

**BEFORE THE HIMACHAL PRADESH REAL ESTATE
APPELLATE TRIBUNAL**

Appeal No.33/HP of 2021
Date of Decision: 14.09.2022

Madhusudan Sood, son of late Shri Raghvar Das, resident of
Raghvar Das Bhawan, District Shimla (Himachal Pradesh).

Appellant-Promoter

Versus

Valley View Flat Owners Association, through its President, Sh.
Satish Chander Walia resident of Flat No.7, Valley View Flats,
P.O. Mashobra, Tehsil and District Shimla (Himachal Pradesh).

Respondent-Association

CORAM:

Shri Inderjeet Mehta
Shri Anil Kumar Gupta

Member (Judicial)
Member (Technical)

Argued by: Shri Sushant, Advocate,
Ld. counsel for the appellant-promoter.

Shri Janesh Mahajan, Advocate,
Ld. counsel for the respondent-association.

ORDER:

ANIL KUMAR GUPTA, MEMBER (TECHNICAL):

The present appeal has been preferred under Section
44(2) of the Real Estate (Regulation and Development) Act 2016
(further called as, 'the Act') by the appellant-promoter against
impugned order dated 16.04.2021 passed by the Real Estate

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Regulatory Authority, Himachal Pradesh (for short, 'the Ld. Authority') in Complaint No. HP-RERA/OFL/2020-16 filed by the respondent-association. In the present appeal, the issue to be adjudicated upon is whether the attic is a common area to be used and maintained by the allottees of the project or it shall remain with the appellant-promoter for his use. The relevant part of the impugned order dated 16.04.2021 is reproduced as under:

i. "It is determined that the attic is a common area. The possession of the same is to be handed over to the association of allottees by the respondent promoter within three months from the date of issue of completion certificate."

2. The word attic is not defined in the Act. The dictionary meaning of the word attic is a space inside or partially inside the roof of a house or a building.

3. As per the averments in the complaint dated 06.11.2020 filed by respondent-association before the Ld. Authority the project in question is being raised by the appellant-promoter on Khata Khatauni No.14 min/17 Khasra Nos.1/1,2,3,4,5,6 Khas 6 measuring 9070 Sq. ft. situated at Mojhal Mashobra Bazaar, Tehsil and District Shimla, Himachal Pradesh. The members of the respondent-association have bought flats from the appellant-promoter on 21.07.2014. The

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map of the project was approved by the Municipal Corporation, Shimla vide sanction No.20 (AP) dated 20.01.2009 for raising construction of a parking floor plus four storied building. The respondent-association got itself registered on 23.10.2020. The Ld. Authority in its order dated 20.10.2020 passed in complaint bearing No.RERA/HP/SHCTA/07200038 filed by one of the members of the respondent-association decided the issue of “common area” but did not decide about the attic as to whether this is a common area or not. The respondent-association sought the relief of handing over of the area of the attic and unhindered access to the same along with other reliefs.

4. The complaint was resisted by the appellant-promoter on the plea that the Ld. Authority has no jurisdiction to adjudicate and decide the complaint as most of the flats in the project had been constructed and sold before the commencement of the Act and before incorporation of the respondent-association. Also, the reliefs sought in the complaint are identical to the reliefs sought in the previous complaint No. RERA/HA/SHTCA/07200038 decided on 20.10.2020. With these pleas it was prayed that the complaint has no merits and as such deserves to be dismissed.

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5. We have heard, Ld. counsel for the parties and have meticulously examined the record of the case. Both the parties have filed their written submissions/arguments.

6. Initiating the arguments, it was contended by Ld. counsel for the appellant-promoter that earlier a similar complaint was filed by one of the members of the respondent-association i.e. Satish Chander Walia against the appellant-promoter. The said complaint was adjudicated and decided by the Ld. Authority vide its order dated 20.10.2020. In the said order, it was not decided by the Ld. Authority about the attic as to whether Attic is a common area or not.

7. It was further contended that filing of the complaint on the similar cause of action is not permissible and, as such, the Ld. Authority should not have adjudicated upon the same issue once again.

8. It was further contended that all the flats except one number flat were already sold before the enactment of Act/registration of the project with the Authority and, therefore, the provisions of the Act will not be applicable.

9. It was further contended that as per definition of the common area at Section 2(n) of the Act, attic has not been elucidated therein and, as such, the observation/finding of the Ld. Authority is against the definition of common area as defined

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under Section 2(n) of the Act and, as such, is not sustainable in the eyes of law. All the common areas apart from the attic has been handed over to the respondent-association. Attic, as per the Wikipedia is a space found directly below the pitched roof of a house or the building. The water tanks are to be laid on the roof and, as such, the same cannot be held to be common area.

10. It was further contended that as per the Town and Country Planning amended bye-laws/'Draft amended bylaws 2022', which are yet to be notified, attic has been held to be separate habitable area, therefore, by no stretch of imagination, attic can be held to be a common area. Attic being habitable area has value and can be sold as separate unit.

11. It was further contended that no right, interest or easement in respect of attic has been given by the appellant-promoter to the respondent-association by register conveyance deed and under the grab of attic, the respondent-association wants to usurp the property of the appellant-promoter. The appellant-promoter has toiled hard to construct the said property and by holding the attic to be common area, economic interest of the appellant-promoter has been put to jeopardy.

12. It was contended that the Ld. Authority has wrongly held the attic to be common area on the grounds that storage tanks are currently lying therein. The roof is yet not complete

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and once the roof is completed, the tanks shall be shifted on the roof and separate access to the same shall be provided. Just because water tanks are temporarily placed on the place where attic is to be constructed the same cannot be held to be common area.

13. With these contentions, it was prayed by the Ld. counsel of the appellant-promoter that the present appeal may be allowed.

14. Per contra, Ld. counsel for the respondent-association contended that the appellant-promoter has executed the FBA in compliance of the order of the Ld. Authority in complaint No. RERA/HP-SHCTA/07200038 and has also handed over the possession of terrace being common area, meaning thereby the appellant has admitted the jurisdiction of the Ld. Authority. Therefore, the appellant is barred by his own act and conduct to challenge the jurisdiction of the Ld. Authority.

15. It was further contended that the appellant-promoter is registered with the Ld. Authority under the Act, the construction is still going on and there are unsold flats in the project, hence, the Ld. Authority has all the powers and jurisdiction to adjudicate the complaint.

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16. It was further contended that the attic comes under the definition of common area as per Section 2(n) of the Act. The appellant-promoter got revised drawing of the project approved in the year 2020 without the consent of 2/3rd allottees. In this drawing plain sloping roof without any dormers and terrace and the internal space formed within the slope of the roof, which is being referred as attic, has been shown to be for placing water tanks. Also, both the common internal staircases were constructed right up to the attic level and access to the terraces has been provided by way of the same staircase through attic. Hence, as per the definition of common area in section 2(n)(iii) makes it amply clear that every space which is common storage is common area. Thus, there is no ambiguity about the attic being common area.

17. It was further contended that there are four flats on the top floor of the project from flat No.1 to 4. Shri Chetan Sharma, Senior Advocate and presently Additional Solicitor General of India purchased the Flat no 1 on 22.05.2013. Flat No.2 was purchased by Shri Harchand Singh Gill on 22.05.2013, flat No.3 was purchased by Shri Surinder Sarin on 11.02.2016, therefore, it has been wrongly stated by the appellant-promoter that no flat on the top floor has been sold.

18. It was contended that the “draft development plan”/ ‘Draft amended bylaws 2022’ of the Town and Country Planning Department of Government of Himachal Pradesh is yet to be notified and, therefore, is not applicable to the buildings whose plan stood already approved and which have already been constructed as per the bylaws in vogue at the relevant time. Moreover, as per the provisions in the draft bylaws maximum two floors plus parking plus attic is permissible, whereas, as per the existing development plan/bylaws of the Town and Country Planning Department four floors plus parking plus attic is admissible. Therefore, the provisions of draft plan/bylaws are not applicable in the present case.

19. With these contentions, it was prayed by the Ld. counsel of the respondent-association that there is no merit in present appeal and the same may be dismissed.

20. We have duly considered the aforesaid contentions of both the parties.

21. The undisputed facts of the case are that the project in question is being raised on Khata Khatauni No.14 min/17 Khasra Nos.1/1,2,3,4,5,6 Khas 6 measuring 9070 Sq. ft situated at Mojhal Mashobra, Tehsil and District Shimla, Himachal Pradesh. The map of the project was approved by the Municipal Corporation, Shimla vide Sanction No.20 (AP) dated 20.01.2009

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for raising construction of a parking floor plus four storied building. The members of the respondent-association have purchased the flats from the appellant-promoter on 21.07.2014. The project is an ongoing project and is a registered project with the Authority. The respondent-association got its association registered on 23.10.2020. In the present appeal, the issue to be adjudicated upon is whether the attic is a common area to be used by the allottees of the project or it shall remain that the appellant-promoter for his use. The word attic is not defined in the Act. The Ld. Authority in its earlier order dated 20.10.2020 passed in another complaint bearing No. RERA/HP/SHCTA/07200038 filed by one of the members of the respondent-association passed the following order: -

“25. keeping in view the above mentioned facts/discussion, this authority in exercise of power vested in under various provisions of the Act issues the following orders/directions:

- i. That flat owners are entitled to get individual water & electricity connections. In this present case, the Municipal Corporation, Shimla has already given NOC for this purpose. Therefore, the complainant as well as other flats owners may apply for getting individual permanent domestic water and electricity connections.*
- ii. This project is a residential project approved by the Municipal Corporation, Shimla as well as by this Authority. It appears that the owners was carrying out*

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certain commercial activities which have been discontinued after the intervention of the Authority. The respondent promoter is directed that in future he may not use this property for any commercial activities except for stacking of construction material etc. required for constructing/completing the remaining portion of the residential project.

- iii. That as per the proviso to the Section 17(2) of the Act, which provides that the promoter shall hand over all the common areas to the association of the allottees. The explanation appended to section 31 requires that the association of allottees shall be registered. We therefore direct that common areas of this project will be hand over to the association of allottees within one month from its registration as part completion/occupancy has already been issued January, 2020.*
- iv. That the parking floor is a common area and should be managed by the association of allottees for the purpose of car parking of flat owners and the respondent promoter also, as he is still to complete the construction of 5 flats.*
- v. The respondent promoter will be provided a key of the parking floor to have unhindered access to the common areas and five under construction flats in the project.*
- vi. The terrace is a common area for the use of flat owners of the building and should be managed by the association of allottees.*
- vii. Whether attic is a common area or not has not been determined at this stage. The association of allottees or the respondent promoter is at liberty to produce relevant record/documents/drawings to enable this*

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Authority to determine the same or can mutually settle the same.

- viii. The guard room along with kitchen and bathroom is an unauthorized construction in the parking floor which needs to be removed by the respondent promoter before the completion of the project.*
- ix. As agreed by the respondent promoter he shall provide the fencing or boundary wall on the sides and rear portion of the building for the safety of the inhabitants within next four months from the date of passing of this order.*
- x. Any noncompliance or any delay in compliance of the above directions shall attract penalty under Section 38, 63 and Section 67 of the Act *ibid*, apart from any other action the Authority may take under the provisions of the Act.”*

22. From the perusal of para (vii) of the above order, it is clear that the Ld. Authority vide the above said order had decided the issue of “common area” but did not decide as to whether attic is a common area or not. Also, the appellant-promoter and the respondent-association of allottees were given the liberty to produce relevant record/documents/drawings to enable the Ld. Authority to determine the same or else the parties were also given the liberty to mutually settle the issue. Thus, there is no merit in the plea of the appellant-promoter that the complaint pertaining to the same cause of action filed by the same individual could not have been entertained by the Ld. Authority

as the matter of attic being the common area or not was not decided by the Ld. Authority in the earlier complaint.

23. In view of the liberty granted by the Ld. Authority vide its order dated 20.10.2020, to either of the parties, to produce relevant documents etc. to determine whether the attic is common area or not, the respondent-association filed the complaint before the Ld. Authority on 06.11.2020 for determining the issue regarding attic along with other issues. The order dated 16.04.2021 passed by the learned authority is reproduced as under:-

“Keeping in view the above mentioned facts/discussion, this Authority in exercise of power vested in under various provisions of the Act ibid issues the following orders/directions:

- i. It is determined that the attic is a common area. The possession of the same is to be handed over to the association of allottees by the respondent promoter within three months from the date of issue of completion certificate.*
- ii. The respondent promoter is directed to hand over the complete portion of the building which has been shown to be completed in the approved revised cum completion plan, to the association of allottees within a period of one month to enable the association to maintain the completed portion of the building, if they so desire.*
- iii. The complainant association should approach the competent authority i.e. M.C. Shimla in the instant*

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case, for taking appropriate action under the relevant laws about the construction works like water tank installation, steel staircases etc. in the parking floor, if not permissible and being beyond the approved drawings.

- iv. The promoter has not been given any permission for the basement floor as per the approved drawings, and any such floor if opened at site, is authorized. The complainant association should approach the competent authority, i.e. M.C. Shimla in respect of the same for taking appropriate action under the relevant laws.*
- v. The complainant association should approach the competent authority i.e. M.C. Shimla, if the approved and completed rain harvesting tanks are not of the prescribe/relevant size as per the sanctioned plans.*
- vi. The association of allottees/individual allottee is at liberty to approach the Adjudicating Officer to demand compensation, as per the provision of Section 71 of the Real Estate (Regulation and Development) Act, 2016.*

24. The contention of the appellant-promoter that the majority of the flats had been sold prior to the incorporation of the act and as such the provision of the act are not applicable is devoid of any merits as the project of the appellant-promoter is registered with the Authority. The Ld. Authority in para 25 of the impugned order has held *“This contention of the learned council is not tenable as it is an admitted position that five out of total 16 flats are still under construction and it is also the fact that the*

concerned project is registered with the Authority as “ongoing project”. The appellant-promoter has not put forward any argument or has produced any documentary evidence to assail the above findings of the authority. It is therefore apparent that construction in the project is going on and completion certificate is yet to be issued. Therefore, the provisions of the Act are applicable to the appellant-promoter as well as to his project.

25. It is the contention of the appellant-promoter that the water tanks which are placed in the attic area are to be shifted to the roof on completion of the roof as it is yet not complete. The water tanks are temporarily placed in the area where the attic is to be constructed and therefore on these bases the area of attic cannot be said to be a common area.

1. It is important here to bring out the provisions of section 2 (n) of the Act which provides as under:

“Common areas” mean— (i) *the entire land for the real estate project or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase;*

(ii) the stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings;

*(iii) the common basements, terraces, parks, play areas, open parking areas and **common storage spaces;***

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(iv) the premises for the lodging of persons employed for the management of the property including accommodation for watch and ward staffs or for the lodging of community service personnel;

(v) installations of central services such as electricity, gas, water and sanitation, air-conditioning and incinerating, system for water conservation and renewable energy;

(vi) the water tanks, sumps, motors, fans, compressors, ducts and all apparatus connected with installations for common use;

(vii) all community and commercial facilities as provided in the real estate project;

(viii) all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use;

2. In para 27 of the impugned order it is held by the Ld. Authority as under: -

“In the instant case, the roof of the building, as per the approved drawing of 2009, was plain sloping roof without any dormers or terraces and the Internal space formed within the slope of the roof, which is referred to as attic, was shown to be used for placing water tank and both common Internet staircases were not proposed up to this attic level. However, in the revised approval of 2020, both the common central staircases were constructed right up to the attic level and the

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access to the terraces was provided by way of the same staircases through the attic. The revised approved drawing also showed in section CD that the water tanks were placed.

26. The Appellant has not provided any documentary evidence to counter the findings of the Ld. Authority that as per the approved drawings of 2009 as well as revised approved drawings of 2020, the area which is being referred to as attic, was shown to be for placing water tanks. Thus, there is no merit in the contention of the appellant that the water tanks were temporarily placed in the attic area and these were to be ultimately shifted to the roof. Thus, as per the definition of common area at Section 2(n)(iii) of the Act, attic is a common area.

27. It is the contention of the appellant-promoter that as per Town & Country planning 'Draft amended bylaws 2022', which are yet to be notified, attic has been held to be a separate habitable area. Since attic is a habitable area, therefore, it cannot be said to be a common area.

28. These bylaws being relied upon by the appellant – promoter is only a draft policy and is yet to see the light of the day and therefore is not enforceable at this stage. Also, the perusal of this document reveals that there is provision of

maximum two floors plus parking plus attic in these bylaws. Whereas, the flats in question are four-storied plus parking plus attic. The appellant-promoter has not advanced any argument and could not prove his case as to how the provisions of the draft bylaws providing maximum two floors plus parking plus attic will be made applicable to the existing flats which are four storied plus parking plus attic.

29. We also find no merit in the contention of the appellant that as per the conveyance deed registered in the names of the allottees no right, interest or easement in respect of attic has been given by the appellant-promoter and therefore the possession of the attic should remain with the appellant-promoter. The appellant-promoter has not contested the findings or has submitted any documentary evidence of the Ld. Authority in para No.27 of the impugned order that both the common central staircases are constructed right up to the attic level and the access to the terrace is provided by way of same staircases through attic. It has been also recorded in para 27 of the impugned order that as per the record with the authority the open terrace is not exclusive with any apartment, therefore is common area. The attic is an ante space to the open terrace. The allottees are to approach the open terrace through the twin staircases. The appellant has not controverted these facts and therefore these are taken to be true. Thus, attic apart from being

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the storage place is also a passage to the open terrace 'a common area'. Therefore, for the said reason the attic is held to be a common area.

30. No other point was argued before us by Ld. counsel for the parties.

31. In view of our aforesaid discussions, it is held that the attic is a common area and is required to be in the possession of the association of allottees as held by the Ld. Authority in the impugned order. Thus, the present appeal has no merits and the same is hereby dismissed.

32. No order as to costs.

33. Copy of this judgment be communicated to both the parties/learned counsel for the parties and the learned Himachal Pradesh Real Estate Regulatory Authority, Shimla.

34. File be consigned to the record.

Announced:
September 14, 2022

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

Anil Kumar Gupta
Member (Technical)

Manoj Rana