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 : 10.02.2020

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

Appeal No. 57 of 2019

Benett Property Holdings Company Limited,
Represented by its Authorised Officer. ... Appellant

Vs

1. Mrs.P.Rani Vellammal
2. M/s.Green Avenue Homes & Gardens
   Represented by its Proprietor
   Mr.D.Dinakaran ... Respondents

This appeal came up for final hearing on 22.01.2020 in the presence of Advocate M/s.Tatva Legal, Chennai for appellant and Mrs.Bhagyalakshmi Advocate for 1st respondent, the 2nd respondent as party-in-person. Having heard the arguments of both sides and having stood over for consideration of this tribunal till this day and delivered the following:

ORDER

The 1st respondent is the home buyer, the 2nd respondent is the promoter and the appellant is the marketing agent for the 2nd respondent.

2. The 1st respondent entered into a sale-cum-construction agreement with the 2nd respondent/promoter on 22.03.2012. The sale price was fixed at Rs.62,22,500/-. The 2nd respondent/promoter agreed to deliver the constructed house within 15 months with a grace period of 3 months from the date of registration. Except Rs.6,41,448/- the balance sale amount was paid by the first respondent to the 2nd respondent. The role of the appellant/marketing agent is only with regard to marketing the villas in the project on an exclusive basis. The said marketing agent and the 2nd respondent entered into an agreement to complete the booking of the villas within a period of 15 months from the date of signing of agreement with a further period of 3 months. According to the appellant the 2nd respondent alone is responsible for construction of 23 villas with all amenities as agreed by him with a prospective buyer. The appellant is no way responsible with regard to development of the project. The responsibility of the appellant rests only with procuring sale on villas and ends once the registration of the said villas is completed.

3. The 2nd respondent/promoter have not completed the construction and failed to handover the possession of the house. Hence the 1st respondent/complainant came forward with a complaint before the RERA in complaint No.165/2018 against the promoter as well as the marketing agent, the appellant herein. In the meantime during the pendency the respondents 1 & 2, namely the home buyer and promoter, entered into a compromise on 15.03.2019. Wherein the developer agreed to complete the remaining works in the villa within 120 days from the date of signing the compromise letter and will

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hand over the villas on receipt of payment of Rs.6,41,448/-. The pending common amenities have also been listed in the compromise letter and the developer assured to complete the common amenities within 6 months from the date of handover of the villas. Since the developer failed to comply the terms of compromise the complainant came forward with the complaint before RERA. After contest the regulatory authority directed the 2nd respondent/promoter to complete the construction and handover the possession of the villa on or before 15.07.2019 and directed the appellant/marketing agent to pay a penalty of Rs.1,00,000/-. Aggrieved upon that the marketing agent preferred this appeal and the promoter filed separate appeal No.59 of 2019. In that appeal, the promoter complied the terms of compromise and handed over the key of the villa on 21.11.2019 and by recording the compromise appeal No.59 of 2019 was closed. The appellant herein against the order of penalty against him contested this appeal.

4. The learned counsel for the appellant would submit that the sale deed in respect of the villa was registered on 01.06.2012 and as such the role of the appellant as a marketing agent was fulfilled upon completion of sale of villas which even took place much before the RERA came into force. Even before the commencement of the RERA the contractual relations of the appellant and respondent terminated. Hence the appellant is not a proper or necessary party to the complaint. The activity undertaken by the appellant even before the coming into of the RERA could not be covered under the term of unfair trade practice. With regard to non delivery of completed villa and in terms of sec.18 of the RERA for not completing the project the promoter alone is liable to compensate the complainant. The appellant had occasional respond to the e-mails of the complainant only as a goodwill gesture and as a gratitude act and

the same does not find any binding contract or obligation. Further would submit that in terms of sec.12 of RERA whenever a person sustains any loss or damage by reason of any incorrect, false statement contained in any advertisement, such person shall claim compensation only from the promoter of the project and not from the marketing or real estate agent. The authority has come to a conclusion on the basis of the communication between the appellant and the 1st respondent/complainant to impose penalty. There is no communication between the appellant and the 1st respondent/complainant after 2013 and after the commencement of the RERA Act. Therefore there is no privity of contract between the appellant and the 1st respondent/complainant. The learned counsel for the appellant has also relied on the following citations in support of his argument:

In the Supreme Court of India
Civil Appeal No.4681 of 2008
Ritesh Agarwal and others
Vs
Securities and exchange Board of India and others.

The FUTP Regulations came into force for the first time on 25.10.1995. Would it apply in a case where the cause of action arose prior thereto? Ex facie, a penal statute will not have any retrospective effect or retroactive operation. If commission of fraud was complete prior to the said date, the question of invoking the penal provisions contained in the said Regulations including Regulations 3 to 6 would not arise.

In the High Court of Bombay
Execution Application No.161 of 2009
In
Arbitration award dated 12.04.2007
Jet Airways (India) Ltd
Vs
Sahara Airlines Ltd and others

We are, therefore, disposed to take the view that the rights of the indemnity holder should not and need not be confined to those mentioned in Section 125, Contract Act. Even before damage is incurred by the indemnity holder, it would be open to him to sue for the specific performance of the contract of indemnity, provided of course it is shown that an absolute liability has been incurred by him and that the contract of indemnity covers the said liability.

5. The learned counsel for the 1st respondent/complainant would submit that the advance receipt and allotment letter which contains signature of the appellant (page Nos.35 and 37 of the typeset). In page Nos.31, 71 & 91 of typeset the appellant has sent letters to the complainant. The demand letter also sent by the appellant in page No.78 of typeset. In page No.91 letter from Aartha to the complainant in which it has been stated that "Aartha is working rigorously with our partner Green Avenue Homes" which is dated 21.08.2013. Till the complainant approached the RERA, the complainant was having constant touch with the appellant. So the cause of action for the complaint is a continuing one. The sale deed executed by the 2nd respondent in favour of the 1st respondent on 01.06.2012 is only with regard to land, and not with regard to villa. The above stated communications of the appellant with the 1st respondent is only with regard to villa. Hence the plea of the appellant that the privity of contract came to an end on 01.06.2012 is not sustainable. The learned counsel further would submit that even after the discontinuation of partnership by the appellant with the 2nd respondent, the appellant has communicated regarding villa. Hence the entire grounds put forth by the appellant are not sustainable. The authority has rightly imposed penalty on the appellant and there is no infirmity in the findings of the authority. The 2nd respondent even though appeared in person after entering into a compromise and handing over the key

of the villa to the 1st respondent, the 2nd respondent have not participated in the proceedings of this appeal.

6. Points for consideration:

i. Whether the plea of no communication between the appellant and 1st respondent after the commencement of the RERA Act is sustainable?

ii. Whether the appeal deserves to be allowed?

Point No.i :

7. The specific contention of the appellant is that after the contract period with the 2nd respondent, no communication on the ground of good faith and gesture by the appellant to the 1st respondent with regard to completion of the villa. The last communication of the appellant to the 1st respondent dated 11.12.2013. After that there is no communication between the appellant and the 1st respondent. Especially after the commencement of the RERA there is no communication between the appellant and the 1st respondent. Furthermore the appellant has not informed to the 1st respondent about the completion of the villa after the commencement of the RERA. In such circumstances there is no jurisdiction to invoke RERA against the appellant, since the RERA Act has no retrospective effect. In support of this contention the learned counsel has relied Apex court verdict of Ritesh Agarwal case. By way of reply the learned counsel for the 1st respondent would submit that the cause of action for the present dispute is a continuing one till the handing over the villa to the first respondent since so far the villa was not handed over to the 1st respondent and moreover the project of the respondent is the ongoing project.

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8. Before going to discuss the merits of the case, date-wise communications between the parties namely appellant, respondents 1 & 2 have to be analyzed.

Page no.of the typeset	Date of communication	Communication from	Communication to	Contents of the communication in brief
35	6.1.2012	Artha Property	Rani Vellammal	We are pleased to allot you villa ...
37	6.1.2012	Artha Property	Rani Vellammal	Received with thanks from Mrs.Rani Vellammal Parthiban the sum of Rs.50,000/- ...
78	3.9.2012	Artha Property	Rani Vellammal	We have received Rs.37,33,500/- till date. You are requested to make aforesaid payment of Rs.6,22,250/- within 7 days from the date of this letter, helping us to complete the project on time.
91	21.8.2013	Artha Property	Rani Vellammal	We are pleased to say that Artha is working rigorously with our partner Green Avenue Homes to ensure all amenities and pending works are completed on priority.
92	1.12.2013	Green Avenue Homes	Rani Vellammal	We have also requested Artha not to communicate with you and redirect all communications as received to our attention and we request you to also be in direct touch with us for any of your queries.
94 & 117	11.12.2013	Artha Property	Rani Vellammal	Even though Artha will not be involved in day to day operations we will be happy to assist the customers in handling all

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				escalations by directly co-ordinating with Mr.D.Dinakaran of Green Avenue Homes. Artha has got an assurance from Green Avenue Homes that they will fulfill all commitments and handover your villa as per the terms of the agreement signed with you and we will expedite the process from our end. Feel free to forward escalations to customer at Artha in wherever assistance of Artha may be required.
105	8.1.2015	Green Avenue Homes	Rani Vellammal	Minutes of meeting dated 6.1.15 4.Progess report will be submitted jointly by GAH & Artha first week of every month for all villas individually through e-mails. 5. Ms Georgena from Artha will be marked a copy of all the mails sent to the clients.

9. The appellant namely the marketing agent designated himself as a partner of Green Avenue Homes & Gardens as per the communication at page No.91 of the typeset. The allotment letter, receipt of the advance signed by the appellant Artha only which refers to page Nos.35 & 37 of the typeset. The Green Avenue Homes & gardens even though instructed the appellant not to interfere with the day to day affairs through communicated dated 1.12.2013 at page No.92 of typeset, the appellant communicated to the 1st respondent in its letter dated 11.12.2013 at page No.94 of the typeset that Artha has got an assurance from Green Avenue Homes that they will fulfill all commitments and handover

the villa. The above said fact was discussed in the meeting on 6.1.2015. The minutes was also communicated in which it has been specifically admitted that both Artha and Green Avenue Home jointly look after the progress of the completion of the villa. Hence it has been specifically mentioned in the minutes that progress report will be submitted jointly by the appellant and the 2nd respondent in the first week of every month and it will be communicated to the individuals through e-mails. If really there is no contact between the appellant and the 2nd respondent there is no need or necessity for submitting the progress report jointly by the appellant and the 2nd respondent. The above said admission of the appellant as well as the 2nd respondent clearly reveals that the appellant even after the closing of the alleged memorandum of understanding between the appellant and the 2nd respondent, they are continuing the project till the handing over of the possession. Hence the learned regulatory authority has rightly come to a conclusion that the appellant has not severed from the Green Avenue Homes & Gardens.

10. The 2nd respondent/developer entered into a settlement with the 1st respondent on 15.3.2019 and agreed to complete the remaining works in the villa within 120 days on receipt of Rs.6,41,448/-. The 1st respondent/home buyer approached the RERA by way of complaint on 22.11.2018. During the pendency of the C.No.165 of 2018 both the respondents entered into a compromise. Since the 2nd respondent failed to comply the settlement, the learned regulatory authority found fault with the appellant and imposed fine of Rs.1,00,000/- and directed the 2nd respondent to handover the villa. Against that order both appellant as well as the 2nd respondent preferred separate appeals and the 2nd respondent complied the settlement and the appeal filed by the 2nd respondent was disposed as settled. The appellant herein even though party to that appeal has not raised his little finger with regard to the settlement. The

appellant being a party to that appeal 59 of 2019 knowing fully well that the possession of the villa has been handed over only on 21.11.2019 by way of settlement in the appeal. Till then the project of the appellant and the 2nd respondent was an ongoing project. The appellant himself admitted that they will fulfill all commitments and handover the villa as per the letter dated 11.12.2013. In the subsequent minutes of meeting on 06.01.2015 also both of them assured to submit progress report of the villa jointly. On 21.5.2015 the 2nd respondent sent a communication to the HDFC Bank, Chennai with regard to the home loan of 1st respondent. That amount was received by the 2nd respondent for which the 2nd respondent gave a receipt on 7.9.2015 for the above said items find place in page No.109 and 113 of the typeset. In between 22.5.2015 to17.11.2018 there is no written communication between the parties. Hence 1st respondent approached RERA by way complaint in C.No.165 of 2018. During the pendency of the complaint also possession of villa was not handed over. During the appeal on 22.11.2019 only possession of villa was handed over. Till that date the project of the appellant and the 2nd respondent was ongoing and both the appellant and the 2nd respondent are responsible and liable for handing over the villa. If the villa was handed over prior to the commencement of the RERA the arguments of the appellant side is tenable. But in this case the project is not a completed one and it was an ongoing project. Till the completion the appellant, as assured by him is absolutely liable for the handing over of the villa since he himself arrayed as a partner for the project. Hence the citations referred on the side of the appellant are not applicable to the facts of this case. So the plea of no communication after the commencement of the RERA has no impact since it was an ongoing project on the date of commencement of the Act and the project was completed only on 21.11.2019. The point is answered accordingly.

Point No.ii :

11. In point No.1 it was decided that the plea of no communication after the commencement of the RERA is negatived and found that the Green Home Project was an ongoing project and completed only in the year 2019. The appellant was imposed with penalty of Rs.1,00,000/- for the failure of the obligation of the promoter and marketing agent. The only defense put forth by the appellant is that regarding completion of construction the appellant is no way responsible. The above said plea was not accepted by the learned authority. The reason adduced by the learned authority for imposing penalty on the ground of active participation of the marketing agent in the completion of the project. Furthermore the appellant himself acted on behalf of the promoter and received the advance on behalf of the promoter and passed receipt for the same and designated himself as the partner of the project. In such circumstances each and every partner jointly and severely is liable for the third party to deal with the partnership. On that principle the learned authority has imposed penalty on the appellant and directed the 2nd respondent to handover the possession as per the settlement. There is no infirmity in the findings of the learned authority. The appellant is entitled to get back from the promoter, the expenses incurred by him due to the delay in the obligation of the promoter, as per the clause 7.2 of the memorandum of understanding between the appellant and the 2nd respondent which runs as follows:

> ***"The developer is irrevocably and unconditionally indemnifies the marketing associate against all liability, loss, harm, damage, cost of expense (including legal fees on indemnity basis) that the marketing associate may suffer, incur or sustain in future as a result of any sum claim, or demand or the activities of the owners and developer in performing its duties or obligation under or by virtue of this agreement,***

except to the extent that such liability, loss, harm, damage, cost or expenses arose directly from the marketing associate's willful misconduct, bad faith or negligence."

12. In the above said clause it has been specifically mentioned that the developer is unconditionally indemnifies the marketing associate against all cost or expenses suffered by the marketing associate as a result of the activities of the developer in performing the duties or obligation under or by virtue of this agreement. Admittedly the developer failed to complete the project as promised within the time. Hence the learned authority has imposed penalty against the appellant, being the partner of the 2nd respondent and it is the cost or expenses due to the failure on the part of the developer. Hence the developer is liable to indemnify the marketing agent. Therefore the appellant is no way suffered any monetary loss due to imposing of the penalty against the appellant. Moreover the appellant is no way be prejudiced since the appellant is entitled to get back the penalty paid by him from the 2nd respondent by way of indemnity as per clause 7(ii) of memorandum of understanding between the appellant and 2nd respondent. Furthermore, it is not the case of the appellant that there is no jurisdiction to impose any penalty against the appellant. In such circumstances there is no chance for interfering with the findings of the learned authority. Therefore this Tribunal comes to a conclusion that this appeal is not deserves to be allowed.

13. In the result this appeal is dismissed. No costs. The order of the learned authority in C.No.165 of 2018 is confirmed.

This order is dictated to the stenographer directly to the computer and typed by her and corrected and pronounced in the open court on the 10th day of February 2020.

Sd/- xxxxxxx
CHAIRPERSON

Sd/- xxxxxxx
ADMINISTRATIVE MEMBER

Sd/- xxxxxxx
JUDICIAL MEMBER

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