BEFORE THE TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL (TNREAT)

(Tamil Nadu, Puducherry, Andaman & Nicobar Islands)

(Under the Real Estate Regulation And Development Act 2016)

Reserved on: 25.08.2023

Delivered on:13.09.2023

Coram : Hon'ble Mr.Justice M.Duraiswamy, Chairperson
Mr.R.Padmanabhan, Judicial Member

Appeal No.32 of 2023

A.Ashok Kumar,
rep by his Power of Attorney T.Arumugam ... Appellant

- Vs -

1. M/s. Kgeyes Residency (P) Ltd
   rep. by its Managing Director

2. Udita Residents' Welfare Association
   rep. by its President ... Respondents

Prayer: The appeal has been filed under Section 44 of the Real Estate (Regulation and Development) Act, 2016 to set aside the order dated 09.02.2023 passed by Tamil Nadu Real Estate Regulatory Authority in C.No.21 of 2022.

Appellant : Mr. T.Arumugam, Party-in-Person
Power of Attorney of Appellant

For 1st Respondent : Mr. S. Ramesh

For 2nd Respondent : Mr. Amalnath.E.K

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ORDER

The brief facts that are relevant for the disposal of the above appeal are as follows:

1. The appellant is the subsequent purchaser of a residential apartment No.G-03, in the real estate project " UDITA" developed by the 1st respondent. The vendor of the appellant, namely, one M.Jyothiprakash entered into a construction agreement with the 1st respondent/promoter on 22.08.2005. After the construction was over, the apartment No.G-03 was handed over to the said Jyothiprakash during March 2007. At the time of his purchase, the appellant came to know that there was an unresolved dispute between his vendor and the 1st respondent/promoter in respect of the allotment of car parking.

2. Stepping into the shoes of his vendor, the appellant contended that as per the Construction Agreement, the cost of construction of the apartment includes one covered car parking described in Schedule-G of the Construction Agreement dated 22.08.2005. It is alleged by the appellant that the 1st respondent/promoter demanded Rs.1,00,000/- as car parking charges, the vendor of the appellant refused to pay. As a result, the 1st respondent/promoter cancelled the car parking allotted to the vendor of the appellant and re-allotted the car parking to another allottee. Challenging the cancellation and reallotment, the vendor of the appellant said to have issued a legal notice during August 2009.

3. Seven years thereafter, the appellant purchased the apartment No.G-03 from the original owner Jyothiprakash on 01.07.2016 vide registered Sale Deed. According to the appellant, he has been pursuing

the matter for allotment of car parking as per the Construction Agreement since the date of his purchase. After six years, the appellant preferred a complaint before TNRERA in C.No.21/2022. After enquiry, the said complaint was dismissed by TNRERA vide impugned order. Aggrieved over the same, the appellant has preferred this appeal before this Tribunal.

4. Per contra, the learned counsel for the 1st respondent contended that at the time of booking the apartment on 22.08.2005, the vendor of the appellant, by name Jyothiprakash, did not opt for allotment of a car parking and availed the benefit of deduction of Rs.1,00,000/- from the total cost and that was the reason why there was no mention about the allotment of the car parking in the booking letter dated 22.08.2005. The net cost of construction was fixed at Rs.27,60,000/-, but the vendor of the appellant had paid only a sum of Rs.26,60,000/- as per the booking letter, which was duly signed by the vendor of the appellant. It is the case of the respondent that possession of the flat alone was handed over to the vendor of the appellant during March 2007 and not the car parking.

5. As an afterthought, the vendor of the appellant demanded for allotment of car parking. But the 1st respondent/promoter was demanding payment for the allotment of car parking in all his correspondences dated 08.11.2008, 30.12.2008 and 20.01.2009. Ultimately, as no payment towards car parking was received from the vendor of the appellant, the 1st respondent/promoter allotted the car parking reserved for the vendor of the appellant to another allottee, by name Fernando, on 23.02.2009. Thereafter, there was exchange of legal notices between vendor of the appellant and the 1st respondent/promoter on this issue. The learned

counsel for the 1st respondent/Promoter contended that even in the Sale Deed dated 01.07.2016, there is no mention about the car parking. With this, the learned counsel for the 1st respondent prayed for dismissal of the appeal.

6. Heard both sides.

7. It is true that there is a mention in the Construction Agreement dated 22.08.2005 that the cost of construction includes one covered car parking. However in the allotment letter, which was issued simultaneously on the same day i.e., on 22.08.2005, there is no mention about the allotment of car parking. The possession of the flat was handed over to the vendor of the appellant during March 2007. Even after taking possession of the apartment, the issue of car parking was lingering between the vendor of the appellant and the 1st respondent/promoter from November 2008 onwards. The subsequent letter correspondences between the vendor of the appellant and the 1st respondent/promoter dated 08.11.2008, 30.12.2008, 12.01.2009, 20.01.2009 and 23.02.2009 clearly show that there was some serious dispute in respect of the allotment of car parking.

8. During February 2009, the 1st respondent/Promoter cancelled and re-allotted the car parking to one Fernando and the same was communicated to the vendor of the appellant by the 1st respondent/promoter vide letter dated 23.02.2009. But the vendor of the appellant, took 6 months time to issue legal notice dated 22.08.2009 to the 1st respondent/promoter questioning the cancellation. Except issuing the legal notice dated 22.08.2009, the vendor of the appellant has not

initiated any legal action against the 1st respondent/promoter for the alleged illegal cancellation of car parking.

9. After being silent for over 7 years, the original allottee Jyothiprakash sold the apartment to the present appellant herein vide Sale Deed dated 01.07.2016. Even in the said sale deed dated 01.07.2016, there is no mention about the car parking. If really the vendor of the appellant was in possession of the car parking as claimed by him in his legal notice dated 22.08.2009, he would have specifically mentioned about the car parking in the Sale Deed itself. The appellant, who knew very well about the dispute with regard to the car parking from the date of his purchase of the apartment, also have not initiated any legal action in respect of the car parking for nearly 6 years from the date of his purchase. The appellant preferred the complaint in C.No.21/2022 before TNRERA only in the year 2022.

10. At the outset, the claim of the appellant with regard to the car parking is clearly barred by limitation as the same was not filed within 3 years from the date of his purchase of the apartment. The application of Limitation Act is not barred in view of Section 88 of the Real Estate (Regulation and Development) Act, 2016.

11. The appellant further contended that as per the Apartment Ownership Act, 1994, car parking area being common area, the 1st respondent/promoter is not entitled to charge any amount separately for the allotment of car parking. As per the definition under Section 3(o) of the Apartment Ownership Act, 1994, those common areas and facilities reserved for certain apartment or apartments to the exclusion of the other apartments is defined as limited common areas and facilities.

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Section 3(o) of the Apartment Ownership Act 1994, is reproduced hereunder for ready reference:

> *3. (o) "limited common areas and facilities" means those common areas and facilities designated in the Deed of Apartment as reserved for certain apartment or apartments to the exclusion of the other apartments"*

12. As per the above said definition, there could be common areas reserved for certain apartment or apartments to the exclusion of the other apartments. So the car parking, though provided in a common area, is the reserved common area for certain apartment or apartments to the exclusion of the other apartments. Common area and limited common area are not one and the same. While "common area" is common for all the allottees, "limited common area" is reserved for an allottee or allottees to the exclusion of other allottees. Therefore, the contention of the appellant cannot be accepted.

13. Coming to the next aspect with regard to the right of the promoter to charge separately for the car parking, Hon'ble Supreme Court in "Nahalchand Laloochand Pvt. Ltd. Vs Panchali Co-operative Housing Society Ltd" judgment reported in (2010) 9 SCC 536, in paragraphs 60 and 61 has held as follows:

> *"60. We have now come to the last question namely-- what are the rights of a promoter vis-`-vis society (of flat purchasers) in respect of stilt parking space/s. It was argued that the right of the promoter to dispose of the stilt parking space is a matter falling within the domain of the promoter's contractual, legal and fundamental right and such right is not affected. This argument is founded on the premise, firstly, that stilt parking space is a `flat' by*

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itself within the meaning of Section 2(a-1) and in the alternative that it is not part of `common areas'. But we have already held that `stilt parking space' is not covered by the term `garage' much less a `flat' and that it is part of `common areas'.

61. As a necessary corollary to the answers given by us to question nos. (i) to (iii), it must be held that stilt parking space/s being part of `common areas' of the building developed by the promoter, the only right that the promoter has, is to charge the cost thereof in proportion to the carpet area of the flat from each flat purchaser. Such stilt parking space being neither `flat' under Section 2(a-1) nor `garage' within the meaning of that provision is not sellable at all."

14. In view of the judgment of the Hon'ble Supreme Court cited supra, we hold that the promoter is entitled to charge for the car parking proportionate to the carpet area of the flat. Therefore, the contention with regard to the charging of car parking raised by the appellant is rejected. Viewing from any angle, the appeal is liable to be dismissed.

15. In the result, the appeal is dismissed. No costs.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
JUDICIAL MEMBER

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