee has placed on file brochure (Annexure R/14), wherein the basic sale price of the second floor along with its terrace has been mentioned and the relevant portion of the said brochure is as under:-

Plot Size (Sq.yds)	Floors	Area (Sq.ft.)	Terrace/Lawn	BSP	Accommodation
270	Ground	1350	Lawn	29,50,000	3 Bedrooms, 2 Toilets, Drawing, Dining, Kitchen, Utility Room, Spacious Balconies
	First	1350		26,00,000	
	Second	1350	Terrace	28,00,000	

14. As is explicit from the perusal of the above, the basic sale price of the ground floor having the facility of lawn, and of second floor having the facility of the terrace, is more than the basic sale price of the first floor, where, neither is facility of lawn nor of terrace can be provided.

15. Also, in the advertisement made in the newspaper 'Hindustan Times' (Annexure R/15), it was advertised that second floor was to be sold by the appellant with terrace.

16. As per Clause (I) of the 'Apartment Buyer's Agreement', independent floor/apartment bearing no. E25/003 having the tentative super area of about 1350 sq. ft. comprising of three bed rooms, two toilets, a drawing/dining room, a kitchen and balconies was purchased by the respondent/allottee from the appellant/promoter and this accommodation, as mentioned in this agreement, is the same as has been mentioned in the brochure (Annexure R/14), as referred above.

17. To arrive at the conclusion that whether along with the second floor apartment, the respondent/promoter was given the terrace rights or not, the stipulation of Clause 15(h) of the said 'Apartment Buyer's Agreement' is most relevant and is of utmost importance, and the same is as follows:-

"h. The ownership of the top roof/terrace above the top floor i.e. the Second Floor of the said Building shall be the Owner/Allottee of the Second Floor, who shall not have any right to raise any structure permanent/temporary over the terrace floor and shall also not object to or raise any claim to the company adjusting the FAR in the other building further. The top roof/terrace above the top shall have a provision for the installation of water tanks and antennas/satellite dishes (one each) for the exclusive use by the respective Independent Floor/Apartment Allottees in the Said Building, who shall have the right to use and access the terrace as reasonable hours of the day for the installation/repair and maintenance of the overhead water tanks/antenna/satellite dishes. The Purchaser agrees that he/she shall not object to the same and make any claims on this account."

18. As per this aforesaid stipulation, the ownership of the top roof/terrace above the top floor i.e. the second floor is of the owner/allottee of the second floor. However, the same is subject to the condition that owner/allottee of the second floor shall not have any right to raise any permanent/temporary structure over the terrace floor and he would also not object or raise any claim to the company adjusting the FAR in the other building further. The said top roof and terrace shall also have

the provision for the installation of water tanks and antennas/satellite dishes (one each) for the exclusive use by the respective independent floor/apartment allottees in the said building and they will have right to use and to have access to the terrace as reasonable hours of the day for installation/repair and maintenance of the overhead water tanks, antenna, satellite dishes and the purchaser of the second floor will not object to the same and would not make any claim on this account.

19. Undisputedly, as per the terms of the 'Apartment Buyer's Agreement', the respondent/allottee has been allotted apartment numbered E25/003 on the second floor of the building. As per the aforesaid stipulation, the ownership of the top roof/terrace above the top floor i.e. second floor is of the respondent/allottee, who has been allotted apartment on the second floor, but, the same is subject to the aforesaid condition as mentioned in the stipulation of Clause 15(h) of the agreement.

20. As referred above and mentioned in the order dated 02.09.2021 of this Tribunal, there is no dispute between the parties for execution of the conveyance-deed as per the terms and conditions of the allotment letter/Apartment Buyer's Agreement. Accordingly, in the conveyance-deed to be

executed between the parties regarding the unit allotted to the respondent/allottee, this stipulation of Clause 15(h) of the 'Apartment Buyer's Agreement' must be included. Further, as has been observed above, the observations made by the learned Authority in the impugned order that the appellant has conceded of charging of Rs.2,00,000/-, still stand.

21. Thus, with our aforesaid observations, the appeal preferred by the appellant stands disposed of.

22. The copy of this order be communicated to learned counsel for the parties/parties and the learned Authority for compliance.

23. File be consigned to record.

Announced:
November 22, 2022

Inderjeet Mehta
Member (Judicial)
Haryana Real Estate Appellate Tribunal,
Chandigarh

Anil Kumar Gupta
Member (Technical)

CL