BEFORE THE TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL
CHENNAI

Friday the 02nd day of September 2022

CORAM : Miss. LEENA NAIR, ADMINISTRATIVE MEMBER
&
Mr.R.PADMANABHAN, JUDICIAL MEMBER

Appeal No.145 of 2021

M/s. SSM Builders & Promoters,
Rep. by its Managing Partner Mr.K.Santhanam ... Appellant

-Vs-

1. Swaminathan
2. K.Thangam
3. Lalitha Gayathri
4. N.Natarajan
5. D.Pradeep Kumar
6. P.Sheela
7. R.Baskaran
8. P.Kalaiamuthan
9. R.Sathish Kumar
10. N.Sujatha
11. A.Anantharaman
12. S.Padmanabhan
13. A.Vijayakaarthik
14. K.Kalaipoongo
15. K.Indira
16. Srimathi Sundaravalli Memorial Nagar Flat Owners Association.
(Also known as SSM Nagar Flat Owners Association)
Rep. by its Secretary P.Kalaiamuthan ... Respondents

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This is an appeal U/s 44(1) of the Real Estate (Regulation and Development) Act 2016 as against the Common Order passed by the Tamil Nadu Real Estate Regulatory Authority in C.Nos.02/2021, 61 to 69,98,99 & 101/2021, dated 06.10.2021.

1. Swaminathan & K.Thangam
2. Lalitha Gayathri
3. N.Natarajan
4. D.Pradeep Kumar & P.Sheela
5. R.Baskaran
6. P.Kalaiamuthan
7. R.Sathish Kumar & N.Sujatha
8. A.Anantharaman
9. S.Padmanabhan
10. A.Vijayakaarthik
11. K.Kalaipoongo
12. K.Indira
13. Srimathi Sundaravalli Memorial Nagar Flat Owners Association. (SSM Nagar FOA)
    Known as SSM Nagar Flat Owners Association
    Rep. by its Secretary P.Kalaiamuthan ... Complainants / Allottee

-Vs-

M/s. SSM Builders & Promoters,
Rep. by its Partners Mr.K.Santhanam
and 4 others ... Respondent/ Promoter

The Respondent / Promoter is the appellant herein. This appeal was taken on file on 17.12.2021 and came up for final hearing on 03.08.2022 in

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the presence of M/s. Harishankar Mani, Salai Varun, Vikram Veerasamy and C.Kaveen, Counsels for the appellant and M/s. D.Sudhakar, L.Senthil Kumar, V.Krishnamurthy and R.Arunkumar, Counsels for R1 to R13, R15 and R16. R14 called absent. 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

For the sake of convenient understanding the parties herein after will be referred to as per their rank and status before the RERA.

The common case of the 13 complainants in brief is as follows:

1. The respondent/promoter developed a housing project namely SSM Nagar at Alapakkam, New Perungalathur, Chengelpet District. The total extent of the land proposed to be developed was about 49.28 acres comprised in various survey numbers. It was a mega project. Totally 66 blocks were proposed to be constructed. Out of 66 blocks, 59 blocks are allocated for residential purpose and 6 blocks are allocated for commercial purpose and 1 block for construction of a club house. The respondent /promoter promised to provide various amenities for the use of the flat buyers. However, the respondent/promoter failed to provide those amenities. All the 13 complainants / allottees have entered into a construction agreement with the respondent/promoter on various dates during 2013. As per the agreement the completed flat were scheduled to be handed over to the Complainants / allottees on or before March 2016. But the flats were handed over to the complainants / allottees only on

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03.09.2018 with a delay of more than 30 months. Therefore the 13 complainants filed separate complaints with nearly 13 reliefs.

2. The first and the foremost relief prayed for was to direct the respondent to register the project with TNRERA. The other reliefs relates to compensation for the delayed handing over of possession and providing amenities such as club house, swimming pool, solar power supply to each flat, etc. Hence the complaint.

The common case of the respondent/promoter is as follows:

3. The CMDA gave the approval for the project on 5.8.2013. The respondent/promoter applied for the completion certificate on 16.5.2017 well before the above said T.N. Rules 2017 came into force. The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 (herein after referred to as T.N.Rules 2017) was came into force only on 22.06.2017. As per Rule 2(h)(ii) of the T.N. Rules, 2017 the project was not an ongoing project, and excluded from Registration with RERA. Therefore all the complaints are not maintainable and liable to be dismissed. The completion certificate was issued by the CMDA on 21.8.2017.

4. The delay in handing over of possession was due to delayed payments by the complainants / allottees. Further the Tamil Nadu Pollution Control Board had issued a show cause notice on 15.7.2014 for some violations. Thereafter as directed by the TNPCB, the construction work was stopped from 22.7.2014. The matter went upto the National Green Tribunal, New Delhi. The construction of the project was stayed by the

National Green Tribunal, New Delhi from 8.7.2015 to 22.4.2016. The respondent was asked to deposit 36 crores with the NGT, New Delhi. Later, Rs.24 crores was forfeited by the NGT. Due to heavy financial loss also there was some delay in completing the project.

5. The respondent never agreed to allot any free car parking slot as stated in the complaint. The respondent is ready and willing to hand over the maintenance work to the flat owners association. The respondent is taking steps to provide solar power for every flat.

6. After hearing both sides the RERA had disposed off all the 13 complaints vide a common order dated 06.10.2021 and issued various directions against the respondent/promoter including the direction to register the project with RERA on or before 31.12.2021. The RERA has also directed the respondent /promoter to provide and complete all the pending amenities on or before 31.3.2022. In so far as the relief of compensation for the delayed handing over of possession, the RERA has permitted the complainants to file separate claim petitions before the Adjudicating Officer as the Adjudicating Officer alone is empowered to decide the issue of Compensation. Aggrieved over the same the respondent/promoter has preferred this appeal before this Tribunal.

7. Heard both sides.

Points for consideration:

1. Whether the project in question was an ongoing project as on 01.5.2017, on which date Section 3 of The Real Estate (Regulation

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and Development) Act 2016 came into force, and required to be registered ?

2. Whether the jurisdiction of RERA has been ousted by virtue of the arbitration clause in the construction agreement?
3. Whether the appeal is to be allowed or not?

Point No.1:

8. All the 24 grounds of appeal raised by the respondent/promoter in their grounds of appeal relates mainly to the direction issued by the RERA to register the project on or before 31.12.2021. The counsel for the respondent/promoter contended that the project in question was not an ongoing project as on 22.06.2017 the date on which the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 (hereinafter will be referred to as T.N.Rules 2017) came into force. According to the learned Counsel for the respondent/promoter they have applied for the completion certificate with the Chennai Metropolitan Development Authority on 16.5.2017 itself and therefore as per Rule 2(h)(ii) of T.N.Rules 2017 the project was excluded from registration under Section 3(1) of the Real Estate (Regulation and Development) Act 2016.

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9. The counsel for the appellant also contended that the list of applications for completion certificate pending with Chennai Metropolitan Development Authority, has been published by the RERA in it's official website as mandated under Rule 2(h)(ii) of the T.N.Rules 2017. The pendency of the application for completion certificate submitted by the respondent/promoter found place in the said list in serial No.35. The learned counsel for the appellant would argue that the RERA having satisfied that the project was excluded from registration as per Rule 2(h)(ii) of T.N.Rules 2017 and having came forward to publish the pendency of the application in the official website, the RERA cannot go back and say that Rule 2(h)(ii) is not applicable. Therefore, according to the learned Counsel, the direction with regard to register the project is not correct and liable to be set aside.

10. Let us now discuss the important facts of this case for coming to a conclusion. As pointed out by the RERA the respondent/promoter admitted in their letter dated 21.10.2017 addressed to the complainants/allottees have clearly mentioned that except few development works the project has been completed. This is a clear admission by the respondent/promoter that the project was not yet completed as on 21.10.2017. This admission was made long after Section 3 of the Real Estate (Regulation and Development) Act 2016 came into force i.e. on 01.05.2017.

11. Further, the club house construction was not fully constructed as on 24.12.2020 as found from the photographs submitted by the

complainants. Moreover the respondent/promoter himself had admitted that the club house block in the project is yet to be completed in their letter dated 14.4.2018 addressed to the L & T Finance limited. In another letter dated 17.4.2021 to the same L & T Housing finance company the respondent/promoter had stated that the EB service connection works to all the 3087 flats are pending. All these facts would go to show that the project was not completed till April 2021.

12. The respondent/promoter admittedly applied for the completion certificate only on 16.5.2017. But Section 3 of The Real Estate (Regulation and Development) Act, 2016, which deals with registration of projects, came into force on 1.5.2017 itself. The T.N.Rules 2017 came into force only on 22.06.2017. As per Rule 2(h)(ii) of T.N.Rules 2017 the cut off date for exclusion from registering a project is 01.05.2017. The filing of application for completion certificate on 16.5.2017 itself was subsequent to Section 3 of The Real Estate (Regulation and Development) Act, 2016 was came into force. Therefore, mere publishing in the official website of the RERA about the pendency of the application for completion certificate submitted by the respondent/promoter will not in any way support the case of the respondent/promoter.

13. Above all the Rule 2(h)(ii) of T.N.Rules 2017 clearly excludes the projects in Chennai Metropolitan area for which application for completion certificate has been filed and pending with Chennai Metropolitan Development Authority as on the date of coming into force

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of sub section 1 of Section 3 of The Real Estate (Regulation and Development) Act, 2016 and not on the date of the T.N.Rules 2017 came into force.

14. So viewing from any angle it can be safely concluded that the project in question was an ongoing project as on 01.5.2017 and required to be registered as per Section 3(1) of The Real Estate (Regulation and Development) Act, 2016. The respondent/promoter having clearly admitted that the club house block in the project is yet to be completed and that the EB service connection works to 3087 flats are pending in their letters dated 14.4.2018 and 17.04.2021 addressed to the L & T Finance limited should not be allowed to seek their shelter under the publication of the pendency of the application for completion certificate submitted by the respondent/promoter in the official website of the RERA. The project, which is admittedly not completed till the year 2021, was not excluded under Rule 2(h)(ii) of The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017. We answer this point accordingly.

Point No.2:

15. The learned counsel for the Respondent / Promoter with the permission of this Tribunal filed additional grounds of appeal. In the said additional grounds of appeal he has raised a legal ground. According to the learned Counsel as per the Arbitration clause contained in the construction agreement executed between the parties, the dispute ought to have been referred to Arbitration. It appears that this issue

was not raised before the RERA. For the first time it was being raised before this appellate Tribunal. As per Section 8(1) of the Arbitration Act the respondent / Promoter ought to have raised this issue before the RERA at the time of filing their written statement, by filing an application under Section 8(1) of the Arbitration Act 1996. Having failed to do so the Respondent / Promoter cannot do so before this appellate Tribunal. On this ground alone the objections raised by the Counsel for the Respondent / Promoter is liable to be rejected.

16. The Honble Supreme Court in National Seeds Corporation Limited Vs M.Madhusudhan Reddy and another 2012 (2) SCC 506 at paragraph No.66 held as follows:

> ***"The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Protection Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Protection Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the Arbitration and Conciliation Act, 1996. Moreover, the plain language of Section 3 of the Consumer Protection Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force. "***

17. The Apex Court in M/s. EMAAR MGF LAND LIMITED – Vs – AFTAB SINGH case, framed many issues for consideration and one such issue was Issue No.4, which is reproduced hereunder.

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(iv) Whether by the insertion of words "notwithstanding any judgment, decree or order of the Supreme Court or any Court" under Section 8(1) by the (Amendment) Act, 2015 legislature intended to do away with the decision of judgments of Supreme Court laying down that Consumer Protection Act being special remedy can be initiated and continued despite there being any arbitration agreement between the parties?

While considering the above issue, the Apex Court by referring the previous judgments of the Apex Court namely National Seeds Corporation Ltd, and Fair Air Engineers Pvt. Ltd. Case laid down the following in paragraph 6 and 7 which is reproduced hereunder.

"6. The judgments relied upon by Shri Ghose do not have any bearing on the issue raised in this appeal. In neither of those cases, has this Court interpreted the provisions of the 1996 Act in the light of the provisions contained in the 1986 Act. Therefore, the propositions laid down in those judgments that Section 8 of the 1996 Act is mandatory cannot lead to an inference that the consumer forum is bound to make a reference to the Arbitral Tribunal.

7. In view of the above stated legal position, the National Commission did not commit any error by holding that the remedy of arbitration available to the complainant does not bar the jurisdiction of the consumer forums and the consumer forums are not under an obligation to refer the matter to the Arbitral Tribunal. With the above observation, the appeal is dismissed."

While considering a Review Petition in R.P.(C) 2629-2630 of 2018 in M/s.EMAAR MGF LAND LIMITED – Vs – AFTAB SINGH case and after taking into consideration of the amendment in Section 8(1) and 8(2) of the

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Arbitration Act, the Hon'ble Supreme Court has held in paragraph 50 as follows.

> ***Can it be said that after amendment under Section 8(1), the law laid down by this Court in reference to Section 2(3), where large number of categories have been held to be non-arbitrable has been reversed or set at naught. Neither any such Legislature intendment was there nor any such consequence was contemplated that law laid down by this Court in context of Section 2(3) has to be ignored or reversed.***

The Hon'ble Supreme Court in it's another Judgment in Rosedale Developers Pvt. Ltd., Vs Aghori Bhattacharya & Others (2018) 11 SCC 337 has held in paragraph 23:

> ***23. This Court rejected the above submission and laid down in paragraph 4:***
>
> ***"4. In our opinion, there is no merit in the submission of the learned counsel. The question whether the existence of an arbitration clause contained in the agreement executed between the parties excludes the jurisdiction of the consumer forum and on an application made by either party, the consumer forum is duty-bound to make a reference to the arbitrator was extensively considered in National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy and it was observed: (SCC pp. 534-35, paras 64-66.)"***

18. Further the Hon'ble Supreme Court has categorically held vide series of judgments that the complaint under the Consumer Protection Act being a special remedy, despite there being an arbitration agreement, the proceedings before the Consumer Forum had to go on and no error committed by Consumer Forum in rejecting the application under Section 8. As rightly pointed out by the Hon'ble Supreme Court, when there is a

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special enactment to deal with a particular dispute as regard to the parties, merely because there is an agreement which normally is a dotted line contract, the parties cannot relegate themselves to the arbitration clause in the agreement. When the special Act empowers a party to deal with the dispute in a particular manner, such disputes can only be dealt under the Special Act and not by the arbitration clause.

In the light of the judgment of the Supreme Court judgments discussed above we hold that the existence of arbitration clause in the construction agreement will not take away the jurisdiction of the RERA which is constituted under the special enactment. We answer this point accordingly.

Point No:3

In view of the finding given by us on point No.1 and 2, this appeal is deserves to be dismissed.

In the result the appeal is hereby dismissed. Connected Miscellaneous Applications if any pending are hereby closed.

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 this 02nd Day of September 2022.

Sd/-xxxx
ADMINISTRATIVE MEMBER

Sd/-xxxx
JUDICIAL MEMBER

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