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 09.11.2020

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

Appeal No. 44 of 2020

Dhanaas Property Developers
Rep. by its Proprietrix
Mrs.V.Manimuthu ...Appellant

..vs..

Vrikshaa Vassees Welfare Association ... Respondent

This appeal was taken on file on 27.02.2020 and came up for final hearing on 14.10.2020 in the presence of M/s.R.Lakshmi Narasimhan, V.Selvaperumal, Counsels for the Appellant and M/s.Karthik Sundaram, Deepika Murali, Aswini.S. Anusha Peri, Anisha Gupta, Counsels for the Respondent. 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:

Verified Real estate ™

ORDER

1. The appellant is the promoter and the respondent is the Association of allottees in the project of the appellant. The respondent association members purchased villa from the appellant/promoter and took possession of the villas and also formed the welfare association of the allottees by name Vrikshaa Vassees Association duly registered under the Tamil Nadu Societies Registration Act. The respondent association requested the promoter to fulfill the promise made in the brochure and agreement. Since the appellant/promoter failed to comply the request the respondent association approached through complaint before the Regulatory Authority in C.No.326/2019 for the relief of direction to the promoter to transfer the OSR site to the local body, direction to provide all amenities as advertised by the promoter and to penalize the promoter for non-compliance of the RERA Act. After contest, the Regulatory Authority directed the appellant/promoter within a stipulated time to comply the direction. Aggrieved upon that, the appellant/promoter preferred this appeal.

2. The appellant came forward with this appeal on 14 grounds. The Learned counsel for the appellant would submit that the appellant has full authority to add or delete amenities as shown in the brochure at any time during the construction of the property. Therefore, the appellant do not have any mandatory obligations to provide the amenities. The appellant has never stated in the brochure about the guarantee to the villa owners with regard to providing the amenities. Further would submit that out of the 180 villas only 10 persons are claiming these amenities such as

Verified by RealEstate™

swimming pool, gym and multipurpose hall with malafide intention to create nuisance and giving mental torture to the appellant. The remaining villa owners are absolutely in co-operation and expressing their intention to close the swimming pool construction due to water scarcity and safety of children. The appellant got his planning permission and got regularization and as per the permit, houses were constructed. The common amenities were provided, already direction to get the revised layout approval from the Coimbatore Local planning authority by specifying the sites for swimming pool, jogging track, children play area, private garden, gym and multipurpose hall are all not necessary since apart from the respondent the other villa owners have given letter by expressing their willingness that they are not interested to construct swimming pool. Against the wishes of the villa owners the Authority wrongly directed the appellant. The appellant is segregating the entire layout under the category of house villas in each phase. Therefore, the question of obtaining permission under the Authority in the category of gated community does not arise at all. Further would submit that the appellant has completed four phases as per the layout plan and fifth phase is in progress at this stage revised layout plan could not be obtained. The appellant expressed her willingness to construct gym and multipurpose hall after completion of the fifth phase project, it was not considered. There are divergent opinions with regard to providing common amenities the Authority failed to consider the same. In the absence of any such written agreement between the parties with regard to amenities direction by the Authority to provide such amenities is erroneous. Therefore, the appeal has to be allowed.

Verified RealEstate

3. The Learned counsel for the respondent association would submit that the Regulatory Authority after considering the facts and evidences adduced by both sides came to a correct conclusion and there is no infirmity in the findings. Even then, the appellant failed to comply with the directions. Therefore, the appeal has to be dismissed.

4. Points for consideration:-

1. Whether the claim of the appellant that there is no guarantee in the brochure to the villa owners with regard to providing the amenities is legally sustainable?

2. Whether this appeal deserves to be allowed or not?

Point No.1:

5. According to the Appellant, he entered into construction agreement with the allottees individually and made construction as per the terms of the construction agreement. The appellant designated herself as a builder/contractor in the construction agreement. The appellant has not openly declared herself as a promoter anywhere else in the brochure or advertisement or in the construction agreement. In such circumstances whether the appellant can be construed as a promoter as per law? For which the answer is available in the definition section of the RERA Act 2016, which runs as follows:

Section 2(zk) of RERA Act

(i) ...
(ii) ...
(iii) ...
(iv) ...

(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;

6. In this case the builder/promoter herself has applied as power agent for the planning permission regularization on 20.09.2018 for which DTCP Coimbatore issued orders on 16.10.2018 (Typed set of respondent, page no.77). In the construction agreement as clause No.3 it has been admitted as follows:

"3. All payments will be in cheque/DD/Pay order in favour of Dhanaaas Property Developers payable at Coimbatore, for which the receipt along with the statement of accounts will be furnished by the builders. The owner agrees to pay the balance promptly as per schedule and promised to pay interest at the rate of 18 % per annum if any default in the payment as per agreed schedule."

7. Therefore as per the above definition and above admission, the appellant herself treated as a promoter or developer and agreed for the sale of constructed villa to the allottees. Further she has clearly and categorically admitted that she had issued brochure for sale of villas. Moreover, the appellant would state that the appellant has full authority to add or delete amenities as shown in the brochure at any time during the construction of the property. Therefore, the appellant do not have any mandatory obligations to give the amenities. The appellant issued two kinds of payment modes to the allottees which are as follows:

Sl. No	Payment modes as per brochure		Payment modes as per construction agreement	
1	Initial payment for booking	10%	Advance	30%
2	Land registration	20%	Starting of foundation work	10%
3	Starting of foundation work	10%	Starting of ground floor brick work	15%
4	Starting of ground floor brick work	15%	Starting of first floor brick work	15%
5	Starting of first floor brick work	10%	Starting of head room brick work, inside and outside plastering	10%
6	Starting of plastering work	10%	Starting of flooring, electrical and plumbing work	15%
7	Starting of flooring, electrical and plumbing work	10%	Finally at the time of handing over the unit	5%
8	Starting of compound wall laying, fixing all amenities and painting	10%		
9	Handing over	5%		

8. The appellant emphasized the "NOTE" mentioned in the brochure below the amenities (at page No.17 of the Typed set of respondent). The above said note was reproduced in a clear version in page no. 4 of the Memorandum of Appeal apart from the brochure. In the above said note in the last portion, it has been stated that the promoter reserves the right to add or delete any facility, specification or amenity at the time of execution of agreement of sale of the villas. According to the appellant, the sale deed for land registered in the name of the allottees and agreement for construction entered between the developer and the owner of the plot,

after the construction the sale agreement will be executed in which the promoter has right to add or delete any facility, specification or amenity. After the completion of the construction there is no need or necessity to execute the sale agreement since the construction was made as per the payment made by the plot owner as per the schedule of payment. So the note incorporated in the brochure will in no way prevent the rights of the allottees in getting the amenities already agreed upon. The promoter openly stated that the brochure does not form any inclusion in the legal documents and purely for information only. The brochures of the appellant find place in page No.6 to 32 of the Typed set of the respondent. In all the brochures, the appellant has clearly and categorically mentioned about the amenities. If the open statement of the appellant is true, it amounts to make belief affair and unfair trade practice. Before the enactment of RERA Act, the draft Real Estate (Regulation and Development) Bill 2013 was introduced in the Parliament and it was referred to standing committee. The standing committee emphasized the background of the Bill as absence of professionalism, absence of standardization, lack of adequate consumer protection and absence of effective mechanism. 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. After elaborate discussion in parliament for another three years and finally the RERA Act was passed in the year 2016.

9. In this case, the appellant went to the extent of saying that the brochure is only for information and it is not a guarantee and it will not be

included as a legal document. To eradicate this kind of mischief and to regularize the construction industry Section 12 is contemplated.

> ***Section 12: Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act:***
>
> ***Provided that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under this Act.***

10. As per the above said Section 12, it is very clear that where any person makes an advance on the basis of the information contained in the advertisement or brochure and if that person sustains any loss or damage by reason of any incorrect, false statement that person shall be compensated by the promoter. Therefore as per Section 12 of the RERA Act the claim of the appellant as he is entitled to alter or delete the amenities promised is certainly legally not sustainable. Moreover, the brochure has been given by the builder to lure the buyers offering and promising to give many amenities and the buyers have categorically stated they bought taking into consideration all the amenities provided to them. Having made them to believe and sold the plot, the builder cannot unilaterally withdraw it. Moreover, admittedly the project of the appellant is an on-going project and Section 12 of this Act is certainly applicable to the facts of this case. Therefore, this Tribunal comes to the conclusion that Section 12 of RERA Act is applicable to the facts of this case and the appellant is not entitled to delete or refuse any amenities specifically

mentioned in the brochure and the plea of the appellant is not legally sustainable. The point No.1 is answered accordingly.

Point No.2:

11. The appellant has questioned the validity of the Order of the Authority under 14 grounds. Out of 14 grounds, two grounds with regard to amenities and regarding amenities in point No.1 it was decided that the plea of the appellant is not sustainable. Regarding construction of swimming pool, the appellant has raised three grounds. The appellant has adduced reason for the closing of construction of swimming pool that due to water scarcity and safety of children. Before advertising in the brochure about the swimming pool, the above said two reasons ought to have been considered and then included in the brochure. But the appellant has failed to do so. After the receipt of the amount for the amenities including the swimming pool, the appellant cannot close the construction suo moto. So this ground is also not sustainable.

12. Regarding the ground namely gated community, the Authority has ordered on the basis of the Real Estate Act 2016. There is no infirmity in that direction. Therefore, this ground is also not sustainable. Regarding approved plan is concerned, the Authority has directed to obtain the revised layout plan. It is also ordered as per the provisions of the Act. Hence there is no infirmity. The next ground is with regard to Gym and Multipurpose Hall. The appellant went to the extent of saying that it will be completed only after the completion of the fifth phase project. The promoter has no loco standi or right to dictate the terms as per his will and

Verified RealEstate ™

pleasure. He must act according to the brochure as per Section 12 of the RERA Act. So this ground is also not sustainable. Regarding layout project plan and its approval, it is the bounden duty of the appellant to make available to the allottee even at the time of booking of villas. As per Section 11 (3) and as per Section 14 the promoter is bound to get written consent from the 2/3rd of the allottee for any addition or alteration in the sanctioned plan. The appellant has not obtained such a consent. Hence, the claim of the appellant for closing of construction of swimming pool is not sustainable. The alleged letters, according to even the builders, are only an after thought, after the filing of the appeal and mostly it has from the tenants which is why the additional documents were rejected by the order in M.A.No.92 of 2020. In any view of the matter the order of the Authority is not against the RERA Act and there is no infirmity. Therefore there is no merits in the Appeal. Hence, this Tribunal comes to a conclusion that this Appeal not deserves to be allowed. The point No.2 is answered accordingly.

13. In the result, this Appeal is dismissed with costs. The order of the Regulatory Authority in C.No.326/2019 dated 9.1.2020 is confirmed. The connected Miscellaneous Applications are closed.

This order is directly dictated to the Stenographer and typed by her in the computer and 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

Verified RealEstate™