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: 08.04.2024

Delivered on: 17.04.2024

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

Appeal No.5 of 2024
and
M.A.Nos.6 & 37 of 2024

G.Baskaran ... Appellant

- Vs -

1. M/s. Optima Homes Pvt. Ltd.
2. P.Abhishek
   Director of M/s. Optima Homes Pvt. Ltd.
3. S.Venkatesan
   Director of M/s. Optima Homes Pvt. Ltd.
4. C.Shanthilal Jain (died)
5. Usha Kumari
   rep. by Power Agent
   M/s. Optima Homes Pvt. Ltd. ... Respondents

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Prayer: Appeal has been filed under Section 44 of the Real Estate (Regulation and Development) Act, 2016 to set aside the order passed by the TNRERA in E.P.No.25 of 2023 in C.No.18 of 2022 dated 30.10.2023, holding as only the 1st respondent responsible, contrary to own order passed in C.No.18 of 2022 holding responsible respondents 1, 2, 3 and 5 and to dismiss the E.P.

For Appellant : Mr. R. Sendhil Kumar

ORDER

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

1. The appellant/allottee is doing business involving supply of building materials to various building promoters under the name and style of 'Baskar Agency'. As such, from the year 2013, he supplied building materials to the 1st respondent/promoter required for the construction of their residential project, namely, "Optima Upgrade". While so, the appellant wanted to purchase an apartment in the above project promoted by the respondents. The appellant paid a sum of Rs.1,00,000/- as advance in the year 2013 itself. The respondents/promoters agreed to adjust the bill amounts payable by them towards the cost of building materials supplied by the appellant/allottee.

2. After two years, on 18.06.2015, an Agreement for Sale of undivided share of land to an extent of 511 sq. ft. and a Construction

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Agreement were executed between the appellant/allottee in respect of the Apartment No.1E-103, having super built up area of 1170 sq. ft. The value of the UDS was fixed at Rs.7,66,500/- and the cost of construction was fixed at Rs.31,00,350/-, aggregating to Rs.38,66,850/-. On various dates, the bill amounts due to the appellant have been adjusted with the amount payable by the appellant under the Construction Agreement. As such, as on 11.01.2018, the appellant had paid Rs.40,26,210/-. In fact, the appellant had paid an excess amount of Rs.1,59,360/-.

3. The respondents have also handed over the apartment to the appellant on 11.01.2018 even before completing some minor works. The appellant also performed the house warming function during January 2018. But the respondents have not come forward to execute the registered Sale Deed in favour of the appellant. Hence, the appellant preferred a complaint before the TNRERA in C.No.18 of 2022.

4. The respondents 1, 3 & 4/promoters remained absent before the TNRERA. The 4th respondent/promoter was reported dead even before the filing of the complaint. The respondents 2 & 5/promoters alone contested the complaint before the TNRERA. It is the case of the respondents 2 & 5 (brother and sister) that it is true that the appellant had supplied building materials to the project developed by the 1st respondent Company. However, they have pleaded that there is no connection between the Construction Agreement and the supply of building materials. It is the further case of the respondents 2 & 5/

promoters that the appellant cancelled the booking of the flat by executing a consent letter dated 20.12.2019. Since the appellant agreed to cancel the booking, the apartment was sold to their own brother P.Rahul, S/o.Pawan Kumar, vide registered Sale Deed dated 17.09.2020. According to the respondents 2 & 5/promoters, the complaint filed by the appellant is liable to be dismissed.

5. After hearing both sides, the TNRERA passed an order in C.No.18 of 2022 dated 09.02.2023 with the following three directions to the respondents/promoters:

Direction No.1:-The respondents/promoters are directed to hand over an alternative flat of equal carpet area and undivided share of land to the appellant/allottee on or before 31.03.2023.

Direction No.2:- Alternatively, the respondents/promoters are directed to explore the possibility of resale of the same flat to the appellant/allottee through P.Rahul, S/o.Pawan Kumar, who is none other than the brother of the respondents 2 & 5/promoters without demanding any further payment.

Direction No.3:- In the event of the respondents/promoters failing to comply with any one of the directions No.1 and 2, the respondents shall jointly refund the entire amount of Rs.40,26,210/- to the appellant along with interest at 9.30% p.a. from the date of respective payments till the date of refund.

6. In addition, the TNRERA found that the respondents/promoters have not only failed to execute the Sale Deed in favour of the appellant/allottee, but also fraudulently executed a Sale Deed in favour of own brother of the respondents 2 & 5/promoters. Consequently, the TNRERA held that the respondents/promoters have violated Section 11(4)(a) and Section 17(1) of The Real Estate (Regulation and Development) Act, 2016 and by exercising its power under Section 61 of the Act, imposed a penalty of Rs.1,50,000/- payable jointly by all the respondents/promoters (except the deceased 4th respondent). With these directions, the TNRERA had disposed of the complaint filed by the appellant/allottee.

7. As the respondents/promoters failed to comply with any one of the three directions issued by the TNRERA, the appellant preferred an Execution Petition in E.P.No.25 of 2023 in C.No.18 of 2022 before the TNRERA. Even in the execution proceedings, the respondents 2 & 5/ promoters alone entered appearance and filed separate interim counter affidavits. According to the 2nd respondent/promoter, he had resigned from the Company in the year 2019 itself. Likewise, the 5th respondent also filed an interim counter affidavit disowning the liability. Accepting the contentions of the respondents 2 & 5, the TNRERA relieved the respondents 2 to 5 from the liability and directed issuance of Recovery Warrant as against the 1st respondent Company alone.

8. Aggrieved over the order passed in the Execution Petition relieving the respondents 2 to 5/promoters from the liability, the appellant/allottee has preferred this appeal before this Tribunal.

9. Heard the learned counsel for the appellant.

10. The notices sent to the respondents/promoters were returned un-served. Though substituted service was effected in respect of the respondents/promoters and their names have been printed in the cause list, none appeared.

11. According to the learned counsel for the appellant/allottee, the TNRERA had originally passed an order in C.No.18 of 2022 dated 09.02.2023 directing all the respondents to make the payment jointly to the appellant. However, the TNRERA has given a clear go-by to its own directions while passing order in the execution proceedings. The TNRERA, while exercising the power to execute its own order under Section 40 of The Real Estate (Regulation and Development) Act, 2016 cannot alter or modify its own order or directions passed in the execution proceedings. It is settled law that the Executing Court cannot go beyond the decree passed in the proceedings. The Executing Court cannot alter or modify the decree in the execution proceedings.

12. The TNRERA, after hearing both sides, on merits, had passed an order on 09.02.2023 in C.No.18 of 2022. The operative portion of the said order reads as follows:

> "32. The Authority also directs the respondents/ promoters to hand over an alternative flat of equal carpet

area and undivided share of land to the complainant/allottee before 31.03.2023.

33. Alternatively, this Authority directs the respondents other than the respondent 4, to explore the possibility of resale of the flat to the complainant/allottee by Thiru.P.Rahul, S/o.Pawal Kumar, who is the own brother of the 2nd respondent, without payment of any further consideration taking into account the payment already made by the complainant/allottee.

34. In case there is no flat of equal carpet area and undivided share of land available in this real estate project to be handed over to the complainant/allottee before 31.03.2023 the authority directs the respondents other than the respondent 4, to **jointly** refund to the complainant/allottee the amount of Rs.40,26,210/- paid by the complainant/allottee by way of cash and supply of building materials to the respondents, before 31.03.2023 with interest thereon till the date of settlement. The rate of interest shall be the RERA rate of interest as per Rules, 2017 which is 9.30% p.a.

35. With the above findings and directions, the complaint is disposed of."

13. As the respondents/promoters failed to comply with any of the three directions issued, the appellant preferred an Execution Petition in E.P.No.25 of 2023 in C.No.18 of 2022 before the TNRERA for recovery of the amount from the respondents/promoters. The TNRERA, while exercising the power to execute its own order as per Section 40 of the Act, has no power to alter or modify its own order passed in the execution proceedings. The TNRERA, considering the joint liability of all the respondents/promoters, ought to have issued Recovery Warrant as

against all the respondents/promoters (except the deceased 4th respondent) by following the order passed in C.No.18 of 2022 dated 09.02.2023. Instead, the TNRERA had issued Recovery Warrant as against the 1st respondent/promoter alone and failed to issue Recovery Warrant against the other respondents/promoters. Thus, the TNRERA had altered its own order passed in C.No.18 of 2022 dated 09.02.2023 and relieved the respondents 2 to 5 from their liability to pay the amount.

14. The TNRERA, which originally directed the respondents/ promoters to jointly pay a sum of Rs.40,26,210/- with interest @ 9.30% p.a., cannot alter its own directions in the subsequent execution proceedings and relieve the respondents 2 to 5 from the liability to pay the amount to the appellant/allottee.

15. As against the order passed by the TNRERA in C.No.18 of 2022 dated 09.2.2023, the respondents 2 & 5 alone preferred an appeal before this Tribunal in Appeal (SR).No.493 of 2023. As they failed to make the pre-deposit amount as per Section 43(5) of the Act, this Tribunal, by order dated 08.01.2024, rejected the appeal as not maintainable.

16. The appellant has filed an application in M.A.No.37 of 2024 under Order 41 Rule 27 of the Code of Civil Procedure for producing additional documents.

17. Since the issue involved in the present appeal can be decided even without those documents, we are of the view that the said documents are not necessary for the adjudication of the matter. Further,

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the appellant has not given any acceptable reason for not producing the documents before the TNRERA. In such view of the matter, we are not inclined to allow the application and the application is liable to be rejected.

18. In these circumstances, the order passed in E.P.No.25 of 2023 in C.No.18 of 2022 dated 30.10.2023 is modified and the Execution Petition in E.P.No.25 of 2023 is ordered as against all the respondents, except the 4th respondent, who is no more. Consequently, Recovery Warrant should be issued to all the respondents, except the 4th respondent, who is no more.

19. In the result, the appeal is allowed. The connected application in M.A.No.6 of 2024 is closed and the application in M.A.No.37 of 2024 is dismissed.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
JUDICIAL MEMBER

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Copy to

1. The TNRERA.

2. M/s. Optima Homes Pvt. Ltd.
   Office at No.6 & 7-A, 1st Floor,
   SSVK Sangamam, Periyar Salai,
   Gnanamurthy Nagar,
   Ambattur, Chennai -53.

3. P.Abhishek
   S/o.Pawan Kumar
   Director of M/s. Optima Homes Pvt. Ltd.
   Office at No.6 & 7-A, 1st Floor,
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4. S.Venkatesan
   S/o.Sadasivam,
   Director of M/s. Optima Homes Pvt. Ltd.
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   Gnanamurthy Nagar,
   Ambattur, Chennai -53.

5. C.Shanthilal Jain (died)

6. Usha Kumari
   W/o.Vinod Kumar
   rep. by Power Agent
   M/s. Optima Homes Pvt. Ltd.
   No.5/7, Flowers Road,
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