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.5 of 2022

M/s.Norton Granites & Properties (P) Ltd.,
(formerly known as Norton Granites &
Spinners (P) Ltd.,),
Represented by its Managing Director,
D.Udayakumar

... Appellant

-Vs-

M/s. KG Foundations Pvt. Ltd.,
Represented by its Managing Director,
Kishorkumar Gokuldas

... 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 Tamil Nadu Real Estate Regulatory Authority in C.No.164 of 2021 dated 18.11.2021.

M/s.Norton Granites & Properties (P) Ltd.,
(formerly known as Norton Granites &
Spinners (P) Ltd.,),
Represented by its Managing Director,
D.Udaykumar

... Complainant

-Vs-

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M/s. KG Foundations Pvt. Ltd.,
Represented by its Managing Director,
Kishorkumar Gokuldas ... Respondent

This appeal was taken on file on 28.01.2022 and came up for final hearing on 05.08.2022 in the presence of M/s.M.Muruganantham, T.Elumalai, K.Anitha and A.Madhan, Counsels for the appellant and M/s.K.Chandrasekaran and Surya Narayanan.N, 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 complainant, whose complaint before the RERA was dismissed, is the appellant herein. For the sake of convenient understanding the parties herein after will be referred to as per their rank and status before the RERA.

The case of the complainant in brief is as follows:

2. The complainant is a company registered under the Companies Act and engaged in the business of purchase and sale of immovable properties. It owns 4.59 acres of land at Mevalurkuppam, B-Pazhanjur village, Poonamallee Taluk, Thiruvallur District. With a view to develop the land into a residential comlex the complainant approached the respondent / Promoter and entered into a Memorandum of Understanding on 9.4.2008. It was mutually agreed to construct 640 residential flats comprised in 16 blocks and also a club house. It was initially agreed between the parties

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that the complainant will be allotted 42.5% of the total constructed area and the respondent/promoter would be allotted remaining 57.5%

3. Subsequently due to some adjustments the share of the complainant was reduced to 41% and the share of the respondent/promoter was increased to 59%. To this effect a joint venture agreement was executed between the parties on 12.4.2012. As per the agreement dated 12.4.2012 the respondent/promoter agreed to give 168 flats to the complainant on or before October 2015. As the respondent was unable to deliver the flats before the due date another supplementary joint venture development agreement dated 30.11.2015 was executed between the parties. As per this agreement the number of flats allotted to the complainant was reduced to 167 from 168 flats. It was orally agreed to adjust between the parties that instead of 12 (2BHK) apartments 8 (3BHK) apartments will be delivered to the complainant. Due to this the number of flats allotted to the complainant was further reduced from 167 to 163.

4. Further, another memorandum of understanding was executed between the parties on 27.1.2016 and a deed of indemnity was also executed 28.1.2016. The respondent delivered 17 flats on 30.6.2016 and another 5 flats during 2018. In the mean time, instead of registering the whole project only the incomplete portion of the real estate project was registered with the RERA in registration number TN/02/Building/0264/2018 dated 13.8.2018. The certificate of registration will be valid up to 8.10.2020. After another supplementary agreement dated 12.8.2019 was executed between the parties, the respondent delivered another 66 flats

during August 2019. As per this agreement the number of flats was further reduced to 144 from 163. As per this agreement the complainant agreed to refund a sum of Rs.1,75,00,000/- to the respondent/promoter in four installments. As the complainant was unable to pay the said amount, he had to forego 23 flats. Due to this the number of flats allotted to the complainant was further reduced to 121 from 144.

5. The supplementary agreement dated 12.8.2019 was obtained by coercion and hence the same is void. As such the respondent is bound to allot 19 flats to the complainant. That being the case the number of flats allotted to the complainant will be increased from 121 to 140. Apart from the 23 flats given up by the complainant in the agreement dated 12.8.2019 two more flats were also given up by the complainant due to internal adjustment between the parties. After adjusting this two flats the complainant will be entitled to (140 - 2 = 138) 138 flats. Thus the number of flats allotted to the complainant was reduced to 138 flats from the initial allotment of 168 flats.

6. So far the respondent had delivered 88 flats to the complainant. Out of those 88 flats the complainant sold out 22 flats to third party purchasers. The remaining 66 flats stands in the name of the complainant. Out of the 50 flats (138 – 88 = 50) yet to be delivered, 14 flats are ready for occupation and 17 flats are promised to be delivered during February 2022 and the remaining 19 flats could not be constructed due to technical reasons. In all the respondent is yet to deliver 31 flats to the complainant. Hence the complainant preferred the above complaint with a prayer to

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direct registration of the whole of the KG Centre Point real estate project and also to deliver the remaining 31 flats to the complainant and also to rectify the defects in some of the specified flats which were already handed over to the complainant.

The case of the respondent in brief is as follows:

7. The complaint is not maintainable either in law or on facts. The complainant is a joint promoter as defined under Section 2(zk) of The Real Estate (Regulation and Development) Act, 2016. Therefore, the interse dispute between promoters being purely of civil nature, are beyond the scope of the Real Estate (Regulation and Development) Act, 2016. As admitted in paragraph 4(1) of the complaint the complainant is engaged in the business of purchase and sale of properties and owns land banks. The complainant is not an independent third party purchaser or allottee. The complainant is a private company and also a land owner who has entered into agreement with the respondent to promote the lands into multistoried residential buildings. As per the agreements entered into between the parties the complainant company gets a share of constructed area and retaining a portion of the UDS of the land for the purpose of selling the flats to the intending purchasers and infact sold 66 flats falling to it's share and leased out 22 flats falling to his share as tabulated in the complaint.

8. Out of the total 16 blocks in the project 12 blocks are not registered because of the fact that completion certificate for 4 blocks have been issued before the commencement of the RERA Act 2016. Another 7 blocks were structurally completed before the cutoff date under the Rules. All the

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88 flats for which possession has been given to the complainant are comprised in these 11 blocks and hence any dispute with respect to these flats are beyond the jurisdiction of the RERA. In respect of the remaining one block no building is going to be constructed as the area has to be handed over to the TNEB for substation purpose for getting the required electricity connections. The relief claimed in the complaint will not be covered within the fold of Section 19 of the Act as the complainant is not an allottee and only a promoter. Moreover the agreements entered into between the parties contains arbitration clause for resolution of disputes. Therefore, the complaint before this forum is not maintainable. Therefore the compliant is liable to be dismissed.

9. After hearing both sides the learned members of the RERA have rejected the compliant vide their order dated 18.11.2021 in C.No.164/2021. Aggrieved over the same the complainant have preferred this appeal before this Tribunal.

10. Heard both sides. The Points for consideration are as follows.

1. Whether the complainant is a co-promoter? If so, whether the complaint preferred by him is maintainable?
2. Whether the appeal is to be allowed or not?

Point No.1:

11. The learned counsel for the respondent had taken us through various agreements entered into between the parties to substantiate his claim that the complainant is only a co-promoter and not an allottee. The

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learned counsel would refer the first and foremost Memorandum of understanding entered into between the parties on 9.4.2008. The clause 1 of the said agreement would read as follows:

> ***Clause 1 : The owner and the developer hereby agree to develop the entire property into a housing colony on joint venture basis in schedule-A. Both parties agreed to construct flats as per specification detailed in schedule-B. Both parties agree that the 42.5% of the constructed area to be allotted to the owners as per schedule –C. The balance 57.5% of the constructed area to the developer as per schedule-D.***

Further the clause 13 (a) and (b) of the same agreement would read as follows:

> ***13(a) value added tax on works contract on the cost of construction of the apartment built for the owner and applicable service tax on the value of the constructed area allottee to the owner is to be paid to the developer before taking possession. If the owner is not able to pay the above charges namely, maintenance, corpus fund, MES deposits, VAT and service taxes immediately he should be denied the right for the 140 units. The builders can retain 6 number of flats as security for the above payment of Rs.1.5 crorers approximately till the owner pay the dues. Similarly, he can retain another 6 flats for returning the refundable and adjustable performance guarantee of Rs.1,75,00,000/-.***
>
> ***13(b). If the owner is unable to pay some or all taxes/charges, due and return the performance guarantee advance amount before taking possession of part/all of flats, the developer shall buy or hold only that***

number of flats that are required to clear the amounts at the rate of Rs.2700/- per sq. ft. belonging to the owner.

12. Secondly the learned counsel would refer the clause 1(a) and clause 14 of the joint venture agreement dated 12.4.2012. As per clause 1(a) of the said agreement the percentage of sharing between the complainant and the respondent was modified in the ratio of 41:59. As per clause 14 of the said agreement the complainant had agreed to share the infra structure and amenities charges in the same ratio of 41:59.

13. Thirdly the learned counsel would refer the area sharing details agreement dated 23.7.2012. The clause 5 of the said agreement is as follows:

"Clause5. The land owner will independently market their share of flats/units on their own. The developer shall join as confirming party willing to sign necessary documents to bank/financial institutions etc to fulfill the buyers' requirements to conclude the sale and agreement for construction of flats."

14. Fourthly the learned counsel for the respondent would refer the memorandum of understanding dated 27.1.2016 (page 115 of the appellant's typed set volume I). In the said memorandum of understanding the complainant has been cited as the party of the first part. By this agreement the party of the first part namely the complainant is entitled to sell flats in annexure A and B of the supplementary agreement dated 30.11.2015. Further, the complainant also undertakes to pay the annual

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maintenance charges, corpus fund, life time club membership charges, etc. This would prove that the complainant is a promoter under the RERA Act.

15. Fifthly the learned counsel for the respondent would refer another supplementary agreement dated 12.8.2019 (page 132 of the appellants typed set volume I). In this agreement at page 135 the complainant expressed his inability to make statutory payments like GST, EB and water charges, etc. and also to make other payments like maintenance and amenities charges, corpus fund. Because of it's inability to make payments of the above said amount the complainant agreed to forego some flats in favour of the respondent in lieu of the respondent agreed to make those payments. Unless the complainant was a co-promoter these arrangements becomes unnecessary for the complainant.

16. The learned counsel for the respondent filed additional documents in the form of typed set along with a memo dated 29.7.2022 and the same was allowed. The learned counsel for the respondent would rely upon a letter dated 6.12.2015 (Typed set of Respondent @ page 1) issued by the complainant to the respondent. In the said letter the complainant had asserted his right to sell the flats allotted to his share.

17. From the terms and conditions extracted from various agreements right from the year 2008 to 2019 between the parties the character and conduct of the complainant is very clear that the complainant company, which causes to be constructed a building consisting of apartments , for the purpose of selling to other persons, is only a co-promoter and not an allottee. Section 2(zk) (i) and (ii) R/w the Explanation

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note thereon, of the Real Estate (Regulation and Development) Act, 2016 clearly defines the term "promoter" as follows:

2(zk) "promoter" means,—

(i) ***a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or***

(ii) ***a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or***

(iii) ***any development authority or any other public body in respect of allottees of—***

(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or 9 of 1932. 6 of 2009. 6 THE GAZETTE OF INDIA EXTRAORDINARY [PART II—

(b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) ***an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or***

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(v) ***any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or***

(vi) ***such other person who constructs any building or apartment for sale to the general public.***

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;

18. The complainant company though not directly involved in the construction of the building, it causes the building to be constructed and sold several apartments to different persons. As per the explanation to Section 2(zk) where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters. Therefore, the complainant is clearly a co-promoter within the meaning of Section 2(zk) and the explanation attached, of the Real Estate (Regulation and Development) Act, 2016. The terms and conditions of the various agreements entered into between the parties also says so. Therefore, we hold that the complainant is a co-promoter and the complaint preferred by him before the RERA as if the complainant is an

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allottee is not at all maintainable. The complainant has to seek his remedy before competent civil court, as the dispute is one of pure civil in nature. We find no error in the findings given by the RERA and it requires no interference by this Tribunal. We answer this point accordingly.

Point No.2:

19. In view of the findings given by us on point No.1 we hold that the appeal is deserves to be dismissed. We answer this point accordingly.

20. In the result, the appeal is hereby dismissed as devoid of merits. Both parties are directed to bear their own costs. Connected Miscellaneous Applications pending if any 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 02nd Day of September 2022.

Sd/-xxxx
ADMINISTRATIVE MEMBER

Sd/-xxxx
JUDICIAL MEMBER

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