

**BEFORE THE TAMILNADU REAL ESTATE
APPELLATE TRIBUNAL (TNREAT)
(TAMIL NADU, PUDUCHERRY, ANDAMAN &
NICOBAR ISLANDS)
(Under the Real Estate Regulation and Development Act, 2016)**

Quorum : Hon'ble Justice Thiru B.Rajendran, Chairperson

APPEAL NO. 2 OF 2018

Marg Properties Limited,
Rep. by its Authorised Signatory,
K.S.Gajendra Babu,
Marg Axis,
4/318, Rajiv Gandhi Salai,
Kottivakkam,
Chennai-600041.

...Petitioner / Appellant

-Vs-

T.M.Arunachalam,
AP-470/10, 23rd Street,
"Sastha Vihar",
5th Street, (Behind PSBB School),
K.K. Nagar,
Chennai-600078

...Respondent / Respondent

Orders Reserved on 23.10.2018

Delivered on 13-11-2018

Dr.Padma, Advocate for the Appellant

The appeal has been preferred by the Promoter as
against the Order passed by the Chairperson, Tamil Nadu

Real Estate Regulatory Authority dated 28-05-2018 duly communicated by its Letter No. TNRERA/332/2017 dated 30-05-2018 on a complaint filed by one T.M.Arunachalam and his wife Mrs.Padmapriya Arun. According to the Complainant, the Appellant M/s. Marg Properties is not entitled to sell or lease any of their lands or residential apartments in the SEZ 'Marg Swarnabhoomi' to the public and persons working in other companies outside the SEZ. He also refers to the Rule 11 in SEZ rules for the above proposition. He booked his apartment on lease basis in respect of Flat no. 307 in 'G' block in the Project Utsav. According to him, in view of the wrong sale made by the promoter to persons outside the SEZ which is illegal, he may later on be put into trouble if the authority takes action. Therefore he seeks for refund of the money to a tune of Rs.14,26,367/- and also claims interest. He also further contends that he has paid his entire life savings in this project and their hopes have been shattered by the wrong doing of the promoter. He further claims a damage of Rs.30,00,000/- and that is how the claim has been made. According to the Petitioner, the agreement was entered into as early as in 04-12-2012 with an understanding that the property would be handed over to them within a period of June 2013 with a further

extension clause of 3 months only, but till date they have not completed. Therefore it can only be called as an 'Ongoing Project' within the meaning of RERA.

For the complaint made by the complainant / Respondent herein, the Appellant herein has filed a response on 29-01-2018. **As per the Lease Agreement, the apartment will be handed over within 3 months from the date of receipt of entire one time lease rental of 15,84,850/-** but there is a balance of Rs.1,58,483/- to be paid by the Complainant. Therefore he is not entitled to the relief as prayed for. Further they also contend that in the event of cancellation of Lease Deed by either party, an amount of 15% of the total upfront one time lease rental shall be forfeited from and out of the payment paid by the Lessee and the balance would be paid within 60 days on submission of papers. Further according to the Agreement, the Petitioner / Complainant is only entitled to an amount of Rs.5/- per sq. ft. for every month delay and finally they have also contend that there is an Arbitration clause which would govern the parties. Lastly they would contend that as per the definition of ongoing project under RERA, the project is structurally completed meaning that the all

columns, beams and slabs have been erected and certified by the Architect, therefore the project would not come under the purview of RERA. The Appellant / Respondent before the authority has filed another counter on 19-05-2018 that their project would not come under the purview of RERA as the Town and Country Planning Authority, after examination, has submitted a report that the project is structurally completed and hence it would not fall under the ambit of jurisdiction of RERA. They would also contend that the earlier fine imposed by the authority for non-registration of Rs.1,00,000/- (Rupees One Lakh) was withdrawn. Therefore the complaint will not lie.

On the basis of the said submissions and personal enquiry conducted by the Authority, the Authority passed an interim order on 30-05-2018 wherein it is clearly stated that even the Appellant herein and Respondent before the authority has clearly admitted that out of the 14 blocks, only 4 blocks have been completed and the remaining blocks are yet to be completed and as their project has been delayed for a quite long time, Authority directed them to furnish structural stability certificate and also directed them to obtain consent from the Complainant within two weeks and also to register the

unfinished project as per their own admission as an 'Ongoing Project', under RERA act. Aggrieved against this order, the present appeal has been filed.

The main arguments of the Appellant at the time of admissions is that the Competent Authority namely the DTCP has filed a report whereby it is stated as a completed project, as slabs, beams, columns have been erected and therefore they are exempted from the purview of RERA. Secondly they would contend that there are still huge amounts of due as balance of arrears to be paid by the Allottees and this is a SEZ project where only a lease has been granted and out of the 14 blocks, 3 blocks have been completed fully and 11 blocks are yet to be completed and the RERA authority cannot compel them to register them under the Act. The Appellant was represented by advocate Dr.Padma.

ORDER

Let me take the first objection for registering with RERA namely; it is only a Lease Deed and not a Sale Deed. Therefore the definition of 'Allottee' under the Act will not be applicable is legally not sustainable for the

following reasons. Though the document is styled as a Lease Deed, the nature of the document when read in full is indicative of that of a Sale Deed. The period of lease is 99 years which is almost that of a sale. Further the lease payment is not paid either monthly or yearly but it is a one-time full payment for the entire 99 years **lease** which could only denote that it is an upfront full payment for the entire flat. Certain clauses of the Lease Deed are extracted below for an appraisal.

1) LEASE

*The **LESSOR** doth hereby grant a lease of the **APARTMENT** more particularly described in Schedule-B hereunder for residential purposes for a period of 99 years to the **LESSEE** commencing from the date of handing over of the possession of the **APARTMENT** to the **LESSEE** by the **LESSOR** together with the right to use and right of way over the common areas in the Schedule-A property and the Special Economic Zone subject to restrictions that may be imposed by the **LESSOR** and the SEZ authorities from time to time.*

2) **CONSIDERATION FOR LEASE**

In consideration of the lease of the **APARTMENT** granted by the LESSOR in favour of the LESSEE for a period of 99 years commencing from the date of handing over of the possession of the APARTMENT to the LESSEE by the LESSOR, the LESSEE has paid a sum of Rs.14,26,367/- (Rupees Fourteen Lakhs Twenty Six Thousand Three Hundred Sixty Seven Only) towards the part amount of the total upfront one time lease rentals of Rs.15,84,850/- (Rupees Fifteen Lakhs Eighty Four Thousand Eight Hundred Fifty only) which the LESSOR hereby acknowledges and has agreed to pay the balance upfront one time lease rentals of Rs.1,58,483/- (Rupees One Lakh Fifty Eight Thousand Four Hundred Eighty Three Only) in the following manner-

1. A sum of Rs.79,243/- (Rupees Seventy Nine Thousand Two Hundred Forty Three Only) on or before 5th February, 2014.

2. A sum of Rs.79,240/- (Rupees Seventy Nine Thousand Two Hundred Forty Only) on or before 31st of December, 2014.

Without prejudice to the rights of the LESSOR under this Lease deed and/or otherwise in law, the LESSEE agrees to pay to the LESSOR an interest at the rate of 15% p.a. on all the amounts which become due and payable under the terms of this Lease Deed, but remaining unpaid by the LESSEE, whether demanded by the LESSOR or not, as also all reasonable charges for recovery of the amounts due as may be incurred by the LESSOR, in this regard. However, in case of default for a continuous period of more than three months from the due date, the interest shall have to paid @ 24% p.a from the original due date till entire amount due and payable with interest is received by the LESSOR.

3) HANDING OVER POSSESSION

The LESSOR shall handover the possession of the APARTMENT within 31st December, 2014. In the event the LESSEE has paid the entire upfront one

time lease rentals of Rs.15,84,850/- (Rupees Fifteen Lakhs Eighty Four Thousand Eight Hundred and Fifty only) and other amounts as stated above to the LESSOR and the LESSOR delays the handing over of the possession of APARTMENT to the LESSEE beyond three months from the date aforesaid, the same will be considered as delay by the LESSOR and for such delay beyond three months as stated above, **the LESSOR agrees to pay to the LESSEE an amount of Rs.5/- per sq.ft., for each month's delay.**

5) LESSEE'S COVENANTS

(a) ...

(b) ...

(c)....

(d)

e) The LESSEE shall abide by the guidelines, rules, regulations and statutory provisions including but without limitation of Special Economic Zone Act, 2005 as may be applicable to an SEZ from time to time and the parties have agreed that this lease deed shall always be subject to the same. In the event of the Special Economic Zones Act, 2005 and the Rules and Regulations thereof requiring this Lease Deed to

be amended, the parties agree to amend this lease deed to conform to the provisions of the Special Economic Zones Act, 2005 and the Rules and Regulations thereof and terms of approval granted to the LESSOR. In addition, the Parties also agreed to amend this Lease Deed to conform to any statutory regulations governing the Special Economic zones.

n) The LESSEE hereby agrees and confirms that he shall alone be responsible and shall pay at all times all taxes, levies, water taxes, electricity charges, sewage and drinking water charges, electricity charges, common maintenance charges payable either to the developer, statutory authorities or to other service providers and other general common charges and the service tax as may be applicable with respect to the APARTMENT leased to him.

o) The LESSEE shall insure the APARTMENT and the keep the insurance in force during the currency of the lease.

6) LESSOR'S COVENANTS

(a) The LESSOR assures the LESSEE that the LESSOR has the absolute right to lease the said APARTMENT and receive lease premium, upfront lease rentals and to execute and register this Lease Deed in favour of the LESSEE.

(c) The LESSOR further declares that the said Schedule-A property is not or otherwise encumbered to anyone else or any other statutory authority or any other person in any manner whatsoever.

11) RENEWAL

This lease deed shall be renewed without payment of any rent automatically for a further period of 99 years upon expiry of the 99 years period of this lease deed on similar or identical terms and conditions.

Even the property tax is to be paid by the LESSEE which clearly means that he becomes the owner of the property.

A reading of the above clauses would clearly indicate that it is not a Lease Deed as no rental is paid. It is only a one-time upfront fee namely equivalent to a sale deed or purchase price being paid in one lump sum. Further in this case, the Allottee has also paid nearly 90% of the entire sale amount as an upfront payment, the balance of course has to be paid in two installments much later after the completion of the work. In view of the non-completion, the balance has not been paid. Therefore literally speaking, he has already almost paid in full the payment for the flat. Even the renewal clause says that it will be given for another 99 years so to say that the period given is for eternity. Hence it has all the trampling of a sale deed rather than a lease deed.

Further in the definition of Allottee under section 2(d) of the RERA act, also includes the word 'has been allotted, sold (whether as a freehold or leasehold or otherwise transferred by the Promoter). Therefore the inclusive definition of the Allottee also includes the leasehold rights if it is a long term say for instance for 99 years plus 99 years as renewal.

In this connection, I am fortified by the Judgment of Bombay High Court made in

Lavasa Corporation Limited, Mumbai

- (Appellant/Applicant)

Versus

Jitendra Jagdish Tulsiani & Another

- Respondents

**made in Second Appeal (Stamp) No. 9717 of
2018 with Civil Application No. 683 of 2018**

**Order dated 7th August, 2018 by the Hon'ble
Division Bench**

in which the Bombay RERA Appellate Tribunal's order was challenged wherein also a question arose whether an Agreement of Lease will be covered by the provisions of RERA particularly, whether the definition of the term 'Promoter' as provided under Section 2(z)(k) in RERA would include the Lessor and whether a remedy provided to the Allottee under section 18 of the RERA can be available only against the promoter and in that sense also against the Lessor. The Division Bench of Honourable

Bombay High Court formulated the three questions of laws;

- (i) Whether the Appellate Tribunal has committed an error in holding that the provisions of the RERA are applicable to the 'Agreement of Lease' executed between Appellant and Respondents?
- (ii) Whether the Appellate Tribunal has committed an error in holding that the 'Adjudicating Authority' under the RERA has jurisdiction to entertain the complaints filed by the Respondents under Section 18 of RERA?
- (iii) Whether the Adjudicating Authority, under the RERA, can go behind the 'Registration Certificate' of the Appellant, so as to hold that it has no jurisdiction, though the project is registered under the said Act?

And after elaborate discussion, it was clearly held that even an Agreement of Lease would also come under the purview of RERA. In that case, out of the total amount of lease money, 80% should be paid upfront and an annual rent of Rs.1 was fixed.

Thus, in this case, if the entire 'Agreement' is perused as such, when it becomes apparent on the face of it also, that it cannot be termed or treated as an 'Agreement of Lease', but, in its real purport, it is an 'Agreement of Sale'.

The Hon'ble Division Bench has held as ;

" 37. Thus it can be seen that, the enactment of the RERA is to meet the need of an hour. The need of the hour is to regulate this real estate industry and to ensure that some standardization and professionalism is brought into this real estate sector, which would help to protect not only the interests of the 'Allottees', the purchasers of the flats/the apartments, who have invested their hard-earned money to get the home of their dream, but also to protect the interests of the 'Promoters', as without protecting their interests, the interests of the 'Allottees' or the 'Consumers' also cannot be safeguarded. The Act is enacted also to encourage the growth of the real estate industry, so that the common

man's dream of a dwelling house can be fulfilled. The RERA is, therefore, essentially for regulation and health growth of the real estate sector.

43. Clause No.5.1 of the 'Agreement' further provides that, in consideration of the customer having expressly agreed to pay to Lavasa the lease premium, which is in the range of Rs.32 to 40 Lakhs, as the case may be, and which is more than 80% of the total consideration amount and the annual lease rent of Rs.1/- for the said apartment, Lavasa agrees to grant to the customer a lease for a period of 999 years for the said apartment.

47. Thus, if the entire 'Agreement' is perused as such, then it becomes apparent on the face of it also, that it cannot be termed or treated as an 'Agreement of Lease', but, in its real purport, it is an 'Agreement of Sale'. The very fact that more than 80% of the entire consideration amount is already paid by the Respondents to the Appellant and the lease premium agreed is

only of Rs.1/- per annum, including the clause relating to the period of lease of 999 years, are self-speaking to prove that, in reality, the transaction entered into by the parties is an 'Agreement of Sale' and not an 'Agreement of Lease'; though it is titled as such. The law is well settled that the nomenclature of the document cannot be a true test of its real intent and the document has to be read as a whole to ascertain the intention of the parties.

48. Needless to state that, in an 'Agreement of Lease', the 'Lessee' does not pay more than 80% of the consideration amount towards the price of the said apartment. In an 'Agreement of Lease', the rent cannot be Rs.1/- per annum only, for such an apartment, market rate of which is more than Rs.40 Lakhs. In an 'Agreement of Lease', parties do not pay the registration charges and stamp duty on the market value of the said apartment. The 'Agreement of Lease' also cannot be for such a long term for '999 years'. This long period of lease in itself is sufficient to hold that, it is not

an 'Agreement of Lease', but, in reality, an 'Agreement of Sale'.

49. In this context, learned counsel for the Appellant has rightly placed reliance on the Judgment of the Madras High Court in the case of Commissioner of Income Tax, Tamil Nadu-III Vs. M/s.Rane Brake Linings Ltd., Chennai, in Tax Case (Appeal) No. 1031 of 2007; decided on 7th April 2014), wherein, reliance was placed on the Judgment of the Hon'ble Apex Court in the case of R.K.Palshikar (HUF) Vs. CIT, M.P. Nagpur and Bhandara, 1988 (172) ITR 311, holding that,

"Having heard to the lease of plot for 99 years, it is clear that, under the lease in question, the Assessee has parted with an asset of an enduring nature, namely, the rights of to possession and enjoyment of the properties leased for a period of 99 years, such transaction amounts to transfer of capital assets, as contemplated

under Section 12B of the Income Tax, 1922."

50. Relying on this decision of the Apex Court in this Judgment, the Madras High Court has also held that,

"Having regard to the fact that the period of lease was of 99 years, it was as good as a lease in perpetuity or a permanent lease in as much as an alienation as a sale". It was further held that, "the mere use of the word 'lease' or the fact that a long term is fixed would not by itself make the document in lease. The payment of lumpsum amount also does not make it a permanent lease any the less an alienation than a sale".

51. Here in this case, the period of lease being of '999 years'; it is as good as the transaction in perpetuity. The payment of entire consideration amount and the lease premium @ Rs.1/- per annum only, further make the intention clear

that, it was not an 'Agreement of Lease', but, clearly an alienation, which can be called as 'sale'.

54. Though much reliance is placed by learned counsel for the Appellant on the definition of the word "Allottee", as given in Section 2(d) of the RERA, to contend that the Allottee does not include a person to whom such plot, apartment or building, as the case may be, is "given on rent", it must be remembered that, the definition of the term 'Allottee' in the present context includes even when the plot sold is a "freehold or leasehold". To that extent, it has to be held that, the definition of 'Allottee' also includes the 'Lease Agreement', though it may not include such Agreement, when the apartment is in its real sense give purely on rent and it is, in reality, an 'Agreement of Rent and Lease' and not, in effect, a transaction of sale. The object of the RERA, it may be recalled, is to regulate the real estate industry, to ensure greater accountability towards consumers and significantly to reduce frauds

and delays, to bring into it the standardization, professionalism and the transparency so that the interests of the consumers are protected. In that view of the matter, the intention of the Legislature was to protect those persons like Respondents, who have invested substantial amounts in the real estate projects. Hence, they are required to be called as 'Consumers' or 'Allottees'. If they are excluded from the definition of 'Allottee' and thereby from the protection given under the Act, by giving restrictive meaning to the term 'Allottee', the very object of the Act would stand frustrated.

59. Thus, what was the mischief, which is tried to be suppressed by enactment of this Act, needs to be considered. In respect of this enactment, the mischief was to ameliorate the sufferings of the persons, who have invested their hard-earned money in the real estate sector. The object of the RERA is to protect the 'Allottees' and simplify the remedying of the wrongs committed by the 'Promoter'. The RERA assures completion of project in time-bound

manner. The main object is to ensure accountability on the part of the Real Estate Sector and to provide a comprehensive, effective and speedy remedy to the persons, who have invested large sums of money for having a home of their dreams. The very enactment of the Act was found necessary, because it was noticed that all over the country in large number of projects, the Allottees did not get possession for years together. Huge amount of money was found locked in. Hence, to suppress this mischief and to provide effective remedy to the consumers, this law was enacted. One of the modes prescribed under the Act to regulate the Real Estate Sector was to impose some penalty on the Developer, who has failed to complete the project in stipulated time. The provisions of Section 18 of the Act are in that way compensatory in nature. As held by this Court in the case of *Neelkamal Realtors Suburban Pvt. Ltd., (Supra)*,

"when the 'Promoter' is, in effect, constructing the apartments for the 'Allottees' and the 'Allottees'

make the payment of premium, the Act requires the 'Promoter' to pay interest to the 'Allottees', whose money it is, when the project is delayed beyond the contractual/agreed period. When the 'Allottee' has parted with entire consideration for purchase of the apartment and still he is not given possession and the 'Promoter' is enjoying the benefit of the said amount of consideration, it is expected under the Act that he is bound to pay compensation to the 'Allottee'. In other words, it becomes a case of unjust enrichment on the part of the 'Promoter', if he is not liable to compensate the 'Allottees' by paying interest on the amount retained by him, the 'Authority' under the RERA also can impose penalty or interest on the 'Allottees' for contravention of the obligations cast upon both of them, in view of Section 38 of the Act. Thus, the legislation has done balancing of rights and liabilities of 'Promoters' and 'Allottees'."

61. Once it is accepted that the Act was legislated to bring some discipline, professionalism, transparency and standardization in all the projects of real estate sector, then excluding from its scope the 'Agreements' like the ones, executed in the present case, is as good as

frustrating the very object of the said Act. If the object of this Act is to ensure greater accountability towards consumer and reduce delays in completion of the real estate projects, then to hold that the agreements of the present nature, in which the Respondents have invested the substantial amount of consideration with an expectation of completion of the project within 24 months, as assured in the 'Agreements', is nothing but defeating the very purpose of the Act. Therefore, as held in Heydon's Rule, the interpretation of the statute has to be not only to suppress the mischief, but also to advance the remedy and also to suppress subtle inventions and evasions for continuance of the mischief. Interpretation of the provisions should be such as it will add force and life to the cure and remedy according to the true intent of the makers of the Act and not to defeat that intent.

65. Thus, it can be seen that the object of establishing this 'adjudicating mechanism' was to provide for speedy dispute redressal by bringing all the disputes under one umbrella. This 'redressal mechanism' is to ensure that, the consumers like the Respondents, who have invested their large amount of hard-earned money in the real estate projects, should get its returns at the earliest, either in the form of completion of the projects and possession of the apartments, or, by way of compensation with interests. If the Respondents, who have invested such money, are not allowed to approach this 'Adjudicating Authority', established under the RERA, and the 'Adjudicating Authority' merely holds that, as the 'Agreement' is titled as an 'Agreement of Lease', it has no jurisdiction to entertain their grievances raised under Section 18 of the said Act, then such interpretation cannot be in consonance and in tune with the object of the Act.

67. Here in the case, as regards the word "Allottee", as a matter of fact, it can never be the intention of the Legislature to exclude long term leases from the purview of the Act; otherwise, the Legislature would not have used the words 'freehold' or 'leasehold', when it has defined the term 'Allottee', under Section 2(d) of the Act.

68. Moreover, exclusion of such long term lease from the purview of the Act would be defeating the very object of the Act. The Developer-Promoter may, in such cases, by executing the 'Agreement' with the nomenclature as the 'Agreement of Lease', can very conveniently escape from the clutches of the provisions of this Act. When the Legislature has stated in the definition of the term 'Allottee' that it does not include the person, to whom the plot, apartment or building is "given on rent", the intention of the Legislature was only to exclude pure 'Agreements of Lease' or the 'rent', as the Lessees therein have not invested the substantial amount, like purchase price, of

the apartment in completion of the project. one may also include therein licenses, but one cannot exclude the persons, who have invested more than 80% of the purchase price of the apartment. One also cannot exclude the transactions, in which the apartment was to be built and then the possession thereof was to be handed over on payment of the entire consideration amount at the market rate. Such 'Agreements' can in no way be called as 'Agreements of Lease' at all. The intention of the Legislature, which is found reflected in the 'Objects and Reasons' of the Act and its various provisions, makes it abundantly clear that, to all the projects, wherein the possession of the apartments is to be handed over in consideration of the sale price or the market price, such projects are included under the purview of this Act. It has to be held that, the Legislature would never have intended to exclude the persons like the Respondents, who have invested their hard-earned money in such projects, from the protective and beneficial provisions of the Act."

Here the Heydon's Rule of Suppression of Mischief needs to be applied with full force and if that Rule is applied, then the provisions of the RERA are required to be held as equally applicable to the long term leases, like the present one of "999 years"; or, where the substantial amount of consideration is already obtained by the 'Developer'. Then the definition of the terms 'Allottee', or, 'Real Estate Project', or, even that of 'Promoter' are required to be interpreted in that context and not in isolation, by placing reliance simpliciter on the word 'selling' used in these three definitions. As rightly submitted by learned counsel for the Respondents, the word 'selling' is grammatical variation of the word "sold", used in section 2(d) of the Act in the definition of the term "Allottee". If the allotment of a plot, apartment or building, as the case may be, can be whether as a freehold or as leasehold, then the word 'selling' used in the definitions of 'Promoter' and 'Real Estate Project' also includes the allotment of a plot by lease. Merely because the Legislature has excluded the allotment, when it is given on rent, it does not exclude the long term lease like the present one. That will be defeating and frustrating the object of the Act and hence, it has to be held that the Appellate Tribunal has rightly held that, so far as the

present case is concerned, considering the long term lease of '999 years', it would definitely amount to sale".

The facts of the above case as decided by the Hon'ble Division Bench of the Bombay High Court, squarely applies to the facts of this case. Therefore the 1st objection for non registration is not applicable. They will come definitely under the purview of the Act for registration.

The next important point raised by the Appellant is that they have been exempted by the DTCP authorities and they come under the purview of the rule 2(h) as they have completed the structures, beams, columns of the building. In fact they have also brought to the notice of the Court originally they have been fined for non-registration and later on it was revoked because of the completion certificate was granted earlier. In this connection, the Authority has specifically recorded its statement that the Appellant has himself admitted before the Authority that they have not completed the project de-horse the completion certificate obtained from the DTCP. This fact has been further fortified and accepted by the Appellant before the Appellate Tribunal also. When a

specific question was put to the advocate whether even at this time, have they completed the project, she had fairly admitted that out of the 14 blocks in this project, only 3 blocks have been totally completed and 11 blocks are still in the process of construction and is yet to be completed. The said statement of the Learned Advocate was recorded by this Tribunal. When there is no dispute at all regarding the non completion of the project, definitely they will come under the purview of the definition 'Ongoing Project' under the Act. The mere certificate issued by the DTCP cannot take away the legal right under the Act to register when in factual aspect it is not completed as per their own admission in accordance with the Act. In this connection as regards the very same Appellant, in an identical matter, in **Appeal No. 1 of 2018 dated 23-05-2018** in the matter of

Y.Ravishankar

...Appellant

-Versus-

Marg Properties Ltd., & another

...Respondents

I have categorically held wherein a similar defence was raised by them in that case, that they have completed the project and they have been issued the DTCP certificate

but it was not accepted by this Tribunal as in that case also, they have admitted that the project has not been completed. Therefore the petition was allowed and accepting the Judgment, they have also registered in accordance with the Judgment. I am extracting a portion of the Judgment.

“Section (2)(h) defines ongoing project in the rules. When it is under a cmda area, it is covered under section 2(h)(ii) and when it is outside the Chennai Metropolitan Area, it comes under section 2(h)(iii)., when the rules have been notified in June 2017, the Developer has to intimate the Deputy Director (Town & Country Planning) within 15 days from the date of notification of the rules whether the construction is structurally completed. The rule also specifies what is the meaning of structurally completed construction. It says “construction is structurally completed meaning that all the columns, beams and slabs have been erected and certified by the Architect or structural engineer / licensed surveyor associated with the project supported by photographs”. Therefore it is mandatory

very clear in the rule that for structural completion, all the columns, beams and slabs have to be erected and should have been certified by Architect / Structural engineer. With this when we analyze the provisions of the act, namely, Section 2(e), definition of an apartment, which clearly says that “any immovable property including one or more rooms or enclosed spaces located on one or more floors or any part thereof in a building or in a plot of land, used or intended to be used for any residential or commercial use such as residence, office.” The intention of the legislature is very clear that the property should be in a usable condition by the allottee. The rules also have stated that at least the slabs, columns, beams should have been completed.

Whereas in this particular case, the Respondent has himself admitted in the 1st objection to the complaint filed before the Authority that in November 2017 in paragraph 2 very clearly that they have intimated the local authority by their letter dated 06-06- 2017 that the project has been completed in respect of all the

slabs, columns and beams except top two floors of Block B and C which means that even in November 2017, they have not completed even the slabs, columns and beams of the project in two floors. Further they have committed in the very same objection in paragraph 5(2)

“The structural works of A Block is already completed and in the case of B and C blocks, only 3 floors slab is to be casted. The internal finishing of A Block can be commenced immediately. The structural completion of B Block will require 2 months and structural completion of C block will require 3 months. Accordingly B and C blocks will require only 3 months commencing internal finishing.”

Wherein they have categorically stated that three floor slabs have to be casted. That means their admission is very clear that they have not completed their project. It could only be construed as only an ongoing project even as per their own admission. In fact even in the objections, they seek further two months time for completion of structural completion in respect of Block B and three months for

structural completion for Block C for which the Petitioner has applied. Therefore having admitted in their objection itself, that it is not structurally completed, how could they even apply to the concerned authority that it should be treated as a completed project as per the Act within 15 days from the notification of the rules which is much earlier namely on 06-06-2017. Therefore the argument of the counsel for the petitioner is very clear that on the date of the coming into force of the Act, the project has not been completed. Hence they would squarely come under the purview of the Act. Further in the course of the argument in the Appellate Forum, Learned Counsel on getting instructions from the concerned officer present in the open court, clearly admitted that on that day of their filing before the Authority in June 2017, they have not completed slabs, columns and beams for three floors. Subsequently they have completed slabs for one more floor which is after November. The counsel also relied upon the website of the DTCP regarding their application for completion. There it has

been stated as SL. No. 87 and the status of the project as stated by the Authority concerned clearly states that Block B and C, 14 floors structural work completed as per approved plan. Whereas in the objection filed in the November, they have categorically admitted that they have not completed the structure and prayed for three months time. Even now when the question is asked in the open court in the appellate forum, they have clearly admitted that further 3 – 6 months to complete the structural columns and slabs. Only then it can be used as a flat. Therefore the intention of the legislature was only for the parties to have a workable usable commodity namely a flat which cannot be construed as an incomplete flat. As per the Act, it even states that the property is intended to be used as a residential or commercial use such as residence or office or shop. Therefore the alleged mere completion of structure or beam cannot connote to the actual users entitlement. In this case, even the authority has only stated 14 floors completed whereas the approved plan is for

16 floors even as per the admission of the parties concerned. Therefore even according to the rules, they have not completed the project. Therefore in this case, the Respondent has neither finished the project either according to the Act or even the rules. Therefore it can only be called as ongoing project as even the slabs have not been completed for three floors as per the Respondent's very own admission.

Further considering the parties statement before the appellate forum, even after the coming into force of the Act, after the notification of the rules, after the application for certificate for completion of project, till date, nearly after one year of the coming into the force of the Act, admittedly they have not completed the project. Further taking into consideration, that the project has not been completed, does it not mean that it is a continuing offence? The allottee has every right to bring to the notice of the authority when there is non completion of the project on the date of the coming into force of the

Act. He has to establish that the promoter is not entitled to claim the exemption because of his continued non completion. In this particular case, as I have discussed earlier, even as per the admission of the Respondent, till date it has not been completed and hence it can only be construed as ongoing project on the date of coming into force of the Act. Therefore they cannot take the umbrage under the alleged application for completion made within the stipulated time from the notification date of the rules to say that they will not come under the provisions of the act. Therefore the main and the only contention raised by the Respondent legally they cannot be compelled to register does not stand to scrutiny. Hence it cannot be construed that the legislature intended that even persons abandoning the project merely by completing a portion within the purview of the rules, so that they can go scot free without even registration. In fact Section 3(ii) proviso in the Act, that gives the power to the authority in the interest of the allottee, if it thinks necessary if a

project has to be registered, it can direct such promoter to register. When such is the case, definitely here is a case where the respondent having admitted that the project has not been completed, in the strict sense of the law, it cannot be summarily allowed to go scot free under the pretext that he had applied within the stipulated time from the date of notification as if it has been completed. Whereas factually it has been proved till date it has not been completed at all.”

Where as in this particular case, the Respondent has himself admitted in the 1st objection to the complaint filed before this Tribunal also that they have not completed 13 blocks. Therefore definitely the Appellant would come under the purview of the act and the project can only be stated as an ongoing project. Hence it needs to be registered.

From the reading of the previous Judgment which is in respect of the very same Appellant, it is very clear that without completing the project, they had applied for DTCP Certificate and it was also given as if slabs and columns

have been erected. Only on this basis and on the certificate of DTCP, the earlier fine of Rs.1,00,000/- for non-registration was withdrawn but even now, even as per their own admission till date, they have not completed which is the finding of the Authority and also the acceptance of the Advocate and the party before the Appellate Tribunal. Hence the findings in Appeal No. 1 of 2018 will squarely apply to the facts of this case also. Mere issuance of the alleged Completion Certificate by the DTCP without the completion as per the Act will not be a ground for them not to register under the Act. Hence the project can only be treated as an 'Ongoing Project' under the Act and it has got to be necessarily registered.

The contention of the Respondent / Complainant is that the property being sold to persons who are not authorised to hold it or in alternative, it is a wrong sale made to persons who are not eligible to acquire the property. According to him it may be a cause later on for any penal action. This is also an important aspect which has to be gone into but that can be gone into only after taking evidence unless the project is itself registered, such question cannot be taken therefore also it is a fittest case

for direction to get registered to safeguard the interest of purchasers which is the paramount motto of the RERA act.

Even though a defence was raised regarding the Arbitration, no serious argument was done by the Appellant. The reference to Arbitration Act cannot be a defence to the Appellant builder in view of the fact that the Act itself came much after the Agreement and this is a Special Act which empowers certain provisions upon the Authority to exercise. One such provision is for the registration of a project namely an 'ongoing project' and also for refund which is a special provision enunciated under the Act. When the statute empowers a certain thing to be done in a certain manner, it can only be done in accordance with that particular provision of law and manner as per the Supreme Court Judgment reported in **State of Jharkhand & Ors vs Ambay Cements & Anr** dated 17th November, 2004 which has held that

"when the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It

is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed".

Earlier the Supreme Court has approved the above principle in Deep Chand vs. State of Rajasthan 1962(1) SCR 662 = AIR 1961 SC 1527 as follows :

"It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor vs. Taylor (1875) 1 Ch.D 426 which was followed by Lord Roche in Nazir Ahmad vs. King Emperor 63 Indian Appeals 372 equivalent to AIR 1936 PC 253 who stated as under :

"Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."

A contractual obligation entered earlier before the coming into force of the Act cannot deter the functions enumerated under the Act when especially they have failed to comply with the specific provision of the Act including the handing over of the building which is the crux of the matter and dispute. Therefore the clause for arbitration cannot be a bar in respect of these reliefs claimed in the complaint.

From the reading of the Order of the Authority also, they have only passed interim direction to produce the structural stability certificate as the building has not been constructed for quite a long time even as per the admission of both parties. Now in the appellate forum they have produced a copy of the structural stability certificate and later on the original. Therefore they have complied with the first part of the order. The second part of the order in getting the consent of the party complainant they have not done so. And the third part of the order is directing them to register as the Authority has rightly come to a conclusion that the project is incomplete and it will come within the definition of an ongoing project. Though the learned advocate made an attempt that there is a compromise being made between the parties with all the buyers, no document has been produced to establish this fact even though they took adjournments earlier. As I have found out and accepted the theory of the Authority, it will be only be an ongoing project as per the Act and as per their own admission for having not completed 11 blocks. Definitely the order of the authority to register under the Act is valid and the

appellant appeal cannot be entertained even in the admission stage itself as it lack in merits and bona fides. It is legally not sustainable.

The appeal is dismissed. No costs. The Appellant is granted 15 days time to register the project without fail.

Place : Chennai

Justice B.Rajendran,
Chairperson,
Tamil Nadu Real Estate
Appellate Tribunal

Dated : **13-11-2018**