

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

1. FAO-CARB No.20 of 2020 (O&M)
Date of Decision: December 23rd, 2020

M/s Landmark Apartments Pvt. Limited

...Appellant

Versus

Advance India Projects Limited

...Respondent

2. FAO-CARB No.21 of 2020 (O&M)

Advance India Projects Limited

...Appellant

Versus

M/s Landmark Apartments Pvt. Limited

...Respondent

**CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH
HON'BLE MR. JUSTICE ASHOK KUMAR VERMA**

Present: Mr. Narender Hooda, Senior Advocate
with Mr. Sajjan Singh, Advocate
for the appellant (in FAO-CARB-20-2020)
for the respondent (in FAO-CARB-21-2020).

Mr. Puneet Bali, Senior Advocate
with Mr. Uday Agnihotri and Mr. Sachin Jain, Advocates
for the appellant (in FAO-CARB-21-2020)
for the respondent (in FAO-CARB-20-2020).

(PROCEEDINGS THROUGH V.C.)

AUGUSTINE GEORGE MASIH, J.

By this order, we propose to decide the above-mentioned two appeals, which arise from the order dated 04.11.2020 passed by the Additional District Judge-cum-Presiding Judge, Exclusive Commercial Court at Gurugram, while deciding a petition under Section 9 of the Arbitration and Conciliation Act, 1996, preferred by M/s Landmark Apartments Private Limited.

2. Briefly the facts are that M/s Landmark Apartment Private Limited (hereinafter referred to as 'landowner'), obtained licence for setting up a commercial colony. The landowner entered into a development agreement dated 31.12.2015 with Advance India Projects Limited (hereinafter referred to as 'developer'). As per this agreement, the developer was to develop the project at its own cost on the parcels of land measuring 3.9562 acres i.e. 19,148.008 square yards or 1,72,332.072 square feet. As per Article 1.1 of the development agreement, current floor area ratio of the project in question was 150% and projected saleable super area was 4,31,470.9 square feet as stipulated in Annexure 9 thereof, which depicted ground floor to 11th floor i.e. 12 floors in all. It was further agreed between the parties that the floor area ratio in the project in question was to be enhanced to 175% and accordingly the saleable area was to proportionately increase by 71,911.8166 square feet super area. As per Article 1.1 under development rights sub clause (vi) and Article 2.1 (b) of the development agreement, landowner had absolute right to own, alienate, transfer, sell, convey (only post receipt of occupation certificate of project) or otherwise assign/part with possession of the developer's area with proportionate and undivided rights in project land underneath and/or other facilities at any time and to receive in its own name, retain and appropriate all sale proceeds thereof from any prospective buyers/transferees without limitation or lien in them. As per Article 2.1 (c) and sub-clause (vii) of Article 1.1, landowner had absolute right to market, brand, allot and book landowner's area i.e. as project sharing ratio on a pro rata basis with the developer's own area along with proportionate and undivided rights in the project land. In terms of

Article 4.1 of the aforesaid agreement, it was agreed that on providing and making available the project land, the developer would have exclusive and irrevocable development rights and the saleable area/units of the project will be divided vertically between both the parties in the ratio of 36.50% of the saleable area/units going to the share of landowner and 63.50% of the saleable area/units to the developer. The available car parking slots were to be also divided in the project sharing ratio.

3. It is on the basis of this that the landowner asserted that as per the current floor area ratio, the share of the landowner was 1,57,486.88 square feet super area, whereas the share of the developer comes to 2,73,984.0215 square feet super area. The landowner submits that only 1,55,336.41 square feet of super area was demarcated/allotted. Article 4.3 dealt with all areas although forming part of the project area but not demarcated as saleable areas/units for the landowner or developer specifically, the party shall have indivisible right over the same in the project sharing ratio. Revenue arising from such areas either through sale or lease or licence etc. shall be based on mutual discussion between the parties and such revenues were to be shared by the parties in their project sharing ratio. However, if any of the parties, without prior written approval of the other party, sold the said area, the basic sale price for such area shall be deemed to be the minimum sale price of the ground floor as on date of such sale and the defaulting party shall pay to the other party the entire revenue realized from such transaction irrespective of the project sharing ratio.

4. Article 13.3 dealt with the already constructed basements by the landowner, which provided for reimbursement of the same. The amount

had to be determined mutually within a period of six months and in case of there being no such agreement, the matter had to be referred to mutually appointed independent management consultant whose advise was to be binding on the parties.

5. On 30.09.2016, two separate agreement to sell were executed between the landowner and the developer. In the first agreement, the landowner agreed to sell its 36.50% share being 1774.53 square feet in auditorium 1 to the developer and as per the second agreement, the landowner sold his share of 36.50% share being 1998.38 square feet in auditorium 3 to the developer. Again on 02.01.2017, the landowner entered into another agreement to sell with the developer transferring an area measuring 21,092.92 square feet super area detailed in Annexure-B of the said agreement.

6. The landowner applied for enhanced floor area ratio of 175% and in pursuance thereto, the same was approved in the year 2020. Accordingly the area of project was enhanced to 71,911.82 square feet super area in addition to the earlier saleable area. Landowner became owner of additional area of 26,247.81 square feet. His total area, therefore, came to 1,83,734.69 square feet super area. As per the stand of the landowner through the above-mentioned sale deeds, 1,07,708.69 square feet of landowner's area was purchased by it and the landowner was left with approximately 57,858 square feet super area out of which 29,575.35 square feet area was demarcated in development agreement and balance 28,284.65 square feet area approximately was not demarcated.

7. A dispute arose between the parties when the landowner asserts

that he came to know that the developer has sold the share of the landowner without there being demarcation of the area and that too in excess of his share, thus, pressed into service Article 4.3 of the development agreement. The apprehension of the landowner was that the money is being siphoned off by the developer. It is under these circumstances that petition under Section 9 of the Arbitration and Conciliation Act, 1996, was preferred.

The Presiding Judge, Exclusive Commercial Court at Gurugram, on the basis of the pleadings and the documents placed on record, came to the conclusion that after the enhancement of the floor area ratio from 150% to 175%, there was increase in the total saleable area in the project. The demarcated area as reflected in Annexure-7 of the development agreement was up to 11th floor and beyond that, from 12th floor to 15th floor, the area was undemarcated. Sale of the said undemarcated area by the developer, without the consent of the landowner, attracted the provisions of Article 4.3 of the development agreement and thereafter proceeded to assess the minimum sale price of the said undemarcated area directing the developer to furnish security to the tune of ₹92 crore in the shape of irrevocable bank guarantee within a period of one month from the date of the order, which bank guarantee, if not furnished in time, would render the prayers made in the petition allowed. The order of bank guarantee shall be effective for initially 90 days and in case of landowner invoking arbitration, the said order would remain operative till the conclusion of the arbitration proceedings. The landowner, if fails to invoke arbitration within the time granted, that would not entitle him to seek further extension in the order.

8. This order dated 04.11.2020 has been challenged by both the parties.

9. The landowner has preferred FAO-CARB No.20 of 2020, wherein it has been contended that the Court below has not restrained the developer from alienating any area of the project concerned nor has it restrained the developer from handing over possession of the area falling in the share of the landowner. Plea has also been made that the Court has not directed the developer to collect the sale proceeds only in the accounts as mentioned in para 29 of the petition filed under Section 9 of the Act. The Court has taken away the right of the landowner to retain the area, which would have fallen in the share of the landowner in case of demarcation of the said area as per the development agreement. Minimum selling price has also been wrongly assessed at the rate of ₹16,500 per square feet, whereas it should have been at the rate of ₹23,000/- per square feet. The developer should have been directed to deposit the bank guarantees for areas already sold by it from ground to 11th floor and from 12th to 15th floor and further restraining the developer from alienating balance super area and on this basis, had sought the partial setting aside of the order passed by the Court below under challenge.

10. On the other hand, developer has preferred FAO-CARB No.21 of 2020 challenging the order dated 04.11.2020 passed by the Additional District Judge-cum-Presiding Judge, Exclusive Commercial Court at Gurugram on the ground that the Court below has erred in wrongly interpreting Annexure-9 of the development agreement while ignoring the very purpose for which it was mentioned there. It is in fact a mere project

sale schedule and it was meant for the purpose of reference in booking the landowner's area of a floor. The total saleable area of the project is provided in Annexure-7 of the development agreement, which deals with the division of saleable area/units between the landowner and the developer. Reference has also been made to Article 4.2, which provides for saleable area/units of the project, which has been divided in the project sharing ratio as per Annexure-7. Relying upon Article 3.2 of the agreement, it is asserted that the developer had the exclusive authority to plan, design, construct and develop the project. It is contended that the Court below had failed to appreciate that the floor area of the lower floor plates was reduced and the floor area ratio was unlocked and as a result of such deduction, additional floors were constructed. Existing floor area ratio had been utilized to raise the construction and not the additional floors. It is asserted that Article 4.3 would not be attracted in the present case and the same has been wrongly interpreted by the Court below. The Court below has wrongly proceeded on the assumption that the undemarcated area has been sold without mutual discussion with the landowner and, therefore, he is entitled to the entire revenue realized from such sale. The Court below has failed to appreciate that the said clause is applicable only on non-saleable areas of the project and no non-saleable area of the project has been sold by the developer. It is asserted that the Court below has erroneously proceeded on the assumption that the enhanced floor area ratio has become available only after sanction was granted on 30.01.2020. This is apparently wrong as the construction up to 15th floor was completed much before the said date on which the building plan was sanctioned.

As regards the minimum selling price as assessed by the Court below, it is asserted by the developer that the agreement dated 16.01.2020, which has been taken into consideration, also points out with regard to the amount due towards the landowner i.e. ₹24,53,00,000/- as on the said date. If that be the liability of the developer towards the landowner, the same would not be sustainable as a loan of ₹13,13,26,900/- was extended to the landowner by the developer. Had the said aspect been taken into consideration, the figure of ₹92 crore would have been moderated by the sum of money alone. An amount of ₹10,30,88,361/-, which was due towards the share of the landowner in respect to the interior cost, was required to be set off, which also has not been taken into consideration. Qua the calculation of the minimum selling price, it is asserted that as per the various sale deeds, the amount comes to ₹7,700/- per square feet, whereas the Court below has wrongly taken that as ₹16,500/- per square feet. On this basis, prayer has been made for setting aside the impugned order dated 04.11.2020.

11. Counsel for the parties have been heard in detail, who argued their cases on the basis of the pleadings and have taken this Court through various documents attached with the appeals to project and justify their respective stands in support of their submissions.

12. The undisputed facts which come to light going through the pleadings and documents are that the landowner and the developer entered into a development agreement dated 31.12.2015 in parcels of land measuring 1,72,332.072 square feet. According to the definitions as provided for in Article 1.1, current floor area ratio was taken and calculated

at the rate of 150% of the project at the time of execution of the agreement. Current FSI was assessed as 2,58,498.108 square feet as per the then prevalent zoning plan. Development rights were solely and exclusively given to the developer of the project with the rights to take all decisions relating to the project including implementation, designing, development, construction and marketing of the project. The absolute right to market, brand, allot and book the landowner's share in the project sharing ratio on pro rate basis with the developer's area along with proportionate and undivided rights in the project land was given to it. Proceeds of such allotment, booking, transfer of the saleable area/units falling within the landowner's area was given to the developer but the same was to be collected in the name of the landowner. Enhanced floor area ratio, which would be applicable to the project pursuant to receipt of approval letter, calculated at the rate of 175%. Enhanced FSI available for the construction of the project calculated at enhanced floor area ratio was 3,01,581.126 square feet. Minimum selling price was to be the basic sale price for the sale of saleable areas/units at given point of time till the completion of the project and as agreed between the parties. Project area shall mean and include area constructed and developed as units, parking, basement, terrace and other saleable/non-saleable area/unit, facilities and any of all the other developed and undeveloped areas in the project. Saleable areas/units shall mean and include retail shops, multiplex, commercial offices, service apartments or any other form of unit and other transferable areas to be constructed and developed as part of the project as the developer deems fit.

Article 3 deals with development and construction of project,

according to which the prerogative was given to the developer. As regards the additional area on account of enhanced floor area ratio is concerned, it was mentioned that the same will be shared by the parties in the project sharing ratio as per Clause 7 and in case of any change of area upon approval of revised building plan based on enhanced floor area ratio, both the parties shall jointly identify the units forming part of landowner's share/allocation. Developer was also authorized to execute the documents prescribed in the agreement on behalf of the landowner as an attorney holder of the landowner.

Article 4 deals with the project sharing ratio, security deposit and payment milestones. Here again, the developer's rights are mentioned and the saleable area/units of the project will be divided vertically between the landowner and the developer in the ratio of 36.50% and 63.50%. The number of car parking slots available shall also be divided in the said ratio. All areas forming the part of the project and not earmarked as saleable area/unit or either the landowner or the developer specifically would be an indivisible right, the party shall have the indivisible right for the same in the project area ratio and the revenue generated therefrom shall be shared in the same ratio. If any area, which has not been demarcated, is sold by either party without prior written approval of the other party, the basic sale price shall be deemed to be the minimum selling price of the ground floor as on date of such sale and the defaulting party shall pay the other party entire revenue utilized from such transaction irrespective of the project sharing ratio.

Article 13 deals with the basement cost, which was to be paid

to the landowner.

Article 13.3 specifically provides that in case the parties are unable to mutually agree to arrive at the basement cost within 30 days of signing the agreement, independent project management consultant would be appointed mutually by the parties, who will assess the cost on the price prevailing at the time of signing of the agreement, which price shall be binding on the parties. The amount had to be disbursed in three equal instalments by the developer to the landowner in the 7th, 9th and 12th month.

13. These are the relevant clauses of the agreement. When seen in the light of the pleadings and the documents placed on record, the issue involved in the dispute relates to the floor area ratio and that too whether with the increase in the floor area ratio from 150% when the development agreement was executed to enhance floor area ratio at the rate of 175% on 30.01.2020 would there be a consequent increase in saleable area of the landowner and the developer or not?

Apart from this, another question which requires to be answered, is whether Article 4.3 of development agreement dated 31.12.2015 will be applicable in the facts and circumstances of the case, which would be dependent upon the fact as to whether the respective share of the landowner as well as the developer have been earmarked in the agreement taking the floor area ratio as 150% or 175% and further as to whether the area, which has been sold by the developer without demarcation would call for invoking of the proviso to Article 4.3.

Connected with this would be also the rate of minimum selling price as assessed by the Court below. Two documents which would be

relevant for determining this issue are Annexures P-7 and P-9 to the development agreement. Perusal of the same would clearly establish that what has been perceived is a project up to 11th floor and accordingly the respective shares have also been culled out. No doubt, as per Article 3.2, which does indicate that the enhanced floor area ratio has been shared by the parties in the project sharing ratio as per Annexure 7 but the said annexure also does not indicate that it covers up to 15th floor. It is true that Annexure 9 is the projected sale schedule for a span of three years but that clearly indicates that it is up to the 11th floor only. The consequence, therefore, as drawn by the Court below with regard to the enhancement of the floor area ratio with the project going up to 15th floor cannot be faulted with.

Another aspect which also adds credence to the conclusion drawn by the Court below is that the formal approval for enhanced floor area ratio was received on 30.01.2020 and it is thereafter only that the floor area ratio was enhanced from 150% to 175%. The obvious conclusion thereof is that the floor area having increased from 150% to 175%, the share area of the landowner and the developer would consequently increase.

14. If that be so, the question would be whether Article 4.3 would be applicable? Article 4.3 reads as follows:-

“4.3 All areas forming part of the Project Area but not earmarked as Saleable Areas/Units for either Land Owner or Developer specifically, the Parties shall have indivisible right over the same in Project Sharing Ratio. Any revenue arising from such areas, either through sale or lease or licences, etc. shall be based on mutual

discussion between the Parties, and such revenues will be shared by the Parties in their Project Sharing Ratio.

If any of the areas which have not been demarcated are sold by either Party without the prior written approval of the other Party, the basic sale price for such area shall be deemed to be the MSP of the Ground Floor as on date of such sale and the defaulting Party shall pay to the other Party entire revenue realized from such transaction irrespective of the Project Sharing Ratio.”

A perusal of the above would show that the said clause would not be applicable to the present case, where no area earmarked as saleable areas/units out of the project area has been sold by the developer. What is being sold by the developer is the area earmarked as saleable area/unit, which falls on floors 12th to 15th. It is not the case of the landowner that the areas, which have been sold, were not saleable area/units of the project area. The initial development agreement dated 30.12.2015 did foresee an increase in the floor area ratio of the project to 175% from 150% and, therefore, it cannot be said that the floors which have been added from 12th to 15th would not be a part of the project area, which can be termed as not earmarked as saleable area/units. Further, it is not disputed by the developer that the landowner would be entitled to the proportionate share as per the project sharing ratio of earmarked saleable area/units. The order dated 04.11.2020 as passed by the Presiding Judge, Exclusive Commercial Court at Gurugram, based upon Article 4.3 of the development agreement to that extent cannot sustain. However, the proportionate share of the landowner having been sold by the developer requires to be safeguarded.

15. Learned senior counsel for the developer has made a statement

that 19,500 square feet of the saleable area/units have not been sold as yet and the same shall be kept as such till the award is pronounced by the Tribunal, which has been constituted. This, he states, would take care of the interest of the landowner. The said plea of learned senior counsel for the developer, to some extent, takes care of the interest of the landowner but keeping in view the enhanced area which would fall to the share of the landowner i.e. 31,664.44 square feet and reducing it by 19500 square feet, the remaining area comes to 12,164.44 square feet.

This area, which is left out, also needs to be secured, for which the minimum selling price needs to be assessed. Both the parties have put forth their respective minimum selling price based upon various documents, which have been placed on record. The landowner asserts that the minimum selling price should be at the rate of ₹23,000/- per square feet, whereas the developer claims it to be ₹7,000/- per square feet. Rate of the minimum selling price needs to be assessed in the year 2020, when the enhanced floor area ratio of 175% was approved by the competent authority. In the considered view of this Court, the admitted loan agreement dated 16.01.2020 executed between the developer and M/s L&T Housing Advance Limited would be the best available document, according to which the minimum selling price would be at the rate of ₹16,500/- per square feet. Taking minimum selling price as ₹16,500/- as the rate per square feet, the approximate amount for 12164.44 square feet area, which would fall in the share of the landowner, would come to ₹21 crore.

16. In view of the above, we allow both the appeals in part by modifying the order dated 04.11.2020 passed by the learned

Additional District Judge-cum-Presiding Judge, Exclusive Commercial Court at Gurugram, by directing Advance India Projects Limited, the developer, to furnish security to the tune of ₹21 crore in the shape of irrevocable bank guarantee within a period of 15 days from today. Further, Advance India Project Limited shall be bound by the statement made by their counsel, as recorded above and, therefore, shall not alienate in any manner the saleable area/units for 19,500 square feet.

17. It has been brought to the notice of the Court that the Tribunal stands constituted and, therefore, this order shall operate unless modified or varied by the said Tribunal.

(AUGUSTINE GEORGE MASIH)
JUDGE

December 23rd, 2020
Puneet

(ASHOK KUMAR VERMA)
JUDGE

Whether speaking/reasoned: Yes

Whether Reportable: Yes