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 14.02.2022

Coram : Mr.Justice B.Rajendran, Chairperson
Mr.N.Balasubramanian, Judicial Member

Appeal No. 89 of 2021

M/s.Harmony Avakash Homes Pvt. Ltd.,
Represented by its Director S.Shanker ... Appellant

-Vs-

Ville Franche Home Owners Association
Represented by its Secretary ...Respondent

This appeal was taken on file on 24.08.2021 and came up for final hearing on 24.1.2022 in the presence of M/s.R.Sivaraman, P.Ramesh Kumar, Hasmukh.S.Surana, Raghav Rajeev Menon and Mudit Bohara.A., Counsels for the appellant and M/s.Rank Associates, Counsels for respondent. Having heard the arguments of both sides through video conferencing and having stood over for consideration till this date and this Tribunal delivered the following:

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ORDER

1. This appeal has been preferred against the order of the Regulatory Authority in C.No.78 of 2020 dated 10.6.2021. Ville Franche Home Owners Association has preferred a complaint against the promoter for the reliefs of registration of the project, defects repair and rectification, handing over of common amenities and other reliefs. After contest the Regulatory Authority found that in the light of the analysis of the status of completion of residential villas and common amenities promised in the construction agreement in phase-I this project is not registrable. The Regulatory Authority further ordered that the land in which common amenities namely water treatment plant, Genset, EB and BSNL room are located for which the promoter shall executed registered conveyance deed in respect of the common areas to the association of allottees and also directed the promoter to sort out the issue with DTCP regarding discrepancy, if any including the land for provision of shops. Further the Regulatory Authority has issued some direction to the promoter regarding amenities. Aggrieved upon the same the promoter has preferred this appeal on the following main grounds:

- Regarding provision of ambulance service since none of the members of the association were willing to bear the cost such as monthly fuel and maintenance charges, salary for a permanent driver.
- The compound wall was completed in the year 2013 and handed over in April 2016. For the compound wall the damage was caused

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actually by a JCB working in the spot on the instructions of the association.

- The appellant is the legal and factual owner of the club house facilities and that they had invested for the benefit of the owners to utilize the club facilities hence it cannot be handed over to the association.
- In the approved layout by the DTCP earmarked for sale for the purpose of sale to persons for building shops in that plot. The appellant has freehold rights to this land.
- The association without notice to the appellant put up a composed plant in that plot of land and has secured it with its lock, thus preventing access to the lawful owner.

2. The learned counsel for the appellant would submit that due to the nonpayment of maintenance charges by the association the appellant has closed the club house area, OSR gifted lands, shops and park for the Phase I & II. The club house and other areas owned by the appellant are not forming part of the gifted lands. The total extend of area admeasuring 2,10,394.8 sq. ft. out of which for the park 21,476 sq.ft. commercial areas 7,748 sq. ft. shops for sale 6,180 sq. ft. The appellant has also purchased another property adjacent to the above layout and applied for layout approval of 17,078 sq.m. (4.22 acres) during 2013. The BDO issued a proceedings dated 3.9.2020 by stating that out of total area reserved area of 21,476 sq.f t to park and 7,748 sq. ft commercial space an area of 20350 sq. ft was only gifted to panchayat and balance of 8874 sq. ft has not been gifted to panchayat. After the receipt of the notice the

appellant has sent a reply regarding the wrongly mentioned measurements. Since it was not rectified by the officials the appellant has filed writ petition before the High Court of Madras in W.P.No.25272 of 2021 and the same is pending adjudication. Hence the order of the Regulatory Authority has to be set aside.

3. The learned counsel for the association would submit that the club house has been maintained by the association right from inception therefore there was no maintenance that was to be paid. Only used by outsiders were chargeable. Swimming pool, gym and recreation room are kept locked by the appellant, even though the maintenance of these facilities was done by the association till recently. Kitchen and medical room have also been locked by the appellant as these facilities were ordered to be handed to the local body by BDO as per DTCP order. Because of this the association members are not having access to proper facilities and food is cooked in a villa and home delivered to members by association and medical facilities are run in a room inside that villa which is not ideal. Therefore the order of the authority has no infirmity and the grounds putforth by the appellant are not sufficient to interfere with the findings. Hence the appeal has to be dismissed.

4. Point for consideration:

Whether the appeal deserves to be allowed or not?

Point:

5. The appellant is the promoter and the respondent is the home owners association. The association came forward with the complaint before the

Regulatory Authority for the relief of handing over the land in which common amenities are located to the association of owners and for related common amenities and facilities and also for registration of the project. After contest the Regulatory Authority came to a conclusion that registration is not necessary and directed the promoter to hand over the land in which the common amenities were located to the association of allottees. Aggrieved upon the same the promoter came forward with this appeal by allowing the appeal to dismiss the complaint of the association. These are all admitted facts.

6. The disputed facts with regard to handing over of land in which the common amenities are located. According to the appellant the land in which the common amenities are located are absolutely belongs to him and the respondent is entitled to enjoy the facilities by paying charges. It is the duty of the promoter to provide facilities at the cost of the respondent. But the respondent denied the claim of the appellant on the ground that in the brochure the promoter agreed for providing facilities and services. Which one of the contention is sustainable has to be analyzed.

7. The appellant relied the construction agreement and the respondent relied the brochure for the above said facilities. Now let us see the brochure as well as construction agreement with regard to this dispute are as follows (Typedset of the appellant Part B page No.2):

Other facilities & services available

- ***Separate vegetarian and non vegetarian restaurants***
- ***Multipurpose Clubhouse with community centre, library and auditorium.***
- ***Sports complex with swimming pool, gym, Jacuzzi, indoor & outdoor games.***
- ***Walking/jogging tracks***
- ***24 Hours Security***

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- ***Power backup for lighting and fans***
- ***Ambulance***
- ***Common area maintenance***
- ***Cottage housekeeping & maintenance***
- ***Travel desk***
- ***Assistance to pay electricity, telephone bills, taxes etc***
- ***Assistance to rent out your cottage.***

(Typedset of the appellant at page No.26-C)

Agreement for construction

11. The Harmony shall manage and maintain the amenities and services listed in Annexure-II and the facilities listed in Annexure-III for an annual maintains charges payable as per the terms agreed upon.

12. The Harmony shall own the facilities in Annexure-III and also manage and maintain the facilities in Annexure III on payment of annual charges as determined by the Harmony.

ANNEXURE-II

Common area facilities, amenities and services

1. ***Common Parking area***
2. ***Perimeter compound wall***
3. ***Landscape and garden***
4. ***Garden pathways, jogging/walking track etc***
5. ***Storage rooms for maintenance goods***
6. ***Water pump-motors***
7. ***Water storage tank***
8. ***Water treatment plant***
9. ***Sewage treatment plant***
10. ***Backup generator for lighting and fans***
11. ***Ambulance***
12. ***Street lighting***
13. ***Security services***
14. ***Housekeeping and Maintenance services (common area and for cottages)***
15. ***Electrical, water, sewage and drainage systems pertaining to the Phase II DTCP approved layout No.16/2013.***

ANNEXURE-III

Facilities, area/building/equipment etc., owned and possessed by the Harmony

1. ***Multipurpose Clubhouse with community centre, library and auditorium and all equipments, fittings and facilities therein.***
2. ***Office Room (offering utility, travel and rental services)***
3. ***Restaurant***

a. ***Kitchen, storeroom, ladies and gents toilets***
b. ***Kitchen equipment***
c. ***Furniture and fittings***

4. ***Sports complex area with Swimming pool (and water source), Gym, Jacuzzi, outdoor and indoor games with all equipments, furniture and fittings.***

8. As per the agreement for construction clause No.11 the promoter and an individual allottee has agreed that the amenities and services listed in Annexure II and the facilities listed in Annexure III for an annual maintains charges payable as per the terms agreed upon. In clause No.12 it has been specifically mentioned about the ownership of the facilities in Annexure III and also manage and maintain the facilities in Annexure III on payment of annual charges. The above said two conditions were accepted by the individual allottees. Against that agreement now the association has prayed for to hand over the land in which common amenities like WTP, Genset, EB room and BSNL room has not been handed over to the association of owners as per prayer No.6.

9. In the complaint filed by the association through Form 'M' before the Regulatory Authority in page No.7 of the complaint at paragraph No.9(c) the association has claimed the handing over of land in which the common amenities are located. But the association has not stated how they are entitled to the above said land and how they are claiming against the agreement for construction. Furthermore after hearing of both side arguments this Tribunal called for clarification from both sides. Both the appellant and the respondent filed affidavits for clarification. On the side of the respondent an affidavit was filed in which in paragraph No.2 it has been stated as "the club house has been

maintained by the association right from the inception therefore there was no maintenance that was to be paid only used by outsiders were chargeable".

10. During the course of argument both the counsels brought to the notice of the court that as per the construction agreement and agreement between the parties the club house and the other amenities offered to the respondents are to be owned only by the promoter. The agreement specifies this that the promoter is the owner of the not only the land but also the club house premises as well as the restaurant premises. It is also brought to the notice of the Tribunal that the home buyers are entitled to utilize the club house, the restaurant, the swimming pool of course on payment of necessary charges. At this point of time the learned counsel for the respondent fairly admitted that the owner of the land will expect returns for his investment and they are ready to pay the maintenance charges if the facilities are provided by the promoter properly. Though there was a dispute that the maintenance was done by the association or by the promoter it is now very much clear that the promoter has to necessarily provide the facility namely the club house, restaurant, swimming pool as they have admitted these facilities would be provided even in the brochure. At the same time this Tribunal also makes it very clear as the promoter is the owner of these facilities they are entitled to collect the necessary usage fees from the home buyers for their use. Now comes the question the quantum of payment of usage fees. No doubt this Tribunal cannot fix the usage fees as it could be only mutually agreed upon between the parties. We also find from the records the promoter has claimed certain amount as sq. foot fees which was not acceptable by the home buyers. It is for both of them to sit across preferably with a valuer to fix the necessary fees for their usage. At

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the same time we make it very clear that it is the bounden duty of the promoter to continue this facility without any hitches for the benefit of the home buyer.

11. In view of our discussion and admission between the parties the direction of the RERA authority to hand over the land wherein the club house is located cannot be granted, when we have specifically accepted the plea from both parties that the ownership of the land wherein the club house is located lies only with the builder.

12. Therefore this Tribunal comes to a conclusion that regarding the handing over of land in which the common amenities were located, the order of the authority has to be set aside.

13. The next contention with regard to issue with DTCP regarding discrepancy in the land for provision of shops. The counsels for the appellant and the respondent have admitted about the pendency of the writ petition W.P.No.25272 of 2021 pending before the Hon'ble High Court of Madras, regarding the discrepancy in the measurement for provision of shops. We also find in paragraph No.49 of the order a direction has been given by the authority that all the amenities such as Water Treatment Plant, STP backup generator etc., are located in the common areas to be vested with the association of allotees. No doubt it is correct that these things admittedly should belong only to the association of allottees. But in this case since there is a discrepancy and there is a dispute in regard to the land in which the such amenities are situated are now pending before the High Court in Adjudication and as the matter is sub-judice we cannot pass any orders regarding the land it is left open at the same time we make it clear that it is the bounden duty of the promoter to see

that all these amenities are continued provided to the home buyers. In this connection we would like to extract the portion from the affidavit file by the builder during their clarification sought for by this Tribunal in which the builder has even undertaken to compensate by paying even the guidelines or allot some other land which is in his custody namely the 'Kadai lands'.

14. As per the undertaking the promoter has to see that at all costs the club house and all other amenities including the restaurant should be provided at any cost to the home buyers dehorse any difficulty which may be faced by the promoter so far as the land is concerned. Therefore the direction given by the authority in paragraph No. 49 in that order is subject to the result in the writ petition. Hence as the matter is pending adjudication no order can be passed at this moment in this regard.

15. Therefore this Tribunal finds that except the handing over of the land to the association in which the common amenities are located, the other findings by the learned Regulatory Authority are not liable to be set aside or modified. Hence this Tribunal comes to a conclusion that this appeal is liable to be allowed in part. The point is answered accordingly.

16. In the result, by allowing this appeal in part the order of the Regulatory Authority in C.No.78/2020 dated 10.06.2021 is partly set aside and partly confirmed as follows:

a) With regard to handing over of land in which common amenities are located cannot be handed over to the respondent association,

b) The appellant is liable to provide the common amenities to the respondent association and its members as per the agreement of construction

between the individual home buyers and the promoter and the home buyers in turn has to pay the necessary usage fees for the amenities like the club house. Sd/- xxx Maintenance charges Sd/- xxx

c) The order of the Regulatory Authority is confirmed regarding other findings and directions. 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 14th Day of February 2022.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
JUDL. MEMBER

(X) Amended as per order in R.P.No. 2/22 dated 28.03.2022. Sd/- xxx

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