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 01.12.2021

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

Appeal Nos. 77 and 82 of 2020

A.No.77 of 2020

M/s.Kgeyes Residency Pvt Ltd.
Rep by its Managing Director

... Appellant

-Vs-

1. Bhavadharini Ramu
2. Dr.Avinash Mysore Srikanth
   Rep. by Power of Attorney
   Mrs.Sarwaswathi Ramu

.... Respondents

A.No.82 of 2020

1. M/s.Kgeyes Residency Pvt Ltd.
   Rep by its Managing Director

2. The Managing Director,
M/s.Kgeyes Residency Pvt. Ltd. ... Appellants

-Vs-

1. Mr.Cyril Anand Bakianathan
2. Mrs.Josephine Mary Prabha .... Respondents

These appeals were taken on file on 02.12.2020 and came up for final hearing on 29.10.2021 in the presence of M/s.S.Ramesh and R.Venkatraman, Counsels for the appellants. The respondents appeared through Advocates M/s.Ralph V.Manohar and R.Ramana. Having heard the arguments of both sides through video conferencing and having stood over for consideration till this date and this Tribunal delivered the following:

COMMON ORDER

1. These appeals have been preferred against the order of the Adjudicating Officer in C.C.P.Nos.253 and 254 of 2019 dated 28.02.2020 by the promoter. Both the appeals arose from the common order of the Adjudicating Officer in C.C.P.Nos. 253 and 254 of 2019 dated 28.02.2020. In both the appeals the appellants are one and the same person namely the promoter and in both the appeals the respondents are home buyers. Herein after in these appeals both the appellants and respondents are referred as per their original rankings as promoters and home buyers. The home buyers in CCP No.253 of 2019 entered into construction agreement and UDS sale deed on 07.12.2016 and 15.12.2016 respectively and sale price was fixed at

Rs.1,63,177,00/- and Rs.1,70,01,916/- respectively and agreed to deliver the constructed building in June 2017 and in CCP No.254 of 2019 the home buyers entered into construction agreement on 17.11.2017 and on the same date UDS sale deed was executed. And the sale price was fixed at Rs.1,67,43,424/- and home buyers Rs.1,50,00,000/- and the date of delivery was November 2017. Even after the payment of entire money and after substantial payment respectively possession of the flats were not handed over, further the application for completion certificate by the promoter was rejected and demolition notice was issued by CMDA. In such circumstances the home buyers came forward with separate complaints for the relief of delay compensation and compensation for mental agony, inconvenience and for costs. On receipt of the notices of hearing in both the cases on behalf of the promoter Deputy Manger of the company had appeared in person for the 1st hearing subsequently the promoter remained absent. On the basis of the documents relied on by the home buyers the Adjudicating Officer allowed the complaints in part and directed the promoter to pay delay compensation and compensation for mental agony and hardship and also granted litigation expenses. Aggrieved upon the same the promoter preferred these appeals on the following main grounds:

- As per the construction agreement entered between the parties there is no delay on the part of the appellant in handing over possession of the flat.
- Section 18(1)(a) of the Act has two parts and both will have to be read in conjunction without offending the other. The first part is

'in accordance with the terms of agreement for sale and the second part is duly completed the dates specified therein'. In the present case, the learned Adjudicating Officer has proceeded based on second part namely dates specified under the agreement without looking into the terms of the agreement.

- The terms of agreement entered into between the parties are very clear when it specified time for completion and other conditions in this regard.
- Clause 4 of the construction agreement was not considered and not properly appreciated by the learned Adjudicating Officer.
- The appellant applied for completion certificate on 31.5.2017. After inspection by the CMDA issued a lock and seal notice on 27.11.2017 and on 29.8.2018 after more than 15 months CMDA rejected the application for completion certificate.
- Appeal preferred by the appellant to the Government and completion certificate was granted on 3.7.2019. From 31.5.2017 till 3.7.2019 the delay occurred due to, not on account of commission or omission of the appellant.
- The home buyers have not complied with their part with regard to the payment of the entire sums as agreed under the contract.

2. The learned counsel for the appellant would submit that the above said grounds were not properly appreciated by the learned Adjudicating

Officer. Further, the learned Adjudicating Officer relied construction agreement to some extent and for the remaining followed the Rules of the Real Estate (Regulation and Development) Act, 2016. This agreement was entered into between the parties on 17.11.2017 and the Real estate Rules came into force on 22.06.2017. Therefore, the agreement between the parties will prevail over the Rules. Hence the order of the learned Adjudicating Officer is liable to be interfered and the appeal has to be allowed.

3. The learned counsel for the home buyers would submit that the learned Adjudicating Officer after analyzing the entire material on record and came to correct conclusion and there is no infirmity in the findings. Further would submit that in Rule 18 of the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 has clearly mandated that the rate of interest payable by the promoter to the allottee shall be the SBI highest marginal cost of lending rate plus 2%. In the said Rule it has not been stated anything with regard to the agreement while fixing the interest. Therefore there is no infirmity in the findings hence there is no chance for interference so the appeal has to be dismissed.

4. The promoter has not participated in the enquiry before the learned Adjudicating Officer in these two complaints. In these appeals the promoter has pleaded for non appearance for the enquiry and more over the promoter has produced documents under Order 41 Rule 27 CPC for receiving additional evidence along with appeals and both the miscellaneous applications were

allowed on the ground of no objection pleaded by the counsel for home buyers. The promoter has also not prayed for any remand. Both sides counsels have also not pray for any remand during the course of arguments in the video conferencing. In such circumstances to avoid further delay and without invoking the remand procedure and to implement the Real Estate (Regulation and Development) Act, 2016 in letter and spirit, the dispute between the parties have to be decided as early as possible. The ultimate aim of the Real Estate (Regulation and Development) Act, 2016 is to ensure possession of flats to the home buyers at the earliest. On this ground also this Tribunal is not inclined to invoke remand procedure. Therefore to meet the ends of justice this Tribunal comes to a conclusion that the dispute between the home buyers and promoter has to be decided in these appeals itself on available records before this Tribunal.

5. Points for consideration:

1. Whether the appeals are deserve to be allowed or not?

Point:

6. According to the appellant the delay in handing over of flats not due to the omission or commission on the part of the appellant/promoter and construction was completed and applied for completion certificate on 31.5.2017 itself. After inspection by the CMDA application for completion certificate was rejected after 15 months then appellant/promoter preferred appeal to Government and it was ordered to issue completion certificate then

CMDA issued completion certificate on 3.7.2019. Due to legal battle the delay was caused for which the appellant/promoter is no way responsible. Further the delay not due to the appellant/promoter and it is due to the order of the competent authorities. Hence it cannot be construed as a delay as per clause 4 of the agreement and the home buyers are not entitled to any interest or compensation.

7. According to the respondents/home buyers it is the duty of the promoter to clarify the title to the property without any encumbrance before starting construction. The appellant/promoter failed in his duty to clarify the title without any ambiguity and rectified the same with huge delay at the cost of the home buyers. Hence the appellant/promoter is absolutely liable to pay interest and compensation.

8. Perused both sides contention. On perusal there is a small dispute between the parties only with regard to delay in handing over possession of flats and awarding of interest and compensation. According to the appellant/promoter the delay for the handing over of flats was only due to orders of the competent authorities and as per clause 4 of the construction agreement the home buyers are not entitled for any interest or compensation since it cannot be construed as a delay. According to the respondents/home

buyers the delay due to dereliction of duty of the promoter hence the home buyers are entitled for the interest for the delay.

9. On the side of the appellant/promoter they have not appeared before the Adjudicating Officer due to miscommunication of their previous Manager Mr.R.Srinivasa Rao. The home buyers preferred complaint before the Regulatory Authority for the relief of registration and before the Adjudicating Officer for the relief of interest and compensation. The said Srinivasa Rao was attended for the hearing before the authority and attended before the Adjudicating Officer one hearing under the impression both the proceedings are one and the same hence, the said Manager not attended before the Adjudicating Officer. Therefore the appellant/promoter came forward with these appeals along with applications to receive additional evidence under Order 41 Rule 27 CPC and the same was allowed on 14.07.2021 since the respondents/home buyers stating no objection to allow the M.A.Nos.93 and 94 of 2021. The appellant/promoter filed documents 1 to 6 as additional typed set of papers to prove their version regarding delay. The above said documents are marked as Ex.B1 to Ex.B6 in A.No.77/2020 and Ex.B1 to Ex.B6 in A.No.82/2020 in these appeals. Both appeals additional documents are one and the same. Ex.B1 dated 29.8.2018 letter of CMDA rejecting completion certificate , Ex.B2 dated 1.10.2018 is the grounds of appeal submitted by the appellant for completion certificate , Ex.B3 dated 12.2.2019 letter of CMDA to the District Collector, Chennai, Ex.B4 dated 22.2.2019 letter of DRO to the

Tahsildar, Ex.B5 dated 2.7.2019 letter of CMDA to the appellant/promoter and Ex.B6 dated 3.7.2019 completion certificate issued by CMDA.

10. On the side of the home buyers they have produced list of completion certificate applications prior to 22.6.2017 in which the application of the promoter was submitted on 31.5.2017 and it is shown as rejected. The appellant/promoter also produced Ex.B1 is the letter of CMDA to the appellant/promoter dated 29.8.2018 in which it has been specifically stated that the completion certificate application was rejected. Then on 1.10.2018, the appellant/promoter preferred appeal before the Secretary to Government of Tamil Nadu. In the appeal on 12.2.2019 the Government H & UD Department sought for clarification from the District Collector, Chennai District and in turn the District Revenue Officer on 22.2.2019 requested the Tahsildar, Velachery Taluk to inspect the subject land and verify all connected records and submit the state on ground report along with color sketch through Revenue Divisional Officer. Then on 2.7.2019 the CMDA directed the appellant/promoter to pay the additional charges and to furnish revised as on site drawing reflecting the site condition duly signed by the class I licensed surveyor and owner for further processing and issuing completion certificate. Then on the next day on 3.7.2019 the CMDA had issued the completion certificate.

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11. The DRO Chennai District in his letter dated 22.2.2019 addressed to the Tahildar, Velachery Taluk in which he has extracted the Government H & UD Department stated matters for clarification which runs as follows:

> **"The appellant M/s.KGEYES Residency Private Ltd. is in enjoyment and possession of excess area over the area specified n the PLR. The plot extent and dimension as per the sale deed executed by Tamil Nadu Housing Board and handing over sketch tally with the site condition but in the revenue document the area and dimension mentioned are lesser. The appeal committee of Government H & UD Department, decided to address the Chennai collector to clarify whether the excess land is any Government Poromboke lands or not so as to take a decision on permitting the appellant to continue the use of the excess land available in the rear side"**

12. From the above said letter it is very clear that the dispute was with regard to land on the rear side of the appellant's project. The project land was purchased by the sale deed executed by Tamil Nadu Housing Board along with handing over sketch. But in the revenue department the area and dimension mentioned are lesser than the sale deed hence the CMDA came to a conclusion that there is a possibility of encroaching into the Government Poromboke land hence CMDA rejected the completion certificate application. On appeal to the Government it was clarified by the spot inspection by the Tahsildar and on the basis of the report of the Tahsildar the Government has allowed the appeal and directed the CMDA to issue completion certificate.

13. The letter of CMDA dated 29.8.2018 which is marked as Ex.B1 further clarified the dispute regarding completion certificate. In the above said letter in para No.3 and 4 have stated about the previous rejections of completion certificate which runs as follows:

> ***"3. Earlier, the completion certificate application for the same site under reference was examined and rejected in the reference 2nd cited for the same reasons as noted above.***
>
> ***4. Therefore, the completion certificate received in the reference 4th citied is rejected."***

14. After the 2nd rejection of the completion certificate the appellant preferred appeal to the Government and after clarification by site inspection by the officials concerned then the Government permitted to issue completion certificate. The above litigation between 31.5.2017 to 3.7.2019 is purely technical aspect due to the orders issued by the competent authorities. The parties themselves agreed in the construction agreement in clause No.4 which runs as follows:

> ***"The builder shall not incur any liability, if it is unable to deliver possession of the said premises by the date aforesaid, if the completion of the building is delayed due to circumstances beyond their control such as non availability of steel and/or any other building materials or by reason of war, civil commotion, riots, epidemics, act of God or if non delivery of possession is the result of any order, Rule, notification of any court of law or any Government agency and/or any other public or competent authority or in the event of decision of any revocation of any permit by the competent authority or if the builder is unable to deliver possession due to circumstances which make the performance of the contract impossible.***
>
> ***It is clarified and accepted by the parties to this agreement that delay in obtaining the sanctions of the various authorities for the construction and***

subsequent service connections for the habitable occupation of the premises shall not be construed as delay in construction or completion thereof"

15. As per the above clause it is very clear that if any delay due to competent authority that cannot be construed as a delay of the builder. Now let us discuss about Section 18 of the Real Estate (Regulation and Development) Act, 2016. It is relevant to mention the Section 18 :

> ***18. Return of amount and compensation***
>
> ***(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—***
>
> ***(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (***
>
> ***b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,***
>
> ***he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:***
>
> ***Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.***
>
> ***(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.***

(3) .. ..

16. This section commences with two parts:

Fails to complete or unable to give possession.

If the promoter fails to complete in accordance with the terms of agreement for sale or fail to duly completed by the dates specified therein.

The second part: if the promoter is unable to give possession in accordance with the terms of agreement or by the dates specified therein.

The first part is not applicable since construction was completed and the builder has applied for completion certificate on 31.5.2017. The second part unable to give possession as per the terms of the agreement mentioned period October 2017(with grace period of one month November 2017) /March 2017 (with grace period of 3 months June 2017) respectively.

17. As per the section 18 if the promoter is unable to give possession within the specified date the promoter is liable to pay interest. But in the terms of contract in clause 4 it has been specifically agreed between the parties that if any delay due to order of competent authority the builder shall not incur any liability. In clause 5 of the said agreement the builder under take to pay a sum of Rs.8000/- per month in the event of any delay in handing over subject to such delay not being attributable to the reasons mentioned in clause 4.

18. In the agreement between the parties, even though the builder agreed to pay Rs.8000/- per month delay, which is subject to clause 4

mentioned conditions. So the parties have agreed for the terms and conditions as contemplated in the agreement and more over the said agreement is a registered document and it was executed after the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 came into force. The learned Adjudicating Officer has relied on the agreement of the parties and rejecting the claim of the home buyers from the dates of respective payments for calculation of interest. For the delay is concerned the learned Adjudicating Officer has not considered the terms of the agreement between the parties. How far it is sustainable has to be analyzed?

19. The builder applied for the completion certificate on 31.5.2017 and it is not disputed and it was rejected two times, it was also not disputed. The rejection of the completion certificate application only after verification of the construction by the CMDA and found violations for the approved building plan. The letter of CMDA dated 29.8.2018, which is marked as Ex.B1, in which 7 deviations/violations were marked. In that letter they have not mentioned about the non completion of the building. So the construction is completed it means the first part of the Section 18 is complied with and the second part namely unable to give possession is not complied. For which the reason adduced by the promoter was due to orders of the competent authority and the same was proved through Ex.B1 to Ex.B6. The reason for the delay due to rear side land belongs to the promoter or to the Government was the issue before the Authorities and it was adjudicated by the Government after site verification. While obtaining the building approval the issue was not raised by

the officials concerned. The issue was raised only at the time of issuing completion certificate. Therefore for the clarification raised by the authority regarding private land or government land the builder cannot be blamed and penalized. Moreover in the agreement itself in clause 4 the solution is incorporated as stated supra. As per the above solution the period from 31.5.2017 to 3.7.2019 cannot be construed as a delay on the part of the builder and as per the agreement the builder shall not incur any liability. Therefore awarding of delay compensation, by way of interest @ 10.15% per annum for the amount paid by home buyers, the order of the learned Adjudicating Officer is not sustainable and liable to be set aside.

20. After getting the completion certificate alone the electricity connection and water connection etc can be obtained. Hence the CMDA itself addressed to the both TNEB and CMWSSB on 3.7.2019 itself. Now from the date of completion certificate two years lapsed why possession is not handed over by the promoter to the home buyers for which no answer is available from both sides. As per the agreement clause 4 the promoter is liable to hand over possession within one month after the completion of construction. In this place the completion of construction means after obtaining subsequent service connections for the habitable occupation as contemplated in clause 4. It is the duty of the promoter to inform the home buyers about the habitable position of the apartment to get possession. Due to pendency of appeal both parties have not taken any steps for handing over of possession. Anyhow it is the duty of the promoter to inform the home buyers and if any failure on the part of the

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promoter, the promoter is liable to pay compensation by way of interest to the home buyers from the date of completion of service connection and water and drainage connections. Therefore this Tribunal comes to a conclusion the order of the Adjudicating Officer is liable to be set aside in part by allowing this appeal in part. The point is answered accordingly.

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21. In the result, this appeal is allowed in part and the order of the Adjudicating Officer in C.C.P.No.253 /2019 is set aside in part and confirmed in part as follows:

a) The delay compensation by way of interest awarded by the Adjudicating Officer at the rate of 10.15% per annum for the amount paid by the home buyers towards sale consideration is set aside.
b) The compensation for hardship and mental agony Rs.1,00,000/- and litigation expenses Rs.25,000/- awarded by the Adjudicating Officer is confirmed.

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22. In the result, this appeal is allowed in part and the order of the Adjudicating Officer in C.C.P.No.254 /2019 is set aside in part and confirmed in part as follows:

c) The delay compensation by way of interest awarded by the Adjudicating Officer at the rate of 10.15% per annum for the amount paid by the home buyers towards sale consideration is set aside.

d) The compensation for hardship and mental agony Rs.1,00,000/- and litigation expenses Rs.25,000/- awarded by the Adjudicating Officer is confirmed.

Connected Miscellaneous applications are closed.

This Order is dictated to the Stenographer and transcribed and typed by her in the computer, corrected and pronounced by us in the open court on 01st Day of December 2021.

List of documents produced under Order 41 Rule 27 CPC and marked in these Appeals.

Ex.B1	29.8.2018	Letter of CMDA rejecting completion certificate
Ex.B2	01.10.2018	Grounds of appeal by the appellant for completion certificate
Ex.B3	12.02.2019	Letter of CMDA to the District Collector, Chennai
Ex.B4	22.02.2019	Letter of DRO to the Tahsildar
Ex.B5	02.07.2019	Letter of CMDA to the appellant/promoter
Ex.B6	03.07.2019	Completion certificate issued by CMDA

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDL. MEMBER