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 : 09.09.2020

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

Appeal No. 67 of 2019

1. K.S.Prateep Kumar
2. Srividhya ...Appellants

..vs..

1. S.Elayaraja
2. S.Sivaraj ... Respondents

This appeal has been preferred against the order of the Regulatory Authority in C.No.309/2019 dated 19.9.2019 and was taken on file on 13.11.2019 and came up for final hearing on 19.08.2020 in the presence of Advocates M/s.T.K.S.Gandhi, J.T.Rajasuriya, M.Arun, S.Aravind, N.Berlin Prabhu, for the Appellants and Respondents appeared through Advocate Mr.Abu Becker Siddique. Having heard the arguments of the both sides through video conferencing and having stood over for consideration till this day and this Tribunal delivered the following order:

Verified RealEstate™

ORDER

1. The appellants are the complainants who are the home buyers and the respondents in the original complaint are the developers. For easy understanding both the parties are herein after referred as home buyers and developers as per their ranking.

2. According to the home buyers the developers advertised that they are developing the group development in area of 11769 sq. ft. Comprised in Survey No.404/13 as per CMDA planning permit No.1670/05 dated 22.11.2005 situated at Okkiam Thoraipakkam Village. Now Sholinganallur Taluk, Kanchipuram District within Chennai Corporation area. The respondents represented by its Proprietor S.Elayaraja through common friends had represented that the 1st respondent is developing a group development consisting of 5 building blocks comprising 26 flat units. The home buyers booked a first floor flat in the front facing block and purchased the same by paying entire consideration, including UDS cost, construction cost and other charges. The developer having received the entire consideration failed to hand over the possession of the constructed flat. Hence the home buyers approached the Regulatory Authority for the relief of registration of the project, direction to restore the materials which were kept in the flat premises and direction to handover possession of the flat.

3. According to the developers that the disputed project does not qualify for being registered with TNRERA as per the Regulations of the Section 3(2)(a) of the Tamil Nadu Real Estate (Regulation and Development) Act 2016. Hence the provisions of the Act or the Rules

Verified by RealEstate™

and Regulations shall not apply to such projects. This is a small sized project having involved in a money dispute between the home buyers and the builder. It has got to be resolved only through a proper civil forum. They have unnecessarily invoked the jurisdiction of this Authority and wasting the valuable time and effort of the authority. Hence they pray the appeal to be dismissed.

4. The developer after entering appearance and after filing counter insisted for an enquiry only on the preliminary issue of maintainability of the compliant. Hence the Authority heard both sides with regard to the preliminary issue and negatived the claim of the complainant as the project does not come under the purview of the RERA Act 2016 and dismissed the complaint as not maintainable. Aggrieved upon that the home buyers have come forward with this appeal.

5. Points for consideration :-

1. Whether the complaint of the home buyers is maintainable under Section 3 of the RERA Act?
2. Whether the appeal deserves to be allowed or not?

Point No.1 :

6. The main contention of the Home Buyers/Appellant is that the complaint is maintainable, since the project of the developer is an ongoing project. In contra the contention of the developer/respondent is that the project of the developer is only a stand-alone project and it is developed only in an area of less than 500 sq. m., hence it is not

registrable. The Learned 'Regulatory Authority' accepted the contention of the promoter and found that the area of the development of the project is below 500 sq. m. On the side of the Home Buyers the Learned counsel would contend that originally the promoter has developed 11759 sq. ft. which is equal to 1093 sq. m. But the developer denied the contention of the appellant as the project of the developer is a stand-alone project. How far the contention of the parties are tenable has to be analyzed. Before going into the merits of the appeal, the relevant provision of Section 3 of the RERA Act has to be looked into and the same is extracted below. Section (3) :

> ***3. (1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act: Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act: Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration. (2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required— (a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases: Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act; (b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act; (c) for the purpose of renovation or repair or re-development which***

does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project. Explanation.—For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

In the above said provision some of the words employed and for which, meanings of the same have been contemplated in the definition sections. The relevant wordings are as follows :

(zh) "planning area" means a planning area or a development area or a local planning area or a regional development plan area, by whatever name called, or any other area specified as such by the appropriate Government or any competent authority and includes any area designated by the appropriate Government or the competent authority to be a planning area for future planned development, under the law relating to Town and Country Planning for the time being in force and as revised from time to time;

(zk) "promoter" means,—

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) any development authority or any other public body in respect of allottees of—

(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

Verified Realstate ™

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public.

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;

(zn) "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 apartment, 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;

7. According to Section 3(1) no promoter shall sell or offer for sale without registering the real estate project with the Real Estate Regulatory Authority established under this Act. The proviso clause specifically states, projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the authority for registration within a period of 3 months from the date of commencement of this Act.

8. The land owner, who is the promoter, has purchased the project land on 25.01.2018 [Typed-set of promoter at page no. 1 to 17] from G.Narendran, S.C.Shanmugam, V. Jaya Kannan, as per Document No.586 of 2018. The land owner namely Mr.C.A.Prabhakar, S/o.Mr.Cruz

Nadar purchased 'A' and 'B' schedule property measuring 11822.5 sq. ft has applied for plan approval on the basis of this sale deed in which the total measurement is mentioned as 11759 sq. ft. It is equivalent to 1092.84 sq. m. from the above said total land the present disputed land measuring 3010 sq. ft was sold by the said Mr.C.A.Prabhakar, S/o.Mr.Cruz Nadar in favour of the home buyers herein through his power agent Mr.Elayaraja who is the promoter herein. In the Power of Attorney deed also the same property was mentioned measuring 3010 sq. ft. The home buyers entered into a sale agreement with the said Mr.C.A.Prabhakar, S/o.Mr.Cruz Nadar through power agent Mr.Elayaraja, the promoter herein on 04.06.2018 [Typed set of promoter at page no. 47 to 53]. In the above said Power of Attorney deed the power agent is arrayed as an ordinary power agent and in page no. 4 of the said power of attorney it has been specifically mentioned as

> ***"Power Agent should maintain proper accounts, vouchers and receipts, in respect of the schedule mentioned property and should produce as and when I demand and no consideration has been received for this Power of Attorney."***

9. In the sale deed executed by the said Mr.Prabhakar, land owner through power agent the promoter herein, there is a specific paragraph with regard to the construction agreement. At page no.8 of the sale deed [At the page no. 118 to 126 of the Typed-set of the appellant] the above said wordings runs as follows :

> ***"Whereas the purchasers entered into a construction agreement with M/s.Grand Style Constructions dated 20.09.2018, and registered as Document No.6538 of 2018, Book 1, in the office of the Sub-Registrar Neelangarai."***

10. The above said words are no way connected with the sale deed because there is no link between the construction and the land owner. The land owner authorized his power agent the said Mr.Elayaraja, the developer herein, to execute sale deed as mere power agent and not as a power agent coupled with interest. The above said documents are relied on by both the parties. The mere reading of power of attorney executed by land owner to the promoter herein is only a ordinary power of attorney. The land owner had purchased 11759 sq. ft equivalent to 1092.84 sq. m. planning area for the purpose of development. As per the definitions 2 (zh) of this Act the planning area means a planning area for future planned development, under the law relating to Town and Country Planning. As per 2 (zk) of this Act, a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon is also the promoter. In this case the land owner Mr.Prabhakar, S/o.Mr.Cruz Nadar has obtained a planning area by way of sale deed has developed as a Real Estate project without any construction by himself is selling the same including the common area. So the land owner will come under the definition Section 2 (zh) (zn) and (zk) as a promoter, but in this case he has not shown himself as a promoter anywhere else.

11. The said land owner sold the land through his power agent, the promoter herein as an ordinary power agent. But in the sale deed executed by power agent in favour of the home buyers herein, there is a specific recital with regard to the construction agreement which finds a place as stated supra. The construction agreement entered into between the promoter and the home buyer and agreement of sale are

all made on one and the same day namely 4.6.2018, the UDS sale deed was executed on 20.09.2018. The promoter herein is not a land owner. He is only power agent and a building contractor. In such a situation who is the promoter, whether the land owner or his power agent or both the land owner and the contractor has to be analyzed through legal provisions.

12. Section 202 of the Indian Contract Act dealt with the Termination of agency, where agent has an interest in this subject matter. The above said section runs as follows :

> ***Section 202 : "Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest. "***

For easy understanding of the above section, the Apex Court has explained in the following verdict:

AIR 1969 SC 73

Seth Loon Karan Sethiya vs Ivan E. John And Ors.

> ***8. There is hardly any doubt that the power given by the appellant in favour of the bank is a power coupled with interest. That is clear both from the tenor of the document as well as from its terms. Section 202 of the Contract Act provides that where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest. It is settled law that where the agency is created for valuable consideration and authority is given to effectuate a security or to secure interest of the agent, the authority cannot be revoked. The document itself says that the power given to the bank is irrevocable. It must be said in fairness to Shri Chagla that he did not contest the finding of the High Court that the power in question was irrevocable.***

Verified RealEstate

13. As per the above said law laid-down by the Hon'ble Supreme Court that it is settled law that where the agency is created for valuable consideration and authority is given to effectuate a security or to secure interest of the agent, the authority cannot be revoked. But in this case for the power of Attorney Deed executed by the land owner in favour of the promoter herein there is a specific recital that there is no consideration was passed for the Power of Attorney. If really there is no consideration what is the necessity for him to include the recitals with regard to construction agreement in the sale deed dated 20.09.2018. Through sale deed dated 20.09.2018 out of 3010 sq. ft. UDS of land 468 sq. ft. alone executed in the name of the homebuyers. As per Section 2 (zk), the person who develops the land into plots even without structure for the purpose of selling as a promoter and person who acts himself as a builder, contractor or claims to be acting as a Power of Attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale is also a promoter. So both the land owner Mr.Prabhakar, S/o.Cruz Nadar and the promoter herein Mr.Elayaraja are also a promoter. But unfortunately, the land owner name does not find place anywhere else in the document relied by both parties as a promoter. The promoter herein projected only to the extent of 3010 sq. ft. alone to show that it is below the required measurement for registration as per Section (3). Originally the land owner purchased 11759 sq. ft equivalent to 1092.84 sq. m. As per Section 3(2) (a) the area of land proposed to be developed does not exceed five hundred square meters. In this case the land owner planning to future development 1092.84 sq. m. out of that he proposed to sell 3010 sq. ft. in which he proposed to construct this apartment. In which also he is claiming shelter for exemption from registration. In the above said provision the last sentence is specifically

mentioned as apartment proposed to be developed does not exceed eight inclusive of all phases. Now let us see whether the above said land owner as well as the promoter has developed this 3010 sq. ft. project alone or more than that we have to analyse.

14. The home buyers after entering into sale deed and construction agreement the dispute arose between them and before approaching the 'Regulatory Authority' there was exchange of legal notices between them. The promoter herein Mr.Elayaraja and Mr.Sivaraj has issued reply for Rejoinder which runs as follows : {Typed Set of the promoter at page no.226 and 233} :

> ***"Under instructions from my clients Mr.S.Elayaraja and Mr.S.Sivaraj, both at M/s.Grand Style Constructions, Flat No.81, "Royal Castle", No.52, Manikodi Srinivasan Nagar, Perungudi, Chennai – 600 096, issue this reply to your rejoinder dated 05.03.2019 as stated hereunder. This rejoinder reply shall be treated as part and parcel of my earlier reply notice dated 25.02.2019, that was previously issued to you. "***
>
> **At page no.233 in the above said notice in para no. 11 admitted as follows: " My clients state that there are five projects having 26 flats being developed by my clients in the same location. They are named as 1) Project Grand melody – 6 flats 2) Project Grand Symphony – 5 Flats, 3) Project Grand Harmony – 5 Flats, 4) Project Grand Rhymes – 5 Flats and 5) Project Grand Rhythm – 5 Flats. Moreover in all the 5 projects at present 15 out of 26 flats have been given possession and respective owners have started enjoying the premises.**

15. From the above said admission by way of reply there are 26 apartments proposed to be developed through 5 projects. Out of which 15 apartments were handed over and the balance 9 apartments is not

yet handed over. The above said projects totally consist of 5 in number. So the intention of the promoter to launch 5 projects for 26 flats in different phases is clearly reflected. As per Section 3(2) no Registration of the Real Estate project shall be required

> ***(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:***
>
> ***(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;***
>
> ***(c) .....***
>
> ***Explanation.—For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand-alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.***

16. The land owner purchased the planning area through sale deed dated 25.01.2018 and the homebuyers herein entered into sale agreement of UDS on 4.6.2008 and on the same date entered into construction agreement and obtained sale deed on 20.09.2018. The Real Estate Act came into force on 26.03.2016 and Section 2 came into effect on 01.05.2016 and Section 3 came into effect on 01.05.2017 and the Tamil Nadu Real Estate Rules 2017 came into effect on 22.6.2017. The land owner purchased the planning area on 25.01.2018 i.e. after the Real Estate Act and the Rules came into force. Hence the land owner as well as the contractor, who are promoters, who are developing land into flats and proposed to construct premises for selling and they have proposed to construct totally 26 flats. Admittedly out of 26 flats 15 flats are handed over. In such circumstances as per the admission of the promoter themselves they have proposed to construct 26 flats in all phases. Therefore it exceeds 500 sq. m. and 8 flats. Hence

Verified by Realstate ™

exemption clause 3(2)(a) is not applicable to the Real Estate Project of the land owner as well as the promoter herein. Therefore the home buyers rightly approached the 'Regulatory Authority' for the direction of registration of the project. The promoter except the admission regarding 26 flats at page number 233 of their typeset no where they have whispered anything regarding total number of flats and total project. The promoter purposefully suppressed the said facts to take shelter under the exemption clause. Hence this Tribunal comes to the conclusion that the complaint of the Home buyers are absolutely maintainable. Point No.1 is answered accordingly.

Point No.2 :

17. In point No.1 it was decided that the complaint of the Home buyers is maintainable. The specific case of the home buyers is that the promoter launched 5 projects out of which in one of the project he entered into agreement. To prove the same on the side of the home buyers, they have produced typed set regarding the admission of the promoter at page number 146 and also in the written argument submitted by the home buyers. The above said facts also elicited at page 244 of the typed set of the home buyer. But the learned authority has not considered the plea of the home buyers and came to a conclusion that

> ***"'Grand Melody' is an independent development consisting of sub-division approval for plot with less than 500 sq. m. extent and planning permission for construction with number of dwelling units less than 8"***

18. But in Section 3 (2) (a) and explanation of the said section specifically stated that the promoter shall obtain registration under this

Verified by RealEstate

Act for each phase separately. But it was not considered by the Learned Authority. In such circumstances the plea of the home buyers regarding maintainability of the complaint is acceptable one and whether the promoter launched more than 8 flats in all phases or not has to be find out only through evidence. Without letting in evidence it cannot be concluded as a project of the promoter is an exempted project. Admittedly the land owner purchased planning area more than 1000 sq. m. and proposed to construct flats for selling through his power agent and the said fact was also admitted by the promoter through legal notice. In such circumstances prima facie case is made out for the maintainability of the case by the home buyers. The burden automatically shifts to the promoter to prove the exemption under Section 3 (2) (a). Without proving exemption clause the promoter is not entitled for exemption. Therefore this Tribunal comes to a conclusion that the project of the promoter is not exempted under Section 3(2)(a) on available records prima facie. It is the bounden duty of the promoter to let in evidence to disprove the case of the home buyers. As there is no such project as stated by the home buyers in the counter filed by the promoter they have not whispered anything regarding the other 4 projects namely Grand Symphony, Grand Harmony, Grand Rhymes and Grand Rhythm. The promoters themselves admitted that there are other projects and other 26 flats out of which 15 handed over. The above said admission is through their own legal notice, the above said admission is a substantial evidence. The promoter has to disprove the said admission as incorrect as per the Apex Court verdict reported in

AIR 1977 SC 1724

Thiru John & Anr -vs- Returning Officer & Ors.

It is well-settled that a party's admission as defined in sections 17 to 20 fulfilling the requirements of section 21, Evidence Act is substantive evidence proprio vigore. An admission, if

Verified by RealEstate™

clearly and unequivocally made is the best evidence against the party making it and though not conclusive, shifts the onus on to the maker on the principle that "what a party himself admits to be true may reasonably be presumed to be so" and until the presumption was rebutted the fact admitted must be taken to be established. In the instant case, there are a number of clear admissions in prior declarations precisely and deliberately made in solemn documents by Shri John. These admissions were made ante litem motam during the decade preceding the election in question. These admissions were entitled to great weight. They had shifted the burden on the appellant (Shri John) to show that they were incorrect. The appellant had miserably failed to show that these admissions were incorrect. [543 C-E]

19. The promoter suppressed the facts to relieve from the clutches of the RERA Act. The preamble of the Act speaks about the aims of the act to achieve promotion of the Real Estate Sector in an efficient and transparent manner and to protect the interest of the consumers in the real estate sector. Hence this Tribunal comes to a conclusion that the appeal deserves to be allowed. Point No.2 is answered accordingly.

20. In point no.1 it was decided by this Tribunal that the land owners Mr.Prabhakar is also a promoter and who is the necessary party to this adjudication.

21. In the result by allowing this appeal with costs the order of the Regulatory Authority in C.No.309 of 2019 dated 19.09.2019 is set aside and the Authority is directed to restore the C.No.309 of 2019 to file and direct the Learned Authority to implead the promoter Mr.Prabhakar as a 3rd respondent in the case to get a binding

Verified RealEstate ™

adjudication and dispose the complaint after giving sufficient opportunity to both sides to let in evidence and dispose the same within 3 months according to the merits. The connected Miscellaneous Applications are closed.

This Order is dictated to the Stenographer, transcribed and typed in the computer by her, corrected and pronounced by us in the open court on 09.09.2020.

Sd/- XXXX
CHAIRPERSON

Sd/- XXXX
ADMINISTRATIVE MEMBER

Sd/- XXXX
JUDICIAL MEMBER

Verified RealEstate™