

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.11.2019

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
and
THE HONOURABLE MR.JUSTICE P.VELMURUGAN

C.M.S.A.No.31 of 2019

A.R.Ravishankar,
S/o.L.Ramanathan, No.33, 1st Floor,
Chatrapathi Sivaji 2nd Street,
Shanmuga Nagar, Chitlapakkam,
Chennai - 600 064.
Now residing at
GRR Apartments,
F6, I Floor, Plot No.55,56,65,66, Anbu Nagar,
11th Street, Valasaravakkam,
Chennai 600 087.Appellant

Vs

M/s.Marg Properties Ltd.,
Marg Axis,
4/318, Rajiv Gandhi Salai,
Kottivakkam, Chennai - 600 041.Respondent

PRAYER: Appeal under Section 58 of the Real Estate Regulation and Development Act, 2016 read with Section 100 of Civil Procedure Code against the order dated 25.04.2019 made in Appeal No.3 of 2019 on the file of the Tamil Nadu Real Estate Appellate Tribunal (TNREAT), Tamil Nadu, Puduchery, Andaman & Nicobar Islands at Chennai confirming the order dated 05.02.2019 made in C.C.P.No.103 of 2018 on the file of the Tamil Nadu Real Estate Regulatory Authority, Chennai.

For Appellant :Mr.N.S.Sivakumar

For Respondent :Dr.S.Padma

J U D G M E N T

(Judgment of the Court was delivered by N.KIRUBAKARAN, J)

The appeal has been preferred against the order of the Appellate Authority confirming the order of the original authority by which the complaint filed by the appellant against the respondent has been dismissed as not maintainable.

2.The facts of the case are as follows:

The respondent had launched a residential project under the name and style of Savithanjali, Kalavakkam, Thiruporur, Kanchipuram District. In the said project, the appellant had booked a flat and paid advance of Rs.34,12,087/-, out of total cost of the apartment of Rs.46,01,565/-.

3.A construction agreement was entered into between the appellant and the respondent on 24.09.2012 and a sale deed was executed in favour of the appellant on 15.02.2013. Eventhough the respondent undertook to deliver and hand over the possession of the fully constructed flat by June 2013, the construction was not completed and possession was not handed over. Therefore, the appellant moved the State Consumer Disputes Redressal Forum during March 2016 in CC.No.295/2017, seeking a direction to refund a sum of Rs.40,90,360/- paid by the appellant towards cost of the construction of the flat together with interest at the rate of 24%, Rs.69,700/- paid by the appellant towards cost of registration and Rs.8,12,971/- towards interest for the housing loan availed by the appellant for buying the flat till September 2015 and a sum of Rs.25,00,000/- by way of damages, hardship, harassment and mental agony sustained by the appellant in the hands of the respondent.

4.During the pendency of the consumer forum proceedings, the Real Estate (Regulation and Development) Act, 2016 (hereafter referred to as RERA Act) came into force on 22.06.2017. Since the new Act had come into force, the appellant filed a complaint before the adjudicating authority on 06.08.2018 and the same had been taken on file and numbered as CCP.No.103/2018, counter had also been filed.

5.After hearing both the parties, the CCP was dismissed on 05.02.2019, holding that the appellant suppressed a material fact that the complaint filed before the State Consumer Disputes Redressal Forum is pending and without withdrawing the complaint, the present complaint is not maintainable.

6.Against the said dismissal, the appellant filed an Appeal before the Appellate Authority. The matter was argued before the Appellate Authority and the Appellate Authority found that there is a consumer case pending before the State Consumer Disputes Redressal Forum.

7.When the matter was taken up for consideration by the Adjudicating Officer, even though it was stated before the Adjudicating Officer that the complaint was withdrawn, but till passing of final orders by the authority on 05.02.2019 in C.C.Nos.253/2015 and 295/2017 which were pending on the file of the State Consumer Disputes Redressal Forum were not withdrawn.

The non withdrawal of the consumer case is contrary to the undertaking given in the petition as per Section 71(1) of the RERA Act, 2016.

8.The Appellate Authority observed that a wrong statement had been made before the Adjudicating authority that the appellant had already withdrawn the complaint, whereas the complaint was withdrawn only after dismissal of complaint before the Adjudicating Authority. It is also noted that wrong submission was made before the Adjudicating Officer by the advocate stating that a memo has been filed before the State Consumer Disputes Redressal Forum, withdrawing the consumer case whereas the memo was filed only on 09.02.2019 and the consumer case was withdrawn on 15.02.2019. Since, till the passing of order by the Adjudicating Officer, the consumer case was not withdrawn, the Appellate Authority found that the Adjudicating Officer rightly dismissed the complaint. The Appellate Authority while coming to the conclusion held that even on the date of the appeal, viz., 21.02.2019, the complaint before the State Consumer Disputes Redressal Forum had not been withdrawn which is contrary to the facts. It is evident from the records that the memo for withdrawing the consumer complaint in C.C.No.295/2017 was filed on 09.02.2019 and State Consumer Disputes Redressal Forum had also permitted the appellant to withdraw CC.No.295 of 2017 on 15.02.2019. Therefore, it is very clear that before filing of the Appeal before the Appellate Authority, the consumer complaint had already been withdrawn. Therefore, the order passed by the Appellate Authority is contrary to facts and has to be set aside.

9.The main contention is that whether complaint is maintainable before the Adjudicating Officer under the RERA Act, when the consumer complaint is pending before the State Consumer Disputes Redressal Forum?

10.Mr.N.S.Sivakumar, learned counsel appearing on behalf of the appellant would submit that it is not a bar for maintaining a complaint before the Adjudicating Officer. He would submit that Section 88 of the RERA Act would enable the appellant to maintain the complaint both before the consumer forum as well as RERA Authorities. He would rely upon the judgment of the Hon'ble Supreme Court in the case of Pioneer Urban Land and Infrastructure Limited and Another Vs. Union of India and others reported in 2019 SCC Online SC 1005 to contend that concurrent remedies are available not only before the consumer Forum under the RERA Act but also under the provisions of the IBC code before the NCLT. Another judgment relied upon by the learned counsel, delivered by the Delhi High Court is in the case of M/s.M3M India Pvt. Ltd., & another Vs. Dr.Dinesh Sharma and another decided on 04.09.2019. By relying upon these judgments,

the learned counsel would contend that the pendency of the consumer complaint is not a bar.

11. Assuming for a moment, it is a bar, the appeal was filed and even before that the complaint was withdrawn and therefore, the provisions of the Act have been complied with. Hence, the order passed by the original authority confirmed by the Appellate Authority has to be set aside.

12. On the other hand, Dr. Padma, the learned counsel appearing on behalf of the respondent would submit that as per the proviso to Section 71(1) of the Act, any complaint pending before the consumer forum has to be stated in the complaint itself and it should be withdrawn. Secondly, she would submit that a false representation had been made before the original authority stating that the consumer complaint was withdrawn whereas even as on the date of passing of the final order by the adjudicating authority on 05.02.2019, the complaint was pending and therefore, the original authority rightly dismissed the complaint and that was also confirmed by the Appellate Authority and therefore, there is no necessity to interfere with the order passed by the Appellate Authority.

13. To understand the issue involved in this case, it is appropriate to note the fact that RERA Act came into force on 22.06.2017. The legislature was conscious of the fact that many complaints are pending before various forums and opportunities have to be given to the parties to withdraw the complaints and therefore, a provision has been made under Section 71 of the Act. Section 71 of the RERA Act is extracted as follows:

"71. (1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard: Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act. (2) The

application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application: Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period. (3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections."

A cursory perusal of Section 71, especially proviso would make it very clear that if any matter covered under Sections 12,14,18 and 19 of the Act is pending before the Consumer Forum before commencement of RERA Act, the complainant with the permission of the forum could withdraw the complaint pending before the said Forum and file an application before the adjudicating authority under the Act. In this case, admittedly, a complaint filed was already pending in CC.No.295 of 2017 on the file of the State Consumer Disputes Redressal Forum at Chennai. After the coming into force of RERA Act on 22.06.2017, an application has been filed before the adjudicating authority on 06.08.2018 by the appellant. The appellant disclosed the pendency of the complaint in column No.7 of the complaint and therefore, there is no suppression about the pendency of the case.

14. Whether the complainant withdrew the consumer proceedings pending before the State Consumer Disputes Redressal Forum is one of the issues raised by the learned counsel appearing on behalf of the respondent. Admittedly, the complaint was pending before the consumer forum when the appellant approached the adjudicating officer. However, there seems to be some dispute with regard to the withdrawal of the complaint.

15. From the facts of the case it is seen that even though the appellant stated the complaint was withdrawn, actually a memo was filed for withdrawal on 09.02.2019 and the Consumer Forum permitted the appellant to withdraw on 15.02.2019. As on the

date of the passing of the order of the adjudicating authority on 05.02.2019, the complaint was not withdrawn.

16.It may appear as if the appellant misled the Forum, stating that the complaint was already withdrawn. Probably the learned counsel, under the impression that he was taking steps to withdraw the complaint, would have represented that the complaint before the Consumer Forum had been withdrawn. In any event, it is a wrong statement and it cannot be presumed to be a deliberate wrong false statement or a statement to mislead the Court.

17.To look into the issue as to whether withdrawal of the complaint is mandatory as per the provisions of the Act, it is appropriate to extract Section 88 of the Act.

"88.Application of other laws not barred - The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force."

The above said provision makes it very clear that the application of the provisions of RERA Act shall be in addition to and not in derogation of provision of any other law for the time being in force. It means that relief under the Act is in addition to the relief already provided under various other acts and that is abundantly made clear by employment of the terms "and not in derogation of" and therefore, it is very clear the withdrawal of the complaint before the consumer forum is not compulsory or mandatory for maintaining the application under the RERA Act.

18.Even otherwise, before filing of the appeal, the appellant has withdrawn, eventhough it is not compulsory. The Hon'ble Supreme Court in the case of Pioneer Urban Land and Infrastructure Limited and Another Vs. Union of India and others reported in 2019 SCC Online SC 1005 categorically held that the remedies available to the allottees of the flats or apartment under RERA act as well as consumer protection Act and also under NCLT are concurrent remedies. Paragraph 103 is extracted as follows:

"103.We, therefore, hold that allottees/home buyerswere included in the main provision, i.e., Section 5(8)(f) with effect from the inception of the Code, the explanation being added in 2018 merely to clarify doubts that had arisen.

Conclusion:

i.The Amendment Act to the Code does not infringe Articles 14, 19(1)(g) read with Article 19(6) or 300-A of the Constitution of India.

ii.The RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over the RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under Consumer Protection Act, 1986, RERA as well as the triggering of the Code.

iii.Section 5(8)(f) as it originally appeared in the Code being a residuary provision, always subsumed within it allottees of flats/apartments. The explanation together with the deeming fiction added by the Amendment Act is only clarificatory of this position in law."

The Hon'ble Supreme Court has categorically held that the remedies are concurrent in nature. In any event, the appellant has already withdrawn the complaint and therefore, there is no prohibition for the authorities under the Act to deal with the complaint.

19.In view of that, the order passed by the adjudicating authority as confirmed by the Appellate Authority is set aside and the adjudicating authority shall decide the matter, after giving opportunity to the parties and dispose of the same. Therefore, this Court remands the matter to the original authority to decide on merits, after giving appropriate opportunity to the parties, within a period of three months from the date of receipt of a copy of this order.

20.Accordingly, this Appeal is allowed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Tamil Nadu Real Estate Regulatory Authority,
Chennai.

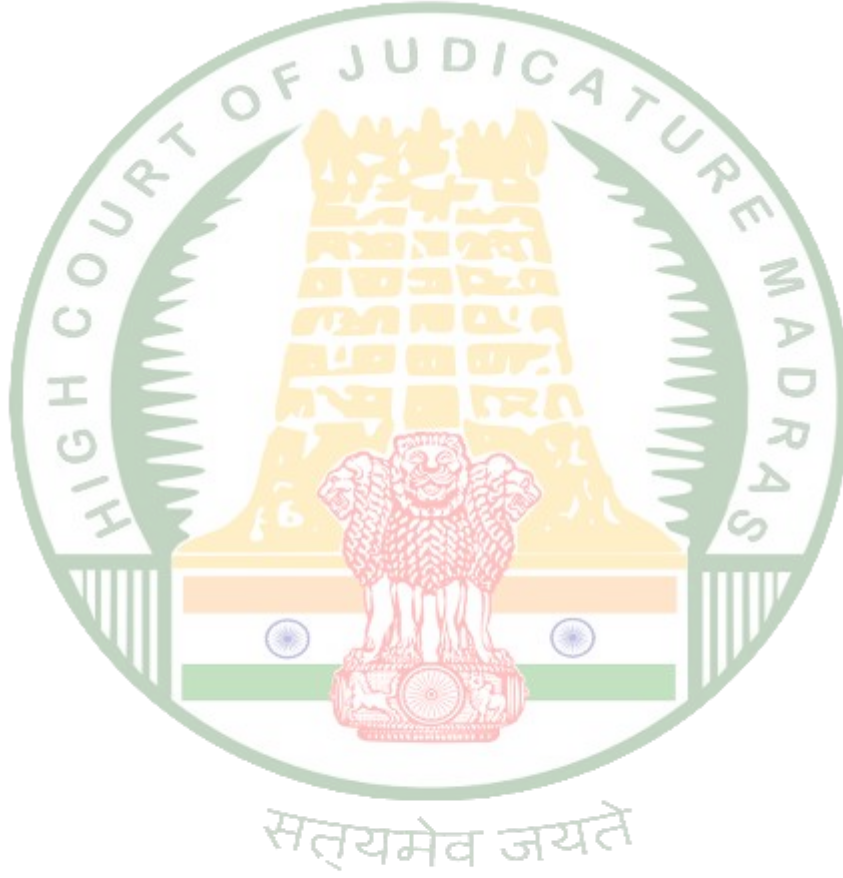
2.Tamil Nadu Real Estate,
Appellate Tribunal (TNREAT)

+1cc to Mr.S.Padma, Advocate, S.R.No.99382

+2cc to Mr.N.S.Sivakumar, Advocate, S.R.No.99336

C.M.S.A.No.31 of 2019

VD(CO)
RV(06/11/2020)



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