BEFORE THE TAMIL NADU REAL ESTATE APPELATE TRIBUNAL (TNREAT)

(Tamil Nadu, Puducherry, Andaman & Nicobar Islands)

(Under the Real Estate Regulation and Development Act 2016)

Dated :22.05.2020

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

Appeal No.39 of 2020

1. Mr. Manu Karan
2. Mrs. Archana Karan ... Appellants / Petitioners

Vs

1. M/s.Devinarayan Housing Board and Property Developments Pvt. Ltd.,
2. N.Nandakumar
3. V.Srinivasan ... Respondents / Developers

This appeal came up for final hearing on 13.03.2020 in the presence of M/s. Legal Empire for appellants and M/s.N.Karuunanidhi, T.Thiyagarajan and V.S.Subramanian, Advocates for respondents. Having heard the arguments of both sides and having stood for consideration till this day and this Tribunal delivered the following:

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ORDER

1) The appellants who are Home Buyers, are the complainants and the respondents who are Developers, are the respondents in the original complaint in Form-M. For easy understanding, both of them are referred as per their original designation as Home Buyers and Developers hereinafter.

2) The Home-Buyers and the developers entered into Sale andConstruction Agreements on 20.07.2017 with regard to the property comprised in R.S.No.102 of 116, Uruur Village, T.S.No.8, Block No. 39, Door NO.5, Jayaram Avenue, Vannanthuruai, Sastrinagar, Chennai – 600 020 measuring an extent of 5935 sq. feet bounded on the north by house in D.No.157 on SelvaVinayagar Avenue, East by House in D.No.7, South by Jayaram Avenue Road, West by house in D.No.3 within the above four boundaries a 3 bed room residential apartment on the 3rd floor measuring 2835 sq. ft of built up area with common area and undivided share measuring 1483 sq. ft out of above 5935 sq. ft the building to be known as "Devi Narayan's Saisagar, together with two covered car park. The cost of apartment was fixed at Rs.3,30,00,000/-. The time for handing over possession was 30.08.2017 after receipt in full off all payments with a specific clause to do any interior work at the choice of home buyers. Out of the said amount home buyers had paid Rs.3,06,00,000/- and the balance was only Rs.24,00,000/-. Deducting the TDS, Stamp duty, Registration charges, interest, cost of charge of scope in work comes to the tune of Rs.66,35,000/-.So as per calculation the developers have to refund to the home buyers to the tune of Rs.42,35,000/-. Even then the developers failed to hand over

possession. Hence the home buyers called upon the developers by legal notice for registration of apartment and refund.

3) On receipt of notice the developers denied the allegations and claimed the possession of home buyers as illegal and also demanded Rs.9,21,356/- from the home buyers. Hence the home buyers came forward with the compliant for the relief of registration of project with RERA and for hand over of possession.

4) After appearance before Adjudicating Officer, the developers took a defence as complaint is not maintainable since before the Real Estate Act came into force project has been completed and completion certificate also issued. The Learned Adjudicating Officerhearing the pleas of the home buyers and developers came to theconclusion that the complaint is not maintainable and dismissed the same. Aggrieved upon that the Home buyers preferred this appeal.

5) According to the Home buyers / Appellants the project of the developers is an 'on going project' on the commencement of the Act since completion certificate was issued only on 19.02.2018 i.e. after 18 months from the date of commencement of Act. Further more the project of developers exceed the limit of 500 sq. mt. and not liable for exemption from registration before RERA Authority. Further the learned counsel would also submitted that the learned Authority without assigning any reason simply mention the provision of Rule and dismisses the complaint as not maintainable and it is against the Real Estate Actand previous findings of this Tribunal regarding the word 'on going project'. Hence the appeal has to be allowed.

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6) The Learned counsel for the Developers would submit that the developers project consists of only four apartments which are exempted under Real Estate Act from registration and the home buyers requested through email on 25.07.2017 that the keys of the apartment be given to them to do the interior decorations. After completion they have not returned the key and illegally occupied without registration of UDS and without payment of balance due. Hence possession of the home buyers are illegal and unauthorized. Further would submit that the home buyers approached the developers for purchase of apartment, which were completed and unsold and booked immediately. For getting EB connection and water connection completion certificate is mandatory hence they applied and it was issued only in February 2018 then only EB and water connection were obtained. So the delay is not on the part of the developers. Hence the Learned Authority considering the fact and came to a correct conclusion.

7) From the above grounds and the defence put forth by the developers the following points are raised for consideration:

a) Whether the project of the developers on the date of coming into force of Section 3 of the Real Estate Act as an ongoing project ?

b) Whether this appeal deserves to be allowed ?

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8) Point (a):

According to the Home buyers, the foremost main plea is with regard to commencement of Section 3 of Real Estate Act. On that date the developers have not applied for completion certificate. According to the developers they have shifted the burden to the CMDA in issuing delayed completion certificate. How far both the plea are sustainable have to be analysed from the documents relied by both sides. Before analyzing the same the reproduction of Section 3 of Real Estate Act and the definition of the word ongoing projects under Rule 2(h) are relevant here.

> ***Section 3. Prior Registration of real estate project with Real Estate Regulatory Authority***. – *(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:*
>
> *(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;

Rules 2(h)

(b) *(h) "Ongoing project" means, a project where development is going on and for which completion certificate has not been issued but excludes such projects which fulfill any of the following criteria on the date of coming into force of sub-section (1) of section 3 of the Act:-*

(c) *(i) in layout projects i.e., where land is developed into plots, the roads and open spaces gifted to the local body concerned;*

(d) *(ii) the projects in Chennai Metropolitan Area for which application for completion certificate has been filed with Chennai Metropolitan Development Authority subject to furnishing certificate from the architect/licensed surveyor/structural engineer associated with the project to the effect that all the buildings in the projects have been structurally completed i.e. all the columns, beams and slabs have been erected supported with photographs. Chennai Metropolitan Development Authority will issue,*

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completion certificate for those projects in compliance with Completion Certificate norms prescribed. In Completion Certificate filed cases, if the Completion Certificate is rejected by Chennai Metropolitan Development Authority for violation of norms, such projects will be intimated to the Real Estate Regulatory Authority and will be bound for registration with Real Estate Regulatory Authority. The details of all projects where Completion Certificate application has been filed with Chennai Metropolitan Development Authority prior to notification of these rules will be disclosed to the public by publishing the list of all such 2 projects on the website of Chennai Metropolitan Development Authority and Real Estate Regulatory Authority immediately after notification of these rules.

(e) *(iii) in the case of projects under execution outside Chennai Metropolitan Area, as no provision and procedure has yet been prescribed for issue of completion certificate, if the construction is structurally completed meaning that all the columns, beams and slabs have been erected and certified by the architect or structural engineer/licensed surveyor associated with the project supported with photographs. Such projects shall be intimated to the concerned Local Planning Authority or Regional Deputy Director of the Town and Country Planning Department within 15 days from the date of notification of these rules with a copy marked to the office of the Director of Town and Country Planning. The Director of Town and Country Planning will make public the list of all such projects in his*

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official website, on the 16th day of notification of the rules besides publication of the same in the website of Real Estate Regulatory Authority.

9) As per the Real Estate (Regulations and Development) Act 2016, Section 3 came into force with effect from 1.5.2017. The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 came into force w.e.f. 22.06.2017.In the above said rule the word 'Ongoing Project' defined in Rule 2(h). In which it has been specifically defined the word on going project where development is going on and for which completion certificate has not been issued but excludes such projects which fulfill any of the following criteria on the date of coming into force of subsection (1) of Section 3 of the Act i.e. on 1.5.2017.

10) As per the above provision and Rule, it is crystal clear that if the developer obtained completion certificate on 1.5.2016, certainly the developers project is excluded from the definition of 'On going project'. The Learned authority gave a finding with regard to the word 'on going project' in para 10 of its order dated 21.11.2019 which is as follows:-

"10. It is seen that this project fulfills the requirement of Rule 2(h)(ii) and hence exempt from registration as an 'ongoing project' with TNRERA. Therefore the complaint is maintainable and it ordered accordingly"

The above said finding has not disclosed how the developers' project fulfill the criteria for exclusion. There is no discussion of allegation of the homebuyers and defence of the developers. Mere mentioning of Rule No.2(h)(ii) alone is not sufficient to negative the

claim of the home buyers. Section 31 of the RERA Act contemplates that every aggrieved person can approach the RERA Authority for redressing his grievance. The specific plea of the home buyer is that the developer has applied for completion certificate and obtained on 19-02-2018, after one year from the commencement of the Act. In support of the contention, completion certificate issued by CMDA was produced but it is not considered by the Learned Authority. Now let us discuss the plea of both sides.

11) The RERA Rule 2(h) specifically contemplated criteria to exclude the project that on commencement of Section 3(i) of Real Estate Act, 2016, application for Completion Certificate ought to have been applied on 01-05-2017. In the order of CMDA as Annexure – 6 in Typed Set at Page Nos. 30-31 of Home Buyers, in which it has been mentioned as Reference No.3 as "Completion Certificate Application from Thiru.V.Srinivasan dated 31-05-2017. The developers have not stated anywhere else in the reply notice, reply statement and their proof affidavit about the date of application for completion certificate. The date mentioned in the completion certificate dated 19-02-2018 was also not disputed by the developers. In such circumstances, it can be easily inferred that the developers had applied only on 31-05-2017. Section 3(i) of RERA came into force on 01-05-2017. So after theSection 3 came into force of the Act only, the developers applied for Completion Certificate. In the Tamil Nadu Real Estate Rules, 2017 itself, in Rule No. 2(h)(ii), it has been specifically state that,

> *"application for completion certificate has been filed with CMDA subject to furnish of certificate from the architect/licensed surveyor/structural engineer associated with the project to the*

effect that all the buildings in the projects have been structurally completed i.e., all columns, beams and slabs have been erected, supported with photographs"

In this case, the developer has stated that he has applied for Completion Certificate on 31.05.2017 but Home Buyer denies the facts of completion. In such circumstances, to disprove the allegation, the developer can very well produce the photograph to prove the completion of building as contemplated in Rule supported with photograph. Hence the developers have not fulfilled the criteria contemplated under the Rule 2(h)(ii) for exclusion. Therefore the plea of the homebuyers cannot be brushed aside by the Learned Authority.

12) But in contra, the Learned Counsel for the developer would submit that the delay in issuing Completion Certificate on the part of the CMDA and not on the part of developers for which developers cannot be blamed and further would submit that the home buyers offered to purchase after seeing the completion of apartment, which is unsold and booked the same, got the key for interior works and failed to complete the interior works and still in illegal possession, without UDS registration.

13) The defence plea of the learned counsel for the developers is a "Novel One". How far is acceptable under law to be analyzed. The proviso clause of Section 3(1) of RERA Act is crystal clear that :-

" That the 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 project ....."

As per the above provision, if on the date of commencement of Act, Completion Certificate is not issued, registration of project is mandatory. But the Rule 2(h) is an exception for that provision.On the date of commencement of Section 3, an application for Completion Certificateto be filed as per Rule 2(h) to invoke exclusion of project.

14) In this case, the developer filed application for Completion Certificate only on 31-05-2017. Real Estate Act, Section 3 came into force on 01-05-2017. So on the date of implementation of Section 3, no application for Completion Certificate was filed and pending before the CMDA. Moreover it was filed after 30 days after the Act came into force. Another argument put forth by the learned counsel for the developers is that on 31-05-2017, Rule is not in force. So Section 3 only is applicable on 31-05-2017. As per Section 3, no completion certificate was issued and even not applied for the same by the developers. The defence of the developers namely, delay on the part of the CMDA and on the side of the home buyer in completing the interior works are not contemplated in the Real Estate Act and Rules. In the Construction Agreement itself, both parties agreed as Clause 9(b) at Page No.6 of Construction Agreement, it has been specifically agreed that :

> *b) the ALLOTTEE has to obtain prior permission of the developer if the allottee with to perform any prayer in the said apartment prior to the date of handing over of possession or to take up any interior works which the allottee may require to be completed prior to the taking over the possession of the said apartment, subject to the condition that any damage during such interior works being undertaken by the allottee will be rectified at the cost of the allottee."*

In the above clause 9(b), it has not been whispered anything with regard to Completion Certificate.

So, taking over of possession of apartment arise only after issuing of the completion certificate. Getting Completion Certificate is the bounden duty of the developer and the home buyer has no business in it. Moreover interior decoration is no way a hurdle to get completion certificate, because if the construction is completed and duly authorized by Structural Engineer, it is sufficient to get completion certificate. Furthermore, the delay in doing interior work is not a ground to apply for completion certificate by the developers.

15) The next defence of the developers is that the apartment was structurally completed and unsold apartment and others took possession of apartment. If really the apartment is completed as alleged by the developers, what is the necessity for entering into a Construction Agreement? They can straight away enter into an Agreement for Sale or outright purchase. So this defence is not sustainable and it is no way helpful to strengthen the case of the developers as his project is not an ongoing project.

16) In any angle, the project of the developers on the date of Section 3 of RERA Act, 2016, came into force on 01-05-2017 is an ongoing project since completion certificate was not issued on that date and it was issued only on 19-02-2018.

17) On the side of the Home Buyers, the Learned Counsel would submit that the developer constructing four apartments within the area

of 2585 sq. ft., which is equal to 551.37 sq. meters. More than 500 sq. meters, area of land proposed to be developed by the Developer, hence registration under Section 3 of the RERA Act is required. The Learned Regulatory Authority has not given any finding with regard to that aspect. It gave a finding only with regard to Rule 2(h)(ii). Regarding area of development is concerned, it exceeds prescribed limit of 500 sq. meters, registration is mandatory. Regarding area of development is concerned, it exceeds 500 sq. metres and before the Act came into force, completion certificate was not obtained, hence it can be easily inferred that the developers project is an ongoing project.

18) Already this Tribunal gave a finding with regard to 'ongoing project'. The verdict of this Tribunal in Appeal No. 1/18 which findplace in the Tribunal website itself. In the above case, this Tribunal interpreted Rule 2(h)(ii) along with Section 2(e) and 2(zn)at pages 14 and 15 of the Judgment, it runs as follows :-

> *"With this when we analyze the provision of the Act, namely Section 2(e) definition of apartment, which clearly says that "any immovable property including one or more rooms or enclosed spaces located on one or more floors or any part there of in a building or in a plot of land,* ***used or intended to be used for any residential or commercial use such as residence or office****".....*
>
> *"In the rules it has been specifically mentioned that completion of all columns, beams and slabs have to be erected and certified by architect or structural engineer. Whether in this case, the Respondent has completed the project either as contemplated under the Act or at least as contemplated under the Rules? Of course the Act prevails over the rules.*

"Under the Act, it is very clear that the end product namely the flat is a usable commodity....."

By following the above finding of this Tribunal, now this Tribunal comes to a conclusion that the requirements under Rule 2(h)(ii) was not complied by the developers on the date of coming into force of Section 3(1) of the TNRERA Act and the developers project is an 'ongoing project'. The point is answered accordingly.

19) Point (b) :

In Point No.(a), it was decided that the developer's project is an ongoing project. The Learned Regulatory Authority has not taken judicial notice of the finding of this Tribunal in Appeal No. 1 of 2018 with regard to Rule 2(h)(ii) of TNRERA Rules, 2017. Moreover the findings of the Learned Authority is without assigning any reason for the finding. At this juncture, this Tribunal comes to a conclusion that there is a force in the arguments of the Learned Counsel for the home buyers with regard to the finding that their plea was not appreciated. Therefore this Tribunal found that the Order of the Learned Authority has to be set aside and appeal is deserved to be allowed. The point is answered accordingly.

20) Both the developer and the home buyer preferred separate appeals A. No. 70 of 2019 and A. No. 39 of 2020 respectively. Both the appeals were heard jointly and both the appeals are posted for orders today. Since the relief for both appeals differed, separate orders are pronounced today. The home buyers preferred two complaints, one for registration of project before Regulatory Authority and another one

before Adjudicating Officer for compensation. In both the complaints, the developer took a plea of maintainability of complaints. In appeal also, same plea of maintainability raised by developer and in both appeals, it is decided that the complaints are maintainable.

In the result Appeal No. 39 of 2020 is allowed and Order of the Learned Regulatory Authority in C. No. 358/2019 dated 21-11-2019 is set aside and Complaint in C. No. 358/2019 is maintainable before the Regulatory Authority. The Regulatory Authority is directed to dispose of the C. No. 358/2019 on merits within three months. No Costs.

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 22nd day of May 2020.

sd/- XXXX
CHAIRPERSON

sd/- XXXX
ADMINISTRATIVE MEMBER

sd/- XXXX
JUDICIAL MEMBER

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