

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No. 1273 of 2022(O&M)
Date of Decision:12.09.2022

M/s Orris Infrastructure Private Limited

.....Petitioner

Versus

M/s Be Office Automation

..... Respondent

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. Maninder Singh, Sr. Advocate
with Mr. Surjeet Bhadu, Advocate
for the petitioner.

Mr. Ashwani Kumar Chopra, Sr. Advocate
with Mr. Vidul Kapoor, Advocate

&

Mr. Anand Chhibar, Sr. Advocate
with Mr. Lalit Thakur, Advocate;

&

Mr. Amit Jhanji, Sr. Advocate
with Ms. Nitika Garg, Advocate
for the caveator-respondent.

LISA GILL, J(Oral).

Petitioner seeks setting aside of order dated 09.03.2022, Annexure P-1, passed by the learned Additional District Judge-cum-Presiding Judge Exclusive Commercial Court at Gurugram, whereby application under Order XXI Rule 10 of the Code of Civil Procedure, 1908 (for short CPC) filed by the respondent has been allowed while passing the directions as detailed therein.

Brief facts necessary for adjudication of the matter are that

present petitioner, who is the claimant in arbitration proceedings and judgment debtor (JD) in execution proceedings claims to be a real estate developer. In the year 2007, 19 acres of contiguous parcel of land was aggregated by the petitioner after collaborating with various land owners in the revenue estate of Badha, Sector 85, Tehsil and District Gurgaon for developing a group housing colony. Respondent (DH), also the counter claimant in arbitration proceedings is the owner of land measuring 5.8 acres adjacent to the land already aggregated by the petitioner. Collaboration agreement was entered into between the parties on 22.10.2007, Annexure P-2, wherein it was agreed that respondent would be entitled to all rights, title and interest to the extent of $1/3^{\text{rd}}$ of the total saleable area along with proportionate rights in the open area, parking, terrace, roof and in all other areas which cannot be divided. Petitioner-developer was entitled to retain balance $2/3^{\text{rd}}$ of the total saleable area. It is further provided that total saleable area out of sanctioned F.S.I on the said land by the Director Town and Country Planning (for short 'DTCP') would be shared in the ratio of 1/3:2/3 (owner: developer). It is also provided in the collaboration agreement that in case of any loss of FSI or saleable built-up area due to land coming in sector-road or any other reason, final sanctioned FSI on aforesaid land will be shared between owner and developer as per their share of 1/3:2/3 (owner : developer). Respondent also executed an irrevocable General Power of Attorney (for short GPA) dated 22.10.2007 in favour of the petitioner for the purpose of obtaining permission for change of land use, procuring license for getting sanctioned site plans and for obtaining all approvals necessary for the purpose of raising construction and for dealing with sale of constructed/ unconstructed and developed or un-developed portions of the group housing colony. License no. 39 of 2009 was granted by

the DTCP, Haryana for setting up the group housing colony on land measuring 25.018 acres. It was decided on 24.01.2011 between the parties that 82 apartments in various towers of the group housing colony and 2 villas as identified would be the entitlement of the respondent and the same was subject to final reconciliation of the area. Minutes of Meeting dated 24.01.2011, Annexure P-4, were drawn up.

It is submitted that petitioner during the process of development of 25.018 acres collaborated with other land owners for additional contiguous area of 4.05 acres and applied for additional license for development of group housing colony on the said additional area as well. Additional license bearing no. 99 of 2011 in respect to the additional land was sanctioned by the DTCP. It is submitted that at this stage, respondent with an ulterior motive to harass the petitioner unreasonably demanded 1/3rd share over the additional 4.05 acres of land which was not even contributed by the respondent and even went on to cancel the irrevocable GPA in total and complete breach of terms and conditions of the collaboration agreement. It is submitted that due to revision in the site plan, location of 9 out of 82 apartments which were initially allocated to the respondent as per mutual agreement dated 24.01.2011, had changed. Therefore, Respondent was requested to choose alternative apartments in place of displaced apartments.

Learned counsel submits that respondent with an ulterior motive to make wrongful gains made an unreasonable demand of 1/3rd share over the additional 4.05 acres of land which was not contributed by it and even went ahead to revoke the registered GPA dated 22.10.2007 in order to pressurize the petitioner. Petitioner filed a petition under Section 9 of the Arbitration and Conciliation Act (for short 'Arbitration Act') in September 2012 with the respondent also filing a petition under Section 9 of the

Arbitration Act in October 2012. Learned Additional District Judge, Gurugram vide decision dated 20.11.2014 (Annexure P-8) in the application filed by the respondent under Section 9 of the Arbitration Act, restrained the petitioner from creating any third party interest in respect of any of the apartments, villas, commercial areas etc., till the matter was finally decided by the learned Arbitrator. Petitioner was further restrained from receipt of any money in respect of any sale thereof. FAO No. 9901 of 2014 was preferred by the petitioner challenging decision dated 20.11.2014, Annexure P-8. Interim measure granted in favour of the respondent was restricted to the one already mutually agreed upon and allocated share and restraint on the remaining project was vacated vide interim order dated 08.12.2014, Annexure P-9 passed in abovesaid FAO.

ARB No. 190 of 2014, was filed by the petitioner which was disposed of on 30.01.2015 while appointing a retired judge of the Hon'ble Supreme Court (Mr. Justice Chandramauli Kumar Prasad) as Sole Arbitrator, who consequently entered reference. Interim arbitral award was passed on 19.08.2015 by virtue of which cancellation of GPA was held to be non-est and bad in law. Interim award was challenged by the respondent before the learned Additional District Judge, Gurugram in ARB No. 99 of 2015, which was withdrawn by the respondent. Counter claim was filed by the respondent.

Relief as originally set-forth by the claimant reads as under:-

- (a) pass an Award directing the respondent specifically to perform the term of the Collaboration Agreement;
- (b) in addition to the above, direct the respondent to pay to the claimant, an amount of Rs. 25,66,47,492/- (Rupees Twenty Five Crores Sixty Six Lakhs Forty Seven Thousand Four Hundred and Ninety Two) as damages;

- (c) Pass an award declaring that the respondent is entitled only to the extent of $1/3^{\text{rd}}$ of the saleable area relatable to the said land of 46 Kanal 8 Marla i.e., 5.8 acres contributed by the respondent under the Collaboration Agreement dated 22.10.2007;
- (c1) “pass an order declaring the revocation of the General Power of Attorney dated 22.10.2007 by the respondent as non-est and bad in law”. (as amended vide order dated 13.05.2015);
- (d) pass an award declaring that respondent is not entitled to $1/3^{\text{rd}}$ share over the additional 4.05 acres of land which was not contributed by the respondent;
- (e) pass an award declaring that the area entitlement of the respondent as calculated and recorded in the Minutes of Meeting dated January 24, 2011 is correct and valid;
- (f) pass an award declaring the revocation of the General Power of Attorney dated 22.10.2007 by the respondent as none-est and bad in law;
- (g) in the alternative to relief (f) above, pass an award cancelling the purported revocation of the General Power of Attorney dated 22.10.2007;
- (h) pass an award directing payment of interest @ 18% per annum on all amounts due and payable by the respondent to the claimant;
- (i) pass an award directing payment of costs of present Arbitration proceedings in favour of the claimant and against the respondent.”

Relief as originally claimed by the respondent in its counter claim reads as under:-

- “(a) Declare that the Counter-Claimant by virtue of Collaboration Agreement dated 22.10.2007 is entitled to $1/3^{\text{rd}}$ of saleable area proportionate to the 5.80 acres of land contributed in the entire project admeasuring 29.06 acres, AND
- (b) Declare that the counter-claimant’s share in terms of

percentage in the project admeasuring 29.06 acres comes out to 19.96%, and $\frac{1}{3}^{\text{rd}}$ of 19.96% is the counter claimant's allocation, which is 6.65 % in the entire project admeasuring 29.06 acres, AND

- (c) Declare that the counter-claimant is entitled to the extent of 6.65% of the entire saleable area Flats/Villages/ Parking/ Shops/ Commercial/ Convenient Shopping and School etc.,)in fully developed Residential Complex admeasuring 29.06 acres including proportionate rights in the open area, parking, terrace, basement, roof and all other areas, which cannot be divided, AND
- (d) Determine, apportion, demarcate and identify the number of flats/ villas/ parking/ shops/ commercial/ convenient shopping and school etc., falling in share of the counter claimant, AND
- (e) Direct original claimant (M/s Orris Infrastructure Pvt., Ltd.) to earmark and hand over vacant peaceful possession of areas (Flats/ villas/ parking/ shops/ commercial/ convenient shopping and School etc.,) falling into the share of the counter claimant, AND
- (f) Direct Original Claimant (m/s Orris Infrastructure Pvt., Ltd.,) to execute necessary documentation towards passing of clear, effective and marketable title in favour of counter claimant towards the allocation of such flats/ villages/ parking/ shops/ commercial/ convenient shopping and school etc., inclusive of executing necessary NOC and ' Deed of Apartment ' from his side, AND
- (g) Direct Original Claimant (M/s Orris Infrastructure Pvt., Ltd.,) to make immediate payment towards 6 flats which had fallen in the share of counter claimant vide Minutes of the Meeting dated 24.01.2011 but has been sold/ booked by the claimant in favour of third party.
- (h) Award pre-quantified and pre-agreed penalty/ damages, in terms of Clause 35 (f) of the Collaboration Agreement, form the claimant (M/s Orris Infrastructure Pvt., Ltd.,) in

favour of the counter claimant, AND

- (i) Award damages to the extent of Rs.25 crores on account of failure of original claimant (M/s Orris Infrastructure Pvt., Ltd.), to pass on the allocation in terms of Collaboration Agreement dated 22.10.2007 in time bound manner and delaying the entire process by raising frivolous disputes, AND
- (j) Award damages suffered by the counter claimant on account of being engaged in unnecessary litigation, more particularly the expenses towards lawyer's fee, tribunal fee, litigation expenses incurred at Chandigarh High Court etc., AND
- (k) Direct original claimant (M/s Orris Infrastructure Pvt., Ltd.) to give proportionate representation to the counter claimant in the "association of apartment owners" which under the provisions of Haryana Apartment Ownership Act, is to maintain the housing project 'Group Housing, Sector 85, Gurgaon' being marked under the name of 'Carnation Residency', Aster Court, Aster Court Premium' and keep the books of expenses open for inspection by the counter claimant or his CA, AND
- (l) any other prayer, which this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case."

Respondent vide application dated 19.06.2016, withdrew and deleted some of the reliefs and admitted one of the relief sought by the claimant, which reads as under:-

"2. The respondent to shorten the issues/ controversies respectfully submit that the respondent is not pressing the following reliefs as prayed by them in their counter claim before your Honour.

- (a) Declare that the counter claimant by virtue of Collaboration Agreement dated 22.10.2007 is entitled to 1/3rd of saleable area proportionate to the 5.80 acres of land contributed in the entire project admeasuring 29.06. acres, AND
- (b) Declare that the counter claimant's share in

terms of percentage in the project admeasuring 29.06 acres comes out to 19.96% and $\frac{1}{3}^{\text{rd}}$ of 19.96% is the counter claimant's allocation which is 6.65% in the entire project admeasuring 29.06 acres.

- (c) Declare that the counter claimant is entitled to the extent of 6.65% of the entire saleable area (flats/ villas/ parking/ shops/ commercial/ convenient shopping and school etc.) in fully develop residential complex admeasuring 29.06 acres including proportionate rights in the open area, parking, basement, roof and all other areas which cannot be divided. AND
 - (g) Direct original claimant (M/s Orris Infrastructure Pvt., Ltd.) to make immediate payment towards 6 flats which had fallen in the share of counter claimant vide Minutes of the Meeting dated 24.01.2011 but has been sold/ booked by the claimant in favour of third party.
3. The respondent admits the following reliefs as no. d as prayed by the claimant in its Statement of Claim.
- “(d) pass an award declaring the respondent is not entitled to $\frac{1}{3}^{\text{rd}}$ share over the additional 4.05 acres of land which was not contributed by the respondent.”

Followings issues were then framed by the learned Arbitrator on the basis of pleadings:-

1. Whether the entitlement of the Counter Claimant to $\frac{1}{3}^{\text{rd}}$ of the saleable area shall fall within the land of 46 kanals 8 marla i.e., 5.8 acres contributed by it under the collaboration agreement dated 22.10.2007?
2. Whether or not the owner shall be entitled to all rights, title and interest over fully developed residential complex to the extent of $\frac{1}{3}$ of the total saleable area along with proportionate right, interest in land including proportionate right in the open area, parking, terrace, roof and all other area which cannot be divided.
3. Whether the Minutes of the Meeting dated 24.01.2011 is legally valid document and capable

to be enforced?

4. Whether the Counter Claimant is entitled to an additional area over and above its share as mutually agreed between the parties and recorded in the Minutes of Meeting dated 24.01.2011?
5. Whether or not Counter Claimant has appointed FAR of 1.75 as mentioned in para no.17 of the Statement of Claim and if the issue is answered in affirmative the Counter claimant shall be entitled to be an additional area on account of revision of site plan?
6. Whether any of the party to contract has committed the breach of collaboration agreement and if so, its effect and consequences?
7. Whether any of the party to the contract is entitled for any sum and interest if so, for what period and at what rate?
8. How part of Counter Claimant area as per collaboration agreement can be demarcated and possession given to it?
9. Relief.

Final award was passed by the learned Arbitrator on 12.12.2016.

Issue no.1 was answered in the negative against the respondent and in favour of the claimant by holding that respondent's area does not necessarily fall within the land contributed by it. Issue no.3 was answered in negative against the respondent by holding that Minutes of Meeting dated 24.01.2011 do not suffer from any illegality. Issue no.4 was answered accordingly to the extent that respondent was not entitled to 1/3rd share over the additional 4.05 acres of land. In view of the findings on the abovesaid issues and the fact that the respondent had deleted the relief, it was held that issue no.5 do not require adjudication. None of the parties were held entitled

to penalty or damages thereby deciding issues no.6 and 7.

In respect to issue no.2, respondent has been held entitled to 1,41,357 sq. ft., in residential complex and 418.06 sq. ft., in the commercial/shop area. It was held that respondent shall get all the 82 apartments mentioned in the Minutes of Meeting dated 24.01.2011, excepting the dislocated 9 apartments and the claimant (petitioner) shall give option to the respondent to choose 9 apartments in the residential complex so that its entitlement to the extent of 141357 sq. ft., is satisfied. In case of deficit, respondent would be entitled to balance area in other apartments. Respondent was also held entitled to 418.6 sq ft., in commercial and shopping area besides two villas along with proportionate right in the open area, parking, terrace, roof and all other areas which cannot be divided. Respondent was further held entitled to receive one-third of the sale proceeds of flats constructed under EWS. Issues no.8 and 9, were answered accordingly.

Respondent challenged award dated 12.12.2016 before the learned Additional District Judge, Gurugram, under Section 34 of the Arbitration Act and also filed an application under Section 36 (2) of the Arbitration Act. It is submitted that in the meantime, petitioner handed over physical possession of 82 flats with the keys thereof and two shops on 18.01.2017 and 09.02.2017, to the respondent as per Award dated 12.12.2016. Reference in this regard is made to report dated 18.01.2017 of the Naib Tehsildar regarding handing over of physical possession thereof. Respondent is stated to have approached the Divisional Commissioner, Gurugram, with the request to stay registration of property of the petitioner's project with immediate effect till the litigation is over on the ground of pending development work in the flats, possession of which had been

received by the respondent.

An enquiry was ordered by the Divisional Commissioner, Gurugram, vide order dated 28.03.2017 with directions being issued to ensure that no property or part thereof is alienated by the petitioner. CWP No. 9075 of 2017 was filed by the petitioner challenging order dated 28.03.2017. Said writ petition was allowed on 07.12.2017 with order dated 28.03.2017 being set aside. An application under Section 9 of the Arbitration Act, is then stated to have been filed by the respondent on 09.08.2017 seeking restraint on alienation of inventory of the project, which was allowed by the learned Additional District Judge, Gurugram, vide order dated 08.12.2017, Annexure P-18, which is the subject matter of challenge in FAO-CARB-9 of 2018, pending adjudication before a Division Bench of this High Court.

Respondent, it is stated filed an execution application seeking execution of award dated 12.12.2016, while annexing certain documents which were not even part of the original arbitration proceedings. Petitioner, it is submitted filed its objections while submitting that the award already stands satisfied as the respondent has handed over almost the entire entitlement of the respondent under the award.

An application under Section 151 CPC was filed by the respondent in the execution proceedings seeking restraint against the petitioner, which was however dismissed vide order dated 13.02.2019, Annexure P-21, which is the subject matter of challenge by respondent in CR No. 1356 of 2019.

Learned Additional District Judge, Gurugram, vide impugned order dated 09.03.2022 proceeded to decide the execution application while holding that allocation of 82 apartments and 2 shops in the Group Housing

Colony, does not satisfy entitlement of the respondent to area of 141357 sq., ft., as determined by the learned Arbitrator. Therefore, respondent was held entitled to 44 more flats out of the list as available on record so as to make good the deficit of area measuring 50365.49 sq., ft. saleable area Present petitioner is also directed to make good the deficit of area measuring 214.85 sq. ft., in respect of commercial and shopping area. Following directions were issued to the petitioner-JD:-

- “(i) JD is directed to allot and deliver possession of 44 flats out of the list of flats available at page no.243 in favour of DH forthwith so as make good the deficit of area measuring 50365.49 sq.ft. Till the time, it is so done, restraint order in respect of remaining two flat nos., 1206, tower 2A and 1302, Tower D5 shall continue;
- (ii) JD is directed to make good the deficit of area measuring 214.85 sq. ft., in respect of commercial and shopping area forthwith;
- (iii) JD is directed to allot and deliver possession of 2 villas in favour of DH forthwith;
- (iv) JD is directed to release amount of Rs.1,32,00,000/- in favour of DH in respect of sale consideration of EWS Flats with immediate effect;
- (v) JD is directed to render accounts qua sale of 5 flats on or before next date fixed in this case;
- (vi) JD is directed to allot and deliver possession of 185 parking bays in favour of DH with immediate effect; and
- (vii) JD is directed to execute all necessary documents pertaining to area of DH’s entitlement as per award without any delay.”

Aggrieved therefrom, present revision petition has been filed.

Learned senior counsel for the petitioner vehemently argues that the learned executing Court has travelled much beyond its jurisdiction as it is not open to the executing Court to go beyond the decree. Respondent, it is

argued raised a new question before the learned executing Court regarding getting area in the residential complex on the basis of 'Carpet Area' instead of saleable area. It is contended that the term "saleable area" is not defined in the agreement and its natural meaning would necessarily mean the area which is capable of being sold for a price. Section 54 of the Transfer of Property Act, 1882 (for short 'TP Act'), it is submitted defines "Sale" as "transfer of ownership in exchange for a price paid or promised or part paid and part promised." Therefore, this term 'saleable area' would necessarily mean the area which the developer can sell in exchange for a price. Respondent itself, it is contended is selling the area of flat as per claim of the petitioner and is admittedly receiving money thereof. Reference is made to specific instances of sale by the respondent of the plot measuring 1500 sq. ft., which is otherwise taken to be 1139.90 sq. ft. by the respondent for the purpose of execution proceedings. Moreover, for all 82 apartments, the Builder Buyer Agreements were entered into between the petitioner and the respondent in the year 2011 itself and area of each flat has been mentioned in accordance with the stand of the petitioner. The entire difficulty, it is submitted arose only when the additional area of 5 acres was included in the project. While referring to application under Section 9 of the Arbitration Act, filed by the respondent on 03.10.2012, it is submitted that it is the case of the respondent itself that entitlement of the said respondent has increased because of the increase in the total area of the project and the revised site plan and that allotment of flats vide settlement dated 24.01.2011 has become inoperative. Vacillating stands, it is contended have been taken by the respondent which have been deprecated by the learned Arbitrator.

Learned counsel further submits that respondent in its objection under Section 34 of the Arbitration Act raised the specific question of

saleable area etc., but admittedly respondent confined its claim only to four of the points therein viz (i) cancellation of GPA dated 22.10.2007, (ii) respondent's claim for damages for delay in offering of possession of petitioner's share in the area, (iii) decision of the arbitrator whereby respondent's claim for share in the colony has been declined and (iv) the remarks in the award regarding club membership to be expunged. Respondent did not choose to agitate qua the others grounds. Respondent, it is contended has been varying its stand as regards his entitlement at different points of time. At one time, respondent raised a claim of 97 flats and then 117, 146 and even 202 flats without any basis or reason, which was the subject matter of criticism by the learned Arbitrator. It is submitted that direction by the learned Additional District Judge to allot and handover possession of 44 flats is totally unjustified as the learned Additional District Judge has proceeded purely on assumptions and presumptions while proceeding to carve out a totally new case for the respondent, contrary to award dated 12.12.2016. Learned senior counsel submitted that in any case, learned Additional District Judge, before pronouncing its interpretation of 'Saleable Area' with reference to Haryana Building Code etc., should have afforded an opportunity to the petitioner to lead evidence in the matter. Learned Additional District Judge, it is submitted has further ignored the fact that third party rights have already been created in the flats. As regards consideration for the EWS flats, the sale proceeds, it is submitted can be received only upon sale thereof and as sale of EWS flats is to be made by the Deputy Commissioner by draw of lots, payment qua the same should not have been directed. This direction is stated to be in direct contravention to the direction given in award dated 12.12.2016. It is thus prayed that order dated 09.03.2022 passed by the learned Additional District Judge,

Gurugram, being totally unjustified, unwarranted and illegal be set aside.

Per contra, learned senior counsel for the respondent while refuting arguments raised by learned counsel for the petitioner argued that impugned order dated 09.03.2022 is a well reasoned and logical order passed in accordance with the provisions of law. It is submitted that impugned order is in consonance with the directions given by the learned Arbitrator and there is no question of learned executing Court going beyond the decree. It is submitted that the learned Arbitrator has held the respondent entitled to 1,41,357 sq. ft., area in the residential complex and 418.06 sq. ft., area in the commercial/ shopping area. Allocation of 82 flats clearly does not satisfy the same. It has been held by the learned Arbitrator that in case of any deficit, respondent shall be entitled to such balance area in the other apartments. Therefore, learned executing Court has rightly directed handing over of the possession of 44 flats in order to complete the deficit.

Learned counsel for the respondent submits that evidence of Ms. Kavita Aggarwal (CW-2) i.e., a witness of the petitioner itself has been accepted and in consonance thereof, entitlement of the respondent as directed by the learned executing Court is clear. Reference was further made to the observation of the Arbitrator in respect to saleable area, which has been held to “mean such area which can be legally transferred for exclusive use of the transferee”. It is submitted that the learned Arbitrator has clearly held that “for the purpose of determination of price, the common area and the area for utilizing facilities, if not prohibited by law, may be taken into account but for the purpose of calculation of the saleable area, those have to be excluded”. In this view of the matter, it is contended learned executing Court has only directed deficit to be made good and no fault can be found therein. It is thus prayed that this revision petition be dismissed.

Heard learned counsel for the parties and have gone through the file with their assistance.

Dispute as narrated above between the parties, is a matter of record. Controversy in this matter revolves around the question whether factum of allotment of 82 apartments and shops in the group housing colony satisfies entitlement of respondent as per award dated 12.12.2016 and whether learned executing Court while going into the question of interpretation of 'saleable area' has exceeded its jurisdiction.

At this stage, it is relevant to note that as per Collaboration Agreement dated 22.10.2007, Annexure P-2, executed between the parties, it was agreed as under:-

'the owner shall be entitled to all rights, title and interest over fully developed residential complex to the extent of 1/3rd share of the total saleable area along with proportionate right/ interest in land including proportionate rights in the open area, parking terrace, roof and in all other areas, which cannot be divided. The developer shall be entitled to retain balance 2/3rd of total saleable area along with proportionate right/ interest in land including proportionate rights in the open area, parking terrace, roof and in all other areas, which cannot be divided of the said commercial. Total saleable area out of sanctioned F.S.I on the said land by DTCP (HUDA) shall be shared in the ration of 1/3:2/3 (owner: developer). Any loss or increase in FS.I., due to any reason shall be shared on prorate basis of the share of owner and developer. If any loss of F.S.I or saleable built-up area is due to land coming in sector-road or any other reason, final sanctioned FSI on aforesaid land will be shared between owner and developer as per there share, that is 1/3:2/3 (owner :developer). Also in owners share of 1/3rd all land owner shall get there share on prorate basis of their land (owned by each owner of this share)'.

Admittedly, vide Minutes of Meeting dated 24.01.2011, 82 flats

and two villas, were identified to be allocated to the respondent in concert with the collaboration agreement dated 22.10.2007. As per Clause 4 of Minutes of Meeting, the same was subject to final reconciliation of area.

Basic foundation of the arguments raised by learned counsel for the petitioner was that respondent had raised a claim to flats more than 82 in number only after additional area of 4.05 acres had been aggregated by the petitioner-developer. Therefore, it was urged that once the number of flats etc., had been determined in the Minutes of Meeting dated 24.01.2011, there was no question of any additional flats being given to the said respondent. Question of any deficit in the saleable area, it is submitted did not arise in the given facts and circumstances and executing Court has proceeded erroneously while treading into a field which was beyond its purview.

It is settled position that an executing Court cannot go beyond the decree and is to implement the same as it is. It is not for the executing Court to enter the arena of interpretation of decree except to find out the meaning or intent of the decree/judgment/award. Equally settled is the position that a decree, even if erroneous, would be binding between the parties, until and unless set aside by the Court of competent jurisdiction. Executing Court, in any case, has no jurisdiction to entertain any objection *qua* validity of the same. Hon'ble Supreme Court in **Shivshankar Gurgar Vs. Dilip, 2014(2) SCC 465** has held that an executing Court cannot go beyond decree and has no jurisdiction to modify a decree but is bound to execute the same as it is. As per Section 36 of the Arbitration Act, an Arbitral Award has to be enforced in the same manner as if it were a decree of the Court. Thus, award dated 12.12.2016, Annexure P-14, has to be implemented as it is by the executing Court without any kind of interpretation of its own.

For this purpose, it is necessary to refer to the arbitral award dated 12.12.2016, Annexure P-14, wherein while deciding issue no.2, it is categorically held by the learned Arbitrator that parties have not joined on the issue of entitlement of 1/3rd of the total saleable area, but the controversy is in the manner of its calculation. Issue no.2 is reproduced again as below:-

“2. Whether or not the owner shall be entitled to all rights, title and interest over fully developed residential complex to the extent of 1/3 of the total saleable area along with proportionate right, interest in land including proportionate right in the open area, parking, terrace, roof and all other area which cannot be divided.”

The expression “saleable area” has not been defined either in the collaboration agreement or in the Minutes of Meeting dated 24.01.2011 i.e., the two documents executed between the parties. Detailed reference has been made by learned Arbitrator, to the stand taken by the respondent and its pleadings in the Statement of defence as well as the counter claim. Plea of the respondent that its share would increase on account of additional 4.05 acres of land, besides the plea that super area, school, club, common area etc., should be taken into account for calculating saleable area, is duly noticed. Learned Arbitrator while holding that such addition of super area etc., is untenable observed as under:-

“In my considered opinion ‘saleable area’ would mean such area which can be legally transferred for exclusive use of the transferee. For the purpose of determination of price, the common area and the area for utilizing facilities, if not prohibited by law, may be taken into account but for the purpose of calculation of the saleable area, those have to be excluded. According to the evidence of CW2 Kavita Aggarwal, the saleable area of the project comprise of flats and villas along with undivided interest in the common area which flow to the flats/villas owners by virtue of the Haryana Apartment

Ownership Act. This witness has given in detail, the details of the project and total FAR for saleable area and the Respondent’s entitlement on the basis of the saleable area. According to her, calculated on that basis Respondent shall be entitled to 141357 sq. ft. (one Lakh Forty One Thousand Three Hundred Fifty Seven Only).”

Learned Arbitrator has then referred to the stand of the respondent inasmuch as firstly claim of 117 flats/villas was raised, thereafter RW-1-Amit Yadav i.e., a witness of the respondent claimed entitlement of saleable area to be 197206 sq. ft in the residential project, which is equivalent to 146 flats and thereafter, claim of 30.5 lacs sq. ft., in the additional affidavit. It is thus observed that in this view of the vacillating stand of the respondent, it is difficult to accept the methodology if any, used by the respondent for calculating saleable area as the said witness seems to have forgotten the difference between the built up area and saleable area. It is in this vein it is recorded that evidence and claim of the respondent in this regard is rejected. Methodology of calculation of saleable area by respondent was not found to be discernable.

Learned Arbitrator thereafter considered evidence of Ms. Kavita Aggarwal-CW-2, a qualified architect examined by the petitioner, who found the respondent entitled to 141357 sq.ft., area. Calculation given by her reads as under:-

1.	Total area of site (in Acre)	29.068
2.	Total area of site (in sq.mt.)	117633.84
3.	Permissible FAR	1.75
4.	Permissible FAR (in Sq. mt.)	205859.21
5.	Consumed FAR	1.74995
6.	Consumed FAR (in Sq. mt.)	205853.60

7.	FAR for EWS 1	4915.66
8.	FAR for EWS 2	1954.20
9.	FAR for community centre	1535.92
	Total FAR <u>for</u> Saleable Area <i>(word 'for' is not mentioned in the reproduction in Award dated 12.12.2016 though present in the actual document)</i>	197447.82
	Land of B.E. Automation products Pvt. Ltd.	46 Kanals & 8 marla 46x20+8 Marlas 928.00 Marlas 5.80 Acres
	Share of B.E. Automation Pvt. Ltd. on Pro rata basis	$\frac{197447.82 \times 5.8}{29.07}$ =39397.18 sq.mt.
	Share of B.E., Automation Pvt. Ltd. on Pro rata basis	$\frac{39397.18}{3.00}$ =13132.39 sq.mt. 1,41,357 Sq. Ft.

Methodology given by the petitioner's witness has been accepted while observing as under:-

“During the course of extensive cross examination of this witness, nothing has surfaced to discredit this witness. She has explained the method of calculation of saleable area and withstood the rigor of cross-examination. This witness is therefore worthy of reliance.”

It is in this backdrop that learned Arbitrator held the respondent entitled to 141357 sq.ft in residential complex and 418.06 sq.ft., in commercial/shopping area and observed as under:-

“The respondent shall get all those 82 apartments mentioned in the Minutes of Meeting dated 24.01.2011 excepting the dislocated nine apartments. The claimant shall give option to the respondent to choose nine apartments in the residential complex, so that its entitlement to the extent of 141357sq. ft., is satisfied. In case of deficit, respondent shall be entitled to such balance area in other apartments. The respondent shall also be entitled to 418.06 (Four hundred eighteen point zero six) sq.ft.,

in commercial and shopping area besides two villas alongwith proportionate right in the open area, parking, terrace, roof and all other areas which cannot be divided. An award in the form of the preliminary decree is passed in the favour of the claimant. Also the respondent shall be entitled to receive one-third of the sale proceeds of flats constructed under EWS.”

A careful consideration and perusal of calculation given by CW-2- Kavita Aggarwal, as reproduced by the learned Arbitrator reveals that calculation has been made corresponding to the total FAR. It is specifically mentioned in affidavit dated 04.01.2016 of CW-2-Kavita Aggarwal, that area entitlement of the respondent as per the earlier sanctioned plan of 2010 was 1,14,565 sq.ft., and as per revised sanctioned plan of 2012, its entitlement is 1,41,357 sq.ft. In her affidavit, CW-2-Kavita Aggarwal has stated that computation of the area entitlement of the respondent (both in residential and commercial) in detail was attached along with her affidavit marked as Ex.CW2/1. Computation has been reproduced as above. Methodology of computation as given by CWP-2 Kavita Aggarwal has been accepted by the learned Arbitrator. The calculation as reproduced in the Award itself reveals that calculation is carried out on the basis of ‘Total FAR for Saleable Area’. Learned Arbitrator, has accepted respondent’s entitlement to be to 1,41,357 sq. ft., in residential and 418.06 sq. ft. commercial area.

It is in this backdrop that learned Executing Court while considering methodology as accepted by the learned Arbitrator carried out the calculation and came to the conclusion that *qua* area in the residential complex, it was only area of 90,991.51 sq.ft. which had been conveyed to the respondent and an area measuring 203.21 sq.ft. in the commercial and shopping area which was handed over. Thus, balance of 50,365.49 sq.ft. *qua*

residential and 214.85 sq.ft. in respect to the commercial and shopping area was found to be deficit in order to complete the entitlement of the respondent. Specific reference is made to saleable area as expounded by the learned Arbitrator as well as the observation of the learned Arbitrator that the common area and area for utilizing facilities could be taken into consideration only for the limited purpose of determination of price and that too if not prohibited by law. However, such area cannot be taken into account for the purpose of saleable area. Learned Executing Court in this regard has observed as under:-

“15. Adverting to merits of the case, having given my thoughtful consideration to the rival contentions and material available on the record, what is seen is that as per the award which has not been challenged by the JD, DH is entitled to allocation of saleable which as held by the Arbitrator means such area which can be legally transferred for exclusive use of transferee. It has also been held that the common area and the area for utilizing facilities can be taken into account only for the limited purpose of determination of price that too if not prohibited by law but such areas in any case cannot be taken into account for the purpose of calculation of saleable area. Learned Arbitrator upon appreciation of the evidence concluded that in the residential complex, entitlement of DH was to the extent of 141357 sq.ft. and for said purpose, DH was held entitled to get all the 82 apartments mentioned in the Minutes of Meeting dated 24.01.2011 except dislocated 9 Apartments. It is borne out of the record that DH has chosen 9 apartments in the residential complex and in this manner, it has obtained possession of 82 apartments. Similarly, DH has also been held entitled to 418.06 sq.ft in commercial and shopping area besides two villas along with proportionate right in the open area, parking, terrace, roof and all other areas which cannot be divided. It is also observed in the award that after allocation of 82 apartments, still if there will be deficit, DH will be entitled

to such balance area in other apartments. This is what is being claimed by the DH as already discussed above.

16. According to DH, total area of 82 flats which does not take into account the area of balconies, shafts, common areas etc., is to the tune of 90991.51 sq.ft which has been calculated in accordance with the interpretation of the Arbitrator. DH has also taken the stand that area of 82 flats as mentioned above is the same area as is mentioned in the sanctioned lay out plan and even while taking electricity connection for the colony, JD submitted a sheet to DHBVN wherein it mentioned area of each flat which is same as mentioned in sanctioned lay out plan. Identical is the stand taken in respect to two shops as well.”

Argument raised on behalf of the petitioner that reference by the learned Executing Court to the Haryana Building Code, 2017 is uncalled for, is devoid of any merit because reference has been so made keeping in view the fact that share of the respondent has been calculated by CW-2-Kavita Aggarwal, on the basis of total FAR for saleable area. In this situation, it is correctly observed by the learned Executing Court as under:-

“19. Thus, area of balconies attached to the flat is free from FAR. JD has not disputed the position with regard to FAR as can be seen from para no.5 & page no.22 of the reply. Further, learned Arbitrator has worked out decree holder’s entitlement of 141357 sq.ft., on the basis of total consumed FAR which is free from balconies. If that being so, there is no question of saleable area of 141357 sq.ft including area of balconies, shafts etc., which the JD seeks to include. So far as common areas are concerned, the same as clearly held by the Arbitrator being not part of FAR, are to be excluded while calculating saleable area to be allotted to the decree holder. According to the Arbitrator, the common areas and the area for utilizing facilities may be taken into account only for the purpose of determination of price but for the purpose of calculation of the saleable area, those areas have to be excluded.”

By raising pleas that as respondent had given up the claim in

regard to excess area on account of further aggregation of land, learned senior counsel for the petitioner had submitted that learned Arbitrator in-fact never intended such an outcome. However, this argument is rejected being untenable as what is being sought is that this Court should now go beyond the decree/award which is clearly impermissible in the given factual matrix. The award/decreed has to be read as it is and it is irrefutable that learned Arbitrator while accepting the method of computation of saleable area given by CW-2-Kavita Aggarwal has held the respondent entitled to the area as mentioned in the foregoing areas. In execution proceedings, there is no scope of dissection of the award in the manner claimed by the petitioner. Similarly, the argument that petitioner should have been permitted to lead evidence in the execution proceedings is devoid of any merit in view of the discussion in the foregoing paras as it is evident that learned executing Court has proceeded as per the mandate of award dated 12.12.2016. It is pertinent to note at this stage that petitioner had been restrained to create third party rights in respect to part of the area as narrated in foregoing paras. There is nothing on record to indicate that any third party objections were forthcoming. Thus, argument in this regard is rejected as well.

Another argument as raised was that entitlement of 141357 sq. ft for the residential complex would include the area of 2 villas. However, a plain reading of the award does not indicate the same as it is clearly stated in award dated 12.12.2016 as under:-

“The respondent shall get all those 82 apartments mentioned in the Minutes of Meeting dated 24.01.2011 excepting the dislocated nine apartments. The claimant shall give option to the respondent to choose nine apartments in the residential complex, so that its entitlement to the extent of 141357sq. ft., is satisfied. In case of deficit, respondent shall

be entitled to such balance area in other apartments. The respondent shall also be entitled to 418.06 (Four hundred eighteen point zero six) sq.ft., in commercial and shopping area **besides two villas alongwith proportionate right in the open area, parking, terrace, roof and all other areas which cannot be divided.** (Emphasis added)”

The use of word ‘besides’ in conjunction with 2 villas necessarily indicates that area of said 2 villas cannot be inclusive of 141357 sq. ft. Similarly, learned counsel for the petitioner is unable to point out any infirmity in the direction by the learned Executing Court directing release of the amount in respect to the sale consideration of EWS flats or allotment and delivery of possession of 185 parking bays in favour of the respondent. Once right of proportionate parking has not been disputed by the petitioner, there is no ground for denying said claim of the respondent. Learned Executing Court in the given factual matrix has proceeded for executing of the award as it is and in case of an error therein, the remedy in such a situation clearly lies elsewhere. It is not open for the learned Executing Court to go beyond the decree in any manner.

Learned counsel for the petitioner is unable to point out any illegality, infirmity or perversity in impugned order dated 09.03.2022, passed by the learned Additional District Judge-cum- Presiding Judge, Exclusive Commercial Court at Gurugram, which calls for interference by this Court in exercise of revisional jurisdiction.

No other argument has been raised.

Revision petition is accordingly dismissed.

12.09.2022
s.khan

[LISA GILL]
Judge

Whether speaking/reasoned : Yes/No.
Whether reportable : Yes/No.