BEFORE THE TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL (TNREAT)

(Tamil Nadu, Puducherry, Andaman & Nicobar Islands)

(Under the Real Estate Regulation And Development Act 2016)

DATED 05.01.2022

Coram : Mr.Justice B.Rajendran, Chairperson
Mr.N.Balasubramanian, Judicial Member
Ms.Leena Nair, Administrative Member

Appeal Nos. 7 & 11 of 2021

A.No.7/2021

Serene Senior Living (P) Ltd.,
Rep. by its Managing Director
Gireesh Kumar Bhandari ... Appellant

-Vs-

1. Serene Rose Residents Welfare Association
   Represented by its Secretary, P.V.Muralee Kesavan

2. M/s.Columbia Pacific Communities Pvt. Ltd.
   Rep. by its Senior Manager K.Manimaran .... Respondents

A.No.11/2021

M/s.Columbia Pacific Communities Pvt. Ltd.
Rep. by its Senior Manager K.Manimaran ... Appellant

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1. Serene Rose Residents Welfare Association
   Represented by its Secretary, P.V.Muralee Kesavan

2. Serene Senior Living (P) Ltd.,
   Rep. by its Managing Director
   Gireesh Kumar Bhandari .... Respondents

These appeals were taken on file on 18.01.2021 and 11.02.2021 respectively and came up for final hearing on 01.12.2021 in the presence of M/s.Senthil and Zahid Ahmed, Counsels for the appellant in A.No.7/2021 & 2nd respondent in A.No.11/2021 and R1 appeared through its Secretary P.V.Muralee Kesavan, who appeared in person for both the appeals and Mr.V.G.Suresh Kumar, N.K.Vanan and M.Yokesh, Advocates for the 2nd respondent in A.No.7/2021 and appellant in A.No.11/2021. Having heard the arguments of the both sides through video conferencing and having stood over for consideration till this date and this Tribunal delivered the following:

COMMON ORDER

1. These appeals have been preferred by the promoter and service provider against the order of the Regulatory Authority in C.No.417 of 2019 dated 9.12.2020. The home buyers association preferred a compliant against the promoter before the Regulatory Authority for the relief of completing the project as planned and provide residents with all infrastructure facilities (boundary wall, medical centre, staff quarters, STP, roads and gardens), and for common facilities including club house, gardens should be handed over to the association as per RERA Rules. It has been sold to service provider M/s.Serene Senior Services Pvt. Ltd. for a consideration, this should be restored

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to residents association. During the pendency of the complaint before the Regulatory Authority, on information from the promoter the 2nd respondent/appellant in A.No.11/2021 was impleaded as a 2nd respondent. After contest the Regulatory Authority allowed the complaint. Aggrieved upon the same both the developer and service provider preferred these separate appeals. For easy understanding and to avoid confusion the appellant and the respondents are referred in this appeal as per their original rankings as promoter, service provider and home buyers association.

2. The home buyers' association members have purchased flats from the promoter and took possession. But the promoter still not completed the project as planned and provide all infrastructure facilities, common facilities including club house, garden, etc., Hence the home buyers' association came forward with the complaint against the promoter for the relief of a) to complete the project as planned and provide all infrastructure facilities, b) common facilities including club house, garden, etc., to be handed over to the association c) to attend civil work under warranty complaints (leakage plumbing and painting defects). After contest the Regulatory Authority allowed the complaint and directed the promoter to hand over the club house to the association for which directed the promoter to return the undivided share cost and construction cost of the club house to the service provider and in turn directed the service provider to hand over club house and to execute conveyance deed to that effect. Aggrieved upon the same both the promoter and service provider filed

these separate appeals. The promoter preferred the appeal on the following main grounds:

- The Regulatory Authority has not passed any speaking orders on the inclusion of the service provider/2nd respondent.
- No evidence of non completion of work was produced.
- The scheme was envisaged prior to the enactment of the Real Estate Act.
- Prior to the enactment of this Act it has been designed in such a manner that the senior care facilities such as Central Kitchen, Air Conditioned Dining Area, medical centre and the club house shall be available to the residents even though the same does not a part of their undivided share. The residents of association have been and shall always be allowed to use the said amenities without the levy of any charges.
- The club house and other senior care facilities per-se does not form part of the undivided share of the allottees. Further the undivided share conveyed to the owners does not include the proportionate undivided share of the club house and other senior care facilities and also the consideration charged for by the developer did not include the construction of facilities.
- Construction agreement clauses 5 and 6 were not properly appreciated.

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- In the services agreement a demarcation has been made on the amenities to be provided by the developer and the facilities to be provided by the service provider.
- Block A and C of the project have been completed in all respects and handed over to the owners hence registration under RERA does not arise.

3. The learned counsel for the appellant/promoter would submit that the learned Regulatory Authority without considering the above said grounds both legally and factually and came to a wrong conclusion. Further would submit that the club house and undivided share thereon purchased by the service provider to the tune of 5 crores as sale consideration and it cannot be re-conveyed by mere order of the Authority without declaration of the said sale as void. Therefore the order of the learned Authority has to be set aside.

4. The service provider preferred the appeal on the following main grounds:

- The 1st respondent association has no locus standi to file any complaint before the Authority since there is no privity of contract.
- The learned Regulatory Authority has no jurisdiction in relation to the complaint and the relief sought for against the service provider since the agreement was entered prior to the enactment of the Act.
- Section 11(4)(d) deals with maintenance of the project and the essential services. However the services provided by the service

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provider are distinctive in nature and do not fall under the purview of the Act.

- When the consideration paid by the allottees does not include the consideration for the common areas, as in the present case, relating to the club house, Section 17 of the RERA Act is not applicable.
- Section 17 of RERA is also silent as to who would bear the stamp duty and charges for such transfer. In this regard the order of the Regulatory Authority is silent.
- All the purchasers had willingly entered into the service agreement with the service providers.

5. The learned counsel for the service provider would submit that the service provider became the absolute owner of the land and club house which was developed to render services such as central kitchen with air conditioned dining area, domestic health care centre and multipurpose hall etc., built on the said land in furtherance to the provisions of the service agreement which was entered into in the year 2015 prior to coming into force of the RERA. Therefore Section 17 has no application. Further would submit that the learned Authority directed to re-convey the service provider purchased property but the Authority failed to direct who has to bear the cost of the stamp duty and registration charges for re-conveyance. The service provider invested 5 crores for the purchase of the land for club house and as well as construction of club house and for service related equipments. But the learned authority without proper

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appreciation of the above facts came to a wrong conclusion hence the order has to be set aside.

6. The home buyers' association represented by its Secretary, who is represented by party-in-person would submit that the ownership of the common facilities should be with the residents' welfare association. It was built by money paid by owners while buying their property. The service provider can maintain these as they are third party and brought in for the purpose of maintenance only as per the agreement signed with them by each resident. The agreement itself appears to have been done in a hurry as an afterthought with motives beyond their understanding. Their complaint is how the common area of land and the club house can be sold to a service provider SSC. As per RERA Rules the common amenities/facilities should be handed over only to the residents' welfare association by the promoter within 30 days of completion. Therefore the learned authority after analyzing the entire material on record and came to a correct conclusion that there is no infirmity hence both the appeals have to be dismissed.

7. The learned Regulatory Authority found that the project was not completed as on 1.5.2017 i.e. on the date of commencement of the Section 3 of the Act. Hence it concluded that the project is to be considered as an ongoing project and directed the promoter to register block A and C along with common amenities and facilities as promised in the brochure and the construction agreement. Further it is directed the promoter to hand over the

common areas, amenities and facilities to the association of allottees as per Section 17 of the Act. Further found that the sale of undivided share of land and club house in favour of the service provider is in contravention of the Section 17 of the Act and also in violation of paragraphs 22 to 24 of the construction agreement. Therefore the Authority held that the ownership of the club house as well as the undivided share in the land is to be vested with the association of allottees and directed the promoter to pay the amount received from the service provider the value of the land and the construction cost and thereafter the promoter has to convey the same to the association of allottees.

8. Point for consideration:

Whether the appeals deserve to be allowed or not?

Point:

9. The original owners of Serene Rose project namely Mrs.Mary Thomas and others purchased their property measuring 5.76 acres on 30.4.1970 and they decided to develop the land into a group housing project for senior citizen and obtained approval under DTCP on 4.9.2012 and obtained planning permission under local planning authority on 17.9.2013. The owners of the said land entered into a development agreement dated 12.9.2012 with Covai Senior Care Constructions Private Limited, which was erstwhile promoter herein, for development of the said land into be a residential group housing complex for senior citizens named as Serene Rose. It is also agreed that the owners will assign or transfer the land for common area to the developer on

completion of the project. It is also mutually agreed that on completion of the project, all the services mentioned will be provided by M/s. Serene Senior Care Private Limited, a company created by the developer for the excusive purpose of taking care and providing services to all the senior care projects being developed and already developed by the developer. A separate services agreement will be signed by the individual investors of project serene rose including the owners for the villas and dwellings allotted to them with the above mentioned services' company. The developer will develop 5.76 acres of land held jointly by the owners. The consideration to the owners will be for an allotment of 53486 sq. ft. of saleable area in the form of villas and apartments with car parks. The owners have chosen to retain 7812 sq. ft. i.e 3 D villas as retained area. The total saleable area agreed between the owners of the land and promoter is 2,09,032 sq. ft.

10. These are the joint development agreement between the owners of the land and the promoter. In pursuance of the joint development agreement the promoter entered into construction agreement with the individual home buyers for construction of flats for senior citizens. The promoter agreed that the developer shall develop the schedule property of 5.76 acres provided by the owners, into a gated residential retirement complex for senior citizens by the construction of villas/flats/apartments together with common ways, infrastructure, amenities and facilities both for the owners of land as well as for the prospective buyers of villas/flats/apartments as per the approved plans. The project shall be completed within a period of 30 months from the date of

final Panchayat approval. The developer shall construct to an extent of built up area of villas/flats/apartments, along with car parks as specified in Exhibit B, together with the corresponding shares of undivided interest in the land to the owners and prospective buyers, collect advances and appropriate to himself the entire sale proceeds as his own. The sale deeds to the purchasers will be effected by the owners during the course of the project on mutually agreed dates. The developer agreed to provide facilities namely club house with lounge, dining room, reading/card room, indoor games, library, TV room, kitchen, pantry etc, medical centre, activity centre, gymnasium, sports arrangements like badminton, multipurpose hall, quarters for staff and guest room. These are the admitted facts.

11. The promoter entered into individual construction agreement with the home buyers. But in the service agreement with the service provider the facilities to be provided by the promoter and provided by the service provider are separately given. In the above said service agreement there is a specific clause in which the SFM (Home buyers) confirms that they have no right, title and interest in the common amenities which are exclusively owned by the SSC (service provider) or its nominees/assigns for the purposes of providing senior care services to the SFM (home buyers). These are the disputed facts.

12. The main contentions of both the appellants, namely the promoter and the service provider, is that the club house and the land in which the club house is situate absolutely belongs to the service provider by right of purchase

for valuable consideration and the home buyers association or the individual home buyers have no right, title or interest over the said property.

13. The rival contention of the home buyers' association is that the club house and the land thereon is part and parcel of the Serene Rose Real Estate project and the promoter has no right to transfer the same for valuable consideration to the service provider as per the RERA Act.

14. The findings of the Regulatory Authority is that the club house and the land thereon is part and parcel of the real estate project under the head of common areas. As per Section 11(4)(d) and 17 the promoter as well as the service provider has no right or title for the common areas namely club house and land thereon.

15. How far these contentions of the appellants and rival contention of the home buyers' association and the findings of the Regulatory Authority is sustainable have to be analyzed?

16. Now let us start with brochure of the Serene Rose project issued by the promoter. In page No. 66 of the Typed set of the promoter under the head overview which runs as follows:

> ***"Overview***
>
> ***The social frame work in India is witnessing a paradigm shift. The fast based life style makes it difficult for senior citizens to cope with. Having fulfilled their social, professional and family obligations, senior***

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citizens certainly deserve a healthy, active and peaceful life during their silver years.

Serene communities are <u>neither 'old age homes'</u> <u>nor simple real estate projects</u>. Serene communities are tailor-made for senior citizens who prefer peaceful and hassle-free life style in an eco-friendly environment. "

17. According to the above said brochure the Serene Rose project is not an old age home and not as a simple real estate project. It is fully a tailor-made project for senior citizens only.

18. The learned Regulatory Authority concluded its order on three points namely:

(i) The project of the promoter is an on-going project since it is not completed as on 1.5.2017.

(ii) The sale of undivided share of land and club house in favour of the service provider is in contravention of Section 17 of the Act and also in violation of paragraphs 22 to 24 of the construction agreement.

(iii) As per Section 11(4)(d) of the Act the association of allottees alone are entitled to enter into service contract with various service providers hence paragraph 21 of the construction agreement is null and void.

The promoter and the service provider as appellants challenged the order of the learned Regulatory Authority. Now let us discuss the first point.

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19. The individual home buyers entered into construction agreement with the promoter in December 2015 and the promoter agreed to hand over the possession of flats on 31st March 2016 along with completion certificate to the purchasers. On 7th May 2017 at Jenny's Residency Hotel, Coimbatore, minutes of the meeting held with the allottees of serene Rose. It was conducted by Mr.V.Kalyanaraman, Chief Operating Officer. In the above said meeting various allottees of Serene Rose of Phase 1 and 2 and officials of the promoter and Director of the SSL and SSC. In the above said meeting the COO Mr. Kalyanaraman informed the gathering about the delivery dates which runs as follows (page No.74 of Typed set of promoter):

> ***"After a careful consideration of the status of the site as of now, the following will stand committed as revised delivery dates:***
>
> ***a) Block C 4th floor - will be delivered for fit outs by 16.5.2017***
>
> ***b) Block C 2nd and 3rd floors - will be delivered for fit outs by 10.6.2017***
>
> ***c) Club house will be handed over to SSC for fit outs for 15.6.2017***
>
> ***d) All other infrastructure will be operational by July 2017 end***
>
> ***SSC will complete fit outs of the club house by 15.7.2017 and conduct a trial runs for a fortnight. Will make the club house a fully operational by 1.8.2017. In other words all the allottees can start living in the project with all amenities by 1st week of August 2017."***

20. According to the home buyers association the works in the flats were mostly completed by October 2017 only. As per the admission in June 2017 the flats were not completed and likely to be completed in July 2017. But actually they have mostly completed only in October 2017 i.e., after the RERA Act came

into force. Further on the date of the Act came into force i.e. on 1.5.2017 the promoter has not completed the flats as a usable commodity and relying the orders of this Tribunal that "the real estate projects should be completed in all respects in a habitable condition as on 1.5.2017 to qualify as a completed project". Further, the learned Authority has relied upon the admission of the COO, as stated supra, regarding completion date and concluded that as on 1.5.2017 the project of the promoter has not at all completed as a usable commodity.

21. Both the appellants challenged the order of the Regulatory Authority on the common ground that the scheme was envisaged prior to the enactment of the Real Estate Act and construction agreement, service agreement were entered into between the parties prior to the RERA Act came into force. It is not disputed that on 3.12.2015 the home buyers, promoter and service provider entered into agreement. The Real Estate Act 2016, Section 3 came into force on 1.5.2017. As per Section 3 proviso clause projects that are ongoing on the date of commencement of this Act and for which completion certificate has not been issued the promoter shall make an application to the Authority for registration of the said project. Section 3(2)(b) of this Act where the promoter has received the completion certificate for a real estate project prior to the commencement of this Act. In this case, the promoter has not produced the completion certificate. But the home buyer association has stated in their reply to the counter submitted by the SSL in C.No.417 of 2019 in which at page No.59 of the Typed set the association has stated as follows:

"Promoter provided completion certificates to the residents dated June 16, 2017, whereas, the works were mostly completed by October 2017 only. We feel this is done by the promoter/builder with ulterior motives of the promoter to get out of the purview of the RERA".

22. As per Section 3(2)(b) if a promoter has received completion certificate for a real estate project prior to the commencement of the Act, that project is exempted from registration. In this case as per the above statement of the home buyers association the completion certificate dated 16.6.2017. As per the provision on 1.5.2017 is the commencement of Section 3 and prior to that the certificate should be obtained. Hence on the date of commencement of this Act no completion certificate was obtained by the promoter. Further, the alleged completion certificate dated 16.6.2017 is valid under the provisions of the Act and Rules have to be analyzed on the basis of the previous orders of this Tribunal and as well as the Judgments of the Hon'ble High Court which runs as follows:

A.No.1 of 2018 dated 23.5.2018

Y.Ravishankar Vs M/s.Marg properties Limited and another

If we also take into considerations the objects and reasons of the Act, the Act has been enacted mainly to infuse transparency, ensure accountability towards allottee s and protect their interest. It also imposes certain responsibility on both the promoter and the allottee, mainly to establish a fast track dispute resolution mechanism. Therefore the intention of the legislature is to have a workable solution for any difficulty faced by an allottee. This can be done if the project is registered under the Authority. In fact, when we also take into consideration, the Rule 2(n) where the definition of real estate project is given, it actually says the development of the building includes the common areas, the development works, all improvements and structures thereon and all easement rights and apprutenances belonging thereto which will clearly indicate that

this legislature's intention in the Act is to say that the project should have been completed in all respects.

Under the Act, it is very clear that the end product namely the flat is a usable commodity. It does not contemplate the promoter to say that they have only completed a portion of it.

As per the above said conclusion of this Tribunal completion of project means that the property should be in an usable condition by the allottee. The end product namely the flat is a usable commodity.

A.No.2 of 2018 dated 13.11.2018

M/s.Marg properties Limited Vs T.M.Arunachalam

Therefore the intention of the legislature was only for the parties to have a workable usable commodity namely a flat which cannot be construed as an incomplete flat. As per the Act, it even states that the properties intended to be used as a residential or commercial use such as residence or office or shop. Therefore, the alleged mere completion of structure or beam cannot connote to the actual users entitlement.

A.No.7 of 2019 dated 27.01.2020

Pacifica (Chennai Project) Infrastructure Pvt. Ltd., and another Vs C.R. Chenthirkumaran and another

The appellant only relied the completion certificate issued by the Pudupakkam Panchayat. But the Pudupakkam Panchayat President has relied on only two planning permit and one building permit. The above said completion certificate is not based upon the Rule contemplated under Rule 2(h)(iii) of The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017. But the intention of the legislature regarding the completion of the project is concerned it should certified only by the architect or structural engineer/licensed surveyor associated with the project supported with photographs. None of the certificates of the above said persons and photographs were not relied by the President of the Panchayat and moreover he has not whispered anything whether he saw the certificates or photographs.

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In these circumstances the completion certificate relied by the appellant is not reliable and the said completion certificate is not sufficient to relief from the clutches of Rule 2(h)(iii).

In the High Court of Judicature at Madras

Dated : 02.12.2020
Civil Miscellaneous Second Appeal No.31 of 2020
& CMP.No.13108 of 2020

Pacifica (Chennai Project) Infrastructure Pvt. Ltd., and another Vs C.R. Chenthirkumaran and another

Furthermore, the Tribunal took note of the entire factual details and clearly culled out as to how the president of the village panchayat, Pudhupakkam issued a false certificate without following the mandatory procedure under the Act. This will clearly demonstrate that the appellants were somehow trying to manage to get out of the rigor of the statutory provisions. Thus, we find that there absolutely no ground to interfere with the order passed by the Tribunal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 15.09.2020

C.M.S.A.No.22 of 2019

Subashini Thulasiram vs M/S.Spr & Rg Constructions Pvt.

24.As rightly pointed out by the learned senior counsel appearing on behalf of the appellant, it is well settled law that the parent Act will prevail over the rules and there cannot be any rules contrary to Act. Assuming that Rule 2(h)(ii) gives some relief to the 1st respondent, it is in contrary to Section 3 of the Act. When the Act has come into force on 01.05.2017, the first respondent should have complied with. The principle that the subordinate legislation cannot be in violation of the Act is supported by following decisions of the Apex Court:

1.Ramesh Mehta Vs. Sanwal Chand Singhvi reported in 2004 (5) SCC 409.

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2.Global Energy Ltd., Vs. Central Electricity Regulation Commission reported in (2009) 15 SCC 570.

The State Government Rule 2(h)(ii) is contrary to Section 3 of the Act and therefore the first respondent cannot take advantage of the same and claim exemption from registration.

23. As per the above verdicts of this Tribunal as well as the Hon'ble High Court the completion certificate obtained by the promoter is not according to law and as per the admission made by the promoter himself the project of the promoter was not completed on the date of coming into force of Section 3 of the Real Estate Act. Hence the findings of the Regulatory Authority that the project of the promoter that it is an ongoing project have no infirmity.

24. The next finding with regard to sale of common area to the service provider is against Section 17 of the Act and in violation of paragraphs 22 to 24 of the construction agreement. The basic document for the project Serene Rose is the joint development agreement dated 12.9.2012 between the land owners and the promoter. In the above said joint development agreement as article 6.7 there is a clause for transfer of common area to the developer (Typed set in A.No.11/2021 at page No.11) which runs as follows:

"Section 6.07: The owners will assign or transfer the land for common area to the developer on completion of the project. "

25. In page No.89 of the above said typed set, sale deed dated 27.10.2017 executed by the promoter, as power agent of the land owners, to the service provider which is the sister concern of the promoter himself. In the

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above said sale deed at page No.93, regarding consideration for the sale deed it has been specifically mentioned as:

> ***"In consideration of the sum of Rs.1,01,95,416/- already paid by the purchasers to the vendors, the receipt of which sum the vendors do hereby admit and acknowledge."***

26. The promoter is the power agent of the vendors. The sale deed dated 27.10.2017 was executed between Serene Senior Living Private Limited and Serene Senior Care Private Limited. As per joint development agreement the owners of the land agreed to assign or transfer the land for common area to the developer on completion of the project. Admittedly Blocks A and C not yet completed on 27.10.2017 and Blocks B and D registered with the RERA on 17.5.2019 and still it is also not yet completed. Before the completion the promoter himself as a power agent has transferred the common area for his sister concern. It is against the joint development agreement article 6.07.

27. Section 17 of this Act read as follows:

> ***17. Transfer of title:***
> ***(1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws: Provided that, in the absence of any***

local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

(2) .. ..

28. Before going to discuss the transfer of common area we have to see what is meant by common area as defined in Section 2(n) of this Act.

Section 2(n):

"common areas" mean—

(i) <u>the entire land for the real estate project</u> 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, fir escapes, and common entrances and exits of buildings;

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

(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;

29. The definition of the word 'common areas' commenced with the entire land for the real estate project. So as per the definition the entire land of

the real estate project is the common area. According to the intention of the land owners while executing joint development agreement there is a specific clause in the agreement as article 1 which runs as follows:

> ***"The project***
> ***Section 1.01: The subject matter of this agreement is the development of the project Serene Rose for senior citizens aged 50 and above. The name of the project cannot be changed by any parties thereto.***
> ***Section 1.02: The developer shall develop the schedule property of 5.76 acres provided by the owners in a gated residential retirement complex for senior citizens by the construction of the villas/flats/apartments together with common ways, infrastructure, amenities and facilities both for the owners of the land as well as the prospective buyers for the villas/flats/apartments as per the approved plans."***

30. The owners of the property have intended to develop a gated community within the schedule of property measuring 5.76 acres. As per the above article the land owners have no intention to sell any portion within 5.76 acres and they have agreed to transfer land to the promoter for common purpose as per article 6.07 only on completion of the project. So factually the entire 5.76 acres meant for the development of the Serene Rose Real estate project only. Therefore, the sale of portion of the common area measuring 25,746 sq. ft. by the developer to the developer (service provider) is against the joint development agreement.

31. Now let us see whether the above said sale is legally sustainable? Already it was decided that the project of the promoter is an ongoing project and the project of the developer is under the purview of the real estate Act. So

Section 17 of the real estate Act is absolutely applicable to this project. The promoter and the service provider objected the application of Section 7 to this project on the ground that this project has been envisaged prior to the enactment of the real estate Act and it has been designed in such a manner that the senior care facilities such as central kitchen, air conditioned dining area, medical centre and the club house shall be available to the residents even though the same does not a part of their undivided share. The residents of association have been and shall always be allowed to use the amenities without the levy of any charges. Further the club house and other senior care facilities does not form part of the undivided share of the allottees. The undivided share conveyed to the owners does not include the proportionate undivided share of club house and the senior care facilities and the consideration charged by the developer did not include the construction of facilities. How far the defence is sustainable is to be analyzed?

32. It is admitted that the agreement between the parties entered into 2012 and 2015. As per the Act entering into agreement for the real estate project is not a criteria and the completion of the project is the paramount consideration to exempt the project. It is no doubt that this project is not at all completed before 1.5.2017 i.e., on the date of commencement of the Section 3 of the Real Estate Act. In the construction agreement at page No.12 and 34 of the typed sets of the appellant in which there is a specific clause that the developer will provide the common amenities for the use by the residents in the said project: club house with lounge, dining room, reading card room, library,

TV Room, indoor games, kitchen and pantry etc. As per the above said clause the promoter is liable to provide club house along with the above amenities and facilities.

33. The land owners and the promoter further agreed in the joint development agreement that "the developer shall construct an extent of built up area of villas/flats/apartments, along with car parks as specified in Exhibit B with the corresponding shares of undivided interest in the land to the owners and prospective buyers, collect advances and appropriate to himself the entire sale proceeds as his own. The sale deeds to the purchasers will be effected by the owners during the course of the project on a mutually agreed dates." The land owners nowhere in the joint development agreement has stated about the sale of common area to the service provider. Against the joint development agreement the promoter has created a sale deed to the service provider.

34. The appellants have stated that in the services agreement a demarcation has been made on the amenities to be provided by the developer and the facilities to be provided by the service provider. The above said fact was not properly appreciated by the Regulatory Authority. It is the main grievance. The amenities provided by the promoter as per the construction agreement as contemplated in the brochure of the promoter. The promoter in the brochure employed the sugar coated words that the "Serene communities are neither old age homes nor simple real estate projects. Serene communities are tailor-made for senior citizens who prefer peaceful and hassle free life style

in an eco-friendly environment." According to the above said sugar coated wordings Serene Rose project is not an old age home and it is not an ordinary real estate project and it is provided specially for the senior citizens for healthy, active and peaceful life during their silver years. This is the motive of the project at the time of inception. According to the home buyers association for achieving the hassle free life style in an eco-friendly environment they have paid double the amount more than the prevailing market rate for the above said project apartments. The developer went to the extent of saying that the decision of the Honble Authority has made to seem as though the Act has only been brought into force to maliciously to punish the promoters and drive them out of business and also quoted the preamble of the Act. The service provider went to the extent of saying that they had spent substantial sums towards stamp duty, registration charges and conveying the deed to the tune of Rs.5,35,15,435/-. The appellants further would submit that the individual purchasers of the home buyers association had knowing fully well about the construction agreement and service agreement with regard to recitals regarding right, title and interest on the club house etc., and now came forward with the complaint that the above said recitals were concealed by the promoter and service provider.

35. The preamble of the Real Estate Act aimed for regulation and promotion of the real estate sector and to ensure sale of real estate project in an efficient and transparent manner. The transparency is the ultimate goal of this Act to regulate the unregulated real estate sector. In the brochure (at page

No.68 of the Typed set) facilities namely club house, lounge, dining room, reading card room, library, open air theatre, TV room, activity centre, gymnasium, medical centre, sports complex, indoor games, multipurpose hall and STP/RO plant were listed with group photos. The promoter has not disclosed about the ownership of club house lies with the service provider. Against the provisions of the Real Estate Act the promoter and service provider obtained the agreements from the home buyers. The Real Estate Act is enacted not only for the benefit of the home buyers but also for the benefit of the promoters. When the stipulations, conditions are against the provisions of the Real Estate Act, the implementing Authority namely Regulatory Authority cannot be a mere spectator. It is the duty of the Regulatory Authority to implement the Act in letter and spirit. The service provider would submit that the order of the Regulatory Authority was silent about the payment of stamp duty for re-conveyance. The Authority has directed the promoter to set right the wrong done by him. Hence there is no ambiguity or no silence.

36. Therefore, as per Section 17 of the Act the undivided proportionate title in the common areas are to be conveyed to the allottees association. The learned Authority has rightly come to a conclusion that the sale deed of common areas in favour of the service provider is against Section 17 of the Act and there is no infirmity in that finding.

37. The next finding is with regard to Section 11(4)(d) of the Act. According to the service provider and the promoter Section 11(4)(d) dealt with

maintenance of the project and the essential services but the services provided by the service provider are distinct in nature and do not fall under the purview of the Act. How far the defence of the service provider and promoter are sustainable have to be analyzed?

38. According to the appellants Section 11(4)(d) mentioned maintaining the essential services only with regard to maintenance of the project and not relating to the services as contemplated in the service agreement. What is the meaning of maintaining the essential services in the project is not defined in the Act or Rules and Regulations. As per the views of the appellants the essential services in the project is maintaining the STP, water tank, lighting etc. The above said services are maintained by the association of allottees through the service providers and not by the home buyers individually. The disputed club house, dining, medical centre with ambulance, etc. are also can be maintained by the association of allottees through the service provider. For maintaining the above said services there is no necessity for any special knowledge etc. The home buyers are the senior citizens and they are having much experience in the administration. They can very well call for the qualified service provider for any services from the public domain by way of internet and publication. There is no difficulty in it. That is why Section 11(4)(d) enacted and carefully worded by the legislature with good intention to regulate the real estate sector. If the powers of maintenance of services lies with the association of allottees they can very well choose the right person by competition. If the promoter himself is a service provider the home buyers

cannot question the service provider even though the service is poor. The aim of the project namely hassle free life style in an eco friendly environment will be questioned if the project services are lies only with the permanent service provider. The home buyers cannot change the service provider and they have to change the apartment. Now the agreement with the service provider itself will defeat the very purpose of the project. In the old age homes the inmates cannot change the service provider or change the menu or change the cook. The purpose of the home buyers to choose this project is only to achieve freedom during their silver years after relieved from the social, professional and family obligations. But unfortunately, by way of this kind of service agreement and construction agreement the home buyers lost their freedom and this construction agreement paragraph No.21 has taken away the freedom of the association of allottees hence the learned Authority rightly concluded that the paragraph No.21 of the said agreement is null and void. Therefore this Tribunal comes to a conclusion that Section 11(4)(d) mentioned services are not distinct services as alleged by the appellants and the arguments of the appellants are not sustainable.

39. From the above said discussion it is very clear that the learned Regulatory Authority has come to a correct conclusion after analyzing the entire material on record and there is no infirmity in the findings. Therefore this Tribunal comes to the conclusion that these appeals are not deserve to be allowed. The point is answered accordingly.

40. In the result,

A.No.7/2021

This appeal is dismissed and the order of the Regulatory Authority in C.No.417/2019 dated 9.12.2020 is confirmed. No costs.

A.No.11/2021

This appeal is dismissed and the order of the Regulatory Authority in C.No.417/2019 dated 9.12.2020 is confirmed. No costs.

Connected Miscellaneous Applications are closed.

This Order is directly dictated to the Stenographer and typed in the computer by her, corrected and pronounced by us in the open court on 05th Day of January 2022.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDL. MEMBER

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