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 10.02.2021

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

Appeal No. 78 of 2020

S. Rakesh Kumar ... Appellant

-Vs-

1. M/s.Acolyte Infrastructure and Mining Ltd.
   (Formerly known as M/s.Nanco Rubber and Plastics Ltd)
   Represented by its Director
   Thiru Ashish Kumar Kataruka

2. M/s. Alcove Industries Ltd.
   Represented by Director,
   Mr.Ashok Kumar Sharma ... Respondents

This appeal was taken on file on 09.12.2020 and came up for final hearing on 18.01.2021 in the presence of M/s.Ralph V.Manohar, R.Ramana and K.Lekkha, Counsels for the appellant and M/s.Sarvabhauman Associates & S.Mukunth and Sam Jayaraj Houston, Counsels for the respondents. 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:

ORDER

2. The appellant is the complainant and the respondents are the promoters. The appellant had entered into a sale agreement with the respondents on 28.12.2008 for the purchase of the flat bearing flat No.1 in 1st floor of Sri sai complex (formerly Raj Kamal Estate) measuring to 1377 sq. ft. of built up area along with 384 sq. ft of garden area and 575 sq. ft undivided share in the said land. The total sale consideration of the flat was fixed at Rs.36,47,800/- and the appellant paid a sum of Rs.6 lakhs as advance on various dates. The balance sale consideration was to be paid within 62 calendar dates i.e. by 20.02.2009. The appellant had applied for housing loan from HDFC bank. The bank officials on inspecting the property found out that the built up area measuring 1377 sq. ft. was not available and available measurement is only to an extent of 1141 sq. ft. Hence the bank officials advised the appellant to rectify the sale agreement by reducing the built up area. Immediately the appellant brought the above issue to the notice of the respondents and requested the respondents to reduce the cost of built up area and rectify the defect in the sale agreement. The respondents refused to rectify the same. While this being so, the respondents issued legal notice on 19.07.2010 by forfeiting the advance amount of Rs.6 lakhs paid by the appellant on the ground that the appellant had not paid the balance sale consideration in terms of the agreement. Hence appellant replied on 02.08.2010 and specifically stated that he was ready and willing to pay the balance sale consideration immediately on measuring the flat with mutually appointed engineer only for the available built up area. On receipt of the above reply the respondents

issued a rejoinder on 16.08.2010 and refused to comply. After hectic steps taken by the appellant the respondents agreed to measure the property by a registered valuer and chartered engineer One Mr.S.Pitchaiah and after measuring the same it was found that the built up area was only 1141 sq. ft. instead of 1377 sq. ft. Even then the respondents refused to accept the report of the registered valuer and refused to reduce the price. Therefore, the appellant on 28.03.2013 had given a complaint to the Commissioner of Police, Coimbatore and the respondents assured before the police that they would reduce the cost of the flat proportionately and receive the amount from the appellant. But even after hectic steps taken by the appellant to pay the balance sale consideration the respondents refused. Hence the appellant again gave another complaint on 15.10.2015 before the Commissioner of Police, Coimbatore. But the police refused to entertain the complaint stating that the issue is civil in nature and that the appropriate remedy would be before a civil court. In the mean time Real Estate (Regulation and Development) Act, 2016 was notified. Therefore the appellant on 28.09.2018 filed a complaint before the Regulatory Authority in C.No.319/2019 for the relief of not to sell or rent related property to anybody, to reduce the amount of corresponding to less area of 236 sq. ft. After contest the Regulatory Authority dismissed the complaint as not maintainable. Aggrieved upon the same the appellant preferred this appeal.

3. The appellant had put forth the following grounds to set aside the order of the Regulatory Authority:

i. The definition of the word promoter under section 2(b) of the Act is so wide and the definition or any other provision under the Act does not restrict to promoters of registered projects.

ii. The remedies and benefits of the Act flow to the purchasers even after obtaining completion certificates as handing over possession.

iii. Without going into the merits of the case dismissal of complaint for want of jurisdiction is erroneous.

iv. The promoter has not obtained the completion certificate till date

v. The obligation of the promoter shall continue even after handing over the possession.

vi. The mere handing over of possession and the purchaser occupied the same alone are not sufficient.

vii. The promoter is having 37 flats remained unsold.

viii. The promoter failed to accept the request of the appellant to reduce the built up area measurement and reduce the cost correspondingly.

ix. The respondents actually sold many units after the implementation of the RERA Act without complying its provisions.

4. The above points were not considered by the Regulatory Authority hence the appeal has to be allowed. In addition to the above grounds, the learned counsel for the appellant during the course of argument in the video conferencing would submit that the built up area was measured by the valuer/chartered engineer and certified that 1141 sq. ft. alone available as built up area and not 1377 sq. ft. In the agreement of sale the built up area mentioned was 1377 sq. ft. so the appellant requested the respondents to reduce the cost of built up area

proportionate to the actual built up area but the request was not considered by the respondents and claiming balance sale consideration for the entire 1377 sq. ft. The real dispute between the appellant and the respondents is only with regard to the measurements. The respondents purposely avoided to accept the truth and prolong the dispute all these years from 2008 onwards. The appellant is always ready and willing to perform his part of contract by way of paying the balance sale consideration to the actual built up area. Hence the appellant rightly approached the Regulatory Authority. But the Regulatory Authority without considering the real intention of the appellant and without going to the merits of the facts of the case and simply rejected the claim on the ground of maintainability and it is against the provisions of the RERA Act.

5. The Learned counsel for the respondents would submit that the Regulatory Authority has rightly comes to a conclusion that the agreement was entered into between the appellant and the respondentss in the year 2008 and advance paid by the appellant was forfeited by the respondents through the legal notice dated 19.07.2010. Even then, the appellant has not approached the civil court for the relief of specific performance as per the agreement dated 28.12.2008. Even after the forfeiture of the advance amount in the year 2010 the appellant has not taken any steps through court of law. After the RERA Act came into force in the year 2017, the appellant leisurely approached this Regulatory Authority. Hence the Authority has rightly negatived the claim of the appellant since there are no merits. Therefore, this appeal is liable to be dismissed.

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6. The points for consideration:

1. Whether the appellant is entitled to invoke the provisions of Real Estate (Regulation and Development) Act, 2016?
2. Whether the appeal deserves to be allowed or not?

Point No.1:

7. According to the appellant, against the actual measurement. The respondents demanded amount for the entire 1377 sq. ft. instead of actual constructed area of 1141 sq. ft. The appellant was always ready and willing to complete the sale transaction by paying the price for the actual constructed area but the respondents refused to accept the same hence the dispute arose between the appellant and the respondents. The reduction in the measurement was also proved by the appellant by measuring the same through a valuer/chartered engineer. Even then the respondents failed to accept the same. Hence the appellant came forward with the complaint before the Authority.

8. According to the respondents, the appellant and the respondents entered into sale agreement only on 28.12.2008 and the period of completion of sale was on 28.02.2009 i.e., within 62 calendar days. In the agreement itself, there is a specific provision regarding breach of contract the remedy under specific performance. There is no agreement between the appellant and the respondents for any construction. The appellant and the respondents entered into the above said agreement with regard to the already constructed flat and not to be

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constructed. Hence for the transaction between the appellant and the respondents, the only remedy available is under the specific relief Act and not under the provisions of Real Estate (Regulation and Development) Act, 2016. Therefore, the Regulatory Authority rightly negatived the claim of the appellant as the complaint is not maintainable.

9. Admittedly, the appellant and respondents entered into an agreement of sale as early as on 28.12.2008 in which the description of property is mentioned as follows:

> ***"In this 1377 sq. ft. of built up area, along with 384 sq. ft. of garden area and 575 sq. ft. undivided share, right, title and interest is agreed to be sold under this agreement."***

The appellant agreed to purchase from the respondents the built up area within 62 days from the date of agreement. The said 62 days ended on 28.02.2009. Within that period the appellant has not completed his part of contract. The respondents on 19.07.2010, through legal notice, cancelled the agreement and forfeited the advance amount of Rs.6 lakhs paid by the appellant to the respondents. The appellant on 02.08.2010 replied through legal notice that he is entitled to the relief of specific performance and to compel the respondents to sell the extent that he has promised and also stated that he would enforce his right before the court of law. Again, the respondents by way of rejoinder sent a notice on 16.08.2010 and stated that the appellant has abounded his right to enforce the contract of sale and the appellant has no locus standi to claim the performance of the agreement and the agreement is unenforceable under law and the respondents has got unfitted powers to deal with the property as they deem

fit. Subsequent to the rejoinder both the appellant and the respondents measured the property through one S.Pitchaiah, Registered Valuer and Chartered Engineer. On 28.03.2013 the appellant lodged a complaint before the Commissioner of Police, Coimbatore to punish the respondents for cheating. After that, the appellant came forward with the complaint before the Regulatory Authority through Form 'M' on 28.09.2018. In between 28.03.2013 to 28.09.2018 the appellant has not taken any steps to proceed with the agreement. The request of the appellant was clearly refused by the respondents on 16.08.2010 itself even then the appellant has not taken any steps to proceed with the agreement. Even though the appellant gave a second complaint on 15.10.2015 and the police also refused to take action and advised to approach the civil court for the remedy. The appellant himself has categorically admitted that he is entitled to the relief of specific performance and compelled the respondent to sell the extent that he has promised. The appellant has to take steps for the relief of specific performance within 3 years from the date of refusal by the respondent or within 3 years from the date of cause of action accrues as per the following verdicts of the Hon'ble Madras High Court and Hon'ble Supreme Court:

99 L.W. 110 (121)

M. THILAKAM AND ANOTHER V. M.R RADHIKA AND ANOTHER

> ***"Article 54 of the Limitation Act states that for Specific Performance of an agreement, the period of limitation is three years from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that the performance is refused."***

AIR 1986 SC 1912 (1918)

ROJASARA RAMJIBHAI DAHYABHAI VS. JANI NAROTTAMDAS LALLUBHAI (DEAD)BY LRS. & ANR.

"The Limitation prescribed under Article 113 of the Indian Limitation Act 1963 for a suit for Specific Performance is a period of 3 years which runs from the date when the cause of action accrues."

10. In this case the respondents refused to perform their part of contract on 16.08.2010 itself. The refusal of the contract by the respondent was informed to the appellant through legal notice itself. The cause of action for the suit for specific performance of contract accrues on 16.08.2010 itself. Subsequently, at the instigation of the appellant the respondents agreed to measure the property in the presence of the appellant as well as the respondents' representative Mr.Ashish Kumar Kataruka, as per the report of the registered valuer (at page no.5 of Typeset of the appellant). The appellant has not chosen to proceed with the civil suit to agitate for his right. Instead of that the appellant approached the Police Commissioner on 28.03.2013 by way of complaint. Again on 15.10.2015 the appellant approached the Commissioner of Police, Coimbatore with another complaint but the police refused to entertain the complaint (as per the version of the appellant in paragraph No.5 (xiv) of the Memorandum of Appeal). Even after the refusal by the police the appellant has not chosen to approach the civil court for the relief of specific performance, since as per the above verdicts of the Hon'ble High Court and Supreme Court, the claim is barred by limitation. After the enactment of the Real Estate (Regulation and Development) Act, 2016, the appellant came forward with the complaint before the Regulatory Authority on 28.09.2018 for the relief of "direction to give flat on accepting reduced amount".

11. On the side of the appellant the learned counsel vehemently put forth the arguments on the ground of maintainability by invoking Section 3(2)(b) of the Real Estate (Regulation and Development) Act, 2016. On the side of the respondents the learned counsel vehemently opposed the complaint on the ground that the disputed building was constructed in the year 1995-1996. Further the learned counsel for the respondents would submit that this complaint, which has been filed at this belated stage, only indicates the complainant's intention to misuse the scheme of the Act, to take advantage of his own wrong. As mentioned above, the project was completed 20 years ago prior to the commencement of RERA and the dwelling units and shops have been handed over prior to the notification of the Rules.

12. According to the appellant the respondents' project is an on-going project on the date of filing of the complaint before the Authority since the respondents have not obtained the completion certificate for their project. The learned counsel for the appellant has relied an order of the RERA in complaint No. RERA-PKL-COMP-144-2018 3rd date of hearing: 12.06.2018 *Sanju Jain Vs TDI Infrastructure Ltd.* In the above said order the power to refund of advance amount lies with the Regulatory Authority and not within the jurisdiction of the Adjudicating Officer since refund of amount is not compensation. The above said fact is no way connected with the facts of the case hence the above order is no way helpful to strengthen the arguments of the appellant side. The next order cited by the appellant relates to *REAL ESTATE APPELLATE TRIBUNAL, PUNJAB, SAS NAGAR (MOHALI) Appeal No. 49 of 2018. M/s. Silver City Construction Ltd. Vs State of Punjab through Principal Secretary, Department of Housing and Urban*

Development, Chandigarh and others. In the above said appeal it was decided that "the complaints against promoters in relation to the projects that are not registered with Real Estate Regulatory Authority Punjab are not maintainable is declared as no longer good law with reference to para 41(2) thereof." The above said fact is no way connected with the facts of this case. In this case whether the complaint is maintainable or not on the ground of on-going project was decided by the Regulatory Authority. Hence, the above referred Punjab Tribunal order is not applicable to the facts of this case. Now let us see the provision of the Act Section 3(2)(b) relied by the appellant.

> *3. (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: Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.*
>
> *(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;

(c) .....

Explanation.— .....

13. As per Section 3(2) (b) if the promoter has received completion certificate for his real estate project before the commencement of this Act he is exempted from registration under RERA. In this case, according to the respondent, he has completed the project during 1995-1996. The agreement entered into between the appellant and the respondents was in the year 2008. The property was also assessed for municipal tax. On the side of the appellant he has produced 11 documents in the Typed set. The first one is the sale agreement. Second one is the loan sanction letter. Nos. 3 to 5 are the exchange of legal notices. Nos. 6 & 7 are the surveyor valuation and his plan. No.8 is the copy of police complaint. No.9 is the complaint filed by the appellant before the Regulatory Authority and No.10 is the reply statement filed by the respondent. No.11 is the copy of the order passed by the Regulatory Authority. Out of 11 documents, no proof is elicited to show that the property in dispute is an on-going project, but in contra the appellant himself entered into an agreement as document No.1 in which the description of property is mentioned as "built up area". Further the appellant has not stated in his reply notice dated 02.08.2010 and his complaint dated 28.03.2013 about the on-going project. The appellant has not produced any piece of paper to show that it is an on-going project. Mere non-obtaining of completion certificate alone is not sufficient to construe as an on-going project. According to the respondents, they have constructed the project in the year 1995-1996 and the appellant has also

admittedly entered into the sale agreement in the year 2008. Till 28.03.2013 the appellant has not whispered anything about the on-going project. The notices between the appellant and the respondent from 19.07.2010 to 16.08.2010 they have spoken about the property as built-up area of 1377 sq. ft. They have not stated anything that it is an incomplete built up area. The appellant himself admitted that it is a built up area and he entered into an agreement with the respondent as outright purchase. Admittedly the appellant has not entered into an agreement with the respondents as a construction agreement.

14. On the side of the respondents, in their reply statement they have stated that they have completed the project in the year 1995-1996 and possession of the flats have been handed over to the allottees namely for the purpose of residence, office and shops. The apartment association was also formed in the year 2015. The property has been assessed to the corporation tax assessment number and pass books have been issued for all flats, offices and shops. The above said documents have been enclosed as a booklet along with the reply statement by the respondents. In the above said booklet first four pages contained reply statement and fifth page index sheet of list of documents and the next page is the memo by the 2nd respondent to record the above said documents and in the next page is also index to the documents the next page onwards it was consecutively numbered from page No. 1 to 113. Page No.1 to 15 property tax booklet and property tax receipts related to the period from 1995-1996 to 10.04.2019. From page No.16 to 21 list of registration of sale deeds it disclosed about 1 to 90 sale deeds. From page No.23 to 98 copies of sale deeds. From Page No.99 and 100 agreement of sale between the appellant and the respondents and

page No.101 to 105 photographs of the apartments. Page No.106 is the advertisement in daily news paper 'The Hindu' dated June 14, 2009. Page No.107 to 112 exchange of legal notices between the appellant and the respondents. Page No.113 is the certificate of registration of societies Sri Sai Complex Shop and Residents Association, the certificate dated 05.10.2015. The appellant has not denied the said documents and more over he has suppressed the above said documents and approached the Regulatory Authority as if the project of the respondents is an on-going project, merely because there is a specific provision under section 3(2)(b) namely

'where the promoter has received completion certificate for a real estate project prior to the commencement of this Act'.

15. This Act, particularly Section 3, came into force only on 01.05.2017. The respondents' project related to the year 1995-1996 and completed and assessed to tax from the year 1995 onwards. The Association of allottees was also formed in the year 2015. The respondents have clearly proved their version that the respondents' project is a completed project. Furthermore, the appellant has entered into sale agreement with the respondents in the year 2008 i.e., nearly after 12 years from the date of completion of the project. At the time of completion of project in the year 1995-1996 the Real Estate Act was not in existence and more over the concept of promulgation of the Real Estate (Regulation and Development) Act was drafted only in the year 2009 and draft bill was introduced in the Parliament in the year 2011 and again introduced in the year 2013 and forwarded to standing committee to file its report about the bill and again it was referred to Parliament Select committee and the select committee

filed its report in the year 2015 and the Act was passed in the Parliament on 10.03.2016 and received the assent of the President on 25.03.2016 and gazette publication was made on 26.03.2016. Section 2, 20 to 39 ,41 to 58, 71 to 78, 81 to 92 came into force with effect from 01.05.2016 and Section 3 to 19, 40, 59 to 70, 79 to 80 came into force with effect from 01.05.2017. The appellant all these years kept silent and surprisingly came forward with the complaint before the Regulatory Authority on 28.09.2018. From the above said documents produced by the respondents it is crystal clear that the respondents has proved his defence and disproved the case of the appellant that the respondents' project is not an on-going project.

16. On the side of the appellant, they have not whispered anything in the grounds of appeal with regard to the documents relied on by the respondents. The respondents stoutly denied the rights of the appellant for the specific performance by way of legal notice and cancelled the agreement and forfeited the advance amount of Rs.6 lakhs. Even then, the appellant failed to proceed with his agreement dated 28.12.2008 for the relief of specific performance before the competent civil court, since it is time barred as per the above referred verdicts of the Hon'ble High Court and Hon'ble Supreme Court. On 19.07.2010 legal notice itself the respondents disclosed his intention of refusal and cause of action for the relief of specific performance arose on that date itself but the appellant failed to take action. Instead of that he proceeded to by way of police complaint in the year 2013 and 2015 all ended in vain and kept silent. After the promulgation of Real Estate (Regulation and Development) Act, 2016 the appellant came forward with the complaint in the year 2018. The respondents' project is a completed project

and there is no need or necessity for obtaining any completion certificate as contemplated in Section 3(2)(b). Moreover, when the project of the respondents came into existence in the year 1995-1996, at the relevant period even "THE THOUGHT OF REAL ESTATE ACT" itself was not in existence. So, Section 3(2)(b) of the Act is not applicable to the project of the respondents and it is not at all an on-going project. Therefore, the appellant is absolutely not entitled to invoke the provisions of the Real Estate (Regulation and Development) Act, 2016 to put forth his time barred claim by way of complaint, for the relief of specific performance instead of civil court. Moreover, it is an abuse of process of law. The point No.1 is answered accordingly.

Point No.2:

17. In point No.1 it was decided that the complaint is not entitled to invoke the provisions of the Real Estate (Regulation and Development) Act, 2016. The Appellant miserably failed to prove that the respondents' project is an on-going project. But in contra the respondents has sufficiently proved that their project was completed in the year 1995-1996 and completed flats were sold to the allottees and the allottees assessed their flats for the property tax to the Coimbatore Municipal Corporation, to that effect they have also produced documents. Hence, the Regulatory Authority rightly came to a conclusion that the complaint of the appellant is not maintainable. There is no infirmity in the findings of the Regulatory Authority. Therefore, this Tribunal comes to a conclusion that this Appeal is not deserves to be allowed. The point is answered accordingly.

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18. In the result this Appeal is dismissed with costs of Rs.10,000/-. The order of the Regulatory Authority in C.No.319/2019 dated 17.10.2019 is confirmed.

This Order is directly dictated to the Stenographer and typed in the computer by her, corrected and pronounced by us in the open court on 10th Day of February, 2021.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
JUDICIAL MEMBER

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