BEFORE THE TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL (TNREAT)

(Tamil Nadu, Puducherry, Andaman & Nicobar Islands)

Under the Real Estate (Regulation And Development) Act, 2016

Reserved on: 08.11.2023

Delivered on: 06.12.2023

Coram : Hon'ble Mr.Justice M.Duraiswamy, Chairperson
Mr.R.Padmanabhan, Judicial Member

Appeal No.42 of 2023
and
M.A.Nos.132 and 133 of 2023

M/s. Mint Homes Pvt. Ltd.,
Rep. by its Managing Director
Raj Natarajan
Now rep. by its Director, P.Murugan ... Appellant

- Vs -

1. Kumara Rathinam,
   rep. by Power of Attorney Holder,
   Ayyagounder Ramaswamy

2. M/s. Sri Renga Property Developers Pvt. Ltd.,
   rep. by its Managing Director,
   Rangasamy Rajaram ... Respondents

Prayer: The appeal has been filed under Section 44(1) of the Real Estate (Regulation and Development) Act, 2016 to set aside the order passed by the learned Single Member, TNRERA in C.C.P.No.132 of 2021 dated 23.02.2023 and to dismiss the Complaint.

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For Appellant : Mr.S.Ramesh

For 1st Respondent : Mr.N.Zahid Ahmed

For 2nd Respondent : Mr.S.Mukunth,
for Mr.Sam Jayaraj Houston

ORDER

The brief facts that are relevant for the disposal of the above appeal are as follows:

1. The 1st Respondent is an Allottee of the real estate project by name "Renga's Greenlands" situated at Kalapatti Village, Coimbatore Taluk. The 2nd Respondent is the Promoter of the said real estate project. On 05.02.2008, they entered into a Construction Agreement. The cost of construction was fixed at Rs.70,00,000/-. The cost of UDS of the land was fixed at Rs.4,86,750/-. On 16.04.2008, the 2nd Respondent/Promoter executed a Sale Deed in respect of the UDS in favour of the 1st Respondent/Allottee.

2. It is the case of the Appellant Company that the 2nd Respondent/Promoter, by executing a Loan Agreement on 21.07.2009, borrowed a sum of Rs.4 Crores from one M/s.Rufi Real Estate and Investments Private Limited to develop the real estate project "Renga's Greenlands" and two other real estate projects developed by them. The Appellant Company is one of the Group Companies of the said M/s.Rufi Real Estate and Investments Private Limited. It is the case of the Appellant that to have a check in respect of the loan granted by its Group Company, they stepped in and on 21.07.2009, entered into a "Construction Management and Marketing Services

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Agreement" (hereinafter referred to as Agreement dated 21.07.2009) with the 2nd Respondent.

3. The learned counsel for the Appellant Company contended that there was no assignment in favour of or taking over of the project by the Appellant under the said Agreement dated 21.07.2009, as contemplated under Section 15 of the Real Estate (Regulation and Development) Act, 2016.

4. It is the case of the Appellant that subsequently disputes arose between the 2nd Respondent/Promoter and the said M/s.Rufi Real Estate and Investments Private Limited and went upto the Hon'ble Supreme Court. The Hon'ble Supreme Court, after impleading the Appellant as the second claimant, referred the dispute to a Sole Arbitrator. The learned counsel for the Appellant contended that because of the litigations between M/s.Rufi Real Estate and Investments Private Limited and the 2nd Respondent/Promoter, the Agreement dated 21.07.2009 was not acted upon. The learned counsel further contended that the 2nd Respondent/Promoter also supported the case of the Appellant, before the Sole Arbitrator, by taking a definite stand that the Agreement dated 21.07.2009 was not acted upon. The learned counsel for the Appellant also contended that the Appellant is not a Promoter within the definition of Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016 and cannot be held liable for refund of the amount to the 1st Respondent/Allottee.

5. The learned counsel for the Appellant also contended that there was no privity of contract between the Appellant and the 1st Respondent/Allottee. Further the learned counsel submitted that no

amount was paid by the 1st Respondent/Allottee to the Appellant and that on this ground alone the Appellant is not liable to refund the amounts paid by the 1st Respondent/Allottee. Further according to the learned Counsel for the Appellant, the Construction Agreement between the 1st Respondent/Allottee and the 2nd Respondent/Promoter was executed on 05.02.2008 and the due date for completion of the project had also expired on 31.12.2008, as on the date of the execution of the Agreement dated 21.07.2009 between the Appellant and the 2nd Respondent/Promoter.

6. According to the learned counsel for the Appellant, it is the 2nd Respondent/Promoter, who received the amounts from the 1st Respondent/Allottee, is liable to refund the amounts to the 1st Respondent/Allottee. The learned counsel for the Appellant prayed to modify the direction of the learned Single Member, TNRERA, to the effect that the Appellant is not liable to refund the amounts, jointly and severally, along with the 2nd Respondent/Promoter and to dismiss the complaint as against them.

7. On the other hand, it is the case of the Respondents that after the execution of the Agreement dated 21.07.2009, the Appellant took control of the project, both technically and financially, including the operation of bank accounts of the 2nd Respondent/Promoter. According to the Respondents, the Agreement dated 21.07.2009 was acted upon. The learned counsels appearing for the Respondents 1 and 2 contended that the Appellant is also considered to be a Promoter in as much as the Appellant was involved in the development of the project and had sent correspondences to the Allottees. According to the learned

counsels for the Respondents 1 and 2, the appeal is liable to be dismissed.

8. After hearing both sides, the learned Single Member held the Appellant as a joint Promoter and directed the Appellant and the 2nd Respondent to refund, jointly and severally, a sum of Rs.64,15,240/- to the 1st Respondent/Allottee along with interest at 9.30% p.a. from the date of respective payment till date of refund. Aggrieved over the order fastening liability on the Appellant, they have filed the present appeal.

9. Heard both sides.

10. M.A.No.133 of 2023 was filed by the Appellant to receive an additional document under Order 41 Rule 27 CPC. The document sought to be filed is nothing but the copy of the Arbitration Award dated 17.12.2022 passed by the Sole Arbitrator appointed by the Hon'ble Supreme Court. In the affidavit filed by the Appellant, it has been averred that the said document was sought to be produced before the learned Single Member when the matter was reserved and pending for orders. The learned Single Member declined to accept the document. Admittedly, the 1st Respondent/Allottee was not a party to the said Arbitral proceedings. As such, it has no relevancy to this appeal. Hence, M.A.No.133 of 2023 is liable to be dismissed.

11. Admittedly, the real estate project "Renga's Greenlands" was developed by the 2nd Respondent/Promoter. There is no dispute between the parties about the execution of the Construction Agreement and Agreement for Sale between the 1st Respondent/ Allottee and the 2nd Respondent/Promoter on 05.02.2008. As per

Clause 12 of the Construction Agreement, the due date for handing over of the apartment was fixed as 31.12.2008. There is also no dispute between the parties that the project has not been completed till this date.

12. As could be seen from the case records, including the "Renga's Greenlands", the 2nd Respondent/Promoter was developing three real estate projects simultaneously. However, the present appeal is in respect of the real estate project "Renga's Greenlands" only. The 2nd Respondent/Promoter had faced considerable difficulties both technically and financially in developing all the real estate projects. Therefore, the 2nd Respondent/Promoter availed financial assistance from one M/s.Rufi Real Estate and Investments Private Limited to the tune of Rs.4,00,00,000/- by executing necessary Agreements on 21.07.2009.

13. Earlier, the 2nd Respondent/Promoter and the Appellant entered into a Memorandum of Understanding on 24.06.2009. In the said Memorandum of Agreement, the Appellant claimed that it has been engaged in development of landed properties and construction of buildings. By entering into such an Agreement, the Appellant came forward to take up all the three projects by involving themselves in the process of construction and marketing the project. Both the Appellant and the 2nd Respondent/Promoter also agreed to enter into another proper Construction Management and Marketing Services Agreement on a mutually convenient date.

14. Accordingly, an Agreement was executed between them on 21.07.2009. This Agreement is said to have been executed at the

instance of the financial creditor namely, M/s.Rufi Real Estate and Investments Private Limited. It is pertinent to note that as per Clause 1 of the said Agreement, the Appellant took over the management of construction and marketing of the real estate project with effect from 01.07.2009. That apart, as per Clause 5(iii) of the said Agreement dated 21.07.2009, the Appellant agreed to procure all the materials required for the construction work. From this, it is evident that the Appellant was authorized by the 2nd Respondent/Promoter to take over the responsibility of construction management and development of the real estate project.

15. The only contention raised by the learned counsel for the Appellant was that this Agreement dated 21.07.2009 was never acted upon. It is pertinent to note that on 25.07.2009, the Appellant wrote a letter to the 1st Respondent/Allottee, which reads as follows:

> *"Dear Sir,*
>
> *We are happy to inform you that we have reached an Agreement with Sri Renga Property Developers. We will be involved in the construction management and marketing services to all the 3 projects; Green Lands, Green Woods and Cedars. As we are a new comer, we need to understand the details of the project which we have planned to complete it by the end of August and we will keep you informed about the commencement and completion of the projects. ..."*

16. Similarly, the 2nd Respondent/Promoter also addressed a letter to the 1st Respondent/Allottee about the engagement of the Appellant for early completion of the real estate project "Renga's

Greenlands". On 17.08.2009, the 2nd Respondent/Promoter wrote another letter to the 1st Respondent/Allottee and the relevant paragraph is extracted hereunder:

> *"M/s. Minthomes Private Limited has taken over the projects for management of technical construction activities and marketing and you are requested to have communication with them for any further doubts in this regard. The contact person in Coimbatore is Mrs.Shalini and her email ID is saliha@minthomes.com and mobile phone No. is 9791535555.*
>
> *Mr.Raj Natarajan, who is Director and in-charge of total activities will be available on specific days from September 14th or whenever he visits to India and you may meet him with prior appointment. His email ID is raj@minthomes.com."*

17. A conjoint reading of the letters written by the Appellant and the 2nd Respondent/Promoter to the 1st Respondent/Allottee, itself prove that the Agreement dated 21.07.2009 has been acted upon. Further, the Appellant withdrew several lakhs of rupees from the bank account relating to the real estate project and utilized for the construction activities. All these aspects clearly prove that the Agreement dated 21.07.2009 has been acted upon.

18. Further, the learned counsel for the Appellant relied upon the counter statement filed by the 2nd Respondent/Promoter before the Arbitral Tribunal in Arbitration Case No.3 of 2019 and contended that the averments in the counter supports the case of the Appellant that the Agreement dated 21.07.2009 was not acted upon. We have carefully perused the said counter statement. In fact, in the said

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counter, the 2nd Respondent/Promoter had exposed and explained various circumstances under which they were cheated by the Appellant Company, represented by its Director Raj Natarajan. Before the Arbitral Tribunal, the 2nd Respondent/Promoter had set up their defence in such a way to make counter claim for Rs.2,00,00,000/- and set off for a sum of Rs.1,09,85,541/- against the Appellant, who is the 2nd Claimant in the above said Arbitral proceedings. In fact, after setting off, the 2nd Respondent/Promoter claimed for the balance amount from the Appellant. It is immaterial whether any award has been passed in favour of the 2nd Respondent/Promoter in respect of the counter claim raised by them or not. Therefore, the counter statement filed by the 2nd Respondent/Promoter before the Arbitral Tribunal in Arbitration Case No.3 of 2019, if read as a whole, do not support the case of the Appellant in any manner. Moreover, the Arbitral proceedings were held with regard to the money transactions between the M/s.Rufi Real Estate and Investments Private Limited and the 2nd Respondent/Promoter and others. The 1st Respondent/Allottee was not a party to the Arbitration proceedings.

19. By writing a letter dated 25.07.2009 (Ex.B6), the Appellant impliedly narrated themselves as the joint promoter along with the 2nd Respondent/Promoter in respect of the three real estate projects including the "Renga's Greenlands" project. This letter, coupled with the fact that the Appellant withdrew several lakhs of rupees from the concerned bank account for construction activities, itself is sufficient to hold that the Agreement dated 21.07.2009 has been acted upon and that the Appellant is a joint Promoter within the definition of Section

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2(zk) of the Real Estate (Regulation and Development) Act, 2016. The Appellant, having assured to complete the project by August 2009 in the said letter dated 25.07.2009, cannot escape from the liability as a joint Promoter. If the Appellant was not a joint Promoter, then there is no necessity for them to write such a letter to the Allottee assuring to complete the construction before August 2009. In a dispute like this, the interest of the Allottee is paramount rather than the interest of the Appellant who played the role of a Promoter. The Appellant had acted as a joint Promoter on the basis of the Agreement dated 21.07.2009 and also by their letter dated 25.07.2009 to the 1st Respondent/Allottee promised to complete the project within a particular date. Hence, the Appellant cannot escape by saying that the said Agreement dated 21.07.2009 between the Appellant and the 2nd Respondent/Promoter was not acted upon.

20. Section 2(zk)(v) of the Real Estate (Regulation and Development) Act, 2016, is wide enough to include any person who acts as a builder, coloniser, contractor, developer, estate developer or by any other name within the definition of the term 'Promoter'. Section 2(zk)(v) is extracted hereunder for ready reference:

> *2(zk)(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;*

21. As per the terms of the Agreement dated 21.07.2009 executed between the Appellant and the 2nd Respondent/Promoter,

the Appellant agreed to procure all the materials required for construction work. As per the definition 2(zk) of the Real Estate (Regulation and Development) Act, 2016, it also includes any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name involved in construction of building or apartment. In the present case, the Appellant had involved themselves in the construction of apartments in the real estate project as a Builder. Therefore, the Appellant is brought within the folding of Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016. In these circumstances, we do not find any ground to interfere with the order passed by the learned Single Member and the Appeal is liable to be dismissed.

22. Accordingly, the Appeal is dismissed. The 1st Respondent/ Allottee is entitled to withdraw the amount of Rs.1,54,27,135/- deposited by the Appellant under Section 43(5), together with accrued interest. The Application in M.A.No.133 of 2023 is also dismissed. Connected Miscellaneous Application is closed.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
JUDICIAL MEMBER

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Copy to :

1. Kumara Rathinam,
   Rep. by Power of Attorney Holder,
   Ayyagounder Ramaswamy,
   Villa No.76, Triyambhava,
   Kalapatti Road,
   Sitra, Coimbatore - 641 014.

2. M/s. Sri Renga Property Developers Pvt. Ltd.,
   rep. by its Managing Director,
   Rangasamy Rajaram,
   68, Bharathi Park Road,
   7th Cross Saibaba Colony,
   Coimbatore - 641 012.

3. The learned Single Member, TNRERA.

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