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 17.12.2020

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

Miscellaneous Application Nos.83 and 85 of 2020
in
Appeal Nos. 48 and 49 of 2020

1) M/s.Oragadam City Developers Pvt. Ltd.,
   Rep. by its Authorized Signatory
2) M/s.New Town Housing
3) M/s.Value Build Homes
4) M/s.Vilagam Housing
5) M/s.Frontier Housing Private Limited ... Applicants/Appellants

..vs..

Mrs.Anitha Arun & Bharathi Arun
filed through their Power Holder
Adithya Arun ... Respondents/Respondents in M.A.No.83 of 2020 in A.No.48/2020

Mrs.Sunitha Nandakumar
filed through her Power Holder
Adithya Arun ... Respondent/Respondent in M.A.No.85 of 2020 in A.No.49/2020

These Miscellaneous Applications were taken on file on 04.09.2020 and came up for final hearing on 09.12.2020 in the presence of

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M/s.A.V.Arumugam, K.Kala, M.Prakash, Advocates for the Applicants/Appellants and M/s.Abinav Parthasarathy, S.V.Supraja, Hariprasath.D.G, Advocates for the Respondents. 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:

COMMON ORDER

1. The homebuyers and the developer entered into an unregistered agreement for sale cum construction on 14.12.2011. Total price was fixed at Rs.31,15,932/- The homebuyers Mrs.Anitha Arun & Bharathi Arun paid a sum of Rs.27,86,890/- and the delivery date fixed for the row house as October 2013 and the homebuyer Ms.Sunitha Nandakumar paid Rs 28,44,827/- and the due date for delivery of row house fixed as December 2013. The sale deeds for UDS were executed in the year 2012 but till date the row houses have not been handed over to the homebuyers. Hence both the homebuyers came forward with the complaint in C.C.P.Nos.159 of 2019 and 160 of 2019 before the Adjudicating Officer for return of amount with interest and for compensation with litigation costs. The first respondent having received the court notice failed to appear. No notice was ordered to the respondents 2 to 5. The Learned Adjudicating Officer on the basis of available records directing the respondents to refund the amount received by the developers with interests and costs and compensation and litigation expenses. Aggrieved upon that the developers preferred these Appeals along with waiver applications. In the waiver

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application the applicant has stated that they are not in a position to pay the amount imposed by the Adjudicating Officer and they will put to great loss and hardship if they are forced to pay the pre deposit demand.

2. The developers have stated that they had sent a handover intimation letter on 23.12.2014 informing the homebuyers that the unit was ready for handing over. After having joint inspection with the homebuyers they promised to clear some technical snags pointed out by the homebuyers. By email dated 18.11.2015 the homebuyers agreed to take alternative units no.35 A and 35 B instead of units booked by them viz. 212 A and 212 B respectively. On the same day, the developers sent the reply by stating that we are clear on your stand regarding the registration charges and shall revert to you by this weekend, post which you can plan your site visit. On 21.11.2015 the developers further stated that as far as the visit to 35A and 35B is concerned suggest you do early next month as the spin road access is blocked due to water logging. Suppressing the above fact the homebuyers stated that they were ready to take possession even in the year 2015. But the Learned Adjudicating Officer without considering the facts directed the developer to refund the amount with interest and compensation. When the construction was completed and ready to hand over the possession and the same was intimated to the homebuyers, the homebuyers were not willing to take possession of the row houses and they are much interested to get back the amount by putting demands and concessions against the terms of agreement. The above said facts are also not discussed by the Adjudicating

Officer and simply relied the proof affidavit of the homebuyers and allowed the complaint as prayed for. It is not a merit order. In such circumstances compliance of that demerit order is against natural justice. Therefore the applicants came forward with these applications for waiver.

3. The homebuyers filed their counter for the waiver applications and stated that the hand over intimation letter dated 23.12.2014 was only an eye-wash to make it appear that the project was complete and was ready for handover. However, on a personal visit of the premises it was found out that none of the terms as per the construction agreement was adhered to. The pre deposit condition is sine qua non for maintaining the appeal before this Tribunal hence the applicants ought to have deposit the entire amount of compensation in order to maintain the present appeal failing which they will be put to irreparable loss and hardship. Hence the applications have to be dismissed.

4. Points for consideration:-

1. Whether these applications are deserve to be allowed or not?

Point :-

5. The applicants are the developers and the respondents are the homebuyers and they have entered into construction cum sale agreement on 28.02.2012 and out of total sale consideration is Rs.31,54,932/- the balance of Rs.2,71,105/-, Rs.3,29,042/- alone is due respectively are not disputed. The only dispute for the homebuyers is that the developer failed to deliver the property as promised in the agreement. Even though they

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have entered into the agreement in the year 2012 within the stipulated period of 22 months the developer failed to deliver the constructed row house. Hence they approached the Adjudicating Officer for the refund of the amount within interest and compensation. Since the developers failed to appear before the Adjudicating Officer the order was passed. Now without complying the pre condition deposit these appeals cannot be entertained. This is the only defence put forth by the home buyers. According to the developer they have completed the houses and intimation regarding taking over of possession even though was given to the homebuyers they have not chosen to take over possession instead of that they have been bargaining to reduce the price. The amount received from the homebuyers have invested in the building and completed the building. At this juncture asking for refund is not sustainable. This is the only plea taken by the developer. How far the plea of the developer is tenable has to be analyzed. Before going to discuss the merits of the applications it is appropriate to mention the relevant provision and recent judgment of the Hon'ble Madras High Court.

Section 43(5) of RERA Act runs as follows:

Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter: Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal atleast thirty per cent. of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard. Explanation.—For the purpose of

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this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

(2020) 5 MLJ 577

T.Chitty Babu Vs. Union of India and Another

27.We may, however, clarify that an appeal can be instituted by a ministerial act of its presentation and physical filing in the office of the Appellate Authority, but it cannot be entertained unless the pre-deposit has been made. We also clarify that no orders can be passed by the Appellate Authority by either issuing a notice on such an incompetent appeal or otherwise and it can only be entertained and then heard, provided the aggrieved party, in the present case the petitioner, deposits the amount as per the provision of Section 43(5) of the 2016 Act unless there is an order of the High Court or the Apex Court otherwise.

6. The Learned counsel for the homebuyers has relied the provision and above Division Bench verdict of Hon'ble Madras High Court. Further Learned counsel would submit that this Tribunal has no discretion to reduce the amount of pre condition deposit. On the side of the developer the Learned counsel would submit that the above said citation with regard to the contested cases. In this case it is an exparte order and more over court notice was issued only to the first respondent and the respondents 2 to 5 have not been issued notice. Furthermore, after completion of the construction even though intimation was given to the homebuyers they have not inclined to take possession. In such circumstances the Division Bench citation is not applicable to the facts of this case.

7. Perused both side contentions. In this case the arguments of the appellant counsel that the Real Estate Appellate Tribunal has no discretion to direct the lesser payment and as a fair payment was ordered by the court below. As per the judgment of the Division Bench of the Hon'ble

Madras High Court reported in (2020) 5 MLJ 577 as stated supra has now been stayed by the Hon'ble Supreme Court. In the order of the Hon'ble Supreme Court in SLP (C) No.130005/2020 dated 19.11.2020, it has categorically stayed the judgment of the Madras High Court. Therefore, for the present, the Appellate Tribunal can take this view. This has further strengthened by the subsequent Division Bench order in which case one of the parties challenged the order for direction to deposit 40% before the division bench. The Division bench by its order dated 03.12.2020 confirmed the Appellate Tribunal order and has observed in para No.4 & 5 are as follows:

CMSA No.32/2020 and C.M.P.No.13123/2020

Sylvanus Builders and Developers Limited and Another Vs K.Srikar Reddy

4. On a reading of the statutory provision, it is clear that there is a discretion vested with the Authority to direct the party to deposit more than 30%, therefore, the authority has jurisdiction to pass an order to impose condition of 40%. This exercise of discretion has not been found to be erroneous or unsustainable. The conduct of the appellants was tested by the Tribunal and the appeal was rejected.

5. We find absolutely no grounds to interfere with the order passed by the Tribunal, however, with a view to give one more opportunity to the appellants, we direct the appellants to deposit 40% mandatory pre-deposit, as ordered by the Authority, on or before 28.12.2020. If they fail to do so, the appeal would stand automatically dismissed and the order passed by the Tribunal shall stand confirmed.

8. As earlier Division Bench order is now stayed by the Hon'ble Supreme Court and the subsequent Division Bench Order has now confirmed the powers of the Tribunal for exercising the discretion. This court taking in the special circumstances of the case where the order passed by the exparte has necessarily come to the conclusion to impose a

direction to deposit 30% of the total amount as ordered by the court below as a conditional order instead of waiving the payment.

9. The homebuyers insisted for refund of the amount with interest and compensation against the terms of their agreement and filed the complaint and got exparte order. Against that exparte order the developer preferred Appeal, for which pre condition deposit of entire ordered amount under Section 43(5) of RERA Act is not applicable to the facts of this case. If it is a contested order the claim of the homebuyers is tenable. Here the order is only an exparte order. For meeting the ends of justice and considering the exparte order this Tribunal is inclined to order pre condition deposit to the tune of 30% of the total amount ordered by the Adjudicating Officer.

10. In the result the petitions are allowed on condition that the applicants/developers are directed to deposit each case 30% of the total amount ordered by the Adjudicating Officer in C.C.P.Nos.159 and 160 of 2019 on or before 10.01.2021 failing which the applications stands dismissed automatically. For compliance call on 11.01.2021.

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 17th Day of December 2020.

Sd/- XXXX
CHAIRPERSON

Sd/- XXXX
ADMINISTRATIVE MEMBER

Sd/- XXXX
JUDICIAL MEMBER

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