

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.02.2020

CORAM:

THE HON'BLE MR.JUSTICE N.KIRUBAKARAN
and
THE HON'BLE MR.JUSTICE P.VELMURUGAN

C.M.A.No.2287 of 2019
and C.M.P.No.10042 of 2019

M/s.Adinath Srinivasa Foundations LLP
Rep. by Managing Partner
T-2, 1st Floor, No.31, Rajamannar Street
T.Nagar, Chennai-600 017. ..Appellant/Appellant

-Vs-

The Secretary
Serene Kshetra Owners Association
Rep. by its Secretary Mr.Shekar Murthy
Plot No.26, CRR Puram, L&T Colony
Manapakkam, Chennai-600 125 ..Respondent/Respondent

Prayer: Civil Miscellaneous Appeal filed Under Clause 58 of the Provision of the Real Estate (Regulation and Development) Act, 2016, against the order passed by the Real Estate Appellate Tribunal for Tamil Nadu, Puducherry, Andaman and Nicobar Islands dated 11.01.2019 in Appeal No.5 of 2018.

For Appellant : Mr.P.Wilson, Senior Counsel
for M/s.Richardson Wilson

For Respondent : Mr.Ralph V.Manohar.

JUDGMENT

P.VELMURUGAN, J.

This Civil Miscellaneous Appeal is filed against the order passed by the Real Estate Appellate Tribunal (TNREAT) for Tamil Nadu, Puducherry, Andaman and Nicobar Islands dated 11.01.2019 in Appeal No.5 of 2018.

2. The appellant is in the field of development and construction of housing and commercial properties. The appellant wanted to develop a Housing project for the benefit of senior citizens. Accordingly, the appellant identified land in Kancheepuram District. The appellant entered into an agreement

of sale with the owner of the land for a total extent of 13.20 acres and a Memorandum of Understanding dated 21.03.2013 with M/s.Serene Senior Living Private Limited to develop an integrated residential project for senior citizens termed as 'Serene Kshetra'. The project consisted of 175 units - 99 Row houses, 15 Villas, 40 Twin Houses and 21 Studio Villas.

3. The owner of the land was requested by the appellant to obtain necessary approval and accordingly DTCP approval was also obtained. Subsequently, the Local Planning Authority also gave planning permission for the building on 09.06.2014 and as per the approval, required Gift Deeds were executed gifting land to the local authority for forming roads, OSR etc. Subsequently, the agreement of sale was cancelled. The appellant had entered into a Joint Venture Agreement dated 11.06.2015 with the land owner.

4. Subsequently, the Real Estate [Regulation and Development] Act, 2016, (hereinafter called as "Act") came into force on 05.05.2016. The appellant states that as per Rule 2(h) (iii) of the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017, an ongoing project is defined as a project where construction is structurally completed in so far as cases outside Chennai Metropolitan Area and such projects shall be intimated to the concerned Local Planning Authority or Regional Deputy Director of the Town and Country Planning Department within 15 days from the date of notification of the Rules with a copy marked to the office of the Director of Town and Country Planning and as such, they are exempted from Registration under the Act. As per the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017, the Authority viz., Director of Town and Country Planning will have to publish the list of all such ongoing projects in the official website, on the 16th day of notification of the rules besides publication of the same in the website of Real Estate Regulatory Authority.

5. According to the appellant, the subject matter of the project viz., 'Serene kshetra' is a structurally completed project and as such it is not an ongoing project. The Authority has also issued a certificate and exempted the said project from registration, by publishing the list of structurally completed projects under Rule 2(h)(iii) of the Rules and accordingly, it was uploaded in the official website of Town and Country Planning Department.

6. The respondent Association preferred a complaint to the Tamil Nadu Real Estate Regulatory Authority, praying to direct the appellant to register 'Serene Kshetra' project under the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 (hereinafter called as "Rules") stating that 'Serene Kshetra'

is an ongoing project and there are two phases in the project and therefore, when the project has not been completed, the project could be called as an ongoing project. Therefore, the said project has not been completed and it cannot be exempted under Rule 2 (h) (iii) of the Rules.

7. The Regulatory Authority, after issuing notice to the parties, directed the Commissioner, Town and Country Planning, to inspect the project and submit a report. Based on the inspection report, it is found that the project was not completed. Therefore, the Authority pointed out that publishing in the Website as structurally completed project is not correct and therefore, allowed the claim of the respondent herein and further concluded that the entire project has to be registered under the Act.

8. Challenging the said order passed by the Regulatory Authority, the appellant herein filed appeal before the Real Estate Appellate Tribunal in Appeal No.5 of 2018 on the file of Real Estate Appellate Tribunal (TNREAT) (Tamil Nadu, Puducherry, Andaman and Nicobar Islands).

9. The Appellate Authority, after considering the entire facts, found that the order passed by the Regulatory Authority, is in order and therefore, dismissed the appeal filed by the appellant herein.

10. Challenging the said order passed by the Real Estate Appellate Tribunal, the appellant has filed this Civil Miscellaneous Appeal.

11. The learned counsel for the appellant would submit that the Regulatory Authority does not have any power to call for the entire records and to review the decision taken by the DTCP. The power of the Real Estate Regulatory Authority under Section 37 of the Act is limited to issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.

12. The power of the Regulatory Authority under the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017, has been extended under Rule 25 as "Additional Powers of the Authority". According to the appellant, even Rule 25 does not confer on the Authority the power to review the decision taken by the DTCP with respect to the ongoing projects. The structural works have been completed in so far as A, B and C Blocks are concerned; only internal finishing work is left and it has to be completed. Therefore, the rule is not applicable to 'Serene Kshetra' Project and the appellant is entitled to avail

exemption under Rule 2(h)(iii) of the Rules. Phase 2 is entirely a different project called 'Adinath Kshetra' and is not covered in the Local Planning Authority's building Planning permission dated 09.06.2014. Perhaps, the confusion has arisen because both the projects have a combined DTCP approval and the gifting of ORS lands were done together. 'Serene Kshetra' is a composite, integrated project and has been fully completed and 137 number of units have been handed over to the owners. All the common amenities such as Club House, Amphitheatre etc have been constructed as per the Construction Agreement and handed over to the purchasers.

13. He would further submit that 'Adinath Kshetra' project is totally a different project. It has nothing to do with 'Serene Kshetra' flats but 'Serene Kshetra' has been completed, sold and handed over to the purchasers. All the common amenities prescribed in the schedule of sale deeds have been completed. Therefore, the respondent cannot demand 'Serene Kshetra' to be registered under the Act along with another project which is to be completed which is in effect what the respondent is demanding through his complaint. Since the 'Adinath Kshetra' and 'Serene Kshetra' are different projects, Phase 1 is named as Serene Kshetra and Phase 2 has been named as 'Adinath Kshetra', the respondent/complainants are allottees of Serene Kshetra and the said project was already completed. Therefore, 'Serene Kshetra' was notified as completed project and DTCP was also issued and the same was also notified. The Regulatory Authority, without any authority of law, gone to the extent that they cancelled the approval given by DTCP and directed the appellant to register the 'Serene Kshetra' under the RERA Act, which is against law and the project 'Serene Kshetra' was already a structurally completed project. Now the only ongoing project is 'Adinath Kshetra'. Therefore, the appellant registered the property of "Adinath Kshethra" under the Act, however, they need not register the "Serene Kshetra" which was a structurally completed project, much before Adinath Kshetra and the Act come into force. Therefore, both the Regulatory Authority and the Appellate Tribunal failed to consider the legal and factual positions and given a direction to register the project as an ongoing project. He would further submit that since the 'Serene Kshetra' is a completed project and it is not an ongoing project, the order of the Appellate Tribunal, requires interference.

14. The learned counsel for the respondent would submit that the respondent is the Secretary of the 'Serene Kshetra' Owners Association and they are Allottees of the flats in 'Serene Kshetra'. There is only one integrated project for senior citizens. Even the DTCP, without considering and ascertaining the ground status of the construction of the

project 'Serene Kshetra', issued Planning Permission Certificate and the Authority also published the said project as structurally completed project in the official website as provided under Rule 2(h)(iii) of the Rules even without inspection of the project. But when the respondent gave a complaint before the Regulatory Authority, the Authority directed the Commissioner, Town and Country Planning, to undertake an inspection and submit a report. The Commissioner also after inspecting the project, submitted a report on 28.02.2018 stating that the project has not been completed. The said report was filed after the Act came into force. Therefore, the project called 'Serene Kshetra' has to be registered based on the Commissioner's Report. The entire project has not been completed and falls under the ongoing project and it will not come under the provisions as specified under Rule 2(h)(iii) of the Rules. Therefore, the Real Estate Regulatory Authority, has rightly directed the appellant to register the project 'Serene Kshetra' under the RERA Act. Thereafter, on appeal before the Appellate Tribunal, the Appellate Authority has also elaborately discussed the legal and factual aspects and has rightly dismissed the appeal and there is no reason to interfere with the order passed by the learned Appellate Authority and therefore, the appeal is to be dismissed.

15. Heard the submissions of learned counsel appearing on either side and perused the materials available on record.

16. The appellant is the Promoter of the Apartments viz. 'Serene Kshetra'. The respondent is the Secretary of the Purchasers' Association. It is not in dispute that the appellant purchased the land which falls under two revenue divisions and therefore, they have got two approvals separately. However, even in the site lay out, it is seen that the entire project viz., 'Serene Kshetra' and 'Adinath Kshetra' are covered under the common Site Lay Out. It is not in dispute that the project started much prior to the Act coming into force, but the project was not completed when the Act came into force.

17. The case of the appellant is that they have taken two different planning permissions and approvals and the land extended in two different villages and the first one is pertaining to Villa Project and the other one, a consolidated house cum flats project. The first one is developed in the place earmarked for each house and the 2nd one as joint one. But the fact admitted by the appellant builder is that the common amenities which is made for both the projects is the same and both the purchasers from both the projects could avail the same without hindrance by anyone. The appellant submits that they completed one of the projects viz 'Serene Kshetra' even much before the Act came into force. Therefore, it is not an ongoing project as per Rule 2(h)(iii) of the Rules and therefore, need

not be registered under the Act.

18. The case of the respondent is that in reality, there are no two projects, one called 'Serene Kshetra' and the other called 'Adinath Kshetra'. There is only one project for the benefit of senior citizens. Therefore, as on the date when the Act came into force, the project has not been completed. Therefore, the claim of the appellant that project falls under the definition of ongoing project as provided under Rule 2(h) (iii) of the Rules, is false. Therefore, the respondent has taken the stand that such claim of the appellant is to be rejected and consequently, the exemption sought for the project as not an ongoing project under Rule 2(h) (iii) of the Rules, is not proper and therefore, filed complaint before the Real Estate Regulatory Authority.

19. The Real Estate Regulatory Authority, on receipt of complaint, has directed the Commissioner, Town and Country Planning, to undertake an inspection and submit a report. The Commissioner, after completing inspection, filed a report on 28.02.2018 and the report reveals that the project has not been structurally completed. Therefore, it is only an ongoing project and the project cannot be excluded as it does not come under the criterion specified under Rule 2(h) (iii) of the Rules.

20. As such, after the Real Estate (Regulation and Development) Act, 2016, came into force, as per the directions of the Regulatory Authority, inspection was undertaken and the report of the Commissioner, Town and Country Planning was that the Project was not completed. The Regulatory Authority had also gone through various documents and found that it is very clear that the builder has only stated it is an integrated residential project for senior citizens. The Joint Venture Agreement itself reveals that it is a Group Development Scheme and not an individual project. Though the Regulatory Authority and also the Appellate Tribunal accepted that the Act empowers the developer to develop a building in phases, it further necessitates that they should have made it very clear as regards the development of the building at the very inception both to the Authority as well as to the buyers. In this case, merely because they have taken two different approvals, as the villages were different, even though the properties adjoin each other, that by itself, cannot make them to say that they can split the very project.

21. Therefore on reading of the entire materials, we do not find any materials to show that at the very first inception itself, the appellant had shown the project as two different phases. Therefore, now the appellant, in order to escape from the clutches of law, cannot split it into two projects in the name of Phase 1 and Phase 2 saying that Phase 2 is named as 'Adinath Kshetra' and it is a different project; as far as Phase 1 is concerned, it is already structurally completed and it is

not an ongoing project and it has to be excluded under Rule 2(h) (iii) of the Act. Therefore, the contention of the appellant that the 1st phase 'Serene Khetra' is a different project and the same was already structurally completed before the Act came into force and need not be registered under the Act, is not an acceptable one.

22. A reading of the entire materials placed in the typed set of papers clearly shows that the 1st document in the typed set is given as 'Serene Kshetra' Layout which shows the entire Plan in both the phases named by the appellant as 'Serene Kshetra'. Even the Prospectus/Brochures clearly show that it is 'Serene Kshetra' and nowhere it is stated there are two different projects and two different phases. Only at a later point of time, most probably, after smelling the new Act, noting that if 'Serene Kshetra' is registered under the Real Estate (Regulation and Development) Act, 2016, the appellant has to incur much expenses and spend huge amount to give benefits to the purchasers and therefore, they invented Phase 2 as 'Adinath Kshetra' and divided one project into two projects viz., 'Serene Kshetra' and 'Adinath Kshetra'. It is further claimed that 'Serene Kshetra' Phase 1 project is completed, therefore, the said Phase need not be registered.

23. A reading of the entire materials and in particular, the order passed by the Regulatory Authority and the Appellate Authority, would go to show that since the very inception, the Developer had not made it clear both to the Authority as well as to the buyers and shown as two phases. Merely because they have taken two different approvals, as the villages were different, even though the property remains adjoining, that by itself, cannot make them to say that they can split the very project.

24. Even as per Section 3(2) of the Act, even assuming that real estate project is developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately. Explanation II under Rule 4 states that when the project has been conceived to be developed in phases, where the plans for the initial phase are approved by the planning authority prior to the date of coming into force of sub-section (1) of Section 3 of the Act, then for such projects, obtaining two third consent from existing allottees is required, but the same is exempted under clause (ii) of sub-section (2) of Section 14 of the Act, for subsequent phase of development, provided the scheme of developing that project is in a phased manner which has been agreed upon by the allottees and promoter in the agreements executed by them.

25. In this case, the appellant is not able to prove that either at the inception itself, it is shown as different projects or otherwise, split the projects into two phases at a

later stage. Therefore, as per Section 3(2) of the Act and Explanation II and III of Rule 4 of the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017, for such projects, obtaining two-third consent from existing allottees, is required as otherwise exempted under clause (ii) of sub-section (2) of Section 14 of the Act. Therefore, in the absence of the same, the appellant cannot now say that as per Section 3(2) of the Act, 'Adinath Kshethra' is a different project and 'Serene Kshetra' is already structurally completed, hence, exempted under Rule 2(h)(iii) of the Rules. The said argument is not acceptable.

26. Even in the site plan, it is not shown as Phase I and Phase II, but it is named as Serene Kshetra. After the Act came into force and on receipt of complaint, the Regulatory Authority directed the Commissioner, Town and Country Planning to inspect the project and give a report. The report of the Commissioner itself reveals that the project has not been completed. As per the report of the Commissioner, the claim of the appellant that it is a structurally completed project is not true and only to escape from the clutches of law and avail exemption under Rule 2(h)(iii) of the Rules, the appellant claimed Serene Kshetra as structurally completed one and it is not an ongoing project falling under Rule 2(h)(iii). In such circumstances, both the Regulatory Authority as well as the Appellate Tribunal, have scrutinised the entire materials placed before them and passed the order directing the appellant to register the project under RERA Act.

27. Furthermore, even after inception, if the developer wanted to split the project into two phases, consent from two-third allottees is required and that consent is not obtained. The claim of the appellant that Adinath Kshetra is a different project and Serene Kshetra is a different project and Serene Kshetra was already structurally completed and it has to be excluded as per Rule 2(h)(iii) of the Rules and therefore, the completed project need not be registered under the Act, is not acceptable. The Regulatory Authority and the Appellate Tribunal are fact finding authorities. They have gone through the entire materials, inspection report and given a finding that it is only an ongoing project and it is not a structurally completed project and given a direction to the appellant to register the project under the RERA Act. This court does not find any perversity in the finding given by both the Regulatory Authority and the Appellate Tribunal and there is no merit in the appeal. In the result, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

The appellant is directed to register the Serene Kshetra under the RERA Act within one month from today.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

Nvsri

To

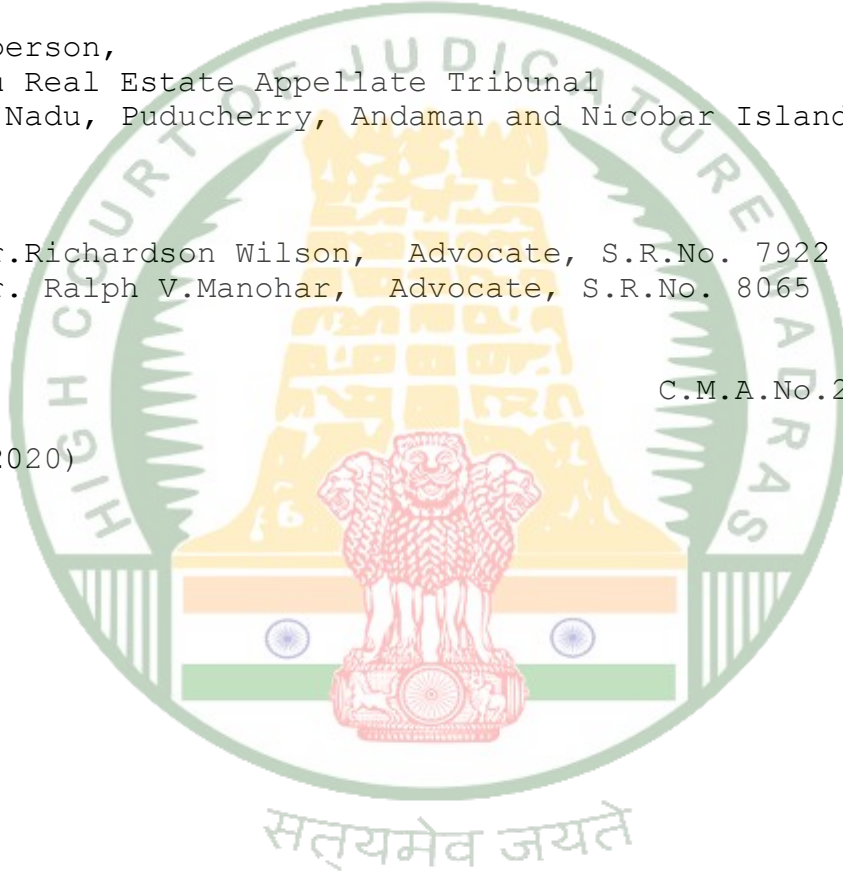
The Chairperson,
Tamil Nadu Real Estate Appellate Tribunal
for Tamil Nadu, Puducherry, Andaman and Nicobar Islands
Chennai.

+1cc to Mr. Richardson Wilson, Advocate, S.R.No. 7922

+2cc to Mr. Ralph V. Manohar, Advocate, S.R.No. 8065

C.M.A.No.2287 of 2019

GN(04/02/2020)



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