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 19.01.2022

Coram : Mr.N.Balasubramanian, Judicial Member
Ms.Leena Nair, Administrative Member

Appeal No. 72 of 2021

Embassy Residency Apartment Owners Association
Rep. by its President
Mr. P.B.Harindranath ... Appellant

-Vs-

M/s. RGE Constructions & Development Private Limited
Rep. by its Authorised Signatory
Ms. Niranjana Ramakrishnan .... Respondent

This appeal was taken on file on 28.06.2021 and came up for final hearing on 22.12.2021 in the presence of M/s. Vijayalaksmi Rajagopal, S.Shanmitha and Vigneshwar Elango, Counsels for the appellant and M/s.G.Vivekanand, T.S.Thevaraj, Preetha Natarajan and ASLF Law offices, Counsels for the Respondent. 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 by the home buyer's association namely Embassy Residency Apartment Owners Association against the order of the Regulatory Authority in C.No.53 of 2020 dated 19.04.2021. The promoter has promoted a real estate project by name Embassy Residency within the area of 25 acres situated at Perumbakkam Village, Tambaram Taluk, Kanchipuram District and the home buyers purchased apartments from the promoter and took possession and then formed an association by name Embassy Residency Apartment Owners Association.

2. The home buyers' association preferred a complaint before the Regulatory Authority against the promoter for the relief of registration of the project for completion of common amenities with firm completion date and completion date for the remaining four blocks with registration before the TNRERA. After contest the Regulatory Authority directed the promoter to complete the common amenities namely club house, swimming pool along with Phase II B construction. The authority has also directed both the home buyers association and the promoter to work together and resolve the outstanding issues separately failing which directed the association to file separate complaint instead of raising the issues in the rejoinder. Aggrieved upon the same the home buyer association has preferred this appeal and hereinafter the appellant and the respondent are called as home buyer's

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association and promoter respectively. The main grounds put forth by the appellant home buyer association are as follows:

- Material breach of the promise by the promoter.
- Prescribed standards of quality not followed by the promoter.
- Evading of structural defect rectification which leads to seepages and water stagnation.
- Even though subsequent events brought to the notice of the authority it failed to mould the relief as per the Supreme Court verdict reported in (2010) 3 SCC 470.
- Promoter had collected Rs.7.58 crores towards club house membership charges even then construction of the club house not commenced.
- Corpus fund and other deposits collected by the promoter to the tune of Rs.19,35,42,000/- not yet transferred to association and utilized interest accrued on that deposit to the tune of Rs.10,29,67,650/-.
- The authority concluded that the appellants are linking grant of consent to construct phase II B with issues of refund of corpus fund, deposit etc. since contractual obligations were not complied with the association constrained to narrate as relevant.
- OSR land gifted to CMDA has neither handed over nor developed and utilized by the promoter.

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3. The learned counsel for the home buyer association would submit that the above said main grounds were not properly appreciated by the Regulatory Authority hence the order of the authority has to be set aside by way of allowing this appeal.

4. The learned counsel for the promoter would submit that the promoter is willing to complete the amenities like club house, etc., with the cooperation of the association along with phase II B. But the home buyer association put forth further issues and demands and delayed the completion. Further the promoter has made temporary arrangements for club house but it was totally suppressed. Anyhow, the authority has come to a correct conclusion and there is no infirmity in the findings hence appeal has to be dismissed.

5. Points for consideration:

1. Whether the plea of the home buyers' association that the Regulatory Authority ought to have mould the relief on the basis of the subsequent events brought by the home buyers' association is sustainable?
2. Whether the appeal deserves to be allowed or not?

Point No.1:

6. The appellant association members are the home buyers who have purchased apartments from the promoter and took possession of their respective apartments and then they formed apartment owners' association

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and came forward with the complaint for the relief of registration of the project, completion of common amenities with firm completion date. The promoter denied the allegations of the home buyers' association by way of counter. Then the home buyers' association has filed a rejoinder and denied the allegations of the promoter and sought for further consequential nine reliefs. These are the admitted facts.

7. After the filing of the rejoinder by the home buyer association the promoter has not filed any counter or objection for the rejoinder. In the main compliant the relief claimed only three in numbers but in the rejoinder the home buyers' association sought for nine reliefs. In particular the association went to the extent of seeking relief with regard to the remaining phase of the project. These are the disputed facts.

8. The learned Regulatory Authority after contest directed the promoter to complete the common amenities along with phase II B Towers within 24 months from the date of CMDA approval and also directed the promoter to register the phase II B project along with common amenities of club house and swimming pool with TNRERA. Regarding the relief sought by the home buyers' association by way of rejoinder, the Regulatory Authority directed the home buyers' association to file separate complaint.

9. Aggrieved upon the same the home buyers' association came forward with this appeal as relief a) allow this appeal and set aside the order of the

Hon'ble Tamil Nadu real estate Regulatory Authority dated 19.4.2021 made in C.No.53 of 2020. As a consequential relief the home buyers' association sought for the following reliefs:

i) to direct the promoter to strictly adhere to the construction agreement while constructing the remaining phase of the project.

ii) to return the entire amount collected by the promoter towards corpus fund.

iii) to return the maintenance charges, club house membership fee together with interest.

iv) to render true accounts.

v) to rectify seepage issues.

vi) to furnish statement of UDS and OSR club house swimming pool along with CAD drawings.

vii) to remove the excess STP treated water from the project premises.

viii) to provide adequate vehicle parking facilities.

ix) to restore the portions of such common area lands which were illegally allotted by the promoter to individual apartment owners as car parking.

10. On the side of the home buyers' association in the grounds of appeal as ground No.5 has stated that the above said consequential reliefs can be moulded by relying the verdict of the Supreme Court which is reported in (2010) 3 SCC 470 Sheshambal (dead) through L.Rs. Vs Chelur Corporation, Chelur Building. In the above said case the landlords seeking for the relief of

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eviction of their tenant on the ground of own use and occupation. Both the rent controller as well as the rent control appellate authority negatived the relief and the landlords preferred revision before the Hon'ble High Court of Kerala and during the pendency the landlords were dead and the L.R.S of the landlord were impleaded as parties and they continued the revision petition. Finally the Hon'ble High Court came to a conclusion that the relief claimed by the landlords for the eviction on the ground of own use and occupation was not sustainable since the landlords were dead and the dependant member of the family for whose benefit they could have sought eviction on the ground that she required the premises for personal occupation. Further, by holding that on the death of the petitioners in the original eviction petition they right to seek eviction on the ground of personal requirement for the demised premises became extinct and no order could on the basis of any such requirement be passed at this point of time and revised the rent to Rs.10,000/- per month. In turn the Hon'ble Supreme Court further revised the payment of rent from Rs.10,000/- to Rs.15,000/- from 1.11.2003 and then further revised to Rs.25,000/- with effect from 1.1.2009. The home buyers association relied this judgment and seeking the Regulatory Authority as well as this Tribunal to follow the above said verdict of the Hon'ble Supreme Court as the Supreme Court has revised the rent from Rs.10,000/- to Rs.15,000/- and to Rs.25,000/- by considering the circumstances. As such they are seeking lesser relief to larger relief. In the above said case during the pendency of the appeal the appellants had filed an application seeking direction against the tenant for payment of rent Rs.50,000/- per month, they have also filed valuation

certificate issued by the Chartered Engineer and Approved valuer. On that basis the Hon'ble Supreme court as well as the High Court were revised the rent. Here, the case in hand is entirely different. The home buyers association sought for the relief of registration of project and completion of common amenities by way of Form 'M'. Subsequent to the denial of the promoter by way of counter and to reply for the above said counter the home buyers association came forward with rejoinder in which they are seeking larger reliefs. Under such circumstances the above said citation of the Supreme Court is not only applicable but also not relevant to the facts of this case.

11. The home buyers' association have relied another four judgments of the Hon'ble Supreme Court in support of their contention. They are as follows:

1. (1994) 1 SCC 1 S.P.Chengalvaraya Naidu Vs. Jagannath
2. (2005) 4 SCC 605 MCD Vs. State of Delhi
3. (2008) 7 SCC 85 Gowtham Sarup Vs. Leela Jetli and ors
4. (2010) 5 SCC 274 S.R. Srinivasa & Ors Vs. Padmavathamma

12. In the first two cases namely Chengalvaraya Naidu case and MCD case the Hon'ble Supreme Court held that non disclosure of vital documents amounts to Fraud. The facts of this case related to the agreement between the parties hence the above said two judgments are not relevant to the facts of this case. The next two cases namely Gowtham Sarup and S.R.Srinvasa cases are related to legal position with regard to admissions and evidentiary value thereof and the facts of

the above said two cases are no way relevant to the facts of this case. So above said four cases verdicts are no way applicable to the facts of this case.

13. The next judgment relied by the home buyers' association is with regard to their rejoinder filed before the Regulatory Authority. In the above said judgment the following Law was laid down by the Hon'ble High Court of Rajasthan which runs as follows:

1998 SCC OnLine Raj 46
State of Rajasthan and another Vs Mohammed Iqbal and others

"9. The principles deducible from the above discussions may be summarized thus-

(a) The plaintiff cannot be allowed to introduce new pleas by way of filing rejoinder so as to alter the basis of his plaint.

(b) In rejoinder, the plaintiff can be permitted to explain the additional facts which have been incorporated in the written statement.

(c) The plaintiff cannot be allowed to come forward with an entirely new case in his rejoinder.

(d) The plaintiff cannot be permitted to raise inconsistent pleas so as to alter his original cause of action.

(e) Application under Order 8 Rule 9 CPC cannot be treated as one under Order 6 Rule 17 CPC as both are contextually different.

10. In the case on hand, the bare look at the pleas sought to be introduced by the plaintiffs should not be at variance with the pleas originally taken in the plaint. No doubt that the plaintiffs were permitted by the learned appellate court to file rejoinder but by this permission, the scope of Order 8 Rule 9 CPC cannot be extended. The impugned order though expressly mentioned that only those facts will be considered as are necessary for determination of the additional issue but his is not sufficient. The learned court below ought to have specifically considered whether the pleas sought to be introduced by way of rejoinder is not inconsistent and at variance with the pleas originally taken in the plaint and whether new pleas which could only be introduced by way of amendment were raised in the rejoinder. In not doing so, the learned court below has committed jurisdictional error and if the order is allowed to stand, it would occasion failure of justice.

11. Resultantly, the revision succeeds and is hereby allowed. The impugned order is set-aside and the case is remitted back for fresh decision to the learned trial court to consider that whether the plea sought to be introduced by way of rejoinder is not inconsistent and at variance with the pleas originally taken in the plaint and whether new pleas which could only be introduced by way of amendment were raised in the rejoinder. The parties are directed to appear before the learned trial court on March 26, 1998."

14. The Hon'ble High Court of Rajasthan has laid down that the new pleas which could only be introduced by way of amendment were raised in the rejoinder, if permitted, it would occasion failure of justice. In this case the home buyers' association, before the Regulatory Authority, after the filing of the counter by the promoter, has filed 24 pages rejoinder. The original petition, as Form 'M', has filed by the home buyers' association only 3 pages with 3 prayers. In the rejoinder the home buyers' association sought for another 9 reliefs in addition to the main relief in Form M. Now in this appeal the home buyers' association has termed the above said reliefs as consequential reliefs. In the above said judgment of the Hon'ble High Court of Rajasthan, the first appellate court permitted the plaintiff to file rejoinder and accepted. Against that the defendant preferred appeal before the Hon'ble High Court in which the Hon'ble High Court found that the court below ought to have specifically considered whether the pleas sought to be introduced by way of rejoinder is not inconsistent and at variance with the pleas originally taken in the plaint and whether new pleas which could only be introduced by way of amendment were raised in the rejoinder. Hence the impugned order is set aside and the case is remitted back for fresh decision to consider the above said query. In this case the learned Regulatory Authority in paragraph No. 54 of its order has pointed out and

directed the home buyers' association to file separate compliant with regard to rejoinder reliefs. The above said judgment of Hon'ble High Court of Rajasthan is squarely applicable to the facts of this case.

15. In the original compliant the home buyers' association sought for the relief of registration of the project and completion of common amenities. There is no specific items of common amenities mentioned in the relief column but in the rejoinder the home buyers' association sought for new reliefs with regard to corpus fund, maintenance charges, deposits, interests, parking facilities, removal of excess STP treated water, statement of UDS and OSR land and restoration of common area lands. These are the new pleas and reliefs and they were not narrated in the original complaint. Therefore on following the above referred Rajasthan judgment it can be introduced only by way of amendment under Order 6 Rule 17 CPC and not by way of rejoinder under Order 8 Rule 9 CPC. Now let us see whether amendment is necessary?

16. According to the Real Estate (Regulation and Development) Act, 2016 Section 38 and section 53, the authority shall be guided by the principles of natural justice and appellate authority shall not be bound by the procedure laid down by CPC but shall be guided by the principle of natural justice. The relevant portions of the above said Sections are as follows:-

> ***38. Powers of Authority***
> ***(1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.***

(2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) .. ..

<u>53. Powers of Tribunal.</u>

(1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice.

(2) .. ..

(3) The Appellate Tribunal shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872.

(4) .. ..

(5) .. ..

17. As per the above provisions of Section 38(2) and 53(1) and (3) the provisions of the CPC is not applicable. The guiding principles are only the natural justice. While introducing new pleas and new reliefs it should be decided by the authority after giving opportunity to the other party as per the guiding principle namely the natural justice. In this case the home buyers' association filed their rejoinder after the promoter filed their counter. The promoters have not been given any opportunity to defend their stand by way of counter or objections to the rejoinder. The home buyers' association in their grounds of appeal as ground No.6 has stated as follows: "The Learned Authority failed to note that when the subsequent events were brought to the notice of the authority promptly and in accordance with the rules of procedural law and the opposite party not having been taken by surprise or not to have ignored the complaint ought to have moulded and granted the relief."

18. The home buyers' association has stated that subsequent events were brought to the notice of the Authority promptly and in accordance with

the Rules of procedural law and the opposite party not having been taken by surprise or not to have ignored the complaint ought to have moulded and granted the relief. Originally in the compliant as Form M the home buyers' association has not put forth any plea with regard to the reliefs stated in the rejoinder. Hence the promoter has filed his counter with regard to the original complaint. Regarding the rejoinder pleas the promoter was not given any opportunity to defend the same it amount to the opposite party having taken by surprise. Hence the learned Authority has refused to mould the relief and granted the relief as claimed in the original complaint. Therefore this Tribunal comes to a conclusion that the moulding of relief does not arise at this stage and it should be decided only after hearing the defence of the other side and the plea regarding moulding of the relief is not sustainable. Point No.1 is answered accordingly.

Point No.2:

19. At the same time the larger reliefs subsequently claimed by the home buyers' association can be dealt with only by giving an opportunity to the opposite party to defend the same. For that purpose the home buyers' association need not be send back for filing fresh complaint. If the learned Authority after filing rejoinder an opportunity is given to the promoter to file reply for the rejoinder without following the procedure as contemplated in CPC and decide the case on merits regarding all the reliefs the time could be saved and the purpose of the Act could have been achieved. But the learned Authority has failed to do so.

20. The ultimate aim of this Act is to ensure sale of real estate project in an efficient and transparent manner and to protect the interest of the consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal. So to implement the Act in letter and spirit and to avoid further litigation, on following the verdict of the Hon'ble Rajasthan High Court this Tribunal is inclined to remand the matter for fresh disposal regarding the entire reliefs claimed by the home buyers' association by giving opportunity to the promoter to put forth his defence regarding new pleas and reliefs claimed by the home buyers' association. Further, the Hon'ble Madras High Court Division Bench has also guided in this regard with regard to remanding the case for fresh disposal laid down the principles in the following verdict which was arose from the order of this Tribunal and the same runs as follows:-

In the High Court of Judicature at Madras
CMSA No.12 to 14 of 2020 dated 21.1.2021
Army Welfare Housing Organization (AWHO)
-Vs- Commander Kotteeswar and others.

21. Be that as it may, we are satisfied that principles of natural justice have been violated, which had been rightly noted by the Tribunal in the common impugned order dated 31.10.2019. 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.

21. Therefore by following the above verdicts of the Hon'ble Rajasthan High Court and Madras High Court this Tribunal comes to a conclusion that, to achieve the purpose of the Act and to protect the interest of the home buyers, the order of the Regulatory Authority is liable to be set aside and to remand the case for fresh disposal with regard to entire reliefs claimed by the home buyers' association against the promoter in a single complaint. Hence the appeal deserves to be allowed. Point No.2 is answered accordingly.

22. In the result, this appeal is allowed and the order of the Regulatory Authority in C.No.53/2020 dated 19.4.2021 is set aside and the case is remanded back to the Regulatory Authority for fresh disposal by giving opportunity to the promoter to put forth his defence regarding rejoinder filed by the home buyers' association and dispose the case with regard to entire reliefs claimed by the home buyers' association within three months. Both parties are directed to appear before the Tamil Nadu Real Estate Regulatory Authority, Chennai on 1.2.2022.

Connected Miscellaneous applications are closed.

This Order is directly dictated to the Stenographer, typed in the computer by her, corrected and pronounced by us in the open court on 19th Day of January 2022.

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDL. MEMBER

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