BEFORE THE TAMIL NADU REAL ESTATE APPELATE TRIBUNAL (TNREAT)

(Tamil Nadu, Puducherry, Andaman & Nicobar Island)

(Under the Real Estate Regulation and Development Act 2016)

Dated : 11th July 2019

Coram : Mr.Justice B.Rajendran, Chairperson
Mr.N.Balasubramanian, Judicial Member
Ms.Leena Nair, Administrative Member

Appeal No.4 of 2018

Dakshin Homes Apartment Owners Association Represented by its President O.N.Chandran .... Appellant

AND

1. Dakshin Home Developers
2. R.R.Arun Raja
3. A.Jamuna and ... Respondents

This appeal has been preferred by the appellant / complainant against the order passed by the Tamil Nadu Real Estate Regulatory Authority dated 27.11.2017. The appellant is the complainant before the Tamil Nadu Real Estate Regulatory Authority. This appeal was coming up for final hearing in the presence of appellant as party in person Thiru O.N.Chandran and Thiru V.Srinivasan, M/s.OM SAI RAM, Advocates and Legal Consultants for respondents and upon perusing the available records and upon hearing the arguments of both sides and having stood over for consideration till this day, this Tribunal delivered the following:

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ORDER

Facts of the appellant's case in brief:

2. The appellant and respondent entered into an agreement for construction of residential apartments on 14.12.2012. The appellant has stated that the apartment is still incomplete and no completion certificate, occupancy certificate, approved building plan and none of other such documents pertaining to Dakshin Homes Project have been issued by the builder to Dakshin Homes Apartment Owners' Association. Furthermore the promoter has not completed the construction as mentioned in the approved plan. Hence the appellant sought for relief as per the RERA Act. After receipt of the complaint the Regulatory Authority passed orders on 27.11.2017 and advised the appellant to approach the Consumer Forum or Civil Court to redress their grievance since the project is completed and occupied. Hence it will not fall within the ambit of RERA. Aggrieved upon that, the appellant preferred this appeal on the ground that appeal before the Appellate Tribunal under Sec.44 of the Act is a constitutional right to the appellant to prefer an appeal before the Appellate Tribunal against the order of the Regulatory Authority. Right of appeal by the appellant cannot be cancelled by the order of another forum. A memo filed by the respondent stating that the appellant has already filed a complaint before the Hon'ble Consumer State Commission, Tamil Nadu State Consumer Redressal Commission, Chennai in CC No.160/18 and hence the present appeal is barred by the Adjudicator. The present appeal will not be barred by law as the present appeal has been preferred against the order of the TNRERA. The respondent herein can raise a plea of the Adjudicator only before the Tamil Nadu State Consumer Redressal Commission, Chennai and not before the TNREAT. The TNRERA passed an order only on the jurisdiction of the complaint. Further no final order can be passed on the memo filed by the respondent. Hence the appellant sought to set aside the order of the Authority. Further the appellant has said that no project without having obtained the completion certificate should necessarily come in the ambit of Real Estate (Regulation and Development) Act and the Bombay High Court has upheld the provisions of the RERA Act and has directed the States such as Tamil Nadu (to change

their rules consistent with the RERA Act which have diluted the provisions of the RERA Act even though the Rule of RERA states that the building structurally developed is treated as completed project. The non registration of the respondent's project with the RERA is a clear violation of the RERA Act.

Facts of the respondent's case in brief:

3. This appeal under sec.44 of the RERA Act, 2016 read with Rule 29(2) of TNRERA, 2017 is not maintainable in law due to want of jurisdiction and applicability of RERA. The subject matter of the execution of the project at Coimbatore (outside Chennai Metropolitan Area) and completed in the year 2014. The Coimbatore Corporation has made assessment of property tax and is collecting tax since April 2014. All the allottees occupied the apartment either physically or constructively in 2015 itself before the provision of RERA came into force. Therefore the appeal is misconceived and liable to be dismissed. The appellant is not the lawful association as per RERA Rule 2017 Sec.2(d). The appellant association was formed with third parties. Its members are mainly consisting of non allottees of apartment. The present appeal cannot be entertained as both Mr.V.Arun Prasad and O.N.Chandran have no mandate authority to represent the alleged association and to file this appeal. The appellant raising the question of completion certificate after 4 years of occupying the flat is ridiculous and malafied. Mr.O.M.Chandran has already filed a case before the Consumer Forum which is still pending. This has been suppressed by the appellant. This is a forum shopping as this appeal is to be dismissed at the threshold. Hence the appeal has to be dismissed.

4. Points for consideration:

1. Whether the respondent's project comes under Sec.3 of the RERA Act?
2. Whether Tamil Nadu Real Estate Regulatory Authority has got jurisdiction to entertain the complaint of the appellant?
3. Whether this appeal deserves to be allowed?

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Point No.1 & 2 :

5. According to the complainant they have entered into sale-cum-construction agreement with the respondent in the year 2012 and the promoter agreed to complete the construction of apartment before 28.02.2015 and also the promoter undertakes to handover the possession of the completed apartment and car park to the allottees within one month after such completion or after receipt of the entire amount due from the allottees in terms of this agreement whichever is later. Admittedly as per the letter dated 11.11.2017 of the Dakshin Homes Apartment Owners' Association in which it has been stated that this project has 76 flats. Owners are living for 2 years now. (at page no.19 of the type set). The respondent also has stated in his objections before the Tribunal dated 26.2.2019 in which he has stated that all the allottees occupied the apartment either physically or constructively in 2015 itself. So the possession of flats taken over by the appellant is not in dispute. The main grievance of the appellant before the Regulatory Authority for the following grounds namely:

Regarding quality of the building, one part of the undivided share of land is unlawfully retained by the builders, title of rights of open terrace is unlawfully retained by the builder, non transfer of corpus fund by the builder to the owners' association, land acquisition amount retained by the builder, piped gas connection not delivered, common area and super built up area have been calculated misleadingly, completion certificate and NOC are not obtained from Corporation due to non completion of drainage connection to Corporation canal, siruvani water facility not provided, non furnishing of copies of real estate project documents to the allottees, respondent's project still not registered under RERA, National Green Tribunal permission was not obtained and since the builder has not entitled to charges for maintenance due to 25% of pending works. These are the grounds put forth by the appellant and sought for the relief before the RERA Authority.

6. The RERA Authority in the absence of respondent promoter directed the appellant to approach the consumer forum or appropriate Civil Court for the relief contained in the complaint on the ground of want of jurisdiction of RERA authority. Aggrieved upon that the appellant came forward with this appeal on the same complaint as the grounds of appeal and further grounds put forth by way of arguments.

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Further stated that the Real Estate Development Regulatory Act clearly stated that any project without having obtained the completion certificate should necessarily came under the ambit of 'Real Estate Regulatory Authority and the Bombay High Court has upheld the provisions of the RERA Act and has directed the States (to change their rules consistent with the RERA Act) which have diluted the provisions of the RERA Act even though the Rule of RERA states that the building structurally developed is treated as completed project'. In addition to the grounds put forth before the RERA Authority in the complaint, now the appellant says that the Tamil Nadu Rules have diluted the RERA Act. The RERA authority has not gone into the merits of the case and passed orders only on the grounds of jurisdiction. It was also admitted by the appellant if we find out whether the RERA Act has got jurisdiction to entertain the complaint we can easily answer for point No.3.

7. According to the respondent he has not appeared before the RERA Authority since he has no notice. After notice in the appeal he appeared through Counsel and filed his objections and stated that the construction of the project was completed in the year 2014 and Coimbatore Corporation has made assessment of property tax and has been collecting tax since April 2014 and all the allottees occupied the apartment either physically or constructively in 2015 itself before the provisions of RERA came into force. Hence the RERA Authority has rightly negatived the claim of the appellant. In addition to that the respondent has stated that the appellant's association was formed with third parties who are not allottees. The appellant raising the question of completion certificate after 4 years of occupying the flat is ridiculous and malafied. It is pertinent to point out here that in so far as projects coming under DTCP there is no need or necessity for getting a completion certificate. In Tamil Nadu there is no practice of giving any completion certificate at all in so far as DTCP projects during the relevant period.

8. Perused both sides contention. On perusal according to the appellant Rule 2(h)(iii) is applicable to the facts of this case and according to the respondent the above said Rule is not applicable to the facts of this case. In this connection, Rule 2(h)(iii) should be read with Section 2(e) of the Act. In fact section 2(e) of the Act 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 a part of land used for or intended to be used for any residential or commercial use such as residence, office." When the Act clearly specifies in the definition of an apartment, it could only mean a completed structure which could be utilized and which can be intended to be used as a residential or commercial building alone will form part and parcel of the project. In this case, rightly both sides have agreed that the flats have duly been occupied by the purchasers. They are living therein for the past two years. The rule which only says structural completion is not accepted in the earlier Judgment in Appeal No. 1 of 2018. There we also considered 2(z)(n) of the Act under the definition where the development of building included the common area. Here of course, what he has complained is that even though 25% of the works were not completed, he was not able to project or prove by any material records to say what are all the works not specifically completed excepting to state that the underground drainage is not completed whereas it is also accepted during the arguments, that the drainage has been duly completed and is connected to a septic tank but according to Appellants, it is situated outside the building area. Similarly the appellants would also mainly contend that the corpus fund is not paid to the association. In fact it was proved before the court by the respondent that the alleged association was not originally formed with the actual members. When this was pointed out in the court, they sought time for deletion of certain members and inclusion of certain members and even thereafter the amendment was made, it was very clearly proved that names of the same family members have been utilized for increase in number whereas they all belong to one particular flat. Further it was also agreed that from day one for the past more than 2 years, neither the Appellants nor the other members are paying the maintenance charges and it was still being paid and maintained by the Promoter and even the Appellant representing the association has not even paid their dues to the promoter. According to the respondent, this is only to harass the Promoter who happens to reside in the very same apartment. They are literally threatening the promoter. Normally it will be the other way around and no promoter stays in the building. Here he not only promoted the building, he is an Allottee, he is staying there, he is taking care of their interest even after the completion

of the project. Further the Appellant herein now basically requires to register the project treating this as an ongoing project whereas they themselves have admitted that all the 76 flats have been completed, they have taken possession more than two years ago and are occupying the same. Therefore rightly the authority rejected that it is not an ongoing project as it is already exempted. In fact even an attempt to mediate was also done through Court but unfortunately that also failed. Already the President of the association has filed a case before the Consumer Forum which is still pending and it has been suppressed. This is a forum shopping and this appeal is liable to be dismissed. Hence sought for dismissal of this appeal.

9. The respondent's project was completed and possession of flats were handed over in the year 2015 and the properties have been assessed for tax by the Corporation of Coimbatore and it is also undisputed facts. The disputed fact between the parties is regarding completion of certain amenities in the project. According to the appellant more than 25% of works were not completed. Hence Sec.3 of RERA Act is applicable to the project of the respondent. According to the respondent the construction of the project has been completed in the year 2014 and possession was handed over to the allottees in the year 2015 and properties have been assessed for property tax by the local body. Hence Sec.3 of RERA Act not attracted. Before going to the merits of the case regarding jurisdiction let us see the provision.

"Section 3(2)(b) of TNRERA Act:
Nothwithstand anything contained in sub-section(1), no registration fo the real estate shall be required.

a. Where the area.....
b. Where the promoter has received completion certificate for a rear estate project prior to the commence of this Act.
c. For the purpose ..... "

The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 Sec.2(h) ongoing project means:

""ongoing Project means, project where development is going on and for which completion certificate has not been issued but excludes such projects

which fulfill any of the following criteria on the date of coming into force of sub section (1) of section 3 of the act.

i. ***In layout projects .....;***

ii. ***The projects .....***

iii. ***In the case of projects under execution outside Chennai Metropolitan Area has no provision and procedure as yet been prescribed for issued of completion certificate, if the 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 projects supported with photographs. Such projects shall be intimated to the concerned Local Planning Authority or Regional Deputy Director of the Town & Country Planning Department within 15 days from the date of notification of these Rules with a copy marked to the Office of the Director of the Town & Country Planning Department. The Director of the Town & Country Planning Department will make public the list of all such Projects in his official web site on the 16th day of notification of the rules besides publication of the same in the web site of Real Estate Regulatory Authority."***

10. The main contention of the appellant is that the respondent has still not completed the project i.e. failed to connect the drainage to the Corporation canal. Hence the Coimbatore Corporation has not issued completion certificate. On the side of the respondent itself he submitted that the RERA Act 2016 came into force with effect from 26.3.2016. Sec.2, 20, 39,41,50,71 to 78 and 81 to 92 came into force with effect from 1.5.2016. Sec.3, 19,40,59,70 and 79 to 80 came into force with effect from 1.5.2017. Tamil Nadu Real Estate (Regulation and Development) Rule 2017 came into force with effect from 22.6.2017. So before the commencement of the Act , the construction was completed. The definition of ongoing project as defined in Rule 2(h)(iii) – obtaining of completion certificate is not mandatory. As per Rule 2(h)(iii) it has been specifically contemplated that no provision and procedure as yet been prescribed for issue of completion certificate if the 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 projects supported with photographs. In this case the respondent has not produced any such documents as stated supra. The respondent has stated that from April 2014 onwards the

property has been assessed for tax. The allottees are in possession and enjoyment of the flats. These facts are also not disputed by the appellant. Is there any possibility that without applying the site plan and building plan to levy tax by the Commissioner of Coimbatore Municipal Corporation. The relevant provision for levying property tax in the Coimbatore City Municipal Corporation Act 1981, the Commissioner is empowered to inspect the building and powers to require alteration of work and also empowered to order for demolition. These powers are contemplated under Sec.281(2), 286 of Coimbatore City Municipal Corporation Act 1981:

Sec.281 - Inspection by Commissioner "

The commissioner may inspect any building during the construction or reconstruction thereof, or within one month from the date of receipt of the notice given under section 129.

Sec.282 - Power of Commissioner to require alteration of work "

(1) If the Commissioner finds that the work-

(a) is otherwise than in accordance with the plans or specifications which have been approved, or

(b) contravenes any of the provisions of this Act, or any rule, by-law, order or declaration made under this Act,

He may by notice require the owner of the building, within a period stated either

(i) to make such alterations as may be specified in the said notice with the object of bringing the work in conformity with the said plans, specifications or provisions or,

(ii) to show cause why such alterations should not be made.

(2) If the owner does not show cause as aforesaid, he shall be bound to make the alterations specified in such notice.

(3) If the owner shows causes as aforesaid, the commissioner shall by an order cancel the notice issued under sub-section (1), or confirm the same subject to such modifications, as he may think fit.

Sec. 286. Demolition of buildings "

(1) If any person intends to demolish a building either in whole or in part, he shall send an application to the commissioner in writing for permission to execute the work.

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(2) The commissioner shall grant permission to execute the work subject to such conditions, as he may deem necessary for ensuring the health or safety of the people living within or near the building.

(3) The demolition of a building shall not be begun unless and until the commissioner has granted permission for the execution of the work, and the work shall not be executed without complying with the conditions, if any, subject to which the permission has been granted"

In this case there is no allegation on the side of the appellant that the Commissioner has ordered any violation or demolition nor that there is any allegation that the respondent contravenes the provisions stated supra.

Regarding assessment of property tax is concerned it is contemplated under sec.129 to 132 which runs as follows.

<u>129. Owners obligation to give notice of construction or reconstruction or demolition of building –</u>

(1) (a) If any building in the City is constructed or reconstructed the owner shall give notice thereof to the commissioner within fifteen days from the date of completion or occupation of the building whichever is earlier.

(b) If such date falls within the last two months of a half-year the owner shall, subject to notice being given under clause (a) be entitled to a remission of the whole of the tax or enhanced tax, as the case may be, payable in respect of the building only for that half-year.

(c) If such date falls within the first four months of a half-year, the owner shall, subject to notice being given under clause (a) , be entitled to a remission of so much not exceeding a half of the tax or enhanced tax, as the case may be, payable in respect of the building only, for that half-year as is proportionate to the number of days in that half-year preceding such date.

(2) (a) If any building in the city is demolished or destroyed, the owner shall, until notice thereof is given to the commissioner, be liable for the payment of the property tax for which he would have been liable had the building not been demolished or destroyed.

(b) If such notice is given within the first two months of a half-year the owner shall be entitled to a remission of the whole of the tax payable in respect of the building only, for the half-year.

(c) If such notice is given within the last four months of a half-year, the owner shall be entitled to a remission of so much, not exceeding a half, of the tax payable in respect of the building only for that half-year as is proportionate to the number of days in that half-year succeeding the demolition or destruction, as the case may be.

<u>130. Remission of tax in areas included or excluded in the middle of a half-year "</u>

(1) If any area is included in the City, the owner of every building or land in such area shall "

(a) if the date of such inclusion falls within the last two months of a half-year, not be liable to pay any property tax in respect thereof for that half-year; and

(b) if such date falls within the first four months of a half-year, be entitled to a remission of so much, not exceeding a half, of the property tax payable in respect thereof for that half-year, as is proportionate to the number of days in that half-year preceding such date.

(2) If any area is excluded from the City, the owner of every building of land in such area shall be entitled, -

(a) if the date of such exclusion falls within the first two months of a half-year, to a remission of the whole of the property tax payable in respect thereof for that half-year and

(b) if such date falls within the last four months of a half-year, to a remission of so much, not exceeding a half of the property tax payable in respect thereof for that half-year as is proportionate to the number of days in that half-year succeeding such date.

(3) No remission shall be granted under sub-section (2) in respect of any building or land unless an application for such remission is made to the commissioner within three months from the date of the exclusion of the area in which the building or land is situated.

131. Power of commissioner to condone omission to give notice "

The commissioner may at his discretion condone omission to give notice under section 127, 128 or 129 or any application under section 130, giving his reasons in writing for every such condonation.

132. Commissioners power to call for information and to enter upon premises.-

(1) For the purpose of assessing the property tax, the commissioner may, by notice, call on the owner or occupier of any building or land to furnish him within thirty days after the service of the notice where the notice is served upon the Government, a railway administration or a company and within fifteen days after such service in other cases with returns of the rent payable for the building or land, the cost of erecting the building and the measurement of the land and with such other information as the commissioner may require, and every owner or occupier upon whom any such notice is served shall be bound to comply with it and to make a true return to the best of his knowledge or belief.

(2) For the purpose aforesaid the commissioner may enter, inspect, survey and measure any building or land, after giving twenty four-hours notice to the owner or occupier".

11. On the side of the appellant has also not stated that the respondent has not applied the Sec.129 of the Coimbatore Municipal Corporation Act 1981 or any action taken by the, Commissioner of Coimbatore Municipal Corporation. In such a circumstance the property tax were levied as per the provisions of the Act. If really the

Commissioner found that any builder has contravened the approved building plan, certainly he would have taken legal action for demolition. In this case no such action was taken against the respondent. So, the respondent's project is properly constructed in terms of building plan and construction is structurally completed and then only the property was assessed for tax. So there is no question of completion certificate is involved as there is no provision of issuing any completion certificate in DTCP area. For this case is concerned since the respondent's project was structurally completed before RERA came into force in the year 2014 and apartment was delivered to the appellant in the year 2015 itself. On the side of the appellant without any proof simply alleged that the respondent failed to complete the construction and the appellant has also relied as an admission of the respondent with regard to ongoing project.

> ***"At page-60 of the typed set "I assure all of you that I will complete the project as per my commitment and hand over to the team newly elected and go. As I am terribly short for funds the delay is regretted which is stated on 22.2.2018".***

12. Above said wordings he has narrated with regard to allegation of RO Drinking water, in which he has answered. The appellant themselves have admitted in their letter dated 11.11.2017 which is found place in page-19 of the type set in which it has been categorily admitted that ***"This project has 76 flats. Owners are living for two years now".*** So on the date of the letter i.e. 11.11.2017 before that for the past two years the flat owners are living. In the alleged e-mail of the respondent dated 22.2.2018 in which the respondent assured that he will handover to the team newly elected. It means not the flats. So the promoter can handover the RO water to the team. So only on the basis of 22.2.2018 e-mail alone it cannot be construed that the respondent project is a ongoing project. Furthermore even though the RERA Authority and the Appellant Tribunal is empowered to question the validity of the completion certificate, etc. in the peculiar circumstances of the case coupled with admission of both parties regarding possession of respondent's project the definition of word 'ongoing project' in Rule 2(h)(iii) is not applicable to the facts of this case as we have rightly pointed out that they have complied with as per the definition under the Act in sec.2(zn) which runs as follows:

"2(zn) "Real Estate Project" is (i) the development of a building or a building consisting of apartments or converting an existing building or a part thereof into apartments or the development of land into plots or apartment for the purpose of selling all or some of the said apartment or plots or building.

(ii)Real Estate Project includes the common areas, the development works, all improvements and structures thereon and all easement, rights and appurtenances belonging thereto."

As per the Act it is a habitable flat and the Act prevails over the Rule. Hence the respondent's project does not come within the purview of sec.3 of the TNRERA Act. So Regulatory Authority and the Appellate Tribunal has no jurisdiction to entertain the complaint of the appellant since the project was completed before the commencement of the Act. So the RERA Authority has no jurisdiction to entertain the complaint. The Points are answered accordingly.

Point No.3:

13. In Point No.1&2 it was decided that the respondent's project does not come under the purview of sec.3 of the RERA Act. Hence the RERA Authority and Tribunal has no jurisdiction. The RERA Authority has directed the appellant on the grounds of jurisdiction and to approach the Consumer Forum or Competent Civil Court.

14. The RERA Act came into force in the year 2016 and Sec.3 came into force only on 1.5.2017 and TNRERA Rules 2017 came into force on 22.6.2017. Admitedly the respondent's project was completed in the year 2014 and the appellant took over possession of the flat in the year 2015 itself. If really the appellant are having grievances with regard to the quality of construction and other grievances narrated in the complaint can be redressed by way of deficiency of service under the Consumer Protect Act. In this regard number of Supreme Court verdicts dealt with deficiency of service.

15. Admittedly the appellant already approached the Consumer Forum and a complaint was pending in CC No.160 of 2018 before the State Consumer Commission, Chennai. The above said complaint was not withdrawn by the appellant and the same is still pending. To invoke RERA provision he ought to have withdrawn the complaint

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before the Consumer Forum with the permission of the Forum and then approach the RERA Authority as per Sec.71 of RERA Act. In this case the appellant has not withdrawn the above said consumer complaint. If really the appellant withdraws the complaint before the Consumer commission and approached this forum, it could have been considered on the ground that the appellant is put to remediless. Hence the RERA Authority can entertain the complaint. But the appellant has not done so. In such a circumstances, the order of the Authority has no infirmity and there is no chance of interfering with the order of the Real Estate Regulatory Authority. Therefore this Tribunal comes to a conclusion that there are no merits in the appeal and concluded that this appeal not deserves to be allowed.

16. In the result this appeal is dismissed and the order of the TNRERA dated 27.11.2017 is confirmed. No costs.

This order was dictated to the Stenographer, transcribed and computer typed by the Stenographer and corrected and pronounced by us in the open Court on 11th day of July 2019.

Sd/- Mr.Justice B.Rajendran
CHAIRPERSON

Sd/- Ms.Leena Nair
ADMINISTRATIVE MEMBER

Sd/- N.Balasubramanian
JUDICIAL MEMBER

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