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 : 09.11.2020

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

Appeal No.75 of 2019

Olympia Grande Apartment Owner's Welfare Association, Pallavaram Registration ... Appellant(s)

Vs

M/s.KSM Nirman Private Limited ... Respondent(s)

This appeal was taken on file on 26.11.2019 and came up for final hearing on 13.10.2020 in the presence of M/s. Hari Radhakrishnan, G.Derrick Sam, G.Vijayabalan, N.Ahilandeeswari, J.Ganesh Ram, Advocates for the Appellants. The respondents appeared through M/s.Fox Mandal & Associates, P.Jayaprakash, J.John Zachariah, M.V.V.N. Sivanthy, Vijay R Sekar Advocates. Having heard the arguments of both sides through video conferencing and having stood over for consideration till this day and this Tribunal delivered the following:

ORDER

1. The appellant is the Olympia Grande Apartments Owners' Welfare Association and the respondent is the promoter. The appellant preferred a complaint in C.No.327/2019 before the Regulatory Authority for the relief of handing over of Corpus Fund, documents, direction to rectify anomalies and deviation and damages and also to fulfill the promises and commitments at the time of sale. The respondent/promoter would contend that the completion certificate for the 16 residential flats have been obtained prior to the notification of the RERA. The promoter had completed 16 residential towers and handed over possession in 2016 itself. The 17th tower is a commercial tower consisting of serviced apartments. On the above said contentions the authority came to a

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conclusion that all the 16 residential towers have been completed and handed over possession as well as completion certificates for these 16 residential towers obtained prior to the Act coming into force, the complaint is not maintainable and is ordered accordingly. Aggrieved upon that the appellant/allottee association came forward with this appeal.

2. The learned counsel for the appellant would submit that the project includes 17 towers consisting of A (9 towers) B (3 towers) C (1 tower) D (1 tower) E (1 tower) F (2 towers) and planning permit has been applied by the developer and permission granted by CMDA on 26.04.2012. All the 788 owners have paid for the UDS for the total common area and has right and privilege for the use of common area for the common purposes. Olympia Grande by its name and premises plan approval is one and unique and all the 788 allottees have UDS in the total area of the premises and can enjoy the property right of common area and no way it is separated as stand alone. Therefore, there is no relevancy for the 3 partial completion certificates. Further would submit that the partial completion certificate dated 13.05.2015, 6.11.2015 and 15.02.2016 have no legal sanction to issue any partial completion certificate. The promoter has applied for completion certificate on 31.05.2017 in any event on the date of coming into force of RERA Act 2016. The promoter did not have a valid completion certificate. The application for completion certificate was made only on December 2017. Further would submit that on the date of coming into force of Section 3 of the RERA Act 2016 the respondent had not even applied for completion certificate. Therefore the subject project was an ongoing project. Lastly, the appellant's counsel would submit that the 17th tower of the integrated project was converted from residential to commercial in blatant violation of provision of Section 14 (2) (ii) of RERA 2016. Hence, the appellant prayed to setaside the order of the Authority.

3. The learned counsel for the respondent/builder would submit that the project of the promoter commenced in the year 2012, possession handed over in the year 2015 and appellant association itself formed in the year 2016. Hence prima facie the complaint itself is not maintainable. Further would submit that the intention of the developer to take up commercial development has been

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incorporated in the contract executed with the allottees. In addition the allottees have also been informed about the project being developed in phases and not at a time vide clause 26 of the construction agreement. On 6.7.2017 itself intimation of handing over of common area maintenance to the Apartments' Owners Welfare Association, even then, they have not taken any steps to take charge of the maintenance. In fact to establish bonafide the developer has deposited the corpus fund with interest in a fixed deposit with the Federal Bank and the copy of the receipt and statement of accounts of the corpus fund were informed to the Appellant. But the Appellant has not produced the register of members to substantiate its claim of being the rightful association. In fact there is a dispute between the apartment owners and there was a complaint before the District Registrar (Administration) cum Registrar of Societies against the appellant on the grounds of mismanagement. Any how the respondent/developer completed the project and handed over the possession before the Act came into force. Hence the complaint itself is not maintainable. So the authority rightly came to a correct conclusion. So there is no chance for interference. Therefore the appeal has to be dismissed.

4. Points for consideration:

1. Whether the complaint is maintainable?
2. Whether the appeal deserves to be allowed or not?

Point No.1:

5. Perused both side contentions. On perusal the Appellant came forward with the complaint for the relief of handing over of corpus fund and documents and for rectification of some defects in construction. The appellant has not prayed for registration of project. The only contention raised by the promoter/respondent is that the apartments have been completed and handed over possession in the year 2015 i.e., before the RERA Act came into force. So the RERA has no jurisdiction to entertain the complaint. The authority has decided the complaint of the appellant as not maintainable since the project has been completed in the year 2015 and handed over possession before the RERA Act came into force.

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The Learned Authority has not considered the relief sought for by the appellant and the impugned order is not with regard to maintainability alone. In such circumstances the Learned Authority ought to have decided that the relief sought for by the appellant is, why not maintainable before the RERA Authority and what is the remedy for their grievances have not been discussed. On the side of the appellants they have relied CMDA letter to the appellant regarding deviation from approved plan as a precedent. The appellant has relied the order In Complaint No.35 of 2018 of the RERA, Chennai and also relied the confirmation order for. Appeal No.5 of 2018 by the Division Bench of the Hon'ble Madras High Court in CMA No.2287/2019 and also relied the Order of Haryana RERA Gurugram in Complaint No.7 of 2018 dated 21.8.2018. Before going to discuss the merits of the appeal first of all we have to decide whether the complaint is maintainable or not.

6. The Real Estate (Regulations and Development) Act 2016 published in gazette on 26.03.2016 Section 1 came into force. Section 2, Sections 20 to 39, Sections 41 to 58, Sections 71 to 78, Sections 81 to 92 came into force on 01.05.2016 Section 3 to 19, 40, 59 to 70, 79 and 80 came into force on 01.05.2017. The Real Estate Act Tamil Nadu Rules 2017 came into force on 22.06.2017. Section 3 of the RERA Act dealt with prior registration of Real Estate project with RERA. In this case admittedly the respondent's project was completed and handed over possession in the year 2015 and there is no dispute. On the side of the appellant the only contention is that the Corpus Fund of the project, documents regarding the real estate projects have not been handed over or rectified the deviation and paid damages. These are the reliefs sought for by the Appellant before the Authority. After handing over possession without rectifying the above items, as narrated in the relief, whether the promoter can be relieved from the clutches of the law. This is the main question to be answered first. In this RERA Act there is a specific word for the ouster of civil court jurisdiction contemplated u/s 79 which runs as follows :

> ***79. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under***

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this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

7. According to this provision no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Real Estate Authority or the Adjudicating Officer or the Appellate Tribunal is empowered under this Act. Under this Act what are the facts to be determined is narrated and emphasized in the background of the Act or preamble of the Act. The Loksabha Standing Committee on Urban Development has filed its report (Thirtieth report of fifteenth Loksabha). In this draft report of the Real Estate (Regulation and Development) Bill 2013 in Chapter 1 the background of the bill is stated as follows:

The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated. There is, thus, absence of professionalism and standardization and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is inadequate to address all the concerns of buyers and promoters in that sector. The lack of standardization has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasized in various forums. Though availability of loan both through private and public banks have become easier, the high rate of interest and the higher EMI has posed additional financial burden on the people with the largely unregulated Real Estate and Housing Sector. Consequently the consumers are unable to procure complete information or enforce accountability against builders and developers in the absence of an effective mechanism in place. At this juncture the need for the Real Estate (Regulation and Development) Bill is felt badly for establishing an oversight mechanism to enforce accountability of the Real Estate Sector and providing adjudication machinery for speedy dispute redressal.

The above background of the bill emphasized the following:

1. Absence of professionalism
2. Absence of standardization.
3. Lack of adequate consumer protection.
4. Absence of an effective mechanism.
5. To enforce accountability.
6. Providing adjudication machinery for speedy dispute redressal.

8. The legislature while enacting the RERA Act they have considered the above said points and carefully worded and incorporated Section 71(1) proviso, Section 79 and 88 which are as follows:

> ***Power to adjudicate:***
> ***Section 71. (1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:***
> ***Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.***
>
> ***Bar of Jurisdiction:***
> ***Section 79. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.***
>
> ***Application of other laws not barred:***
> ***Section 88. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.***

9. Section 71 dealt with power to adjudicate by the adjudicating officer under Sections 12,14,18 and 19 of the RERA Act. In this provision, there is a proviso clause was included in which it has been specifically contemplated that any person whose complaint in respect of matters for compensation etc is pending before the Consumer forum on or before the commencement of this Act, he may, with the permission of such Forum withdraw the complaint and filed before the adjudicating officer under this Act. Section 79 dealt with Bar of Jurisdiction. This provision contemplates that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the Adjudicating Officer or the Appellate Tribunal is empowered by or under

this Act to determine. Section 88 dealt with application of other laws not barred. This provision of the Act shall be in addition to, and not in derogation of, the provisions of any other law. So the legislature expressed their intention to emphasize the above said six points stated supra that though the Consumer Protection Act 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is inadequate to address all the concerns of buyers and promoters in that sector. So they have incorporated the proviso clause in Section 71(1) of RERA Act to withdraw the complaint under Consumer Forum and to file the same before the Regulatory Authority, Adjudicating Officer for the same grievances for the purpose of speedy dispute redressal. At the same time the legislature has barred the jurisdiction of civil court to deal with the grievances under the construction industry and further enacted Section 88. At the same time further enacted Section 88 as the provisions of RERA shall be in addition to the provisions of law and not in derogation. These are the intentions of the legislature. From the above said intention it reflects the applicability of the Act is not limited to the registered projects alone. In this RERA Act no where stated that these provisions of RERA are applicable to the registered projects alone.

10. Ultimately the intention of the legislature is to bring the disputes and grievances regarding Real Estate sector under the single roof namely RERA Act. So they have not specifically provided where the RERA Act is applicable to the projects which were completed before the Act came into force or applicable only to the projects which are on going on the date of commencement of the Act. For the purpose of registration of project alone Section 3 is contemplated and Rule 2(h) were incorporated. Regarding grievances, claims and to enforce rights and liabilities of the homebuyers and the promoters, the RERA Act is applicable without any limitation. Section 14(3) of RERA Act runs as follows:

Section 14(3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development

is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

Section 11 deals with Functions and duties of promoter.

11. (1) The promoter shall, upon receiving his Login Id and password under clause (a) of sub-section (1) or under sub-section (2) of section 5, as the case may be, create his web page on the website of the Authority and enter all details of the proposed project as provided under sub-section (2) of section 4, in all the fields as provided, for public viewing, including—

(a) details of the registration granted by the Authority;

(b) quarterly up-to-date the list of number and types of apartments or plots, as the case may be, booked;

(c) quarterly up-to-date the list of number of garages booked;

(d) quarterly up-to-date the list of approvals taken and the approvals which are pending subsequent to commencement certificate;

(e) quarterly up-to-date status of the project; and

(f) such other information and documents as may be specified by the regulations made by the Authority.

As per Section 14(3) of RERA Act, the obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify the same. In this provision the legislature specifically mentioned the period of limitation as five years. In Section 11 (4) (a) proviso clause the responsibility of the promoter extended beyond the period of five years as contemplated in section 14(3) and shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed. So even if all the apartments were handed over and the sale deeds executed even then for the structural defect or any other defect the promoter is liable and the responsibility is fixed without any limitation. The above said provisions are contemplated in this Act since it is a welfare legislation not only for the allottees but also for the promoters. Now let us decide this issue on the basis of the intention of the legislature.

11. In this case the appellant/complainant came forward before the Authority for the relief of handing over of Corpus Fund, documents, to rectify anomalies and deviation and damages. The appellant/complainant has not prayed for registration of project and moreover the appellant/complainant has not pleaded about the ongoing project. The only grievance of the appellant with regard to Section 11. Section 11 dealt with functions and duties of the promoter. According to the appellant, the promoter failed to do the duties and directed him to do the duty by way of complaint. The promoter would contend that already provided Fixed Deposit with regard to Corpus Fund and there is an internal dispute with regard to the association they are agitating before the different forum. Hence there is no mistake on the part of the respondent. It reflects from the documents produced by the respondent. So both the appellant and the respondent contended before the Authority regarding their stand with regard to the complaint. Now the only redressal forum is contemplated in the preamble of the RERA Act is Regulatory Authority under RERA Act. Other forum to redress grievances is the civil court. It was also barred and pending complaint is also permitted to withdraw from the consumer forum. In such circumstances the only ways and means open to the aggrieved party under construction industry is the provisions of RERA Act. Hence the appellant approached the Regulatory Authority rightly and the RERA provisions also specifically contemplated with regard to redress grievances under the RERA Act irrespective of their registration. Moreover it is also the intention of the legislature if the dispute between the appellant and the respondent are not redressed before the Authority under RERA Act the purpose of the Act will be defeated. Hence this Tribunal comes to a conclusion that the complaint of the appellant is absolutely maintainable before the Regulatory Authority, since there is no other ways and means for the appellant to redress their grievances. The point No.1 is answered accordingly.

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Point No.2:

12. The Learned Authority has passed order as the complaint is not maintainable. The above said Order in paragraph 30 runs as follows:

> ***"In as much as all the 16 residential Towers have been completed and handed over possession as well as the completion certificates for these 16 residential towers obtained prior to the Act coming into force, the Complaint is not maintainable and is ordered accordingly."***

The Learned Authority came to a conclusion on the ground that 16 residential towers have been completed and handed over possession as well as completion certificate for that 16 towers. Hence the complaint is not maintainable. The relief sought for by the appellant is no way connected with the completion of 16 towers. The Learned Authority has not considered the relief claimed by the appellant, on the basis of the relief claimed by the appellant/complainant alone the maintainability has to be decided. In this case the Learned Authority, without considering the relief claimed by the appellant and not even discussed anything about the relief claimed by the appellant and simply accepted the plea of the respondent/promoter and has held that the complaint is not maintainable. The legislature intended to redress the grievances of the homebuyer or promoter under the provisions of the RERA Act. That is why they have incorporated Section 71 proviso clause and Section 79 of the RERA Act. The appellant/complainant sought for the relief on the basis of the duties and responsibilities of the promoter which is contemplated under section 11 of RERA Act. For this relief the appellant/complainant cannot approach the civil court since there is a specific bar under section 79 of RERA Act. Therefore, the only way open to the appellant/complainant is under RERA Act. So as per Section 11 of the RERA Act the complaint is absolutely maintainable and as decided in point No.1 of this order the intention of the legislature is also to redress the grievances through the RERA Act. The Learned Authority without considering these provisions and intention of the

legislature simply dismissed the complaint as not maintainable is not sustainable and it is against the RERA Act itself. In such circumstances this Tribunal comes to a conclusion that this appeal is deserves to be allowed. The point No.2 is answered accordingly.

13. In the result this appeal is allowed and order of the Regulatory Authority in C.No.327/2019 dated 6.11.2019 is set aside and the Regulatory Authority is directed to restore C.No.327/2019 to file and dispose the complaint on merits within 3 months. No costs. 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 the 9th day of November 2020.

Sd/- XXXX
CHAIRPERSON

Sd/- XXXX
ADMINISTRATIVE MEMBER

Sd/- XXXX
JUDICIAL MEMBER

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