

**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 : 19.06.2019

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

Appeal No.2/19

M/s.SPR & RG Construction Private Limited,
Repd by its Authorised Signatory Mr.Ragilaj,
No.1, Cooks Road,
Perambur, Chennai 600 012

... Appellant

AND

Mrs.Subashini Thulasiram,
Repd. By her Power Agent Mrs.B.Jayalakshmi,
W-195, 15th Street, 3rd Avenue,
Anna Nagar West Extension,
Chennai – 600 001

... Respondent

The Appeal against the order passed by the adjudicating Officer dated 20.12.2018.

1. The Appeal has been preferred against the order dated 20.12.2018 passed by the learned Adjudicating Officer ordering to numbering the compliant preferred by the complainant. Aggrieved upon that the respondent/appellant preferred this appeal. The appellant represented by Senior Advocate Thiru M.S.Krishnan, and Thiru John Zachariah, Thiru M.V.V.N.Sivanthy, Thiru Vijay R.Sekar and Ms R.S.Pornima,

Advocates. The respondent is represented by Advocates M/s.S.Shahul Hameed and L.F.Shika

ORDER

Complainant/Respondent case in brief:

2. The complainant is the respondent in this appeal. The above said complainant had purchased a flat from the respondent and also entered into a sale-cum-construction agreement on 27.11.2012. So far he has paid Rs.75,18,367/- The balance Rs.6,67,013/- is to be paid by the complainant and the same was withheld by the complainant.

3. As per the agreement, the possession of the flat is to be handed over within 36 months from 31.3.2012. It was assured by the respondent that all the approvals for the construction were obtained and the construction was made in **conformity** of the approvals. The respondent has obtained only the planning permission, but the prior environmental clearance has not been obtained by the respondent till date and the completion certificate put on hold since the project Osian Chlorophyll comes under the ambit of ongoing project. Hence it has to be registered under Sec.4 of TNRERA. As per the agreement the respondent has to handover the possession by 31.3.2015 which has not been taken place till date due to glitches in getting the prior environmental Clearance. Hence the respondent through e-mail had sought for extension of time. The respondent before the commencement of the construction had to have taken prior environmental clearance as per the Environmental Protection Act. But he failed on this ground. The application for the environmental clearance was submitted much after the construction was started. The appellant was prohibited from making any further construction by the Authority and a letter of undertaking-cum-apology was given by the respondent to that effect. But the respondent had continued with the construction and completed the same making it in habitable condition. Hence the Tamil Nadu Pollution Control Board had filed a criminal complaint in CC No.86/2016 on the file of Judicial Magistrate Court of Ambattur and the same is pending. In this situation it is not conducive to continue the project and the best option is to withdraw from the project and

this complaint is made for refund of money together with interest at the rate of 24% p.a. Also sought to impose penalty under Sec.61 of RERA Act and sought to declare and include the respondent in the list of defaulter as per sec.34C of the RERA Act.

Respondent/Appellant case in brief:

4. The respondent appellant raised a preliminary objection on maintainability and said that this complaint is liable to be dismissed in limine as being not maintainable due to lack of jurisdiction. The respondent further stated that Rule 2(h)(ii) of RERA specifically excludes those projects in Chennai Metropolitan Area for which the application for completion certificate has been filed prior to the date of notification of the Rules. The project has been completed as early as 3.5.2017 and application for completion certificate with the CMDA was filed on 29.5.2017 and the completion certificate was granted on 6.9.2018. The said fact has further corroborated by entry no.53 in list of completion certificate application submitted in CMDA for Chennai Metropolitan Area published in the Website of TNRERA. Therefore this project does not fall within the ambit of ongoing projects. On the date of notification of Rules this project is a completed project and does not fall within the ambit of RERA. Hence the complainant filed in the present instance do not fall within the jurisdiction of Adjudicating Officer. Hence the complaint has to be dismissed.

Arguments of the appellant side:

5. The learned counsel for the appellant has submitted that the appellant specifically questioned the maintainability of the complaint filed by the complainant. Before the notification of the Rules of the RERA the appellant applied for completion certificate. It was also mentioned in the list of completion certificate applications submitted in CMDA prior to 22.6.2017 for Chennai Metropolitan Area and status of the applications filed under Rule 2(H)(II) of Tamil Nadu Real Estate (Regulation Development Rules) 2017. As per the list, the appellant name mentioned as Sl.No.53. The completion certificate was issued later. So on the date of notification i.e. on 22.06.2017, the appellant project is not at all an on-going project. Hence the claim of the complainant is not maintainable. But the learned Adjudicating Officer without

considering Rule 2 h(ii) of the RERA Rules 2017 and directed the appellant to register under RERA. It is against law hence the order of the Adjudicating Officer has to be set aside.

Arguments of the respondent side:

6. The learned counsel for the respondent would submit that considering the various aspects the learned Adjudicating Officer came to a correct conclusion and there is no infirmity in the findings of the learned adjudicating Officer. The respondent specifically questioned the non compliance of the appellant with regard to environmental clearance. Regarding environmental clearance is concerned the appellant has not stated anything. The environmental clearance is a mandatory one before commencing the construction. The report of the environmental clearance order itself it is also clearly mentioned about the violations of the appellant. Furthermore the appellant has not followed the Rules contemplated in the construction of project. Hence the respondent apprehends that the project alleged to be completed by the appellant is not in accordance with law. Therefore to protect his interest the appellant approached RERA. Furthermore ordering for registration of the project is no way affect the rights of the appellant. Hence the appeal has no merits and it has to be dismissed.

7. Points for consideration:

1. Whether the environmental clearance is mandatory for the appellant's project?
2. Whether mere the procedural violations of the appellant, namely non obtaining of environmental clearance, relieved the appellants project from the concept of ongoing projects?
3. Whether the appeal is deserved to be allowed?

Point-1 :

8. According to the complainant/respondent the appellant without obtaining environmental clearance illegally constructed the building and thereby caused breach of contract and failed to hand over the possession within the stipulated period. Hence, the complainant was not willing to continue the project and sought for the relief of refund of

the amount and for other reliefs. The appellant came forward with the only defence as maintainability of the claim petition made by the complainant and also reserved rights to file detailed counter. According to the appellant on the date of commencement of the Rules i.e. on 22.6.2017 the appellant had completed the project and filed application for completion certificate i.e. on 29.5.2017. Hence the project of the appellant does not fall under the category of on-going project. So the complaint itself is not maintainable for want of jurisdiction. It is the only defence put forth by the appellant. The learned Adjudicating Officer after hearing both sides came to a conclusion that the RERA has got jurisdiction under Sec.71,79 & 88 and also found that the project of the appellant is an on-going project. Hence the complaint was entertained and directed the appellant to register under RERA.

9. As per the allegation of the complaint the project of the appellant failed to comply the mandatory requirement environmental clearance. On the side of the appellant they have applied for environmental clearance on 28.1.2011 itself. Hence the clearance given by the Authority on 27.6.2018 and the delay is not on the part of the appellant. So non-compliance of environmental clearance does not arise. The environmental clearance was issued on 27.6.2018.

The relevant portion for the environmental clearance as per Central Government notification is as follows:-

"Published in the Gazette of India, Extraordinary, Part-II and Section-3, sub section (ii), Ministry of Environment and Forests, New Delhi – Notification dated 14th September, 2006.

S.O.1533 whereas, a draft notification under sub-rule (3) of rule 5 of the Environment (Protection) Rules, 1986 for imposing certain restrictions and prohibitions on new projects or activities, or on the expansion or modernization of existing projects or activities based on their potential environmental impacts as indicated in the Schedule to the notification, being undertaken in any part of India, unless prior environmental clearance has been accorded in accordance with the objectives of National Environment Policy as approved by the Union Cabinet on 18th May, 2006 and the procedure specified in the notification, by the Central Government or the State or Union territory level Environment Impact Assessment Authority (SEIAA), to be constituted by the Central Government in consultation with the State Government or the

Union Territory Administration concerned under sub-section (3) of section 3 of the environment (Protection) Act, 1986 for the purpose of this notification, was published in the Gazette of India, Extraordinary, part II, section 3, sub-section (ii) vide number S.O.1324(e) dated the 15th September 2005 inviting objections and suggestions from all persons likely to be affected thereby within a period of sixty days from the date on which copies of Gazette containing the said notification were made available to the public."

In the above said notification further clarification in page no.6 which is as follows:

"2.Requirement of prior environmental clearance: The following projects or activities shall require prior environmental clearance from the concerned regulatory authority which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under category 'A' in the schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under category 'B' in the said schedule, before any construction work or preparation of land by the project management except for securing the land, is started on the project or activity:

- i. All new projects or activities listed in the schedule to this notification;**
- ii. Expansion and modernization of existing projects listed in the schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the schedule, after expansion or modernization;**
- iii. Any change in product – mix in an existing manufacturing unit included in schedule beyond the specified range."**

10. The only contention on the side of the appellant is that before notification of the Rules dated 22.6.2017 on 29.5.2017 he filed an application for completion certificate and the said application was also find place in the list of RERA pending application for completion certificate and also applied for environmental certificate on 28.1.2011 before starting construction. Hence he sought for relieving glitches of RERA Act. So as per the notification issued by the Central Government, Ministry of Environment & Forest as referred supra obtaining of environmental clearance prior to commencement of construction is a mandatory one. The point is answered accordingly.

Point-2:

11. On the side of the appellant have produced the order of environmental clearance issued by the Member-Secretary, SEIAA-TN dated 27.6.2018. In the above said letter at page no.6 in sub para ii stated as follows:

"The project proponent in his letter dated 1.7.2013 furnished the letter of apology / commitment duly resolved by the Board of Directors for the violation of EIA Notification, 2006, as the construction activities have already been started without obtaining the mandatory prior environmental clearance from the competent authority received by SEIAA-TN on 13.7.2013. The letter of apology furnished by the project proponent was forwarded to Government of Tamil Nadu, Environment & Forest Department to initiate credible action against violation committed by project proponent in this office letter No.SEIAA-TN/F.433/2011 dated 19.7.2013".

12. As per the above said version of the order there is a clear violation by the appellant for which Government had initiated criminal proceedings against the appellant before the Judicial Magistrate Court of Ambattur in sub para 9 of the said order which runs as follows:

"Further based on the Hon'ble Supreme Court judgement, the SEIAA-TN sought clarification from MoEF & CC (vide letter No.37/NGT/SEIAA-TN/2015 dated 29.9.2015) stating 'whether environmental clearances may be issued to such cases where credible action has already been initiated by State Government with a condition that the project proponent shall comply the directions of the Hon'ble Supreme Court of India in C.A.No.7191-7192/2015 and 7193-7194/2015 or in light of the stay order issued by the Hon'ble Supreme Court."

13. As per the above order since credible action has already been initiated by the State Government, the competent authority concerned issued environmental clearance with condition. Even though the appellant applied for environmental certificate before commencing the construction the environmental certificate was not issued and the same was issued only on 27.6.2018. Before issuing the environmental clearance certificate procedural violation of the appellant was questioned and proper penal action was initiated and after that only environmental certificate was issued. In fact it is pertinent to point out here in the environmental clearance certificate it is clearly stated

that they were originally given the certificate as early as in 2015 itself. Subsequently due to court case in a batch of cases it was withdrawn and ultimately the government after the new notification absolving all their defects have granted a clean chit and granted this certificate. So the environmental authority itself ratified the violation of the appellant and issued certificate. Furthermore the procedural violation of the appellant only with regard to commencement of construction during pendency of application for environmental clearance certificate. That violation was ratified subsequently after clear inspection of the site and also required modifications made by the appellant. Only after compliance the environmental clearance was issued. Furthermore coupled with facts in this particular case where respondent himself has admitted that construction was already over on 03.05.2017 itself and his sister has also taken possession prior to that and he was also offered to take possession, this project cannot be deemed to be a ongoing project.

Point-3:

14. According to the complainant/respondent the appellant's project is the ongoing project since due to non obtaining of environmental clearance certificate. But in point No.2 it was decided that the issuing of environmental clearance certificate after initiating penal action for procedural violation amounts to relieving the appellant's project from the concept of ongoing project. Furthermore, according to the appellant he has completed the construction of the project and urged the respondent to take possession of the flat and the respondent's sister also had obtained possession of flat and is residing there, but the respondent avoided to take possession of the flat for the reason best known to him. The above said contention was admitted by the respondent in his counter filed before this Tribunal in this appeal in Para No.2 which runs as follows:

"2. The respondent submit that the appellant had urged the respondent to take possession of the flat without any completion certificate and the environmental clearance. The respondent was not ready to take the flat with such violations as the respondent had bought the flat to be owned without any legal hazels. The appellant had obtained the completion certificate only on 6.9.2018 even though the construction was completed on 3.5.2017,"

15. As per the own admission of the respondent the construction was completed on 3.5.2017 itself and possession was tendered by the appellant. At this juncture what is the legal position to be analysed. The Rule No.2(h)(ii) of RERA Rules 2017 is contemplated as follows:

“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 i.e., where land is developed into plots, the roads and open spaces gifted to the local body concerned;***
- ii. The projects in Chennai Metropolitan Area for which application for completion certificate has been filed with CMDA subject to furnished certificate from the Architect/Licensed Surveyor/Structural Engineer Associated with the project to the effect that all the buildings in the project have been structurally completed i.e. all the columns, beams and slabs have been erected, supported with photographs. CMDA will issue completion certificate for those projects in compliances with the completion certificate norms prescribed. In completion certificate filed cases, if the completion certificate is rejected by CMDA for violation of norms, such project will be intimated to the Real Estate Regulatory Authority and will be bound for registration with Real Estate Regulatory Authority. The details of all projects where completion certificate application has been filed with CMDA. Prior to notification of these Rules will be disclosed to the public by publishing of all such projects on the website of CMDA and RERA immediately after notification of these Rules”.***

16. As per the above Rule, in the metropolitan area application for completion certificate has been filed after furnishing certificate from the Structural Engineer to the effect that all the buildings in the project have been structurally completed. That application was filed before the RERA on 29.5.2017 itself. The completion of construction of flats was on 3.5.2017 itself as per the admission of the respondent. The flat was completed for habitable nature. Hence the respondent has admitted as completion on 3.5.2017 itself. The respondent has not stated anything about the incompleteness of building construction. Mere procedural violation alone cannot be construed as ongoing project. The learned Adjudicating Officer came to a conclusion

with regard to jurisdiction since section 3 of RERA came into force on 1.5.2016 and the Act will prevail over the Rules framed under the Act. Section 3 of the RERA came into force only on 1.5.2017, but mistakenly in the order it is mentioned as 1.5.2016. Section 2 of RERA came into force on 1.5.2016. In which the meaning of the word 'ongoing project' was not defined but the word 'completion certificate' alone defined as the same is given as follows:

"Completion certificate means the completion certificate or such other certificate by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws."

17. As per the above definition if the construction made as per the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws it is sufficient to issue completion certificate. Admittedly the appellant completed the construction on 3.5.2017 and applied for completion certificate on 29.5.2017. The application of appellant has not been rejected by the competent authority. Hence it has issued completion certificate on 6.9.2018. Even though the REAT is empowered to questioning the issuing of completion certificate, in the peculiar circumstance of this case is concerned due to admission of the respondent about the completion of construction and another admission of the respondent with regard to taking over of possession by the sister of the respondent this Tribunal has come to a conclusion that the construction has been completed on 3.5.2017 itself and applied for the completion certificate on 29.5.2017 itself before the RERA came into effect on 22.6.2017. So before the RERA Rules came into force, the appellant applied for completion certificate and the delay in issuing completion certificate may not be only on the fault of the appellant. Furthermore the CMDA authority has not found fault with the appellant that the construction is not completed or not complied with the approved plan and the delay cannot be found fault only on the appellant. So this finding cannot be a precedent for other cases. The REAT and RERA are empowered to even question the completion certificate, if it is found that the flat is not constructed in a habitable nature as per section-3.

18. The learned Adjudicating Officer invoked RERA jurisdiction with the help of section 71, 79 & 88. To invoke jurisdiction under RERA Act what are the pre conditions are contemplated in section 3 of the Act. The relevant portion of the section 3 is as follows:

"3. Prior registration of real estate project with Real Estate Regulatory Authority

- (1)***
- (2) Notwithstanding anything contained in sub section 1, no registration of the real estate project shall be required -***
 - (a)***
 - (b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act.***
 - (c)"***

19. As per section 3(2)(b) if the completion certificate was received by the promoter registration of the project is not required. The RERA Rules came into force on 22.6.2017. In which in section 2(h)(ii) explained the meaning of the word ongoing project and also included the project for which an application filed for completion certificate for structurally completed projects.

In the RERA Act in section-2 (zn) of the definition for the word 'Real Estate Project' contemplated that Real Estate Project means 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 apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto.

In this case the appellant has completed above requirements and then the appellant has applied for completion certificate before the commencement of the Rules i.e. on 22.6.2017. In this case the construction was completed before the Rules were

brought into force on 22.06.2017 and in conformity with Sec-2 (zn) of the RERA Act coupled with the admission of the party that they were offered possession even as early as on 03.05.2017. Further completion certificate was issued after complete inspection which is not in dispute. In such a circumstances there is no question of ongoing project definition will be applicable to the appellant's project. At this juncture the invoking of section 71,79, 88 of RERA by the learned Adjudicating Officer is unwarranted and not applicable to the facts of this case. Hence the order of the learned adjudicating Officer is liable to be set aside.

20. In the result the appeal No.2 of 2019 is allowed and the order of the learned Adjudicating Officer in S.R. No. 0002 of 2018 in unnumbered CCP of 2018 is set aside. No costs.

This order is dictated to the Stenographer, transcribed and typed in the Computer by the Stenographer, corrected and pronounced by us in the open Court on 19.6.2019.

CHAIRPERSON

ADMINISTRATIVE MEMBER

JUDICIAL MEMBER