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

Miscellaneous Application No.92 of 2020

in

Appeal No. 44 of 2020

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

..vs..

Vrikshaa Vassees Welfare Association ... Respondent/Respondent

This Miscellaneous Application was taken on file on 11.09.2020 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

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video conferencing and having stood over for consideration till this day and this Tribunal delivered the following:

ORDER

1. The applicant/appellant filed this petition under Order 41 Rule 27 of CPC to permit the applicant/appellant to file additional documents and in support of her petition she has filed an affidavit and stated that she has completed all the amenities. The respondent has been insisting on to complete swimming pool and ear marked area for multipurpose hall and gym. After passing of the order by the Regulatory Authority she has mooted complete survey among the purchasers in the villas with regard to completion to the swimming pool. The majority of the purchasers expressed their unwillingness to use the swimming pool due to scarcity of the water in and around area and also maintenance charges, life issues etc., Due to the above said reasons the majority of the purchasers have expressed their willingness to convert the swimming pool as event place or any other useful entertainment area by their letter dated 7.9.2020 to 9.9.2020 addressed to the applicant/appellant. Therefore the above said letter could not be filed. In such circumstances the applicant came forward with this petition to receive as additional documents.

2. The respondent association filed counter and stated that the respondent association has been insisting on the construction of the swimming pool only because the applicant had at various times promised to provide the same within the precincts of the project. Further stated that the survey mooted by the applicant is contrary to law and has no basis. In

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any case, majority of the signatories to the letters are tenants and tenants cannot transfer/destroy the rights of the owners in the absence of the valid power of attorney from the respective owners. Hence the petition has to be dismissed.

3. Point for consideration:-

Whether this application deserves to be allowed or not?

Point:

4. According to the applicant even though she promised to construct swimming pool majority of the villa owners are not willing to construct swimming pool due to shortage of water, maintenance charges and life issues. The above said willingness came to the knowledge of the applicant only after passing of the order by the Authority, the applicant has mooted complete survey at that time the owners of the villas have expressed. According to the respondent the so called survey mooted by the applicant is contrary to law and majority of the signatories to the letters are tenants and the applicant has not attached the power of attorney of the respective owners of the villa.

5. Perused both side contentions. On perusal providing swimming pool in the project was agreed upon during construction agreement. After the passing of the order by the Regulatory Authority the applicant/appellant mooted survey regarding construction of swimming pool at that time the owners expressed their unwillingness. But it was denied by the respondent on the ground that the survey mooted by the applicant/appellant is against law and against agreement. The so called

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willingness expressed by the owners of the villa during survey mooted by the applicant is not the real willingness of the owners of the villa. Most of the persons who expressed willingness against swimming pool are only tenants and not the owners of the villa and the applicant has not filed any power of attorney from the respective owners. Hence the alleged letters is no way helpful and they are inadmissible in evidence. Now let us discuss the legal position with regard to reception of documents at the appellate stage. In this regard on the side of the respondent has cited the verdict of the Hon'ble Supreme Court which is as follows:

(2017) 4 SCC 760

SATISH KUMAR GUPTA VS STATE OF HARYANA

19. The other part of the impugned order permitting additional evidence and remanding the case for fresh decision is uncalled for. No case was made out for permitting additional evidence on settled principles under Order XLI Rule 27 of CPC. The provision is reproduced below:-

"27. Production of additional evidence in Appellate Court.-

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if –

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, The Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

> ***20. It is clear that neither the Trial Court has refused to receive the evidence nor it could be said that the evidence sought to be adduced was not available despite the exercise of due diligence nor it could be held to necessary to pronounce the judgment. Additional evidence cannot be permitted to fill-in the lacunae or to patch-up the weak points in the case[17]. There was no ground for remand in these circumstances.***

As per the above verdict of the Apex court it is very clear that before allowing the petition to receive additional evidence by the Appellate Court, the appellate court shall record the reason for its admission such as: Neither the trial court has refused to receive the evidence nor it could be said that the evidence sought to be adduced was not available despite the exercise of due diligence nor it could be held to necessary to pronounce the judgments. Additional evidence cannot be permitted to fill in the lacuna or to patch up the weak point in the case.

6. In this case admittedly the documents sought to be received as additional evidence contain letters dated 7.9.2020 to 9.9.2020. The trial court namely the Regulatory Authority passed orders on 9.1.2020 and this appeal was preferred in February 2020 and this application was filed in September 2020 so till the appeal has been preferred there is no such document available with the appellant. Only after the passing of the order by the Authority and after the appeal was taken on file in February 2020 the appellant came forward with this document in September 2020. As per the agreement the applicant/appellant is bound to provide swimming pool. But she has not provided anything as agreed. Now the applicant/appellant came forward with this document along with this application can be construed as to fill in the lacuna or patch up the weak point in the case as

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expressed by the Apex court. Therefore as per the above Apex court verdict the claim of the applicant to receive additional evidence cannot be permitted. The point is answered accordingly.

7. In the result this Miscellaneous Application is dismissed with cost.

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 9th day of November 2020.

Sd/- XXXX
CHAIRPERSON

Sd/- XXXX
ADMINISTRATIVE MEMBER

Sd/- XXXX
JUDICIAL MEMBER

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