BEFORE THE TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL (TNREAT)

(Tamil Nadu, Puducherry, Andaman & Nicobar Islands)

(Under the Real Estate Regulation And Development Act, 2016)

Dated : 30.01.2020

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

Appeal No. 60 of 2019

M/s. T.K.Housing & Constructions,
Villa No.28A, Thirukumaran Nagar,
Jasmine Grove,
Echankaranai,
Behind Mahindra World City,
Chennai-603 002. ... Appellant

Vs

1. B. Geethapriya
2. Arivazhagan Murthy
   180, Avigna Celeste,
   Echankaranai Village,
   Kunnavakkam, Chennai – 603 107. ... Respondents

This appeal came for final hearing on 09.01.2020 in the presence of Advocates, Mr.K.Mukund Rao and Mr.K.Mahalingam for the appellant and the respondents appeared in person and having submitted the written arguments and having stood over for consideration of this Tribunal till this date and delivered the following :

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ORDER

2. The respondents/complainants filed a complaint before the Regulatory Authority in Form 'M' for the relief of registration of the builder's project under TNRERA and to hand over the villa as per the agreement. After contest the Regulatory Authority passed the Order by directing the builder to hand over the Villa within one month from the date of the order as per the terms and conditions of the agreement and directed to charge only for the floor area approved by the competent authority and also directed to register the layout with the authority. The appeal is against the order passed by the Authority dated 20-06-2019. The builder is the Appellant herein. Complainant before the Authority is the Respondent herein.

3. As per the Complainant, he originally booked a Villa No. 20A at "Jasmine Grove" which was promoted and developed by TK Housing and Constructions (Appellant herein). According to the Complainant, they entered into a Sale Agreement and Construction Agreement simultaneously with the Appellant represented by its sole proprietor T.Kumar on 29-06-2017. According to the complainant, it is only an 'On-going Project'. Further is not an individual project, it is a combined one which is called as a gated community project by the builder and the total area / extent of the land is 3.56 acres comprised in S.Nos. 47/1, 47/2, 48/1, 48/2B, 48/3A. Originally according to the complainant, the entire land of 3.56 acres is owned by the proprietor T.Kumar. Later on, on 07-07-2009, T.Kumar executed a Settlement Deed in favour of his wife Hemamalini under a registered Document No. 3347/2009 to an extent of 2.2 Acres in S. Nos. 48/1, 48/2B and further to an extent of

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2915 sq. ft. comprised in 47/1, 47/2 on the file of Sub-Registrar, Chenglepet. Subsequently on 05-10-2009, K.Hemamalini, 1st Vendor, wife of T.Kumar had executed a Power of Attorney in favour of her husband T.kumar under Document No. the 618/2009 in respect of 2.26 acres. Subsequently on 30-10-2013, S.Kalarani, 2nd vendor executed another General Power of Attorney in favour of T.Kumar bearing Document No. 15655/2013 and the remaining extent of 1.23 acres comprising in S. No. 48/3A was still owned by T.Kumar. According to the complainant, the said T.Kumar was developing and promoting the project which he has named as 'Jasmine Grove' and selling them as individual villas and also as apartments. According to the Complainant, the very approval of the plots came into existence only after the coming into force of the Tamilnadu Real Estate Regulatory Authority Act. Further even during the pendency of the case and the appeal, the said T.Kumar has been dealing with the property, selling the same as villas and apartments by different sale deeds dated.

Sl.No.	Villa / Apartment	Date	Sale Deed No
1	20A (1635 sq ft)	21.11.2017	11380/2017
2	18 (750 sq ft)	07.05.2018	4642/2018
3	41 (855 sq ft)	07.06.2019	6700/2019
4	Apartment #1	11.06.2019	6891/2019
5	Apartment #2	11.06.2019	6895/2019
6	Apartment #3	23.09.2019	11474/2019
7	Apartment #4	01.11.2019	12977/2019

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4. From the table, it is seen that according to the Complainant, even during the pendency of the appeal, properties have been sold. Therefore the Appellant's contention that the DTCP approval was obtained only on the basis of individual buyers and the said T.Kumar acted as a facilitator is completely false. According to the Complainant, even for the grant of loan for the entire project or for individual buyers also, the said T.Kumar had given an undertaking before the bankers that it is his sole responsibility to obtain Completion / subdivision plan certificate (DTCP approval / Registration as per Regularization Act from the competent authority within 3 months from the date of sanction of loan). He had also executed a Gift Deed to the government in respect of the OSR for the approval of the plan. Therefore the contention of the Appellant that the Construction Agreement was based only on the 'Need to work' is legally not sustainable. Even according to the construction agreement, they have specifically stated that the construction could only be taken by the appellant alone and the buyers of the land are not entitled to have their own construction agent. This will also categorically prove beyond any doubt that it was a joint project, owned and projected by the Appellant. Further it was named as 'Jasmine Grove' as developed by the Appellant. Above all these things, if it is a stand-alone project, there cannot be an agreement for maintaining the project for a period of 15 years and that too in respect of all the villas and flats. Builder is also developing and promoting through his website and the project is not completed. The building is not handed over and all these things are still pending after coming into the force of the Act and he has filed an application for registering the project and also for direction to handover the villa. After hearing both the parties, and rejecting their claim that they have gone for arbitration which is on their own initiative on the basis of his dotted line agreement, negatived the claim.

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The Authority has not accepted the defence and has granted both the prayers. Aggrieved on the same, the appellant has come forward with this appeal.

5. As the appellant would mainly contend that the plots have been sold by Hemamalini, wife of the Appellant as per the Settlement Deed even in the year 2009 and he only sold them as Power of Attorney of his wife excepting 5 plots which were retained by Hemamalini in her name. Subsequently two plots were sold in the years 2018 & 2019. In the remaining plots, his wife has put up the construction in 2015. According to the Appellant, Hemamalini who is the owner of plot No.21 and Kalarani owner of Plot No. 20 subdivided the two plots into three plots by creating Plot No. 20A, and the present plot was purchased by the Respondent/Complainant on 29-06-2017 with Kalarani and Hemamalini represented by Power of Attorney Agent T.Kumar. On the same day, they have entered into a construction agreement in respect of the land covered under the sale agreement and undivided share of the land was registered on 22-11-2017. As the DTCP approval was not obtained in respect of the land under regularization scheme, permission was obtained for the already sold plots vide DTCP Na.Ka.54 of 2017 dated 22-12-2017. Thereafter pursuant to the Construction Agreement, construction of the Plot No. 20A was taken by the Appellant. According to the Appellant, even during May 2018, the construction was 99.9% completed (but for the fittings) and even though it was ready, as the Respondent did not pay the balance amount of Rs.4,39,400/-, disputes have arisen between the parties for which the Appellant invoked the Arbitration clause and notice was issued for the arbitration as early as on 09-10-2018 for which the Respondent issued a reply notice dated 22-10-2018 alleging that there is no scope for arbitration and the Arbitration Tribunal cannot proceed with the same. But

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in spite of the notice by the arbitrators, the Respondent did not appear before the Arbitrator. The Arbitrator has passed an order ex-parte. Only to circumvent the same, the complainant has chosen to come before the RERA. The Appellant has mainly raised the point of maintainability but the final order has been passed on 20-06-2019 to handover the property as well as to register. According to the Appellant, the project is not registerable as the villa is only to an extent of 1635 sq. ft of land that is 151.89 sq. metres. Therefore they will come under the purview of exemption under Section 3(2)(a). It is a stand-alone construction of the villa in the layout formed as early as 2009. Merely because a regularization has been done on 22-12-2017, it will not clothe the right of the RERA to interfere. Therefore he would contend that the order passed by the Authority is legally not sustainable. Heard both the parties. Both parties have also given written arguments and produced documents.

6. On a careful consideration of the entire issue, the main point of consideration is whether the project is a stand-alone project or it is a group development and whether it requires registration. From the very brochure, the Appellant clearly states the that Jasmine Grove is an exclusive gated project with 75 individual villa houses in a span of 3.56 acres of land located adjacent to Mahindra World City, Singaperumal Koil, New Chennai. It also states that the entire villa house is fully independent gated, with three phase electricity connection, sump and solar power. At the same time, there are also apartments which are all put under one compound wall. There are no independent compound walls in between the villas. It is also very clear that originally T.Kumar was the owner. He executes a Settlement Deed in his wife's favour. There after she executes a Power of Attorney in favour of her husband. Husband sells the property retaining a portion with him.

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He executes the common area jointly for all the property, OSR to the government. Originally it is not an approved layout. Therefore when the construction started, the builder as the power of attorney, in the year 2017, had applied for regularization which is for the entire area. Therefore the actual approval for the layout plan was obtained only on 16-11-2017 vide CR/ DTCP/LP/173 (R)2017. It was also made very clear by the promoter that all the buyers could only engage his company for putting up construction. Therefore the argument of the Appellant that it is only a stand-alone project for every individual has rightly been not accepted by the Learned Authority.

7. Further the Appellant has given an undertaking to the bank that he is responsible to get the land approval and he also enters into an agreement to maintain the property for a period of 15 years. If it is a stand-alone project, where is the question of maintenance for 15 years and that too by starting a association and maintaining the same. Above all these things, as rightly pointed by the court below, the construction is not completed even as per their own admission. There is also a dispute in respect of the constructed area as per the documents produced. The promoter has also executed some sale deeds much later in the year 2019 after filing of the complaint and during the pendency of the appeal also which clearly proves that the constructions were going on and not a completed one.

8. Even as pointed out by the Respondent, the Appellant clearly stated that as promoter, he only agreed to construct the villa houses and names the project as 'Jasmine Grove'. Further there is a clear understanding and agreement between the parties that the allottees agrees to avail to only the services of the promoter namely the Appellant even for the maintenance of the project. It is brought to the notice of the court below that the advertisement for the sale of the project is done by the said

T.Kumar giving a consolidated figure that it is a joint project under the name and style of 'Jasmine Grove'. It is also brought to the notice of the court below that even during the pendency of the case below and now the appeal pending before the Appellate Tribunal, the said T.kumar have been executing sale deeds for villas and apartments. Therefore the argument of the appellant that it is a stand-alone project separately and only this villa is constructed, that too, as per the wish of the said individual are all not correct. The main argument of the Appellant is only that the villa is only 1635 sq. ft., i.e., 151.89 Sq. Metres. Therefore it would come under the purview of exemption under Section 3(2)(a) of the Act cannot be accepted for the very simple reason that the project is not done as one stand-alone project. It is very clear that the entire area of 3.56 Acres, many number of villas are constructed and sold not as a land alone but comprises of land as well as putting up construction as villa. Therefore it is a joint project as rightly pointed out by the Learned Authority that it is termed as a gated community. When that being so, merely because the extent of one particular flat or villa is less than 500 sq. m. it cannot be treated as standalone project. Whereas taking into consideration the entire project as such which is comprised in the larger extent of land especially in this case, 3.56 Acres out of which the project is contained in 2.2 acres, definitely it would come under the purview of the Act. A common factor in this whole aspect is the same seller who gives the Power of Attorney to her husband is the present seller who also is compelled to be the construction agreement holder / promoter of the project. It was made clear between the parties even at the sale of the undivided share of the land, that the sale is not one of the land alone but as a villa which is a comprehensive project. The present contention of the builder that every building is constructed only according to the standalone instructions cannot be accepted at all for the simple reason only it is

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now to circumvent the registration of RERA, they have come forward with this theory. Whereas all along they are building a group of villas calling them as a gated community. It is further strengthened by the very admitted fact of the promoter that it is he who advertises for entire project, to sell and it is he who alone is entitled to put up constructions in the plots though sold individually only in respect of undivided share and further nobody else could be permitted to construct and thereafter even to maintain for the next 15 years, when it is to be done in this way, can this be called as a standalone project. Therefore it is only a group development project as stated by the Respondents. That is why the Learned Authority has categorically not accepted the arguments of the Appellant and directed them to register. As it is an 'Ongoing Project' as they have categorically found out that the project has not been completed as on date. Admittedly the approval to construct or the regularization for construction even in the sold plots are taken only 22-12-2017, much after the Act came into force and the construction remained incomplete on the date of the Act came into force. Therefore rightly the Learned Authority has come to a conclusion that it needs to be registered. Even the promoter' agreement has been signed by both the parties only on 29-06-2017 which is much later than the Act came into force in Chennai city on 22-06-2017. The Act was notified on 22-06-2017.

9. Now to deal with the case regarding the arbitration. Here the arbitration which is referred to is not the arbitration as appointed by the court. The Appellant has initiated the arbitration on his own pursuant to the agreement and appointed his Arbitrator. The arbitrator in turn had sent a notice. The Respondent has clearly stated that it is not an arbitrable dispute and refused to participate in that. Ultimately the order has been passed as ex-parte. According to him, the Arbitration will not lie

in view of the special Act where the facts are only governed under the provision of the RERA Act alone. In view of that matter, the learned authority has rightly pointed out following the directions of the Hon'ble Supreme Court in *M/s. EMAAR MGF LAND LIMITED – Vs – AFTAB SINGH* specifically pointing out when there is a special enactment for the adjudication of the dispute, the same cannot be referred to arbitration.

The Apex Court in *M/s. EMAAR MGF LAND LIMITED – Vs – AFTAB SINGH* case, framed many issues for consideration and one such issue, Issue NO. 4 :

> " (iv) Whether by the insertion of words "notwithstanding any judgment, decree or order of the Supreme Court or any Court" under Section 8(1) by the (Amendment) Act, 2015 legislature intended to do away with the decision of judgments of Supreme Court laying down that Consumer Protection Act being special remedy can be initiated and continued despite there being any arbitration agreement between the parties?"

While considering the above, the Apex Court by referring the previous judgments of the Apex Court namely **National Seeds Corporation Ltd. and Fair Air Engineers Pvt. Ltd.** case laid down in the following paragraph 6 and 7 :

> *6. The Judgments relied upon by Shri Ghose do not have any bearing on the issue raised in this appeal. In neither of those cases, has this Court interpreted the provisions of the 1996 Act in the light of the provisions contained in the 1986 Act. Therefore, the propositions laid down in those judgments that Section 8 of the 1996 Act is mandatory cannot lead to an inference that the consumer forum is bound to make a reference to the Arbitral Tribunal.*
>
> *7. In view of the above stated legal position, the National Commission did not commit any error by holding that the remedy of arbitration available to the complainant does not bar the jurisdiction of the consumer forums and the consumer forums are not under an*

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obligation to refer the matter to the Arbitral Tribunal. With the above observation, the appeal is dismissed.

Further referring to Judgement in *Rosedale Developers Pvt. Ltd.,* - Vs – *Aghori Bhattacharya & Others (2018) 11 SCC 337*, has held in paragraph 23 :

> "23. This Court rejected the above submission and laid down in paragraph 4:
>
> "**4.** In our opinion, there is no merit in the submission of the learned counsel. The question whether the existence of an arbitration clause contained in the agreement executed between the parties excludes the jurisdiction of the consumer forum and on an application made by either party, the consumer forum is duty-bound to make a reference to the arbitrator was extensively considered in National Seeds Corpn. Ltd., v. M. Madhusudhan Reddy and it was observed : (SCC pp. 534-535, paras 64-66.)"

Further the Hon'ble Supreme Court has categorically held vide series of judgments that the complaint under the Consumer Protection Act being a special remedy, despite there being an arbitration agreement, the proceedings before the Consumer Forum had to go on and no error committed by Consumer Forum on rejecting the application under Section 8. Further referring to the *Booz Allen & Hamilton Inc.* –vs – *SBI Home Finance Limited & Ors.* (2011) 5 SCC 532, has also pointed out that the arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country.

Thereafter taking into consideration of the amendment in Section 8(i) and 8(ii) of the Arbitration Act, considering various aspects in paragraph 50 in *M/s. EMAAR MGF LAND LIMITED – Vs – AFTAB SINGH* case has held :

> **"Can it be said that after amendment under section 8(1), the law laid down by this court in reference to Section 2(3), where large number of categories have been held to be non-arbitrable has**

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been reversed or set at naught. Neither any such Legislature intendment was there nor any such consequence was contemplated that law laid down by this Court in context of Section 2(3) has to be ignored or reversed."

As rightly pointed out by the Hon'ble Supreme Court, when there is a special enactment to deal with a particular dispute as regards to the parties, merely because there is an agreement which normally is a dotted line contract, the parties cannot relegate themselves to the arbitration clause in the agreement. When the special Act empowers a party to deal with the dispute in a particular manner, such disputes can only be dealt under the special Act and not by the arbitration clause. In this particular case, even the arbitration as cited by the Appellant was not accepted by the Respondent. He did not participate in the arbitration and it was also not an arbitration by a court appointed arbitrator and the award having been passed ex-parte, that cannot be a ground to negate the provisions of the Act. Therefore rightly the Authority has negatived the arbitration plea. Therefore we have no hesitation in confirming the order of the Authority.

Hence the appeal is dismissed. No costs. The Order of the Authority dated 20-06-2019 is confirmed.

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 30th day of January 2020.

Sd/- XXXXX
CHAIRPERSON

Sd/- XXXXX
ADMINISTRATIVE MEMBER

Sd/- XXXXX
JUDICIAL MEMBER

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