

**IN THE KARNATAKA REAL ESTATE APPELLATE TRIBUNAL,
BENGALURU**

DATED THIS THE 25th DAY OF JANUARY, 2023

PRESENT

HON'BLE SRI B SREENIVASE GOWDA, CHAIRMAN

AND

HON'BLE SRI K P DINESH, JUDICIAL MEMBER

AND

HON'BLE SRI P S SOMASHEKAR, ADMINISTRATIVE MEMBER

APPEAL NO. (K-REAT) 65/2022

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BETWEEN:

Smt. Padmavathi Biruduraju,
Aged about 52 years, W/o Sri. Sudeep Kumar,
Flat No.207, Anand Enclave,
Jambusavari Dinne,
Opposite Sri.Chaitanya Techno School,
J.P. Nagar, 8th Phase, Bengaluru – 560 083.

...APPELLANT

(By Sri. G. Sridhar, Advocate)

AND

1. M/s T R Builders & Developers,
Office at No.26 to 31, SBC Complex,
Uttarahalli Main Road,
Subramanyapura Post, Uttarahalli,
Bangalore – 560061
Represented by its Partners:
 1. M Reddappa
 2. P G Thyagaraj
 3. P.A Vinay

Present address
M/s TR Builders & Developers

Yashodha Regacy No.3
5th C Main, Tata Silk Form, KR Road,
Bengaluru – 560 070.

2. Sri. Vijay Anand Kumar,
"Ashwini", No.33/1,
Aga Ali Abbas Road,
Bengaluru – 560 042.
3. Smt. Karpagam Anand Kumar,
"Ashwini", No.33/1,
Aga Ali Abbas Road,
Bengaluru – 560 042.
4. Karnataka Real Estate Regulatory Authority,
1/14, 2nd Floor, Silver Jubilee Block,
Unity Building, CSI compound,
3rd Cross, Mission Road,
Bengaluru-560 027
Represented by its Secretary.

..RESPONDENTS

(By Sri. Sudarsana Reddy, Advocate for R1
Smt. H.H Sujatha, Advocate for R2 and R3,
R4-RERA served, unrepresented)

This Appeal is filed under Section 44 of the Real Estate (Regulation and Development) Act, 2016, praying to set aside the impugned order dated 02.08.2022 passed by Respondent No.4-RERA in complaint No. CMP/UR/200106/0005148.

APPEAL NO. (K-REAT) 66/2022

BETWEEN:

Suhas S Kulkarni,
S/o Shrikant N Kulkarni,
Aged about 45 years.

residing at "Anand Enclave"
Flat No.111, first floor, J P Nagar, 8th Phase,
Jambu Savari Dinne, 1st Cross Rd,
South Avenue, Gottigere,
Bengaluru – 560 083.

...APPELLANT

{Appellant No.2 deleted v.c.o dated 23.09.2022}

(By Sri. G. Sridhar, Advocate)

AND

1. M/s T R Builders & Developers,
Office at No.26 to 31, SBC Complex,
Uttarahalli Main Road,
Subramanyapura Post, Uttarahalli,
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(By Sri. Sudarsana Reddy, Advocate for R1
Smt. H.H Sujatha, Advocate for R2 and R3,
R4-RERA served, unrepresented)

This Appeal is filed under Section 44 of the Real Estate (Regulation and Development) Act, 2016, praying to set aside the impugned order dated 02.08.2022 passed by Respondent No.4-RERA in complaint No. CMP/UR/200109/0005161.

These appeals having been heard and reserved for Judgment, coming on for pronouncement of Judgment this day, the Hon'ble Chairman pronounced the following:

J U D G M E N T

Since the facts and grounds urged in these two appeals are similar and arising out of the common order dated 2nd August, 2022 passed by the 4th respondent -Authority, they are clubbed together and disposed of by this common Judgment.

2. For the sake of convenience, the appellants are referred to as 'allottees', Respondent No.1 is referred to as 'promoter', Respondents 2 and 3 are referred to as 'land owners' and Respondent No.4 is referred to as 'the Authority'.

FACTS OF THE CASE:

3. The above appeals are preferred by the allottees of flats in a real estate project known as 'ANAND ENCLAVE' developed by the promoter in the layout called "ROYAL COUNTY", situated at Kothanur village, Uttarahalli hobli, Bangalore south taluk, within the jurisdiction of BBMP, against the common order of the Authority dated 2nd August, 2022 dismissing the complaints filed by the allottees and directing the promoter to take steps to obtain OC from the competent Authority.

4. That the allottee in Appeal No.65 of 2022, purchased a flat bearing No.009, in the ground floor of the said project from previous purchasers-Smt Archana Dayanand and Sri Dayanand Prabhudev

through a registered sale deed on 1.3.2019. It is stated that the vendors of the allottee had purchased the said flat from the promoter during the year 2016.

5. The allottee in Appeal No.66 of 2022 entered into an agreement of Sale and Construction Agreement with the land owners represented by its GPA holder-1st respondent-promoter for purchasing a flat bearing No.111, in the 1st floor of the said project "ANAND ENCLAVE" on 4.3.2015 and the promoter has executed a registered sale deed in favour of the allottee on 30.4.2016.

6. The grievance of both the allottees is that since the project was ongoing as on the date of the commencement of the Real Estate (Regulation and Development) Act, 2016 (for short, the 'Act'), the respondents 1 to 3 ought to have registered the project with the Authority, but till date they have not taken steps for registration of the project. It is further urged that inspite of executing the registered sale deeds in favour of the allottees, the promoter has failed to obtain occupancy certificate prior to coming into force of the Act. Aggrieved by the inaction on the part of the promoter to register their project and obtain Occupancy certificate, the allottees filed two separate complaints before the Authority praying to direct the promoter to get the project registered under RERA and to impose penalty of 10% of project cost as per Section 59 of the Act.

7. After issuance of notice in the complaints, the promoter appeared before the Authority through their counsel and filed objections denying the allegations made by the allottees as false. It is contended that the project was completed as far back as 24.4.2016 and the Architect has issued work completion certificate and all the apartments fallen to the share of the respondents were sold between 2016 and earlier to 1.5.2017., i.e., prior to the Act coming into force. Hence, the question of registering the project does not arise. Accordingly, the promoter prayed for dismissal of the complaints.

8. The Authority, after hearing both sides and perusing the documents produced by the parties, by common order dated 2nd August, 2022 though dismissed the complaints, issued direction to the promoter as under:

“In exercise of the power conferred under Section 31 of the Real Estate (Regulation and Development) Act, 2016, the complaints bearing no.CMP/UR/200109/0005161 and CMP/UR/200106/0005148 are hereby disposed of as under:-

Respondent is directed to take steps to obtain OC from competent Authority”.

9. Heard Sri G.Sridhar, learned counsel for the appellant-allottee, Sri S.Sudarsana Reddy, learned counsel for the 1st respondent- promoter, Smt. H.H Sujatha, learned counsel for

Respondents 2 and 3- land owners. Respondent No.4-Authority-though served, remained unrepresented.

10. Learned counsel for the allottees submits as under:

- that the impugned order passed by the Authority without appreciating the contentions raised by the allottees suffer from serious infirmity and is therefore liable to be set aside;
- that the Authority has erroneously accepted the contention of respondents that the sale deeds were executed in 2016 prior to coming into force of the Act and allottees have failed to produce any material to show that the project was ongoing as on 1.5.2017;
- the fact that the promoter has not obtained Occupancy certificate (OC) itself becomes a deficiency of service;
- that the conclusions drawn by the Authority that the project has been completed prior to the Act coming into force and it is exempted from registration is without consideration of the provisions of the Act;
- that Section 3 of the Act mandates registration of all new and ongoing projects, but inter alia exempts those projects from registration (i) for which completion certificate has not been issued prior to coming into force of the Act (ii) which are exempted from registration under proviso to sub-section 2 (a), (b) and (c) of Section 3 of the Act and (iii) which are ongoing

projects which satisfy the conditions enumerated under any one of the explanation (i) to (v) of Rule 4 of the Karnataka Real Estate (Regulation and Development) Rules, 2017 (for short, the Rules);

- that the expression "Completion Certificate" used in Section 3 and Explanation to Rule 4 of the Rules is the one issued by a competent authority as defined under Section 2(q) of the Act;

11. The learned counsel for the allottees by referring to definitions contained in Sections 2(q), 3 and Explanations (i) to (v) of Rule 4 of the Rules, submits that the impugned order passed by the Authority is without application of mind and liable to be set aside.

12. The learned counsel, further, by referring to the definition of 'allottee' as contained in Section 2(d) of the Act, submits that it includes subsequent purchaser, who is also entitled to maintain the complaint.

13. The learned counsel submits that the judgment of the Hon'ble Supreme court in the case of M/s. NEWTECH PROMOTERS AND DEVELOPERS PVT. LTD., Vs. STATE OF UP & ORS. ETC. **reported in 2021 SCC ONLINE SC 1044** applies retroactively to the project which has not been completed and for which completion certificate/occupancy certificate has not been issued prior to the Act coming into force, as referred to in Section 2(q) of the Act.

14. On these grounds, the learned counsel submits that the impugned order is not sustainable in law and is liable to be set aside, by allowing the appeals.

15. Whereas, the learned counsel appearing for the promoter submits that the Authority was justified in holding that as both the conditions-(i) execution of sale deed on 26.3.2016 and (ii) completion certificate issued by the Architect on 24.4.2016 have been fulfilled prior to coming into force of the Act, the project in question is not liable to be registered and is exempted from registration.

16. The learned counsel submits that the Authority holding Point No. (1) in the negative, ought not to have directed the promoter to obtain Occupancy certificate from the competent authority. However, he submits that there is no infirmity or illegality in the impugned order passed by the Authority warranting interference by this Tribunal and prays for dismissal of the appeals.

17. Smt Sujatha H H, learned counsel for Respondents 2 and 3 has filed written arguments and submits that the land owners have executed GPA in favour of the 1st respondent and they have nothing to do with regard to registering the project with the Authority or obtaining Occupancy certificate as per the provisions of the Act and it is for the promoter to prove that the project was not ongoing as on the date of the Act coming into force.

18. Learned counsel further submits that they are not necessary parties to the complaint as there is no privity of contract between the complainants and the land owners. However, she fairly submits that the order passed by the Authority is not in accordance with law inasmuch as the Authority has failed to adjudicate the issue whether the said project is exempted from registration or not. Instead, the Authority has held that the Complainants have not placed any material on record to show that the project was ongoing as on 1.5.2017 when the RERA Act came into force.

19. The learned counsel submits that the appeals may be disposed of remanding the matter to the Authority for fresh consideration, in accordance with law.

20. After hearing the learned counsel for the parties and perusing the impugned order, the points that arise for our consideration are:

“(i) Whether the Authority was justified in dismissing the complaints and directing the promoter to take steps to obtain OC from competent Authority?

(ii) Whether the impugned order passed by the Authority calls for interference at the hands of this Tribunal?

(iii) What order?”

Point Nos.(i):

21. The undisputed facts are that the 1st Respondent is a partnership firm engaged in the business of construction and sale of

residential apartments. Respondents 2 and 3 are the land owners who have entrusted the task of development of their land into residential apartments to the 1st respondent-promoter by executing a registered general power of attorney in its favour. One of the projects undertaken by the promoter is 'ANAND ENCLAVE' and the appellants are the purchasers of the flats in the said project.

22. To appreciate the rival contentions of the parties and the question whether the project is liable to be registered or exempted from registration, it is useful to refer to the relevant provisions of the Act i.e., Section 2(d), 2(q) and 3 of the Act:

"2. In this Act, unless the context otherwise requires,

Xx xxx xx

(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

Xx xx xx

(q) "completion certificate" means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws;

Xx xx

3 (1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required—

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

(c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

Explanation.—For the purpose of this section, where the real estate project is to be 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.

23. It is also relevant to refer to Rule 4 of the Rules, which reads as under:

"4. Additional disclosure by promoters of ongoing projects.-

(1) Upon the notification for commencement of sub-section (1) of section 3, promoters of all ongoing projects which have not received completion certificate shall, within the time specified in the said sub-section, make an application to the Regulatory Authority in the form and manner as specified in rule 3.

Explanation: For the purpose of this rule "Ongoing project" means a project where development is going on and for which completion certificate has not been issued but excludes such projects which fulfill any of the following criteria on the date of notification of these rules, namely:-

(i) in respect of layouts where the streets and civic amenities sites and other services have been handed over to the Local Authority and Planning Authority for maintenance;

(ii) in respect of apartments where common areas and facilities have been handed over to the registered Association consisting of majority of allottees;

(iii) where all development works have been completed as per the Act and certified by the competent agency and sale lease deeds of sixty percent of the apartments/houses/plots have been registered and executed;

(iv) where all development works have been completed as per the Act and certified by the competent agency and application has been filed with the competent authority for issue of completion certificate /occupation certificate; and

(v) where Partial occupancy certificate is obtained to the extent of the portion for which the partial Occupancy Certificate is obtained.

(2) The promoter shall in addition to disclosures provided in rule 3 disclose the following information, namely:-

(a) the original sanctioned plan, layout plan and specifications and the subsequent modifications carried out, if any, including the existing sanctioned plan, layout plan and specifications;

Explanation:- For the purpose of clause (ii) of sub-section (2) of section 14 of the Act, the Prior written consent of at least two third of the allottees would not be required if,-

(i) implementation of the proposed plan has already been disclosed to the allottees under the agreement prior to registration, or

(ii) modification is required to be made in compliance of any order or direction issued by competent authority or statutory authority. under the agreement for sale, the promoter is not required to obtain the consent of allottee in case of any alteration or addition to the apartment required by Government authorities or due to change in any law.

(b) the total amount of money collected from the allottees and the total amount of money used for development of the project including the total amount of balance money lying with the promoter; and

(c) status of the project (extent of development carried out till date and the extent of development pending) including

the original time period disclosed to the allottee for completion of the project at the time of sale including the delay and the time period within which he undertakes to complete the pending project, which shall be commensurate with the extent of development already completed, and this information shall be certified by an engineer, an architect and a chartered accountant in practice.

(3) The promoter shall disclose the size of the apartment based on carpet area even if earlier sold on any other basis such as super area, super built up area, built up area etc. which shall not affect the validity of the agreement entered into between the promoter and the allottee to that extent.

(4) In case of plotted development, the promoter shall disclose the area of the plot being sold to the allottees as per the layout plan.

(5) For projects that are ongoing and have not received completion certificate on the date of commencement of the Act, the promoter shall, within a period of three months of the application for registration of the project with the Authority, deposit in the separate bank account, seventy percent of the amounts already realized from the allottees, which have not been utilized for construction of the project or the land cost for the project as required under sub-clause (D) of clause (I) of sub-section (2) of section 4, which shall be used for the purposes specified therein:

Provided that if the receivable of the ongoing project is less than the estimated cost of balance construction, then the promoter shall deposit 100 per cent of the amounts to be realised in the separate account."

24. After coming into force of the Act, Section 3 mandates that all new projects and all projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the

Authority for registration of the said project within a period of three months from the date of commencement of this Act. However, certain projects are exempted from registration as per proviso to Section 3 of the Act.

25. The learned counsel for the promoter submits that the Authority was justified in answering Point No.1 in the negative. The promoter, except contending that all the flats in the project have been sold and completion certificate has been issued by an Architect prior to coming into force of the Act, has not demonstrated the said contention by producing sale deeds and Occupancy certificate issued by competent Authority. The promoter has not specifically contended that their project is exempted from registration under proviso to Section 3 of the Act, nor it is their case that though the project was an ongoing project, it is exempted from registration under any of the Explanations (i) to (v) Rule 4 of the Rules.

26. The promoter has neither specifically contended that their project was completed and completion certificate as defined under Section 2(q) of the Act was issued prior to coming into force of the Act nor it is their contention that it is exempted under proviso to Section 3 of the Act or any of the Explanations to Rule 4 of the Rules.

27. The reasons assigned by the Authority that since sale deeds have been executed and completion certificate has been issued

by the Architect prior to coming into force of the Act, and, therefore, the project is exempted from registration, cannot be accepted since, completion certificate referred to in Section 3 should be one as defined under Section 2(q) of the Act. It is to be observed that a promoter of a Real Estate Project after obtaining completion certificate from an architect could apply for obtaining completion certificate/occupancy certificate by the competent Authority.

28. Merely based on the Completion certificate issued by an Architect, no project can be exempted from registration. By a plain reading of explanation (iii) & (iv) of Rule-4 of the Rules makes it clear that where all development works have been completed as per the Act and certified by the competent agency and sale lease deeds of sixty percent of the apartments/houses/plots have been registered and executed and where all development works have been completed as per the Act and certified by the competent agency, the promoter could file an application with the competent authority for issue of completion certificate /occupation certificate.

29. The burden of proof that a Real Estate Project has been completed prior to coming into force of the Act and completion certificate has been issued by the Competent Authority as per Section 2(q) of the Act, lies on the promoter of the project. The said burden cannot be cast upon the allottee. It is the promoter who is required to discharge the said burden. Thus the Authority has

committed a grave error in holding that since the allottees have not proved that the project was an ongoing project by producing documents, the complaints are dismissed. Hence, the finding of the Authority on point no.1 is liable to be set aside.

30. That even in the absence of an appeal by the appellant challenging the second part of the operative portion of the impugned order directing the promoter to obtain occupancy certificate from the competent authority. The second part of the operative portion of the impugned order being consequential to first part of the impugned order, the same is liable to be set aside, even though promoter has not preferred an appeal challenging the said part of the order.

31. Accordingly, we answer Point No. (i) in the negative.

32. That in view of answering point No. (i) in the negative, point No.(ii) is answered in the affirmative.

33. Before parting with the case, we state that as per Section 44(5) of the Act, the appeals shall be disposed of within sixty days from the date of receipt of appeals. The appeals were filed before the Tribunal on 03.09.2022. After compliance of office objections, notices were issued to the respondents. After appearance of parties, the appeals were admitted and records were called for. The learned counsel appearing for the parties submitted their arguments and reply arguments. After hearing the learned counsel on both sides,

the appeals were listed for Judgment today. In the process, some time was taken. Hence, the appeals could not be disposed of within the time prescribed under Section 44(5) of the Act.

34. In view of the foregoing paragraphs, we pass the following:

ORDER

- i) The appeals are allowed;
- ii) The common impugned order dated 02.08.2022 passed by the 4th Respondent-Authority in complaint Nos. CMP/UR/200106/0005148 and CMP/UR/200109/0005161 is hereby set aside and the matter is remanded to the Authority for fresh consideration, in accordance with law and in the light of the observations made hereinabove, after affording opportunity to both sides;
- iii) Since the appellants-allottees and respondents have appeared before this Tribunal through their counsel, they are directed to appear before the RERA on 01.02.2023 without expecting further notice from RERA;
- iv) In the event if there is no sitting of the Authority on the said date, the matter may be taken up on the next date of sitting;
- v) In view of disposal of the Appeals, pending I.As, if any, do not survive for consideration and shall stand disposed of;

- vi) Registry is hereby directed to comply with the provision of Section 44(4) of the Act and to return the record to RERA, if received.

No order as to costs.

**Sd/-
HON'BLE CHAIRMAN**

**Sd/-
HON'BLE JUDICIAL MEMBER**

**Sd/-
HON'BLE ADMINISTRATIVE MEMBER**

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