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 06.10.2021

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

Appeal Nos. 67 to 69 of 2021

1. Army Welfare Housing Organization (AWHO)
   Rep. by its Managing Director
   South Hutments, Kashmir House,
   Rajaji Marg, New Delhi – 110 011

2. The Project Director
   Army Welfare Housing Organization
   Dinesh Vihar, Thazhambur Link Road,
   Chennai – 600 103. ... Appellants

-Vs-

Col. C.M. Unnithan .... Respondent in A.No.67/2021
Commander N. Koteeswar .... Respondent in A.No.68/2021
Capt.Nagarajan Vasudeva Rao .... Respondent in A.No.69/2021

These appeals were taken on file on 28.06.2021 and came up for final hearing on 15.09.2021 in the presence of M/s.AAV Partners, P.H.Manoj Pandian,

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N.Zahid Ahmed & Sonali.J., Counsels for the appellants and M/s.R.Ramasubramaniam Raja, R.Hemavathi & D.Nancy Devadass, 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:

COMMON ORDER

1. These appeals have been preferred against the common order of the Tamil Nadu Real Estate Regulatory Authority in C.Nos.291, 293 and 294 of 2019 dated 25.03.2021 by the promoter. The appellant in all the three appeals is the promoter. All the respondents in three appeals are the allottees. For easy understanding hereinafter the parties are referred as per their original rankings as allottees and promoters.

2. The promoter/appellant is Army Welfare Housing Organization, which is registered under the Indian Societies Registration Act. The aim and object of the organization is to construct houses for the welfare of serving/retired Army personnel and the widows in selected stations throughout the country. As such the allottees/respondents have been allotted respective houses and handed over possession on 5.12.2019 (C.No.291/2019), 12.08.2020 (C.No.293/2019) and 22.02.2020 (C.No.294/2019). The above said project commenced in May 2012. The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 came into force on 22.06.2017. Hence the allottees came forward with the complaints

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before the Regulatory Authority for registration of the project and for delay compensation. The Regulatory Authority closed the complaints by its order dated 21.05.2019 by stating that the housing project developed by the Army Welfare Housing Organization has been structurally completed hence exempted from registration with RERA. Aggrieved upon the same the allottees have preferred appeals before this Tribunal. This Tribunal, after contest, set aside the order of the Regulatory Authority by its order dated 31.10.2019 and directed the promoter to register the project. Aggrieved upon the same the promoter preferred Civil Miscellaneous Second Appeal before the Hon'ble High Court. After contest the Hon'ble High Court remanded the matter to the Regulatory Authority for fresh decision. After issuing notice to the appellant as well as the respective 1st respondent and summoning all records from the planning authority and if necessary, the authority shall examine witnesses and record statements by issuing commissions, provide adequate opportunity to the respective 1st respondent to place materials before the Authority and take an informed decision by recording reasons. Then the Regulatory Authority after contest delivered the order on 25.03.2021 by holding that the project of the promoter is an ongoing project and directing the promoter to register the project before 30.04.2021. Aggrieved upon the same the promoter preferred these appeals on the following grounds:

i. The project of the appellant is a completed one as per the letter of the Commissioner of Town and country Planning authority dated 26.07.2018.

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ii. The Regulatory Authority after satisfying on the report of the architect report dated 14.03.2017 and the engineer's report dated 24.04.2017 and the RERA report dated 2607.2018 issued by CTCP the TNRERA letter dated 28.08.2018 accepted the project as structurally complete and exempted from registration.

iii. The project of the appellant has been assessed to property tax by the local body by its order dated 11.10.2017.

iv. The appellants mainly contended that the Hon'ble High court direction is not followed, no sufficient opportunity given as contemplated by the Hon'ble High Court.

v. As per Section 38(2) of the RERA Act the delay of 34 days was condoned in notifying the local authorities applying for exemption.

vi. The registration process with RERA would impose certain cost implications on the appellant and that the same would financially translate to the allottees.

vii. Without impleading the MLPA as a party or calling as witness to substantiate the report the rejection of the report is not sustainable.

The above referred six main grounds were not properly appreciated by the Regulatory Authority.

3. The learned counsel for the appellant would submit that he Hon'ble High Court Division Bench has specifically directed the Regulatory Authority which runs as follows:

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"Therefore the authority should bear in mind that the power conferred on its onerous and the authority has power to make a thorough enquiry into the matter before a decision is taken.

The authority, being the first fact finding body, is required to make a through probe into the matter especially when the respective 1st respondent have taken a categorical stand that the project cannot be brought under the ambit of Rule 2(h)(iii) of the Rules and admittedly, the project was not published in the list of projects, which are to be construed as not ongoing project in terms of Rule 2(h)(iii) of the Rules. Hence this court is of the considered view that the matter should be remanded to the authority for a fresh decision, bearing in mind the observations made by this court in this common judgment".

4. The above said observation was not followed by the Regulatory Authority and simply accepted the version of the respondents as it is and completely failed to adhere the observations of the Hon'ble Division Bench. It is against the principles of judicial discipline. Therefore, the order of the authority is not sustainable as per the directions of the Hon'ble High Court. Hence appeals are to be allowed.

5. The learned counsel for the respondents would submit that the Regulatory Authority has passed orders after analyzing entire facts and materials on record and came to a correct conclusion and there is no infirmity in the findings of the authority. Further would submit that as per the direction of the Hon'ble High Court the authority has discussed about the documents relied by

both sides and came to a correct conclusion. Therefore, there are no merits in these appeals and all the appeals have to be dismissed.

6. Point for consideration:

1. Whether the directions of the Hon'ble High Court is complied by the Regulatory Authority while passing orders?
2. Whether the appeals are deserve to be allowed or not?

Point No.1:

7. The appellant organization formulated by the rules framed by the board of management under powers vested in it by paragraph 12 of the Regulations of the Army Welfare Housing Organization. Its rules will apply to those who have been registered under Master Brochure July 1987 as amended from time to time. Master Brochure March 1979 and Master Brochure July 1982 as amended from time to time have since been repealed. Before going to discuss the merits of the appeals the background of these complaints have to be looked into. As per the above scheme the complainants applied for the allotment of dwelling unit and got allotment. Due to delay in handing over possession the respondents approached the Regulatory Authority for the relief of registration of the project under Real Estate Regulatory Authority. The respondents have also claimed compensation before the Regulatory Authority.

8. The appellant organization applied for exemption from registration before the Real Estate Regulatory Authority for which on 13.12.2017 the Regulatory Authority directed to register the project. Subsequently again the appellant

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organization made a representation. Considering the representation by its letter dated 28.08.2018 the Regulatory Authority exempted the appellant organization from registration. The respondents preferred a complaint for registration before the Real Estate Regulatory Authority on 15.04.2019. On 21.05.2019 the Regulatory Authority has passed final order by stating that the project of the appellant organization has been structurally completed under Rules 2(h)(iii) hence exempted from registration. Accordingly the complaint is closed. Against that order the respondents herein preferred appeals before this Tribunal. This Tribunal not accepted the exemption granted by the Regulatory Authority and directed the appellants to register the project before the Real Estate Regulatory Authority. Aggrieved upon the same the appellants have preferred second appeal before the Hon'ble High Court in CMSA Nos. 12 to 14 of 2020 before the Hon'ble High Court. After contest the Hon'ble High Court considered both letters of the Regulatory Authority dated 13.12.2017 and 28.08.2018 and orders of this Tribunal gave findings with directions that:

> ***"The authority should bear in mind that the power conferred on it is onerous and the authority has power to make a thorough enquiry into the matter before a decision is taken.***
>
> ***More importantly the decision making process should be fair, transparent and should comply with principles of natural justice.***
>
> ***The authority, being the first fact finding authority, is required to make a thorough probe into the matter especially when the respective 1st respondent have taken a categorical stand that the project cannot be brought under the ambit***

of Rule 2(h)(iii) of the Rules and admittedly, the project was not published in the list of projects, which are to be construed as not ongoing project in terms of Rule 2(h)(iii) of the Rules. Hence, this court is of the considered view that the matter should be remanded to the authority for a fresh decision bearing in mind the observations made by this court in this common judgment. "

The Hon'ble High court has also observed as follows:

"22. Before parting with the case, we wish to observe that the appellant is an organization formed by the respondents and persons like the respondents. The respondents are none other than the ex- servicemen, who have served the country. The appellant organization appears to have been established to implement the projects PAN India for the welfare of serving defence personnel as well as retired defence personnel, war widows, etc. As could be seen from the letter written by the appellant to the Authority, they have got a promoter, which is a developer registered in Chennai. The manner, in which, the appellant organization should deal with the matter is slightly different from how a private promoter/developer would deal with such cases."

In the result, the above civil miscellaneous second appeals are partly allowed. The decision rendered by the Tribunal in the common impugned order dated 31.10.2019 with regard to point No.1 is confirmed. The decision rendered by the Tribunal in the common impugned order dated 31.10.2019 with regard to point Nos.2 and 3 framed for consideration is set aside and the matters are remanded to the Authority for a fresh decision after issuing notice to

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the appellant as well as the respective first respondent and summoning all records from the Planning Authority and if necessary, the Authority shall examine witnesses and record statements by issuing commissions, provide adequate opportunity to the respective first respondent to place materials before the Authority and take an informed decision by recording reasons. Since the matters are pending from 2017, we request the Authority to give priority to these matters and dispose of the same preferably within a period of four weeks from the date of receipt of a copy of this common judgment. No costs. Consequently, the connected CMPs are closed.

9. From the above said observation and directions of the Hon'ble High Court the following points to be borne in mind by the Regulatory Authority:

- Before take a decision a thorough enquiry is necessary.
- It should be fair, transparent by complying natural justice.
- Being the first fact finding authority thorough probe under Rule 2(h)(iii).
- The appellant organization created for the welfare of the Army personnel by the Army personnel.
- The manner, in which, the appellant organization should be dealt with the matter is slightly different from how a private promoter/developer would be dealt with in such cases.
- A specific direction is issued in the final order to send for the records from the concerned office and let in parties to adduce evidence if necessary and then come to a decision.

Now we have to analyze whether the above said directions and observations were followed or observed by the Regulatory Authority while deciding the remanded complaints. Before analyzing what are the consequences, if the directions were not complied, has to be looked into.

10. For the above said query the answer is available in the following Madras High Court Judgment referring the apex court verdict.

17. The action of the assessing officer in passing the impugned assessment order, which has been passed without any regard to the direction given by the Appellate Assistant Commissioner, having regard to the statutory hierarchial scheme and the binding nature of the order passed by the appellate authority as envisaged in the various decisions above referred to, cannot be legally sustainable and it has to be set aside with a specific direction to the assessing officer to follow the directions given by the Appellate Assistant Commissioner in his proceedings dated 17.7.2001.

Sri Rajendra Mills Limited Vs. Joint Commercial Tax Officer, Salem, reported in (1971) 28 STC 483, a Division Bench of this Court considered the issue on the fact that certain turnover on cotton lending was regarded by the assessing officer as sale, but according to the assessee, it was only lending. For the assessment year, the Tribunal assessee's own case found similar transaction as lending. But the Revenue took the matter on appeal before High Court in Tax Case. The assessing officer on the ground of pendency of Tax case expressed his view that the

transaction was sale. In those circumstances, a writ petition came before the Division Bench, which ruled as follows: "... We consider that in the hierarchy of authorities set up under the Act, the Tribunal is superior to the Appellate Assistant Commissioner, who is bound by the orders of the Tribunal. The orders of the Tribunal will be as effective as the orders of this court so far as their binding character on the Appellate Assistant Commissioner is concerned. Merely because a tax case has been filed by the department, it does not mean it acts as a kind of stay of operation of the order of the Tribunal. So long as that order of the Tribunal is not set aside, the Appellate Assistant Commissioner is bound to give effect to it, and if he fails to do it and by-passes it on the ground that the department has filed an appeal, it will be really a contempt of the Tribunal's order...."

UNION OF INDIA VS. KAMAKSHI FINANCE CORPORATION reported in 1991 (55) E.L.T. 433 (S.C.), The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities.

11. The Regulatory Authority passed its common order with 62 paragraphs. Out of 62, 38 paragraphs regarding pleadings of both sides. Paragraph Nos.39 & 40 with regard to what are the factors have to be taken into consideration. Paragraph Nos.41 & 42 dealt with Rule 2(h)(iii) and paragraph No.43 dealt with Section 3, paragraph Nos.44 & 45 dealt with definition section 2(n), Paragraph No.46 with regard to common amenities, Paragraph No.47 with regard to

commencement date of Section 3 and Paragraph No.48 with regard to the ruling of this Tribunal in A.No.1/2018, Paragraph Nos.49 to 59 with regard to the documents relied by the complainants, Paragraph No.60 with regard to environmental clearance and finding, Paragraph No.61 & 62 with regard to directions of the authority.

12. This Tribunal in its order in A.Nos.53,54 and 56 of 2019 dated 31.10.2019 from paragraph 16 to 22 dealt with the documents relied by the allottees/complainants and gave a finding that the project of the appellant is an ongoing project and directed the appellant to register the project before the RERA. Against that finding the appellants preferred the second appeal before the Hon'ble High Court in which the order of this Tribunal was set aside and the matter was remanded for fresh decision bearing in mind the observations made by the Hon'ble High Court in CMSA No.12 to 14 of 2020 dated 21.01.2021. The learned Regulatory Authority now has passed orders as stated supra in paragraph No.11.

13. The Hon'ble High Court specifically observed that the appellant organization was created by the respondents and his fellow personnel for the benefit of both. It also further observed that the project work undertaken by the appellant organization is not as a private promoter. Even though the Regulatory Authority on 13.12.2017 directed the appellant to register the project in its letter 28.08.2018 exempted the appellant from registration with RERA. For which the Regulatory Authority referred two documents namely representation of the

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appellant dated 19.02.2018 and reply received from the Commissioner, Town and Country Planning dated 26.07.2018. On the basis of the above said letter exemption was granted by the same authority against the order passed by the same authority dated 13.12.2017. Regarding the above said letter dated 19.02.2018 communications between the departments have been filed by the complainant himself in Typed set page Nos.39 to 43. Originally, the architect gave a certificate on 14.03.2017, the inspection report dated 24.04.2017, block development officers' letter dated 11.10.2017, for which letter has been sent to the PDO on 18.05.2017 and the letter dated 15.05.2016 of the Member Secretary, Mamallapuram Local Planning Authority. The above said references referred in page No.4 of the Typed set of the complainants. On the basis of the letter dated 20.09.2017 the Regulatory Authority came to a conclusion that the project of the appellant is not liable to be exempted. The very same authority after analyzing some documents came to a different conclusion that the appellant project is liable to be exempted. The very same authority gave two different findings. On that basis this Tribunal has also taken into account the first letter dated 13.12.2017 and rejected the contention of the appellant. That is why the Hon'ble High court came to a conclusion by setting aside the order of this Tribunal remanded the matter for fresh decision by finding the truth on the basis of power vested with the authority under section 35 of the Real Estate (Regulations and Development) Act, 2016. The relevant portion of the order of the Hon'ble High Court is as follows:

> ***Since the Authority had not made any enquiry as required to be done under Section 35 of the Act, the respective first***

respondent/allottees/purchasers have been put to great prejudice. The Authority, being the first Fact Finding Body, is required to make a thorough probe into the matter especially when the respective first respondent have taken a categorical stand that the project cannot be brought under the ambit of Rule 2(h)(iii) of the Rules and admittedly, the project was not published in the list of projects, which are to be construed as not ongoing projects in terms of Rule 2(h)(iii) of the Rules. Hence, this Court is of the considered view that the matter should be remanded to the Authority for a fresh decision bearing in mind the observations made by this Court in this common judgment.

The learned Regulatory Authority without following and taking into consideration the directions and observations made by the Hon'ble court and simply passed an order on the basis of the order passed by this Tribunal. The basis of the order passed by the Tribunal itself was set aside by the Hon'ble High Court. In such circumstances, the Hon'ble Authority ought to have taken steps to call for the records under Section 35 of the Real Estate (Regulations and Development) Act, 2016 and find out the truth. But the learned Regulatory Authority has miserably failed to do so. In such circumstances this Tribunal is not in a position to give a finding in this matter since both the findings of this Tribunal as well as findings of the Regulatory Authority are one and the same and it was already set aside by the Hon'ble High Court. Therefore this Tribunal comes to a conclusion that the directions and observations of the Hon'ble High court were not followed by the Regulatory Authority. As per the above referred judgments it amounts to judicial indiscipline and it should be avoided. In such

circumstances, there is no other go for this Tribunal to remand the matter to the limited extent of directing the Regulatory Authority to give a finding with regard to the matters related to the documents by invoking section 35 of the Real Estate (Regulations and Development) Act, 2016 and summoning all records from the planning authority and if necessary, the authority shall examine witnesses and record statements by issuing commissions, provide adequate opportunity to the respondents to place materials before the authority and take an informed decision by recording reasons. On a careful reading of the order such an exercise has not been followed by the Authority. In that view of the matter when the intent of the remand by the Hon'ble High Court has not been complied with, necessarily we will have to remit the matter back to the authority for such a compliance. The point No.1 is answered accordingly.

Point No.2:

14. In view of our finding in point No.1 especially the authority has not given an opportunity by calling for the records from the concerned authority and give an opportunity to both parties to let in evidence the finding as made by the authority has necessarily to be set aside. Hence the matter has to be remanded to the authority to give a finding in the light of the observations of the High Court. In that view of the matter the appeals have to be necessarily allowed for the only purpose to remand the matter to the authority to give a finding after calling for records from the concerned authority and also for giving opportunities to both parties to let in evidence if necessary. Hence the appeals are allowed the

matter is remanded back to the authority to give an appropriate order in accordance with the direction given by the Hon'ble High Court.

15. In the result, by allowing these appeals the order of the Regulatory Authority in C.Nos.291,293 and 294 of 2019 dated 25.03.2021 is set aside and the matter is remanded back to the Regulatory Authority for fresh disposal to comply with the direction given by the Hon'ble Madras High Court in CMSA Nos.12 to 14 of 2020 dated 21.01.2021 in para No.24 in the letter and spirit. No costs. Connected Miscellaneous Applications are 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 06th Day of October 2021.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDL. MEMBER

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