IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.11.2023

CORAM :

THE HON'BLE MR. JUSTICE R. MAHADEVAN

AND

THE HON'BLE MR. JUSTICE MOHAMMED SHAFFIQ

C.M.S.A.No.15 of 2023 &
C.M.P.Nos.1462 and 1463 of 2023

M/s.Alliance Projects,
Rep. by its Authorized Signatory,
No.36/1, Gandhi Mandapam Road,
Kotturpuram Road,
Chennai - 600 085. ... Appellant

Vs.

Palm Flat Owners Welfare Association,
Rep. by its Secretary Mr.B.Sukumar,
Having its Registered Office at
Palm Block, Alliance Orchid Springs,
No.54, Canal Road, Korattur,
Chennai - 600 076. ... Respondent

Civil Miscellaneous Second Appeal filed under Section 100 of CPC r/w under Section 58 of the Real Estate Regulation Development Act, 2016, against the Judgment and Decree dated 04.01.2023 in Appeal (SR)No.765 of 2022 passed by the Tamil Nadu Real Estate Appellate Tribunal.

For Appellant : Mr.P.L.Narayanan,
Senior Counsel for Mr.E.Hariharan

For Respondent : Mr.N.L.Rajah,
Senior Advocate
For Mr.A.Vimalraj

ORDER

(Order of the Court was made by R. MAHADEVAN, J.)

This Civil Miscellaneous Second Appeal is filed by the appellant / promoter under Section 58 of the Real Estate (Regulation and Development) Act, 2016, (in short "RERA Act") challenging the correctness of the order dated 04.01.2023 passed by the Tamil Nadu Real Estate Appellate Tribunal (in short, "the Appellate Tribunal") in Appeal (SR)No.765 of 2022 preferred against the order dated 22.08.2022 passed by the Tamil Nadu Real Estate Regulatory Authority in C.No.279 of 2021. For the sake of reference, the order passed by the Appellate Tribunal, is extracted hereunder:-

> *"Pursuant to the orders of this Tribunal dated 14.12.2022, the appellant deposited a sum of Rs.2,03,23,500/- being the amount alleged to have been collected towards corpus fund. However, the appellant has not deposited the accrued interest as directed by the Tamil Nadu Real Estate Regulatory Authority. On a perusal of the order passed by Tamil Nadu Real Estate Regulatory Authority, it could be seen that the Authority directed the appellant / promoter to hand over the proportionate corpus fund, relating to the Palm block along with the actual interest earned before 31.10.2022 to the complainant / association.*
>
> *Mr.P.L.Narayanan, the learned counsel for the appellant submitted that the amounts collected from the allottees were deposited in the current account of the appellant / promoter. The learned counsel further submitted that the said amount was utilized for the maintenance of the block.*

The submission made by the learned counsel for the appellant cannot be accepted for the reasons that the amounts collected from the allottees would have been utilized by the promoter for some other purposes and they would have earned sufficient income from the said amounts. As per Rule 18 of the Tamil Nadu Real Estate (Regulation and Development Rules), 2017, the rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest Marginal Cost of Lending Rate plus two percent. Though there is no material to show that the promoter had earned interest over and above the lending rate of the State Bank of India, we are of the considered view that in the interest of justice, the appellant / promoter can be directed to deposit the Fixed Deposit interest paid by the nationalized banks. Accordingly, we direct the appellant / promoter to deposit the interest at the rate of 5.5% p.n on the amounts deposited by the allottees on or before 01.02.2023.

Post the matter on 03.02.2023 for reporting compliance."

2. The necessary facts leading to the filing of this appeal would run thus:

2.1. The respondent herein viz., Palm Flat Owners Welfare Association (POWA), the members of which, had purchased flats from the appellant, lodged a complaint in C.No.279 of 2021 before the Tamil Nadu Real Estate Regulatory Authority (TNRERA), Chennai, under Section 31 of the RERA Act, alleging certain deficiencies and shortcomings on the part of the appellant in deliverables to the owners of the Palm Block, and sought the following reliefs:

"(i)to register the Project "ALLIANCE ORCHID SPRINGSS" under TNRERA Act;

(ii)to hand over the proportionate Corpus Fund of more than Rs.2.36 crores pertaining to Palm block along with interest accrued till date of full payment to the complainant;

(iii)to direct the Respondent to rectify the lapses, shortcomings, deficiencies and undelivered promises as mentioned in the Focus Area paragraph above and to complete the said list of deliverables in a structured time schedule with mile stone to be fixed by this Hon'ble Authority;

(iv)to hand over all original documents of undivided share of land with taxes and other charges cleared up to date;

(v)If there is any shortfall in the undivided share of land, the same may be compensated with interest and penalties and hand over the details of drawings, certificates obtained from relevant authorities for compliance requirements and also transfer annual service contracts with service providers to the complainant;

(vi)to hand over the entire maintenance of Palm Block to the complainant including handing over of Assets i.e., Lifts, DG Sets, OHTs and other common areas / common amenities within the Palm along with actual built up drawings of Plumbing / Electricals pertaining to Palm block and common amenities like WTP, STP etc. to a Central or Apex Association;

(vii)The respondent has sold 200 apartments as against the CMDA approval of 198 apartments. Therefore, this is a clear "fraus est celare fraudem" and the complainant humble request this Hon'ble Authority to take necessary penal action against the respondent;

(viii)Respondent has sold car parking instead of allotment and has to be penalised for undue profits. Also the respondent has sold more than the approved car parks reducing the UDS/Green cover."

2.2. By order dated 22.08.2022, the TNRERA after considering the pleadings and submissions made by the parties, disposed of the complaint filed by the respondent and the Interlocutory Application filed by the appellant, by issuing certain directions, one among which is that the appellant / Promoter shall handover the proportionate corpus fund relating to the Palm Block along with the actual interest earned before 31.10.2022 to the Complainant / respondent Association. Challenging the aforesaid order passed by the Regulatory Authority, the appellant / promoter preferred appeal in SR No.765 of 2022 before the Appellate Tribunal. By order dated 04.01.2023, the Appellate Tribunal directed the appellant to deposit the interest at the rate of 5.5.% per annum on the amounts collected from the members of the respondent Association towards corpus fund, on or before 01.02.2023. Aggrieved by the same, the appellant is before this court with the present appeal.

3. When this appeal came up for admission on 30.01.2023, this court has granted an order of interim stay.

4. The learned senior counsel appearing for the appellant would submit that the corpus fund was explicitly collected for the sole purpose of funding common maintenance and was never intended for refund to the allottee(s) at any point of time and hence, the order of the Appellate Tribunal to deposit interest that accrued on the corpus fund is fundamentally flawed. Adding further, the learned senior counsel submitted that no interest was accrued on the corpus fund, which is an adjustable 1st year maintenance collection that was deposited for utilization in the current account, which yielded no interest and therefore, it is impossible for the appellant to deposit the interest before the Appellate Tribunal. It is also submitted that the impugned order appears to be passed on conjectures and surmises rather than concrete evidence. That apart, Rule 18 of the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 referred to by the Appellate Tribunal, is applicable only to the cases where the party's liability is

crystallised, whereas, in the present case, there has been no crystallization of liability. The learned senior counsel further submitted that the entire corpus fund has been utilized exclusively for the maintenance of the block of flats and that, there is no question of payment of interest, especially, when more than Rs.50 lakhs is due from the respondent. In support of his submissions, the leaned senior counsel placed reliance on the judgment of the Calcutta High Court in ***D.M.Wadhwana Vs. Commissioner of Income-Tax, West Bengal [(1966) 61 ITR 154],*** wherein, it was observed that *'the set-off of the loss claimed by the assessee cannot be granted, if he did not fulfil the provisions of statute''.* With these submissions, the learned senior counsel prayed to allow this appeal by setting aside the order passed by the Appellate Tribunal.

5. Per contra, the learned senior counsel appearing for the respondent submitted that the corpus fund is intended to be deposited in interest bearing account and the interest accrued is to be utilized for common area maintenance, that too, if the monthly maintenance amount collected from the allottees for common area maintenance was found to be deficient and hence, the contention raised on the side of the appellant that corpus fund was meant for utilization of common area maintenance and there was no interest accrued, is incorrect and contrary to the terms of the construction agreement. Continuing further, the learned senior counsel submitted that the appellant collected two types of

deposits viz., (i) corpus deposit which is Rs.50/- per square feet of the Super Built Area, and (ii) maintenance deposit which is Rs.2.50 per square feet of the super built area collected in advance for 12 months, as evident from Annexure "AA" of the construction Agreement. Thus, according to the learned senior counsel, the stand of the appellant that corpus fund represents the first-year maintenance charges and is not intended for deposit in an interest bearing account, is utterly false. Referring to the judgment of the Apex Court in ***M/s.Newtech Promoters and Developers Pvt. Ltd., Vs. State of UP and Others [(2021) SCC Online SC 1044],*** the learned senior counsel submitted that when the promoter files an appeal before the Appellate Tribunal, they have to pay the total amount ordered to be paid to the allottees with interest as a pre-condition, as stated in section 43(5) of the RERA Act. It is also pointed out that the order impugned herein is only to comply with the statutory pre-requisite as contemplated under section 43 of the RERA Act and hence, the appellant may be directed to deposit the interest amount on the alleged corpus fund of Rs.2,03,23,500/- and agitate the issues before the Appellate Authority. Therefore, the learned senior counsel sought for dismissal of this appeal.

6. Heard the rival submissions and perused the materials available on record.

7. The challenge made in this appeal is to the order passed by the Appellate Tribunal, directing the appellant to deposit interest at 5.5% p.a. accrued on the corpus fund of Rs.2,03,23,500/-. The appellant raised the following substantial questions of law to be considered by this court:

> *"(i) When there is no provision under the RERA Act and its 2017 Rules for depositing the maintenance fund in any bank's fixed deposit or interest earning deposit, can the Tribunal direct the appellant to pay interest along with the total amount to be paid to the allottee?*
> *(ii) When there is no proof of the appellant having utilized the maintenance/corpus fund for any other purpose, can the Tribunal assume and impose payment of interest on the ground equity?*
> *(iii) Should equity follow law or vice versa, when on facts the appellant had not earned any interest from his current account and when there is no statutory provision in this regard?"*

8. According to the appellant, corpus fund was collected from the members of the respondent Association, for maintenance purposes and was not intended to be refunded to the allottee(s). Further, the corpus fund was not deposited in any interest bearing account and the construction agreement does not speak about interest accrued on the corpus fund. While so, the order of the Appellate Tribunal directing the appellant to deposit interest at 5.5% p.a. on the corpus fund, that too, without any concrete evidence, is erroneous and unsustainable in law. On the other hand, it is the stand of the respondent that the construction agreement relating to 'maintenance deposit / fee and common maintenance', states that interest accrued on the maintenance deposits has to be used for

maintenance purpose; and that, as per section 43 of the RERA Act, the deposit of interest accrued on corpus fund is pre-requisite for filing appeal before the Appellate Tribunal and hence, the order of the Appellate Tribunal is perfectly correct.

9. This court is of the opinion that the issues involved herein are triable in nature and the same require detailed analysis based on the evidence and documents produced by the parties. Therefore, the substantial question of law raised herein are left open to be decided by the Appellate Tribunal, which shall take up the appeal filed by the appellant and decide the same, on merits and in accordance with law, after affording reasonable opportunity to both the parties, within a period of three months from the date of receipt of a copy of this judgment. The parties are at liberty to raise all the contentions, including the deposit of interest accrued on the corpus fund and the quantum of such interest, etc., before the Appellate Tribunal, with supportive materials.

10. Accordingly, this appeal stands disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

[R.M.D,J.] **[M.S.Q, J.]**
16.11.2023

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Index: Yes / No.

Speaking order/ Non-speaking order
Neutral Citation: Yes / No.

R. MAHADEVAN, J.
and
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To

1. Tamil Nadu Real Estate Appellate Tribunal,
Chennai.

2. Tamil Nadu Real Estate Regulatory Authority,
Chennai.

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