IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CR-600-2022 (O&M)
Reserved on : 17.02.2025
Date of decision : 16.5.2025

Essel Towers Residents Welfare Association and another

... Petitioners

VERSUS

M/s Essel Housing Projects Private Limited

... Respondents

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Argued by : Mr. Sandeep Bansal, Advocate,
for the petitioners.

Mr. Ashish Chopra, Sr. Advocate with
Mr. Gagandeep Singh and
Mr. Varun Aryan Sharma, Advocates,
for the respondent-caveator.

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PANKAJ JAIN, J.

The defendants are in revision aggrieved of the order dated 10.2.2022 passed by Additional District Judge, Gurugram allowing the application filed by the plaintiff under Order XXXIX Rule 1 & 2 Code of Civil Procedure (In short, “CPC”).

2. The plaintiff filed suit for declaration with consequential relief of permanent injunction. The plaintiff is the developer and has developed residential group housing complex named ‘Essel Towers’. The defendant petitioner is a society registered under Haryana Registration and Regulation of Societies Act, 2012 formed by the allottees/purchasers of the apartment in the residential project. As per the plaintiff, 8,50,000 square feet built up residential area stands allotted to the pilot society and rest of the area was

agreed to be exclusively owned and possessed by the plaintiff. The same includes commercial and institutional area. The built up residential area already stands allotted and vests in the pilot society. The dispute relates to a club/community building consisting of basement, ground floor and first floor covering total area measuring 32277.51 square feet having facilities like swimming pool, gymnasium, sauna steam bath, badminton court, lawn tennis court, zumba room, table tennis room, carom and chess room, billiards room, card room, saloon, restaurant, two banquet halls and three guest rooms etc. It has been claimed that occupation certificate was granted on 14.12.2016.

3. After developing club, operations were started by the plaintiff for providing entertainment, sports and other facilities to the residents/occupiers of the towers on chargeable basis. The first floor consisting of restaurant, two banquets halls and three guest rooms measuring 11730 square feet was leased out to M/s Ottimo Visuals. The applications were invited from the owners/occupiers of the apartment for new member of the club and community building. There are around 300 active members of the club/community building.

4. On account of Covid-19, the club was shut down with effect from 22.03.2020. After Corona when the officials of the plaintiff tried to enter the property to make it useable for the members, they were shocked to find that the defendants and their office bearers resisted their entrance and tried to create hindrance in the ingress and egress of the plaintiff and its officials in the suit property.

5. The plaintiff claimed that the defendants and the alleged members with malafide and dishonest intention are trying to interfere in the

use and occupation of the suit property and creating obstruction in the peaceful user thereof. The plaintiff, thus, approached the Court seeking decree of declaration to the effect that the plaintiff is absolute owner in possession of the suit property, i.e. club/ community building consisting of basement, ground floor and first floor and further sought relief of permanent injunction restraining the defendants from interfering in their peaceful possession.

6. The suit was resisted by the defendants. They admitted that the suit property was developed by the plaintiff. However, it was denied that it is the plaintiff who is looking after and is in possession of the suit property. As per the defendant, it is the President of defendant No.2-Resident Welfare Association who is looking after the day to day affairs of the society. Association has been formed for the welfare of the residents residing in more than 756 units. It was claimed that the residents are fully empowered to enjoy the occupancy of their respective properties along with easement and other extended rights in terms of the deed of conveyance as well as the provisions contained under Haryana Apartment Ownership Act and deed of apartment. It has been further claimed that even as per occupation certificate dated 14.12.2016, the community building area is against the permissible FAR in the present project and is to be utilized by the residents only. It is only prior to establishment of the resident welfare association or till issuance of occupation certificate that the colonizer or builder is required to provide the maintenance work to the residents over common areas and amenities. Once RWA comes into being, the builder is required to handover the maintenance work of all the common areas or amenities and facilities to the owners association or government local authorities.

7. The Court of first instance dismissed the application filed by the plaintiff holding that no *prima facie* case is made out in favour of the plaintiff. The Court of first instance relied upon Section 11 of Real Estate (Regulation & Development) Act, 2016 (in short, "2016 Act") to hold that as per the same, the promoter is responsible for providing and maintaining the essential services at reasonable charges till the taking over of the maintenance of the project by the association of the allottees. Thus, the resident welfare association having come into being, the plaintiff is bound to handover possession of the suit property to the defendants.

8. The plaintiff preferred appeal. The appellate Court reversed the order passed by the trial Court and allowed the application filed by the plaintiff under Order XXXIX Rule 1-2 CPC. The lower appellate Court held that there being specific clause in the buyer agreement that buyer shall not claim any right or interest in their common property and as per Clause 13, it having been specifically provided that all other land, area, facilities and amenities specifically excluded from the scope of the sale deed, the club area is excluded from the common area. The appellate Court, thus, found that the plaintiff proved *prima facie* case in their favour and allowed the appeal granting temporary injunction to the plaintiff.

9. Mr. Bansal, counsel for the plaintiff has drawn attention of this Court to various provisions of Real Estate (Regulation and Development) Act, 2016. He reads Section 9 to submit that all community and commercial facilities as provided under Real Estate Project fall within the definition of 'common area', to contend that in terms of Section 17 of 2016 Act, the promoter is bound to handover necessary documents and plans including common areas to the association of the allottees or the competent authority

as the case may be as per local laws. He, thus, submits that the club being a common area was required to be handed over by the plaintiff to the defendant association. He further refers to Section 79 of 2016 Act to submit that any matter which authority or adjudicating officer or the appellate Tribunal is empowered under this Act to determine, no injunction can be granted by any Court or any authority in respect of any action taken or to be taken in pursuance of any power conferred by or under 2016 Act. He, thus, submits that the present *lis* being related to obligation of the promoter under Section 17 of 2016 Act falls within exclusive domain of the authorities prescribed under 2016 Act. Thus, jurisdiction of the Civil Court is barred under Section 79 of 2016 Act. He, thus, submits that the civil suit being not maintainable, the Civil Court ought not have granted injunction.

10. Per contra, Mr. Ashish Chopra, learned senior counsel submits that the provisions of RERA Act are not applicable to the present case. It has been contended that in terms of ratio of law laid down by Supreme Court in the case of **Newtech Promoters & Developers (P) Limited** v. **State of U.P. (2021) 18 SCC 1**, 2016 Act is not applicable to the projects completed or to which completion certificate has been granted. Thus, the reliance placed by the counsel for the petitioner on the provisions contained in 2016 Act is misplaced. Mr. Chopra, Senior Advocate has drawn attention of this Court to the Apartment Buyers Agreement which is part of the Lower Court record as Annexure 17 to submit that there is a specific covenant in the buyers agreement, as per which, super area does not include community centre. He draws attention to Annexure 8, appended to the buyers agreement which shows that common area does not include club house. Further attention has been drawn to Annexure 3 appended to sale deed/conveyance deed which is

part of record of the trial Court as Annexure A18 which defines common area and amenities and does not include club. He submits that as per Annexure 5 appended to the sale deed, club house has been specifically excluded from the scope of sale deed. Further reliance is being placed upon the ratio of law laid down by the Supreme Court in **DLF Limited** v. **Manmohan Lowe and others** reported as **(2015) 12 SCC 231** to submit that there is difference between the ownership and user. He submits that the land earmarked for schools, hospital, community centres etc. vests with colonizer and the allottee has no other right but to use the same.

11. I have heard the counsel for the parties and have carefully gone through the record of the case.

12. Present revision petition has arisen out of the proceedings under Order XXXIX Rule 1-2 CPC. The same need to be dealt and tested on the touchstone of famous tripode tests. The claim of the plaintiff needs to be tested upon three parameters :

(a) *Prima facie* case;

(b) Balance of convenience

(c) Irreparable loss

9. So far as reliance placed by Mr. Bansal upon the provisions as contained under 2016 Act to claim ownership of the welfare association over the common area is concerned, the same is misplaced. Admittedly, the occupation certificate to the project was granted on 14.12.2016. Ongoing project has been defined under Rule 2(o) of Haryana Real Estate (Regulations and Development) Rules, 2017. The same reads as under : -

"**On going project**" means a project for which a license was issued for the development under the Haryana Development and Regulation of Urban Area Act, 1975 on or before the 1st May, 2017 and where development works were yet to be completed on the said date, but does not include :

(i) any project for which after completion of development works, an application under Rule 16 of the Haryana Development and Regulation of Urban Area Rules, 1976 or under sub code 4.10 of the Haryana Building Code 2017, as the case may be, is made to the Competent Authority on or before publication of these rules; and

(ii) that part of any project for which part completion/completion, occupation certificate or part thereof has been granted on or before publication of these rules."

13. The project having been granted occupation certificate prior to 28.07.2017, this Court finds that the provisions of 2016 Act are not applicable. Reliance can be placed upon the following observations made by Supreme Court in **Newtech Promoters & Developers (P) Limited** (supra) which read as under : -

"**53.** *From the scheme of the 2016 Act, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the ongoing projects and future projects registered under Section 3 to prospectively follow the mandate of the 2016 Act."*

14. The issue regarding user and ownership under Haryana Apartment Ownership Act, 1983 has been elaborately dealt by Supreme

Court in the case of **DLF Limited** v. **Manmohan Lowe** (supra) wherein the Supreme Court observed as under : -

> *"36. We have clearly indicated that the ownership right over the land earmarked for schools, hospitals, community centers and other community buildings referred to in Section 3(3)(a)(iv) of the Development Act vests on the colonizer. That ownership can be divested, as already indicated, by the colonizer through a declaration under Sections 11 to 13 read with Section 3(f) of the Apartment Act. The colonizer has to provide those facilities in discharge of its legal obligations under the Development Act and the Act itself has recognized its or his legal ownership over the area set apart for those facilities under Section 3(3)(a)(iv) of the Act. All the same, the right to enjoy those facilities referred to in Section 3(3)(a)(iv) of the Development Act, whether shown in the declaration or not, under the Apartment Act, cannot be restricted or curtailed and the apartment owners have no other right, except the right of "user". Community centers, nursery schools, shops etc., therefore, being part of the approved layout plans by the DTCP, can be used by the apartment owners and, being part of the larger colony, are intended for independent use of all the apartment owners having direct exit to common areas, to the public street, road, etc. All those facts would indicate, so far as apartment owners are concerned, they have only a right of user, so far as the facilities provided under Section 3(3)(a)(iv) of the Development Act are concerned.*
>
> *37. Learned counsel for respondents sought to argue that the Silver Oaks Apartments is a 'gated' colony and, therefore, the developments which have taken place inside the boundary walls of that colony are to be treated as parts of internal development works and, therefore, these are parts of common areas. In this very direction, it was further submitted that these are the necessary and essential facilities which have to be provided to the flat owners by the developers, for the common use of the flat owners. Though, this argument appears to be attractive, it has no merit when we*

examine the nature of structures developed by the developer i.e. the appellant to which it is claiming its exclusive right. These structures are two nursery schools, three shops and one community centre, which cannot be treated as "common areas and facilities" within the definition of Section 3(f) of the Act. As already pointed out above, they are parts of planning for larger area, which plans were submitted by the appellant. It is not meant for the exclusive use of the flat owners of Silver Oaks Apartments. Position would have been different had these been integral parts of the facilities, in the sense that these facilities are essential for the enjoyment of the flats.

38. Common passages, staircases, lifts etc. are the examples of such common areas and facilities. Likewise, stilt parking area may be treated as part of common areas and facilities, in certain circumstances. Here these structures are the part of the larger area of about 130 acres in respect of which 7 licenses were obtained for development of the colony. Silver Oaks Apartments, which comprises of 14.75 acres, is only a part thereof. The nursery schools, shops and community centre are meant for the development of the entire colony and are not confined only to these apartments, as already noted in detail above. Further, as per our detailed discussion hereinabove, it is clear that the developer is given right to transfer these "community buildings and community centers". Likewise, even schools cannot be termed as part of "integral development" use whereof would be confined to residents of these apartments. Even the shops which are inside the boundary walls have their opening from outside to enable the shopkeepers to cater to the customers not only from these apartments, but outsiders as well. Therefore, on these facts, we are not impressed by the argument predicated on "gated colony".

Cost not on Apartment owners:

39. We have found that the Colonizer is legally obliged under Section 3(3)(a)(iv) of the Act to construct at his own cost the community and

commercial facilities stipulated therein and an agreement has to be entered into by the Colonizer with the DTCP under the Development Act by which the Colonizer is prohibited by law from recovering the cost of providing those facilities from the apartment owners. The operative portion of the agreement executed by the colonizer reads as follows:

> *"j) That only convenient shopping sufficient for requirement of the Group Housing will be allowed which shall be approximate one shop per one thousand persons, covering a maximum area of 200 sq. ft. per shop.*
>
> *k) That adequate educational, health, recreational and cultural amenities to the norms and standards provided in the respective Development plan of the area shall be provided.*
>
> *The owner shall at his own cost construct the primary-cum-nursery school, community building/dispensary and first aid centre on the land set apart for this purpose, or if so desired by the Govt. shall transfer to the Govt. at any time free of cost land thus set apart for primary cum nursery school, community building/dispensary and first aid centre, in which case the Govt. shall be at liberty to transfer such land to any person or instruction including a local authority on such terms and conditions as it may lay down.*
>
> *o) That the owner shall abide by the provisions of the Haryana Apartment and Ownership Act, 1983.*
>
> *p) That the responsibility of the ownership of the common areas and facilities as well as their management and maintenance shall continue to vest with the colonizer till such time the responsibility is transferred to the owners of the dwelling units under the Haryana Apartment and Ownership Act, 1983."*

40. Section 3(3)(a)(iv) of the Development Act read with the above-mentioned clauses in the agreement would indicate that ownership of the portion of the land set apart for the common areas and facilities referred to therein vest with the Colonizer so also the obligation "at his own cost" to provide those facilities in the land set apart for the said purpose. The Colonizer cannot recover cost of land or the amounts spent by him for

providing those facilities from the apartment owners. It is for the said reason that clause 7 of Section 3(f) of the Apartment Act has not made it obligatory, on the part of the Colonizer to include the "community and commercial" facilities in the declaration. If the colonizer includes the same within the declaration, then Section 6 of the Apartment Act will kick in, consequently, the apartment owners would be entitled to the undivided interest in respect of the community and commercial facilities provided therein without bearing the cost incurred by the colonizer in purchasing the land and the cost of construction. In our view, the colonizer could not have included the community and commercial facilities referred to in Section 3(3)(a)(iv) of the Development Act, because the same is meant for the benefit of the entire colony, not merely the flat/apartment owners in one part of the colony since they form part of the lay out plans duly approved, which takes in plotted area and the group housing societies area as well."

15. Applying the aforesaid parameters to the present case, the issue of determination is whether apartment owners paid price of the common areas or they only paid the user charges.

Clause 7 of the Buyers Agreement reads as under : -

"**Details of the items included or excluded in the price of the apartment.**

7. It is further clarified to the Allottee(s) that the Company has calculated the total price payable of the said apartment on the basis of its super area which comprises of the apartment area and pro rata share of the common areas and facilities within the said building only. The Company makes it abundantly clear to the Allottee(s) that he/she shall be entitled to the ownership rights and rights of usage only as per details given below :

i) That Allottee(s) shall have ownership of the said apartment consisting of the apartment area only. The definition of the Apartment area

is given in Annexure III. The apartment area is included in the computation of super area.

ii) The Allottee(s) shall also have undivided proportions share in the common area and facilities, as listed in Annexure II, within the said Building only. As the share of the Allottee(s) is undivided and cannot be separated, this would require him/her to use such common areas and facilities within the said building harmoniously along with other occupations and maintenance staff etc. in the said building and without causing any inconvenience or hindrance to them. Further the use of such common areas and facilities within the said building shall always be subject to the timely payment of maintenance charges. The undivided proportionate share of the Allottee(s) in such common areas and facilities within the said Building shall be calculated in the ratio of super area of his/her apartment to the super area of all the apartments within the said Building only. Such undivided proportionate share of common areas and facilities as listed in Annexure II only and none other is included in the computation of super area.

iii) In addition to above, though not forming a part of computation of super area for which price is charged, the Allottee(s) shall have the ownership of undivided proportionate share in the land underneath the said building only (i.e. the land which is the foot print of the Building in which the said Apartment is situated). The undivided proportionate share of land underneath the said Building shall be calculated in the ratio of super area of the said apartment to the total super area of all the apartments within the said Building only. It is made abundantly clear and agreed by the Allottee(s) that no other land(s) [other than what is stated in clause 7(i) and 7(ii) is/are forming part of this Agreement and the Allottee(s) shall have no right, or no title or no interest of any kind whatsoever on any land(s) other than what is stated herein and below).

(iv) In addition to the above, though not forming a part of the computation of super area, the Allottee(s) shall also be entitled, without any ownership rights, only to exclusively use the reserved open/covered parking space specifically allotted to him for parking his/her vehicle in terms of Clause 13 below, as listed in Annexure IV.

(v) In addition to above though not forming a part of the computation of super area for which price is charged, the Allottee(s) shall also be entitled to use the general common areas and facilities within the said complex precisely as listed in Annexure VI, which may be within or outside the foot print of the said building earmarked for common use of all the occupants of all the buildings to be constructed on the said site. However, such general/common areas and facilities earmarked for common use of all occupants shall not include the exclusive reserved open/covered parking space individually allotted to the respective occupants for use."

16. Annexure III further provides as under : -

"It is specifically made clear that the computation of Super Area does not include :

1) Site(s) for Shop(s)

2) Sites/Buildings/Area of Community facilities/Amenities like Nursery/Primary/Higher Secondary Schools, Club/Community Centre, Dispensary, Creche, Religious Buildings, Health Centres, Police Posts, Electric Sub-station, Dwelling Units for Economically Weaker Sections/service Personnel.

3) Roof/terrace above apartment/penthouses (excluding exclusive terrace for Penthouses)

4) Car Parking area within the complex :

a) Covered Car Parking are allotted to Apartment Allottee, for exclusive use, at stilt level.

b) Open car parking area allotted to Apartment Allottee, for exclusive use around building."

17. In view thereof, this Court finds that the allottees did not pay price of common area. The same vests in the plaintiff and not in the defendant. Thus, the plaintiff has *prima facie* case in his favor.

18. As per the claim of the plaintiff, there are more than 300 active members of the club/community building. Thus, the plaintiff being under duty to provide common facilities to its members/the apartment owners, balance of convenience lies in favour of the plaintiff. There being third party right involved in the present case, this Court finds that the injunction, if not, granted, the plaintiff is bound to suffer irreparable loss.

19. Finding that the Appellate Court has rightly granted injunction in favour of the plaintiff, this Court finds no reason to interfere in the well reasoned order passed by the Appellate Court. Resultantly, the revision petition is ordered to be dismissed.

20. Needless to say, the suit shall be decided by Courts below without being influenced by anything observed hereinabove.

(PANKAJ JAIN)
JUDGE

May 16, 2025
Paritosh Kumar

Whether speaking/reasoned Yes/No
Whether reportable Yes/No