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 23-09-2020

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

Appeal Nos. 71 to 73 of 2019

Green Avenue Homes and Gardens
Represented by Proprietor Dhinakaran
.... Appellants in A.Nos.71to73/2019

..Vs..

1. Ms.Sarojam Gopinathan
2. Col.Sanath Gopinath ... Respondents in A.No.71/2019

1. V.S.Srikumar
2. V.S.Sriram ... Respondents in .ANo.72/2019

R. Chitra ... Respondent in .A.No.73/2019

These appeals have been preferred against the order of the Tamil Nadu Real Estate Regulatory Authority in C.No.248, 249 and 250 of 2019 dated 19.09.2019 by the developer. These appeals were taken on file on 18.11.2019 and came up for final hearing on 09.09.2020 in the presence of .Advocates Mr.K.Venkatesan for

appellants and Advocate Mr.V.Raghavachari for respondents and having heard the arguments of both sides through video conferencing and having stood over for consideration till this day and after considering the arguments of both sides and available materials on record and this Tribunal delivered the following.:

COMMON ORDER

1. The appellant is the developer and the respondents are the owners of the flats. In this appeal for easy understanding the appellant is described as developer and the respondents are described as flat owners.

2. The described property is Plot No. 66 in Z block 5th Avenue, Anna Nagar, Chennai – 600 040. It consisted of a building and three floors with two flats in each floor totaling six flats. The said flats were purchased from the Tamil Nadu Housing Board by one 1) Mrs.R.Chitra, 2) Mr.V.R.Srinivasan, 3) Mr.James Joseph, 4) Mr.S.C.Agarwal, 5) Mr.M.Gopinathan and 6) Mr.C.Rathnam. The appellant approached the said six owners with an offer to jointly develop the said property. The developer offered to construct a new building at his own cost after demolishing the existing building and also the developer offered to pay a sum of Rs.8,00,000/- each apart from paying monthly rents to them for their accommodation at the rate of Rs.20,000/-. Except the flat owner Mr.S.C.Agarwal other 5 owners agreed for the said proposal. The said Mr.Agarwal was neither willing for the joint development nor offered to sell his flat. The developer later purchased the same from the said Mr.Agarwal and thereby became the owner of a flat and as well as the developer. Then on 16.04.2012, the above said flat owners except the said Mr.Agarwal and the developer Mr.Dinakaran entered into the development agreement to which the developer should complete the construction of the building blocks within 10 months from the date of receipt of the approved

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building plan from the competent authorities and also on the execution and registration of a General Power of Attorney pertaining to the schedule D property in favour of the developer. In the above said agreement A schedule property is the total property in plot no.66. Flats 'A' to 'F' are described as B schedule property. Schedule C is the undivided share to be retained by the owners to the tune of 6/8 share. Schedule D is described as 2/8 UDS to be allotted to the developer. Schedule E is described as total flats allotted to owners namely Mrs.R.Chitra, allotted flat 'A' with car park in 1st floor, Mr.V.R.Srinivasan allotted flat 'B' with car park in 1st floor. Mr. James Joseph and Co. allotted flat 'C' with car park in 2nd floor, Mr.D.Dinakaran allotted flat 'D' with car park in 2nd Floor. Mrs.Sarojam Gopinathan & Co. allotted flat 'E' with car park in 3rd floor, Mr.Rathinam allotted flat 'F' with car park in 3rd floor. All the flats plinth area is measuring 935 sq. ft each. 'F' schedule allotted to developer flat no. G and H in 4th floor. Schedule G describes the list of amenities to be provided by the developer namely 1) lift, 2) Genset Generator, 3) Toilet with stilt floor, 4) sump 18,000 litres, 5) Over Head Tank 10,000 liters.

3. According to the flat owners they have entered into development agreement with the developer on 16.4.2012 and surrendered the possession to the developer in December 2012. The building plan sanction was accorded by December 2013, till date the developer has not completed the construction and handed over the possession of the flats. Hence the flat owners came forward with the complaint before the authority for the relief of registration of the project, directed to renew the approval of CMDA, directed to complete the project and hand over, directed to pay the arrears of rent and in the alternative if the developer fail to comply with the direction sought permission to proceed with the project by the flat owners.

4. According to the developer the facts narrated regarding ownership and agreement are admitted. The five owners agreed for the development as narrated by the developer. The said Mr.Agarwal is not willing and he offered to sell his flat to the developer to the tune of Rs.1.5 crores which was nearly three times the market value. The developer was reluctant to buy the said flat at such a fancy price. The developer's offer was based on costing of the project which was free money of Rs.40 lakhs to the 5 owners and the cost of construction of the new building. However as the entire plan has gone ahead too far, the developer was forced to buy the said flat from S.C.Agarwal for which the developer has to borrow from a financier with interest at the rate of 36% per annum. The reason for the delay according to the developer is that the 5 flat owners handed over the possession only after the receipt of Rs.8 lakhs each and approval was granted by the CMDA only after the direction from the Hon'ble Madras High Court. Immediately the developer demolished the existing building and started construction of new building. He put Pile foundation and constructed stilt floor for car parking and constructed columns up to 1st floor from when funds were a crunch for him. Hence he was constrained to obtain loan from Mr.Subash Chand Jain for which he had executed two sale deeds in favour of said Mr.Subash Chand Jain even after execution of two sale deeds the said Mr.Subash Chand Jain refused to give the balance amount. Therefore he could not mobilize any more funds to go ahead with construction beyond the stilt floor stage. Moreover, the developer's other projects were also not generating enough income so that he could infuse those funds to the project. The developer has no intention to delay the project and the delay occurred due to the reasons stated supra. Therefore the developer wishes to complete the project by new development agreement to raise the total floor area for 10 flats and also to compensate the delay by two additional flats. The developer proposed to provide amenities for the five flats owners namely modular kitchen, wardrobes of all the three bedrooms, shutters for all lofts in all

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three bedrooms and the kitchen. For which the flat owners were not willing and approached the Regulatory Authority and after contest the authority directed the developer to pay the arrears of rent payable to the flat owners and as agreed by developer under article No.25, of development agreement directed the flat owners to complete the construction at the cost of the developer and also restraining the developer from proceeding further in this project on the strength of the General Power of Attorney and joint development agreement. Aggrieved upon that the developer has preferred this appeal.

5. The appellant/developer came forward with this appeal on the ground that the authority has restrained the developer from proceeding further in the project when the flat owners themselves pray to complete the project. The developer even though explained his situation, which prevented him from proceeding further in completing the project and also his bonafides regarding payment of Rs. 8 lakhs each of the owners and also paid monthly rent up to May 2014, but the above said facts were not considered by the authority. Hence the developer/appellant sought for setting aside the order of the Regulatory Authority. In addition to that during the course of the arguments the learned counsel for the appellant would submit that the appellant is always ready and willing to complete the project that is why he suggested alternative arrangements by way of new construction agreement for 5th floor. The appellant has also considered the delay and inconvenience caused to the flat owners to compensate them the developer is prepared to provide additional facilities like modular kitchen, wardrobes of all the three bedrooms, shutters for all lofts in all three bedrooms and the kitchen magnanimously. But the authority has not considered these aspects. Hence the appeal has to be allowed.

6. The learned counsel for the flat owners would submit that the flat owners are the senior citizens and the developer purchased the flat from the said Mr.Agarwal prior to the construction agreement. After purchase of the said flats only and after considering the entire facts namely cost of the land, cost of construction and other allied expenses, the developer agreed to construct the flats and entered into agreement. There is no truth in the allegations of the developer regarding the amenities as offered by him magnanimously are all only 'make belief affairs'. That is why he came forward with an idea of new agreement for 10 flats, to which he has added as additional amenities as a sugar coated one. Hence the authority has considered all these facts and came to a correct conclusion that he has to pay as per the development agreement. There is no merit in the appeal and it is liable to be dismissed.

7. Point for consideration :-

1. Whether the appeal deserves to be allowed or not?

Point :

8. According to the appellant the delay caused is only due to the financial crisis to him and it is neither willful nor wanton and still he is willing to complete the project subject to signing of new agreement. According to the respondents they are not willing to enter into new agreement. They are ready to complete the project on their own at the cost of the developer.

9. Admittedly the flat owners and developer entered into an agreement namely development agreement on 16.04.2012. Before going to discuss the merits of the appeal we have to look into the development agreement entered into

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between the parties. The relevant article with regard to this dispute in the development agreement is as follows :

Development agreement clause 19 (b)

The developer hereby confirms and declares that the developer is qualified, skilled and experienced in developing and constructing the property and he has the necessary expertise, infrastructure, financial ability and resources to perform the obligations, as mentioned in this Agreement and to carry out the development as envisaged herein in a timely manner and that the developer .....

Developer agreement clause no.25

In case the developer commits breach of any of the terms of this agreement or in the event the developer fails to complete the construction of the building complex in accordance with the terms of this agreement and the sanctioned plans, on account of any reason attributable to the developer including but not limited to his negligence without prejudice to any legal rights or remedies available to the owners, the owners shall be entitled to forthwith terminate this agreement and complete the construction in accordance with the approved and sanctioned plans at the cost and expense of the developer. Notwithstanding anything contained herein, to recover the said amounts from the developer, the owners are hereby granted an irrevocable right by the developer to exert a charge and lien on the properties described in Schedule 'D' and schedule 'F' and also collect the amounts due from the purchaser's and/or allottee/s of the undivided share in the property described in Schedule 'D' and Schedule 'F' to meet the cost of construction. If any surplus amount is available, the same shall be paid to the developer. On the other hand if the amounts are insufficient to meet the remaining construction cost the developer shall be personally liable to pay the deficit amount to the owners.

Developer agreement clause no. 27

All the parties herein agree that this Development Agreement is neither transferable nor assignable in any manner and does not create any right whatsoever in the Developer to pledge borrow or mortgage the property or part thereof.

Developer agreement clause no. 31

Any amendment alteration, variation or modification to this Agreement must be in writing and signed by both the Parties.

10. The flat owners and the developer entered into the development agreement on 16.04.2012 and the developer paid Rs.8 lakhs each to the flat owners and the developer paid rent for some time and still there is a balance are all admitted facts.

11. The developer approached the flat owners for development of the property out of six owners except one owner S.C.Agarwal, other owners namely R.Chitra, V.R.Srinivasan, James Joseph, & Ors, Mrs.Sarojam Gopinathan & another and C.Rathinam agreed for development. So the developer purchased the flat belonging to the said S.C.Agarwal by a sale deed dated 29.11.2011 (doc. No.3694/2011). The agreement for development of 8 flats was entered on 16.04.2012 after that the developer obtained CMDA approval for the building plan after getting order from Hon'ble High Court on 26.04.2013 and approval was obtained only on 20.12.2013.

12. Then the flat owners delivered the possession to the developer and the developer demolished the building and started construction till stilt floor. Afterwards there is no progress. This fact is also not disputed by both parties. The only reason adduced by the developer is financial crisis met out by the developer. The developer has elaborated about his inability and cause of financial crisis due to purchase of flats from the said S.C.Agarwal for huge cost namely fancy price as fixed by the S.C.Agarwal.

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13. According to the developer he incurred Rs.1.5 Crores for the said purchase for which he had borrowed from the financier with interest at the rate of 36%.p.a. The developer then approached another financier Mr. Subash Chand Jain seeking loan from him to settle the previous loan. For which the said financier sought for security. The developer agreed and gave a new flat as security and he released Rs.25 lakhs to the developer then informed to the developer to offer further security. There is no other go for the developer who agreed for the same and got another 20 lakhs further requested for the remaining loan amount. The financier insisted for the execution of sale deed in favour of him. Therefore the developer executed two sale deeds on 19.09.2013 in favour of financier Mr.Subash Chand Jain, after execution of sale deed also financier refused to release the balance loan amount. These are the causes narrated by the developer for his financial crisis. The above said allegations regarding financial crisis happened in the year 2011 and 2013. For the above said allegations the developer has not produced any piece of paper to prove the allegations regarding his financial crisis. Per contra on 16.04.2012 in the development agreement the developer has confirmed and declared that he has experience, infrastructure, **financial ability and resources.** If really at the time of entering into development agreement in April 2012 if there was any financial crisis there is no need or necessity for the developer to declare about his financial ability, stability etc. It is not the case of the developer that the flat owners compelled the developer or insisted the developer to purchase the flats from the said Agarwal for the huge amount. After completion of the sale deed only he entered into the development agreement i.e nearly after 4 months. As per the clause 27 of the development agreement it has been specifically mentioned that no parties to the agreement should create any encumbrance regarding the property or part thereof. The developer himself has admitted that he has executed two sale deeds to one Mr.Subash Chand Jain for the loan without the consent of the other co-owner. He has violated the clause by

encumbering the property without any consent._ Hence the developer has acted against this clause 27. Furthermore as per the clause 31 addition or alteration or modification to the agreement must be in writing and signed by both the parties. He has also violated clause 31 by seeking to increase the number of flats to 10 without the consent in writing and especially the two flats allotting for himself to sell. In this case the developer abandoned the construction work after stilt flooring he has not taken any steps for further construction from 2017.

14. The reason adduced by the financial crisis regarding payment of interest and repayment of principal and disputes with regard to the payment of GST etc in his another project are all internal matter between the developer and his creditors. There is no connection between the above said matters and the flat owners. The developer after ascertaining the situation and analyzing the cost of construction and his financial stability and resources only he entered into the development agreement. Now he goes to the extent of saying that he has paid Rs.40 lakhs as a free cost to the flat owners. All the flat owners have purchased flats for the price, they have not purchased anything for free of cost. So they have fixed the price for new flats as old flats plus 8 lakhs plus rent till the new flats possession is handed over. The above said price was accepted by the developer and they have entered into an agreement. If really the above said price is expensive and he was not able to meet out the same he could not have entered into the development agreement. The developer calculated the cost of two new flats to be allotted to himself and he came to a conclusion that alleged huge amount paid by the developer to the flat owners is less than the cost of two new flats allotted to him and certainly he would earn profit from the sale of new flats. The principle is 'The buyer beaware'. Furthermore the principle 'the buyer beaware' is applicable to this developer. It is his look out and he could not take advantage of his inability to complete the project. Therefore the reason adduced by the developer for the non performance

of his part of contract is not sustainable and it is not tenable as per the 16.04.2012 development agreement.

15. The counsel for the appellant would allege that they have prepared to give some additional extra amenities for the delay caused in constructing his project and further stated that they asked home buyers to execute a new agreement for construction of 10 flats which they were not agreeable. Originally the developer entered into agreement for construction of 8 flats, even which he is not able to complete the same due to his financial crisis. In this situation he has proposed to construct another two flats it will cause further financial burden which definitely he may not be able to handle at all. As on date the developer has no sufficient funds to complete the project. In such a situation if another development agreement is entered into, naturally the developer has to get another loan from somebody. So the flat owners were not willing for fresh agreement. At this juncture the stand taken by the flat owners is tenable. So the authority is not in a position to compel the flat owners or direct the flat owners to enter into fresh agreement which the home buyers believe that the promoter cannot comply with.

16. On the side of the appellant the main and foremost ground put forth by the appellant is that the prayer made by the flat owners is only to complete the project by the developer but the authority has not considered the same. The learned authority has considered all these reasons adduced by the developer and came to a conclusion that by invoking article 25 of the development agreement and permitted the flat owners to complete the project at the cost of the developer. So the ground raised by the appellant is not sustainable.

17. Next ground is with regard to direction of the authority to pay the arrears of rent without considering their financial crisis. The financial crisis is the

look out of the developer. The developer promised the flat owners and has obtained possession of the flats. Now they are out of their property. At this juncture the written agreement which is legally entered into between the parties have to be strictly followed. So this ground is also not sustainable.

18. The last ground put forth by the appellant is that the authority failed to accept the bonafides of the appellant namely payment of 8 lakhs each to the flat owners. The developer has not explained how the money paid by him to the tune of Rs.8 lakhs each can be construed as a free money. The developer offered to construct the flats to the each owner. The flat owners accepted that offer by way of consideration. The developer fixed the price for the new flats as old flats and plus 8 lakhs plus rent. The above said three ingredients made the flat owners to accept the consideration as a justifiable and agreed for the development agreement. When the true fact is as such the developer's contention that he has paid free money of Rs.8 lakhs each is absolutely not acceptable. These are all only make belief claims by the developer when already the flat owners have handed over the possession of the flats on the promise made by the developer and now they are residing in the rented building. So the payment of 8 lakhs each by the developer to the flat owners is only a part of price and not the free money and it cannot be construed as valid argument by the developer so this ground is also legally not sustainable. The above said ground put forth by the appellant is also not sustainable and untenable.

19. The learned authority has considered all these things and came to a conclusion by invoking article 25 of the agreement. In the development agreement except clause 25 no other alternative method is incorporated, in case of failure of the developer, to complete the project. Hence the learned authority rightly invoked alternative method as contemplated in clause 25. In such a

situation there is no chance for interfering with the findings of the Learned authority. Therefore this Tribunal comes to a conclusion that this appeal not deserves to be allowed and it is devoid of merits. The point is answered accordingly.

20. In the result

A.No.71/2019 is dismissed with cost and the order of the Regulatory Authority in C.No.248/2019 dated 19.09.2019 is confirmed.

A.No.72/2019 is dismissed with cost and the order of the Regulatory Authority in C.No.249/2019 dated 19.09.2019 is confirmed.

A.No.73/2019 is dismissed with cost and the order of the Regulatory Authority in C.No.250/2019 dated 19.09.2019 is confirmed.

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 23-09-2020.

Sd/- XXXX
CHAIRPERSON

Sd/- XXXX
ADMINISTRATIVE MEMBER

Sd/- XXXX
JUDICIAL MEMBER

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