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 22.11.2021

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

Appeal No. 57 of 2021

M/s.VGN Homes Private Ltd.
Rep. by its Managing Director,
B.R.Nandakumar ... Appellant

-Vs-

Mr.J.Jayaraj .... Respondent

This appeal was taken on file on 16.04.2021 and came up for final hearing on 06.10.2021 in the presence of M/s.G.Peranban, S.Sentamilselvan and D.Dhanasekar, Counsels for the appellant. The respondent appeared through Advocates M/s.A.Smrithi and N.Vasanth Kumar. 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:

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ORDER

1. This appeal has been preferred against the order of the Adjudicating Officer in C.C.P.No.255/2019 dated 05.02.2021 by the promoter. The home buyer preferred a complaint before the Adjudicating Officer against the promoter for the relief of refund of sale consideration with interest and compensation along with litigation costs. After contest the Adjudicating Officer directed the promoter to refund a sum of Rs.21,95,520/- along with interest at the rate of 10.05% and awarded compensation of Rs.1,00,000/- with litigation costs of Rs.25,000/-. Aggrieved upon the same the promoter preferred this appeal. For easy understanding the parties are arrayed hereinafter as per their original rankings as home buyer and promoter.

2. The appellant/promoter preferred this appeal on the following main grounds:

- The home buyer committed default in making payment and therefore under Rule 19(2) of The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017, right of claiming any interest of compensation from the promoter does not arise.
- The arbitration and conciliation Act 1996 is a special law and playing a vital role in the contemporary legal battle among the litigants and therefore, overruling the provision of Rule of law is an arbitrary.
- Where there is legal requirement of fulfilling environmental clearance is a mandate procedure, the appellant lawfully exercised

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the remedy and after completion of legal necessity, delivered the flats to all the allottees in their project. But the home buyer intentionally refused to take the physical possession of the flat. Therefore imposing compensation of Rs.1,00,000/- on the appellant is erroneous.

3. The learned counsel for the appellant/promoter further would submit that the learned Adjudicating Officer failed to consider the above said grounds hence the appeal has to be allowed.

4. The learned counsel for the home buyer would submit that the learned Adjudicating Officer after considering both oral and documentary evidences adduced by both sides came to a correct conclusion and there is no infirmity in the finding. Therefore the appeal has to be dismissed.

5. Points for consideration:

1. Whether arbitration clause contemplated in the construction agreement can be ignored when there are special remedies are provided in the Special Act?
2. Whether the appeal deserves to be allowed or not?

Point No.1:

6. The specific contention on the side of the appellant/promoter is that there was a specific agreement between the parties in the construction

agreement in clause 32 in which it has been specifically agreed between the parties that

> ***"In case of any dispute arising between builder and the allottee or any issue under this agreement, the parties have agreed to refer the same to an Arbitrator to be appointed by the builder at its discretion and whose decision shall be final and finishing upon the parties. "***

7. Against that agreement clause 32, the home buyer approached the Regulatory Authority for adjudicating the dispute regarding refund and compensation. Hence the findings of the adjudicating officer is an arbitrary one. On the side of the home buyer the learned counsel would submit that the arbitration clause was included by the builder to redress the grievances at the discretion of the builder alone, it is not fair and moreover when there are special remedies are available in the special Act namely Real Estate Act and other remedies are barred the builder cannot insist for the arbitration alone. In support of his arguments the learned counsel has referred the order of this Tribunal in A.No.60/2019 in which this Tribunal relied on the Apex Court verdict which runs as follows:

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION REVIEW
PETITION (C) Nos. 2629-2630 OF 2018
IN
CIVIL APPEAL NOS.23512-23513 OF 2017

M/S. EMAAR MGF LAND LIMITED **...APPELLANT(S)**

VERSUS

AFTAB SINGH **...RESPONDENT(S)**

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55. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.

8. As per the above verdict of the Apex Court, it is very clear that when there are special remedies are provided for and which are opted by an aggrieved person that, Judicial authority can refuse to relegate the parties to the arbitration. In this case the home buyer sought for the relief of refund as well as for compensation due to delay. In the construction agreement there is no specific clause for the refund and there is a provision of compensation @ 4 per square feet. Hence the aggrieved person, namely the home buyer, invoked the Real Estate Act and the learned Adjudicating Officer has not accepted the arguments of the promoter on the basis of the Apex court verdict. Apex court verdict is the law of the land. Hence the learned Adjudicating Officer rightly rejected the plea of the promoter and there is no arbitrariness. The point is answered accordingly.

Point No.2:

9. According to the promoter since the promoter failed to hand over the possession the learned adjudicating officer took adverse inference and passed order against the promoter. The learned adjudicating officer failed to consider the various facts namely the mandatory requirements of environmental clearance was not able to be fulfilled by the promoter due to pending of case

before the supreme court. Hence the delay caused, in getting the completion certificate. Even though the promoter has expressed his inability due to non obtaining of environmental clearance the learned adjudicating officer simply ignored. Further would submit that the home buyer committed default in making payment and hence under Rule 19(2) of the Tamil Nadu Real Estate (Regulation and Development) Rules 2017 the home buyer is barred to get any interest or compensation was also not considered by the learned adjudicating officer. Further would submit that already there was a construction agreement between the parties in which it has been specifically agreed for the delay in delivery the promoter is liable to pay compensation @ Rs.4 per square feet per month. The promoter by implementing the above said specific clause, the promoter himself voluntarily called the home buyer and gave a sum of Rs.55,050/- by way of cheque. It was accepted by the home buyer. Even though the above said fact was brought to the knowledge of the adjudicating officer by way of written explanation (counter affidavit) as paragraph No.8 and the home buyer admitted the same in proof affidavit as in paragraph No.8, further the promoter has also narrated the above said facts in his proof affidavit as paragraph No.8, even then, the learned Adjudicating Officer failed to mention the payments of Rs.55,050/- and accepted by the home buyer, the above said fact was not disclosed in the order. Without considering the above said payment imposing compensation of Rs.1,00,000/- without any basis the statutory enactment has to be appreciated only in the absence of contract to contrary but the learned adjudicating officer without appreciating the agreement between the parties by way of invoking the provisions of the Act

and allowed the claim it is not according to law. Therefore the appellant sought for allowing the appeal.

10. On the side of the respondent/home buyer the learned counsel has replied that the home buyer has not concealed anything and he has disclosed everything with regard to receipt of compensation as per the agreement in the proof affidavit itself. The learned adjudicating officer considered all the facts and allowed the claim and there is no infirmity in the findings.

11. Perused both side contentions. On perusal it is crystal clear that the promoter has paid a sum of Rs.55,050/- by way of cheque and it was also accepted by the home buyer in paragraph No.7 of the complaint itself and paragraph no.8 of his proof affidavit. But unfortunately, the learned adjudicating officer failed to consider this admission. The home buyer stated the reason for the receipt of the amount that, 'when the promoter called upon the home buyer through phone on 29.05.2017 he was not able to attend the meeting and asked his wife to attend the meeting. But the promoter instead of handing over the keys and relevant documents handed over the cheque for a sum of Rs.55,050/- and obtained signature in some undertaking letters.' After knowing the facts the home buyer has not protest the payment and simply accepted the payment as it was paid as per clause 20 of the agreement. The above said admission clearly reveals that the delay compensation paid by the

promoter and accepted by the home buyer as per the construction agreement. In such circumstances further claim of the compensation for mental agony and claim by way of interest are not acceptable.

12. The promoter has claimed that as per Rule 19(2) of the Tamil Nadu Real Estate (Regulation and Development) Rules 2017, the home buyer is not entitled for any interest or compensation if the home buyer is a defaulter. On the side of the promoter, has not produced any piece of paper to show that the home buyer has not paid the amount payable to the promoter without delay. As per the construction agreement clause 7 & 8 the builder is entitled to terminate the contract and also entitled to interest at the rate of 24% per annum. The promoter has not invoked such clause against the home buyer. Instead of that the promoter has sent a letter on 29.05.2018 to the home buyer and requested the home buyer to make payment of Rs.73,721/- towards handing over payment. The above said letter clearly states that the home buyer has not made any payment with delay. If really the home buyer was in default certainly there is a chance for the promoter to claim the interest at the rate of 24% as contemplated in the construction agreement in clause 7 & 8. Therefore this ground is also not sustainable.

13. The next important and foremost ground putforth by the promoter is the environmental clearance certificate. The delay in getting the environmental

clearance certificate leads to getting delay the completion certificate that is the only reason adduced by the promoter for the delay in delivery of the flat. According to the promoter in December 2014 application for environmental clearance was submitted before the SEIAA of Tamil Nadu and the completion certificate was granted only on 17.05.2018 but the home buyer intentionally refused to take the physical possession of the flat. On 15.05.2018, the promoter has sent an email to all the allottees and asked the individual customer to inspect their unit and also the promoter has replied for queries raised by the Owners' Welfare Association mail dated 12.05.2018. On 29.05.2018 the promoter has sent an individual letter communication to the home buyer by demanding handing over stage payment of Rs.73,721/- from the home buyer. For the above said letter, what is the response from the home buyer, there is no answer from the home buyer side. The home buyer approached the Adjudicating Officer by way of Form N on 4.10.2019 for the relief of refund of sale consideration with interest and for compensation for mental agony. The home buyer came forward with form N after 16 months. During the interval of 16 months, why the home buyer has not taken any steps against the promoter? For which also the promoter has not stated any reason. According to the promoter the other home buyers started to get possession from the promoter.

14. The above said fact was not appreciated by the Learned Adjudicating Officer even though it was brought to the notice of the

Adjudicating Officer by way of counter affidavit and proof affidavits of home buyer as well as promoter. Absolutely, the home buyer is entitled to invoke the provisions of the Real Estate (Regulation and Development) Act, 2016 since it is the welfare legislation for the home buyers. But at the same time the home buyer is not entitled to invoke both hot and cold namely the construction agreement as well as the Real Estate Act provisions simultaneously. The home buyer himself accepted the delay compensation given by the promoter as per clause 20 of the construction agreement. After the receipt of the delay compensation from the promoter the home buyer is absolutely not entitled for refund of the sale consideration as well as interest and compensation for delay in construction since the home buyer received the amount Rs.55,050/- as per clause 20 of the construction agreement in lieu of delay compensation. In such circumstances, the order of the Learned Adjudicating Officer with regard to refund of sale consideration of Rs.21,95,520/- with interest at the rate of 10.05% per annum along with compensation of Rs.1,00,000/- and litigation expenses of Rs.25,000/- is unwarranted and it is neither under the terms of construction agreement nor under the provisions of the Real Estate Act and Rules. Therefore this Tribunal comes to a conclusion that the order of the learned Adjudicating Officer is liable to be set aside and this appeal is deserves to be allowed. Point No.2 is answered accordingly.

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15. In point No.2 it was decided that this appeal is deserves to be allowed. Consequently, the complaint of the home buyer has to be dismissed. At this juncture the home buyer became remediless and handing over of possession of the dwelling unit to the home buyer by the promoter is also a difficult task since both the home buyer and promoter fighting tooth and nail for the past three years. Hence the home buyer again has to start second round of litigation for getting possession and it is unfair and the purpose of the Real Estate Act will be defeated. Therefore, for the ends of justice and to implement the Real Estate (Regulation and Development) Act, 2016 by letter and spirit the possession of the dwelling unit has to be ensured to the home buyer since he has paid entire sale consideration except the last payment as stated by the promoter. Further, the Adjudicating Officer has no power to ensure possession of the dwelling units from the promoter to the home buyer. Hence this Tribunal is decided to issue direction to the Tamil Nadu Real Estate Regulatory Authority to ensure handing over of possession to the home buyer from the promoter, by invoking Section 37 of the Real Estate (Regulation and Development) Act, 2016.

16. In the result, this appeal is allowed without costs and the order of the Adjudicating Officer in C.C.P.No.255 of 2019 dated 05.02.2021 is set aside and complaint of the home buyer is dismissed. Regarding handing over of possession by the promoter to the home buyer this Tribunal issued the following directions:

(a) The home buyer is directed to deposit the handing over stage payment of Rs.73,721/- before the Regulatory Authority within two weeks from the date of receipt of this order and inform to the promoter immediately.

(b) The promoter is directed to hand over the possession of dwelling unit due to the home buyer within two weeks from the date of deposit intimation received by the promoter.

(c) The Tamil Nadu Real Estate Regulatory Authority, Chennai is directed to ensure the handing over of possession of the dwelling unit by the promoter to the home buyer within a month from the date of deposit by the home buyer by invoking Section 37 of the Real Estate (Regulation and Development) Act, 2016.

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 22nd Day of November 2021.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDL. MEMBER

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