BEFORE THE TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL
CHENNAI

Friday the 12th Day of August 2022

Coram : Ms.Leena Nair, Administrative Member
&
Mr.R.Padmanabhan, Judicial Member

A.No.10/2022

M/s. Mars Sun Properties,
Rep. by Managing Partner,
S.Varadaraj ... Appellant

-Vs-

Dr.A.Ramalingam ... Respondent

This is an appeal U/s 44(1) of the Real Estate (Regulation and Development) Act 2016 as against the Order passed by the T.N.Real Estate Regulatory Authority, Chennai in C.No.167 of 2021 dated 30.12.2021.

Dr.A.Ramalingam ... Complainant

-Vs-

M/s. Mars Sun Properties,
Rep. by Managing Partner,
S.Varadaraj ... Respondent

The Appeal was taken on file on 10.03.2022 and came up for final hearing on 01.08.2022 in the presence of M/s.V.Balaji and

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V.Yurendrakumar, Counsels for the appellant and M/s. B.Rajkumar Ashok Singh, B.Mahendran and D.Gopinath, 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,

ORDER

1. The parties hereinafter will be referred to as per their rank and status before the RERA.

2. **The case of the complainant in brief is as follows:** The complainant is the owner of 956 square feet of undivided share of land out of 3049 square feet of land and another third person by name T.D. Kumaravel is the owner of the remaining 2093 square feet of the undivided share of land. As the joint owners of the land measuring 3049 sq. ft. situated in Arumbakkam Village, Nungambakkam Taluk, Chennai, both of them decided to promote and develop the property into a house project. They approached the respondent / builder for that purpose. A memorandum of agreement for joint promotion dated 18.11.2013 was entered into between the parties. The respondent agreed to bear the construction costs and also to complete the entire construction within a period of 12 months from the date of obtaining sanctioned plan from the competent authority.

3. As per the agreement the complainant shall be allotted 1464 sq. ft. of super built up area including 20% common area in the front side of the first floor together with undivided share of 702 sq. ft. out of the

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total extent of 3049 sq. ft. with one covered car parking area in the ground floor. In lieu of the cost of construction the respondent will be entitled for 3,126 sq. ft of super built up area in both at the ground floor and at the first floor with 3 covered car parking and 20% common area. The respondent shall construct the whole building at his own costs and entitled to retain or sell the same to third parties of the portions reserved for him subject to the conditions mentioned above.

4. Subsequently, on 09.06.2014 an Addendum to the Memorandum of Agreement for joint promotion dated 18.11.2013 was entered into between the complainant and the respondent alone. By this addendum the respondent agreed to give up from his share and the complainant agreed to purchase an additional constructed area of 300 sq. ft. (super built up area) plus additional undivided shares of land to an extent of 140 sq. ft. The complainant further agreed to pay Rs.26,50,000/- for this additional constructed area and also for the additional undivided share of land. The complainant has paid the said amount of Rs.26,50,000/- on various dates during 2014 itself. Consequently, the total super built up area to be allotted to the complainant increased from 1464 sq. ft to 1764 sq. ft. and the undivided share increased from 702 sq. ft to 842 sq. ft.

5. The sanctioned plan was obtained by the respondent on 14.02.2014. The project as per the agreement should have been completed on or before 13.02.2015. In spite of 5½ years lapsed the respondent is not in a position to complete the construction in so far as the flat to be allotted to the complainant alone is concerned. Hence the complainant

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preferred the complaint before the RERA with a prayer to direct the respondent to hand over the flat bearing No.F1, First floor, AVR Vasantham premises, Mangali Nagar 1st Street, Arumbakkam, Chennai – 106 and also to direct the respondent to hand over all the receipts and documents pertaining to the property.

6. **The case of the respondent in brief is as follows:** The complaint does not fall within the purview of the RERA Act 2016. The total extent of the land proposed to be developed is only 3049 sq ft. which is equivalent to 283.252 square meter. The number of apartments proposed to be developed was less than 8 in numbers, inclusive of all phases. As per section 3(2)(a) of the Real Estate (Regulation and Development) Act 2016, the RERA has no jurisdiction to try the complaint. Moreover, the respondent has completed the construction within the stipulated time. The other co-owner, who is also entitled for a flat took possession of his flat on 25.08.2015 itself. The Corporation of Chennai also assessed the building for property tax by its assessment order dated 07.02.2015. Since the building falls within the partial stilt with two floors category no completion certificate is required.

7. As per the agreement dated 18.11.2013 the allottee namely the complainant shall bear all the expenses in securing water connection, drainage connection and EB connection. The respondent is entitled for reimbursement of the amounts incurred by him in this regard from the complainant. Claiming this amounts and also the expenses incurred by him towards some alteration works, the respondent issued a

legal notice dated 23.07.2016 claiming Rs.10,56,199/- towards the amount spent by him towards the alteration work, service tax, EB, drainage and metro water connection. The total amount spent by the respondent has been wrongly mentioned in the legal notice as Rs.10,56,199/- instead of Rs.10,67,899/- due to multiplication error. The same has been rectified as Rs.10,67,899/- at the time of filing the counter.

8. The complainant with a view to avoid this payment the complainant has initially preferred a complaint in the year 2016 before the District Consumer Disputes Redressal Forum, Chennai (North) in C.C.No.152/2016 with the same allegations. After enquiry the said complaint was dismissed on merits by the District Consumer Disputes Redressal Forum, Chennai (North). Against such dismissal the complainant had preferred first appeal before the State Consumer Disputes Redressal Commission in F.A.No.29/2018 which is pending before the State Commission. The complainant, by exercising the option given to him under Section 71 (1) of the Real Estate (Regulation and Development) Act 2016, ought to have withdrawn the said first appeal from the State Consumer Disputes Redressal Commission, before preferring this complaint before RERA. Above all the project was already completed during 2015 itself and it is not an ongoing project as on 01.05.2017. Hence the RERA has no jurisdiction to entertain the complaint. Therefore the complaint is liable to be dismissed.

9. After hearing both sides the RERA has allowed the complaint and directed the respondent to hand over the flat completed in

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all respects to the complainant/allottee on or before 28.02.2022 subject to the complainant paying the actual payment made by the respondent towards electricity connection, metro water, sewerage connection, service tax in respect of additional construction cost subject to production of copy of receipts issued by the concerned authorities. The RERA has also directed the respondent to hand over all the original documents relating to the property to the allottees of this Real Estate project. Aggrieved over the same the respondent/promoter has preferred this appeal before this Tribunal.

10. Heard both sides.

11. **Points for determination:**

1. Whether the RERA has jurisdiction to entertain the complaint in view of Section 3(2)(a) of the Real Estate (Regulation and Development) Act, 2016 ?
2. Whether the complainant is entitled to file this complaint while his complaint before the District Consumer Dispute Redressal Forum, Chennai North (C.C.No.152/2016) is pending by way of appeal before the Tamil Nadu State Consumer Dispute Redressal Commission in F.A.No.29/2018?
3. Whether the appeal is to be allowed or not?

Point No.1

12. The Section 3 of the Real Estate (Regulation and Development) Act, 2016 deals with registration of projects with the Real

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Estate Regulatory Authority. Section 3(1) restrains the promoters from advertising, marketing, booking, etc., without registering the real estate project. Section 3(2) is an exception to Section 3(1). As per section 3(2)(a), no registration of the real estate project shall be required where the area of land proposed to be developed does not exceed 500 square metres or the number of apartments proposed to be developed does not exceed 8 inclusive of all phases. Hence it is very clear that Section 3(2)(a) deals with the one of the parameters for exemption from registration of the project.

13. In this case on hand the complainant himself has not prayed for any relief before the RERA for registering the project. The RERA has also not passed any directions with regard to the registration of the project. Therefore, Section 3(2)(a) cannot be invoked in this case as there is no dispute with regard to registration of the project. Therefore the arguments put forth by the learned counsel for the appellant in this regard has no relevance. We answer this question accordingly.

Point No.2

14. It is an admitted fact that on 23.07.2016 the respondent/builder had first issued a legal notice to the complainant/allottee demanding to pay a sum of Rs.10,56,199/- (in the counter it is mentioned as Rs.10,67,899/- after rectifying the multiplication error) towards the expenses incurred by him in carrying out the additional civil work, and in getting EB, drainage, metro water connections and in paying service tax. The complainant/allottee sent a reply notice on

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3.8.2016 denying the claim of the respondent/builder. Immediately after issuing such reply notice, the complainant/allottee rushed to the District Consumer Disputes Redressal Forum, Chennai (North) and preferred a consumer complaint in C.C.No.152/2016, against the Respondent /Promoter herein for the very same reliefs. After enquiry, the said complaint was dismissed on 26.12.2017 on merits i.e., after The Real Estate (Regulation and Development) Act, 2016 was came into force. Against such dismissal order the complainant/allottee preferred an appeal before the State Consumer Disputes Redressal Commission, Chennai, in F.A.No.29/2018.

15. After three years of filing such appeal before the State Consumer Disputes Redressal Commission and while the appeal before the State Consumer Disputes Redressal Commission was pending the complainant /allottee preferred the present complaint in C.No.167/2021 before the RERA against the very same Respondent/Promoter and for the very same reliefs. The complainant/allottee did not chosen to withdraw the appeal in F.A.No.29/2018 preferred by him before the State Consumer Disputes Redressal Commission till the complaint in CNo.167 of 2021 on the file of RERA was disposed on 30.12.2021. After the RERA passed the order in his favour, the complainant/allottee had filed a withdrawal memo before the State Consumer Disputes Redressal Commission, on 22.02.2022 by stating that he had already obtained a favourable order from the Tamil Nadu Real Estate Regulatory Authority. The State Consumer Disputes Redressal Commission had allowed the memo and dismissed the appeal as

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withdrawn. The order of the State Consumer Disputes Redressal Commission is as follows:

> *"Hearing advanced from 10.03.2022 to 22.02.2022. When the matter is taken up for consideration the counsel for the appellant filed a memo stating that as he has obtained a favourable order dated 30.12.2021 from the Hon'ble Tamil Nadu Real Estate Regulatory Authority. He wanted to withdraw the appeal pending before this commission. Memo recorded. In view of the memo the appellant is permitted to withdraw the appeal. The memo shall form part of the order. No costs. "*

The attitude of the Complainant/ Allottee clearly shows that he had wantonly failed to withdraw the appeal in F.A.No.29/2018 with some ulterior motive.

16. Whether the complainant/allottee is entitled to prefer and maintain two parallel proceedings simultaneously, on the same cause of action is now the million dollar question. On this aspect the learned counsel for the appellant would rely upon the judgment of the Hon'ble Supreme Court in Irego Grace Realtech Pvt. Ltd Vs Abhishek Khanna & Ors reported in 2021 (I) CPJ 60 (SC). At paragraph No.20.6 the Supreme Court held as follows:

> *20.6 Section 71 of the RERA Act empowers the RERA Authority to determine compensation payable under Sections 12, 14, 18 and 19 of the Act. The proviso to Section 71 provides that a consumer has the right to withdraw its complaint before the*

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consumer fora in respect of matters covered under Sections 12, 14, 18 and 19 of the Act, and file the same before the RERA.

The Supreme Court further held in paragraph No.20.9 as follows:

20.9 An allottee may elect or opt for one out of the remedies provided by law for redressal of its injury or grievance. An election of remedies arises when two concurrent remedies are available, and the aggrieved party chooses to exercise one, in which event he loses the right to simultaneously exercise the other for the same cause of action.

From this judgment of the Hon'ble Supreme Court it is very clear that after the coming into force of the Real Estate (Regulation and Development) Act, 2016 when two concurrent remedies are available, and the aggrieved party chooses to exercise one, he loses the right to simultaneously exercise the other for the same cause of action.

17. The Real Estate (Regulation and Development) Act, 2016 was notified on 26.03.2016 after getting the assent of the President of India, though some of it's provisions were later notified and came into force subsequently on various dates. The complainant/allottee chosen to file the appeal before the State Consumer Disputes Redressal Commission only in the year 2018 in F.A.No.29/2018. Three years thereafter complainant/allottee filed similar complaint on the same cause of action in C.No.167/2021 before the RERA. The complainant/allottee did not

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withdraw the appeal filed by him before the State Consumer Disputes Redressal Commission. It is settled law that appeal is the continuation of the suit/complaint. Therefore the pendency of the appeal shall be construed as the pendency of complaint. In the light of the above said judgment of the Hon'ble Supreme Court above referred, the complainant/allottee once opted for one out of the two remedies provided by law for redressal, he automatically loses the right to simultaneously exercise the other option to file a separate complaint on the same cause of action. On this ground alone the complaint filed by the complainant/allottee is liable to be dismissed.

18. Inspite of this judgment of the Hon'ble Supreme Court was brought to the notice of the RERA and discussed in it's order also, the RERA has not followed the dictum of the Hon'ble Supreme Court. On the other hand the RERA has misconceived the observations made by this Tribunal in a different context, at paragraph 11 of the order passed in A.No.75/2019 dated 9.11.2020. At paragraphs 9 and 11 of the said order, this Tribunal had mentioned about the Proviso to Section 71 of the Act and observed that, " any person whose complaint in respect of matters covered under Sections 12,14,18, and 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commision, he may, with the permission of such forum or Commision, as the case may be, **withdraw the complaint** pending before it and file an application before the Adjudicating Officer under this Act 2016". Nowhere in the said order,

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this Tribunal had held that two parallel legal proceedings before two different forums are maintainable.

19. In that case no parallel proceedings were pending before both RERA and the State Consumer Disputes Redressal Commission. Maintainability of the complaint on the ground of jurisdiction was the only issue involved and decided by this Tribunal. Whereas the maintainability of two parallel legal proceedings simultaneously before two different forums is the question to be decided in the present case. The facts of both cases are entirely different. Hence the RERA ought not to have relied on the observations made by this Tribunal in A.No.75/2019 dated 9.11.2020. Had the RERA relied upon the judgment of the Hon'ble Supreme Court discussed in its order, it would have come to a right conclusion. Hence we answer this point in the negative.

Point No. 3

20. In view of the above discussion we hold that the appeal has to be allowed and the order passed by the RERA is liable to be setaside.

21. In the result, this appeal is hereby allowed and the order passed by the RERA in C.No.167/2021 dated 30.12.2021 is hereby setaside. Connected miscellaneous applications if any pending are hereby closed.

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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 the 12th Day of August 2022.

Sd/xxxxx
ADMINISTRATIVE MEMBER

Sd/xxxxx
JUDICIAL MEMBER

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