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 12-03-2020

Coram : Mr.Justice B.Rajendran, Chairperson
Mr.N.Balasubramanian, Judicial Member

Appeal No. 42 of 2020

M/s. Sathyam Homes Pvt. Ltd.
Represented by its Managing Director
Mr.R.Kannan Nandhakumar ... Appellant

-Vs-

M.Gopalakrishnan ... Respondent

This appeal came up for final hearing on 02-03-2020 in the presence of advocates M/s. M. Chinnathurai and P. Thirupathiraj advocate for appellant. No notice was served to the respondent since admissibly of the appeal alone heard and having perused to the case records and the arguments put forth by the appellant side and grounds of appeal and having stood over for consideration of this Tribunal till this date and deliver the following:

ORDER

2. The Appellant is the Respondent/Promoter in the main case. The appellant has filed an application seeking to cross examine the Respondent herein (Complainant before the Authority) as CW-1. The contention of the appellant before the authority was that the complainant had suppressed material facts and is trying to mislead the authority for unlawful gain and further he has made contradictory statements in the proof affidavit and the complaint. In view of this contradiction and suppression of facts, the appellant herein has filed an application seeking to cross-examine the Respondent herein.

3. According to him, the procedure as contemplated in RERA is summary in nature, yet there is no prohibition for oral evidence. Further he would mainly contend that even as per the RERA Rule 38, if the Adjudicating Officer is satisfied on the basis of the statement of the parties, he has power to decide the complaint in accordance with law. At the same time, he is also empowered to adduce further evidence. Therefore the rejection of the application to cross-examine summarily is legally not sustainable. Hence he has preferred the appeal.

4. As the very appeal itself is to be decided, whether the application filed before the authority is maintainable, we heard the appellant at the admission stage itself and hence passed this order.

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5. POINT FOR CONSIDERATION:

Whether this appeal is maintainable or not?

6. On the side of the appellant raised five grounds to set aside the order of the Learned Adjudicating Officer which are all as follows:

i. Contrary to the facts of the case and law.
ii. Failed to establish the conduct of the parties through oral examination.
iii. Necessity of cross examine the respondent based on the principles of natural justice.
iv. Ought to have permitted the petitioner to cross examine the respondent to avoid misleading the forum for illegal enrichment of the parties.
v. Ought to have followed the well settled law of evidence and the need of corroborating the witnesses.

The above said grounds are to be analysed on how far it is sustainable to set aside the order of the Adjudicating Officer.

7. The first and foremost ground is only a formal one in which the appellant has raised that the impugned order is contrary to the facts of the case and law. The appellant has not explained how far it is contrary to the facts and law. Hence it is only a formal ground. So this ground is not sustainable.

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8. The next ground is 'failed to establish the conduct of the parties through oral evidence'. The Presiding Officer has no role to establish the conduct of the parties. Further more in the facts of the case is concerned th conduct of the parties are immaterial since both parties entered into an agreement and for their non performance the affected party can approach the RERA. So it is the bounden duty of the party those who approached the RERA must establish the case by documentary evidence. So this ground is not sustainable.

9. The third ground is with regard to 'principles of natural justice'. The appellant has stated that refusal of permission for cross examining the respondent against the principles of natural justice. Before going to answer this point we have to analyse what is the meaning of natural justice. It is dealt with by the Apex Court in the following verdict :

AIR 1970 SC 150

A.K. Kraipak & Ors Vs Union of India

Natural justice : *The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules could operate only in areas not covered by any law validly made. In other words they supplant the rules of natural justice which are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal appointed for that purpose.*

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From the above said guidance of the apex court it is very clear that the aim of the natural justice to secure justice or to prevent miscarriage of justice. Further, stated that these rules can operate only in areas not covered by any law.

10. In this case the Real Estate (Regulation & Development) Act, 2016 was enacted by the Parliament and assent was given by the President and Rules and Regulations were framed and notified the procedure for conducting inquiry and the powers of the authority and the Tribunal were contemplated in Section 35,38 and 53 respectively.

11. In Section 35, it has been specifically contemplated about the suo moto powers vested with the authority. To call upon any promoter or allottee or real estate agent, as the case may be, at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require and appoint one or more persons to make an inquiry in relation to the affairs of any promoter or allottee or the real estate agent, as the case may be. If necessity arises the authority has ample powers to order for inquiry suo moto. In this case both the appellant and the respondent entered into the contract and on the basis of the privity of contract they have to agitate the matter by documentary evidence. There is no need or necessity for any oral evidence in this case is concerned. So this ground is also not sustainable.

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12. The next ground with regard 'to avoid misleading the forum for illegal enrichment of the parties'. Admittedly both the appellant and the respondent entered into a sale cum construction agreement on 20.04.2018 and as per the agreement the appellant executed a registered sale deed on 04.06.2018 and constructed a residential house which was ready for occupation. According to the appellant, the respondent paid a sum of Rs.48,51,000/- and agreed to pay the balance of Rs.17,49,000/- and Rs.2,51,000/- for the additional works and issued two cheques each for a sum of Rs.10,00,000/- as final settlement but not honoured the two cheques. The balance amount of Rs.20,00,000/- is still pending. Hence possession of the house was not handed over. These are the facts narrated in the Memorandum of Appeal itself. When the facts are as stated supra, the real dispute is between the parties with regard to the balance due and not regarding any technical matters. For each and every payments necessarily there is a possibility for having written documentary evidence. In such circumstances there is no chance for misleading the forum. So this ground is also not sustainable.

13. The last ground with regard to 'not following well settled law of evidence'. As per Section 53 (3) the Appellate Tribunal shall also not be bound by the rules of evidence contained in the Indian Evidence Act. As per section 38 (2) the Authority shall be guided by the principles of natural justice and Subject to the other provisions of this Act and the Rules made thereunder. The Authority shall have powers to

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regulate its own procedure. Section 53 (1) of the RERA Act further contemplated that the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure 1908 but shall be guided by the principles of natural justice. So as per the provisions contemplated in Section 35, 38 and 53 the natural justice alone to be followed and procedure of civil procedure code and rules of evidence shall also not be bound. So this ground is also not sustainable.

14. The learned counsel for the appellant during the course of argument would submit that the respondent has raised several issues in the proof affidavit that are not at all raised in his complaint and he has contradicted to his own statement made in the complaint and in the proof affidavit and he has not approached this forum with clean hands and to strengthen his arguments he invoked Section 71(3) of RERA Act and Rules 37(2)(e) and (g) and 38(2)(c)(d) & (e). Let us see the above provisions.

Rule 37(2)(e) of RERA Rules 2017

In case the Authority is satisfied on the basis of the submissions made that there is need for further hearing into the complaint, it may order production of documents or other evidence on a date and time fixed by it.

Rule 37(2)(g) of RERA Rules 2017

(g) on the date so fixed, the Authority upon consideration of the evidence produced before it and other records and submissions is satisfied that-

(i) the respondent is in contravention of the provisions thereunder , it shall pass such orders including imposition of penalty as

it thinks fit in accordance with the provisions of the Act or the rules and regulations made thereunder;

(ii) the respondent is not in contravention of the provisions of the Act or the rules and regulations made thereunder the Authority may, by order in writing, dismiss the complaint, with reasons to be recorded in writing.

Rule 38(2)(c)(d) & (e) of RERA Rules 2017

(c) In case the adjudicating officer is satisfied on the basis of the submissions made that the complaint does not require any further inquiry it may dismiss the complaint.

(d) In case the adjudicating officer is satisfied on the basis of the submissions made that the there is need for further hearing into the complaint, it may order production of documents or other evidence on a date and time fixed by him;

(e) the adjudicating officer shall have the power to carry out an inquiry into the complaint on the basis of documents and submissions.

First let us see the provision relied by the appellant. **Section 71(3)** while holding an inquiry the Adjudicating Officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if on such inquiry he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case any be, as he thinks fit in accordance with the provisions of any of those sections.

15. The above said provisions do not speak about any cross examination. Section 38(2)(d) states that there is need for further hearing into the complaint it may order production of documents or other evidences. The Adjudicating Officer, as per the Section 38(2)(e), has power to carry out the inquiry on the basis of documents and submissions. Permitting cross examination is no where contemplated in the provision. So the argument put forth by the appellant has no substance.

16. The next last argument with regard to 'contradicting their own statement'. In this regard, our Apex Court has laid down a law with regard to contradicting own statement or no evidence without pleading dealt with in the following case :

Nandkishore Lalbhai Mehta Vs. New Era Fabrics Pvt. Ltd. & Ors.
[Civil Appeal No. 1148 of 2010]
[Civil Appeal Nos. 1131-1132 of 2010]
R.K. Agrawal, J.
Civil Appeal No. 1148 of 2010

> *15. The relevant principle relating to circumstances in which the deficiency in, or absence of, pleadings could be ignored, was stated by a Constitution Bench of this Court in Bhagwati Prasad v. Chandramaul:*
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> *"10. ... If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily*

disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties.

16. The principle was reiterated by this Court in Ram Sarup Gupta v. Bishun Narain Inter College:

"6. ... It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise.

As per the above law laid down by the Apex Court the contradictory statement made by the respondent is beneficial to the appellant so it can be elicited by the appellant during the course of arguments. For eliciting the contradiction, there is no need or necessity for cross examination mere production of contradictory statement alone is sufficient. It need not come out from the mouth of the person who contradicted the statement. Therefore this ground is also not sustainable to permit the appellant to cross examine the respondent. In any angle, the claim of the appellant to cross examine the respondent is not sustainable and not permissible since each and every transaction between appellant and the respondent are through documentary

evidence. Even as per chapter 6 of the Indian Evidence Act namely **OF THE EXCLUSION OF THE ORAL BY DOCUMENTARY EVIDENCE** dealt with under Sections 91 to 100 of Indian Evidence Act. So when there is documentary evidence is available there is no need or necessity for let in any oral evidence. Particularly regarding contradictions are concerned documentary evidence alone is applicable. In such circumstances the claim of the appellant for cross examination of the respondent is not at all permissible. This Tribunal has not found any infirmity on the finding of the Learned Adjudicating Officer. Therefore interference by this Tribunal is not warranted under law. Hence this Tribunal comes to a conclusion that this appeal is not deserves to be maintainable.

17. In the result this appeal is dismissed as not maintainable. 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 12.03.2020.

Sd/- XXXX
CHAIRPERSON

Sd/- XXXX
JUDICIAL MEMBER