

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

APPEAL (K-REAT) NO.31/2021

DATED THIS THE 2ND DAY OF AUGUST 2022

BETWEEN:

Zenith Resident's Association
Karle Zenith Residence
No.263 (Old Sy.No.94/1, 94/3
And 94/10), 100 Feet Road
Kempapura Main Road, Nagavara
Bengaluru Urban-560 045
Represented by its President
Mr. Munawar Pasha

:APPELLANT

AND

- 1) Karle Homes Private Limited
No. 151, Industrial Suburb
Yeshwantpur
Bengaluru Urban-560 022.
- 2) The Real Estate Regulatory Authority
Karnataka,
Having office at:
2nd Floor, Silver Jubilee Block,
Unity Building, CSI Compound,
3rd Cross, Mission Road,
Bengaluru - 560 027.
Represented by its Secretary

:RESPONDENTS

Hon'ble Judges/Coram

**HON'BLE JUSTICE B SREENIVASE GOWDA, CHAIRMAN
AND
HON'BLE SRI K P DINESH, JUDICIAL MEMBER
AND
HON'BLE SRI P S SOMASHEKAR, ADMINISTRATIVE MEMBER**

Counsels:

(M/s Trial Base, Advocates for Appellant)

(M/s Dua Associates, Advocates (Caveator) for R1)

(Sri Robert D'Souza, Advocate for R2-RERA)

This Appeal is filed under Section 44 of the Real Estate (Regulation and Development) Act, 2016 before the Karnataka Real Estate Appellate Tribunal, Bengaluru, to set aside the order dated 11th May 2021 in CMP/UR/200710/0006128 passed by the First Additional Bench, RERA.

This appeal having coming up for pronouncement of Judgment this day, the **Sri K.P Dinesh, Judicial Member**, Made the following:

J U D G M E N T

The "Zenith Residences" Association (hereinafter referred to as 'association' for short) which is an association constituted under the provisions of the Karnataka Apartment Ownership Act, 1972, (hereinafter referred to as 'the Act of 1972' for short) has preferred

this appeal challenging the impugned order dated 11.05.2021 passed by the Karnataka Real Estate Regulatory Authority (hereinafter referred to as 'the Authority' for short) in complaint No.CMP/UR/200710/0006128, by which, the complaint filed by the association has been rejected by exempting registration of the project under the provisions of the RERA Act.

Brief facts leading to this appeal are:

2. As averred in the complaint (Annexure-2), the appellant is a registered association constituted under the Act of 1972, comprised of all the apartment owners of the residential apartment called "Zenith Residences" developed by the 1st respondent-Karle Homes Private Limited (hereinafter referred to as 'promoter' for short); as per the scheme of project, every purchaser of an apartment has got proportionate and undivided interest in the schedule-A property on which the project was undertaken and the said terms has been specifically incorporated in the construction agreement entered into between the promoter and the homebuyers; in the broacher/prospectus published by the promoter, it was notified that the said project includes the following amenities and facilities:

“(i) Gymnasium (ii) Mediation room (iii) Billiards room (iv) Jacuzzi (v) Home theater (vi) Library, dance & music hall (vii) **Relaxation Healthclub** (viii) Laundry room (ix) Doctor’s clinic (x) Café, saloon (xi) Kid’s pool (xii) Swimming pool (xiii) Creche (xiv) Aerobics and (xv) Terrace golf.”

3. Pursuant to the said brochure, Home buyers/Association Members entered into an agreement to sell with the promoter in which the promoter assured that the purchaser has undivided interest in schedule-A property; even in the construction agreement entered into between the prospective purchasers and developer, the facilities and amenities to be provided to the purchaser have been categorically incorporated. It is alleged that the promoter has failed to get the said project registered after commencement of the Karnataka Real Estate (Regulation and Development) Act, 2016, (hereinafter referred to as ‘the RERA Act’ for short), as the said project was an ongoing project, inasmuch as no occupancy certificate has been issued on the date of commencement of Act and that Occupancy Certificate was issued on 14.12.2017. The complainant produced the registered sale deed dated 28.09.2018 (document No.9) and contended that execution of sale deed was after commencement of the Act. The promoter vide e-mail communication dated **04.12.2012** addressed to one of the

homebuyer specifically stating that 'clubhouse', 'party halls' situated in the ground floor of tower A and C and premium lounge situated on the 13 floor of the project are part and parcel of the project; based on the said e-mail communication the homebuyers of the project, were all along under the impression that the said club house is also part and parcel of the project and they are having undivided share over the same; to the utter shock of the homebuyer the promoter, while executing registered sale deeds in favour of the respective homebuyers, has unilaterally incorporated a clause retaining the ownership of the clubhouse, party halls and the premium lounge of the project; as such, the homebuyers were not in a position to negotiate for change of the said clauses, as they were at the risk of losing the money invested by them; by virtue of incorporation of the said clauses unilaterally, the promoter deprived the homebuyers from their legitimate right of ownership over the clubhouse, party halls and the premium lounge which are part and parcel of schedule-A property on which the project has been developed, the promoter while transferring all the common areas to the association has refused to transfer the clubhouse, party halls and the premium lounge and on the contrary, issued a demand notice to all the homebuyers who are the members of the association to pay a sum of Rs.2000/- as subscription fee for the

clubhouse apart from receiving a sum of Rs.3,50,000/- from each homebuyers towards membership fee; the promoter has no right to claim ownership and possession over the clubhouse, party halls and the premium lounge; the members of the association submitted their reply (document No.12) to the demand notice issued by the promoter on 04.07.2020; since, the clubhouse, party halls and the premium lounge are part and parcel of the entire extent land comprised in schedule-A property and as per the terms contained in the agreement to sell, construction agreement and the sale deeds, the respective homebuyers has got undivided share over the schedule-A property. Hence, the promoter cannot claim exclusive ownership or possession over the clubhouse, party halls and the premium lounge inasmuch as the promoter has already sold the said clubhouse to various homebuyers while executing sale deed in their favour; the promoter, while executing deed of declaration in favour of the association clearly admitted that the clubhouse consisting of 1,98,198 square feet is a part and parcel of schedule-A property and thereby the promoter who sold the undivided share including the clubhouse to 398 homebuyers estopped from claiming any right over the clubhouse; it is further averred that as mentioned in schedule-D of the construction agreement, the construction includes the list of amenities mentioned therein including the clubhouse which is

described in schedule-B and the cost of construction of the said clubhouse collectively borne by the 398 homebuyers and the promoter has no right or authority to claim ownership over the clubhouse, inasmuch as those conditions incorporated in the agreements are irrevocable clauses and the promoter cannot skewed against the homebuyers by retaining the ownership of the clubhouse with him and the same is nothing but cheating the homebuyers and would result in unfair trade practice; at the time of signing the booking form and in the prospectus, the promoter did not disclose to the homebuyers that he intends to retain the ownership of the clubhouse with him; the homebuyers, for the first time, came to know about the intention of the promoter to retain the clubhouse with him only after receipt of draft sale deeds; as the promoter was at a dominant position and the homebuyers were in subservient position, they have not challenged the unilateral clauses imposed on them by the promoter; the definition of 'common areas' contained in Section-2 (n) of the RERA Act, would mean that the entire land of a project and all commercial facilities of the real estate project; as per Section-3(f) of the Act 1972, common areas include community and commercial facilities; as per law, immediately after a period of three months from the date of issuance of occupancy certificate, the promoter is bound to execute a registered conveyance deed in

favour of the association of the homebuyers of a real estate project regarding undivided title in the common area of the entire project including the clubhouse which is covered under the definition facilities/amenities to be provided in a real estate project but, the promoter has failed to execute such conveyance deed and hand over possession of the clubhouse to the association and thereby violated the provisions of Section-17 of the RERA Act and the provision of the Act 1972; it is averred that commencement certificate (document No.04) of the project has been issued on 02.02.2013 and occupancy certificate (document No.08) has been issued on 14.12.2017 and, hence, the project is required to be treated as an ongoing project and the promoter is required to register the project with the Authority, as contemplated under Section-3 and 4 of the RERA Act; since, the promoter has not at all registered the project with the RERA, huge penalty is to be imposed against the promoter and he be directed to get the project registered. It is relevant to refer to the reliefs sought by the association which reads thus:"

"5.1 Direct the respondent to handover physical possession of the clubhouse, party halls and premium lounges constructed in the real estate project called 'Zenith Residences' on immoveable property bearing Sy.No.94/1, 94/3 and 94/10 of Nagavra Village presently bearing

municipal khata no.236 to petitioner association in terms of the provisions of the Act.

5.2 Direct the respondent to register the project under Section-3 of the R. E. (R &D) Act, 2016 and to levy and impose penalty on the respondent amounting to 10% of the estimated cost of the project for having failed to register the real estate project under Section-3 of the R.E. (R & D) Act, 2016.

5.3 Direct the respondent to refund the amount of Rs.3,50,000/- (Rupees Three Lakhs Fifty Thousand Only) collected from all the members of the Complaint Association as membership fees of the Clubhouse constructed in the Residential Apartment complex called 'Zenith Residences' along with an interest of 18% p.a.

5.4 To levy and impose penalty on the respondent having failed to form an association within 3 months from the date of majority of Allottees having booked their apartments, as per Section-11(2) (e) of the Act.

5.5 Restrain the respondent builder from collecting any subscription charges in respect of the Club House formed in the real estate project from the members of the Complainant Association by directing the respondent to recall the demand for payment of subscription charges.

5.6 Restrain the respondent from alienating the clubhouse or inducting any third parties into possession of the clubhouse."

4. During the enquiry before the Authority, the promoter appeared through counsel and contested the case by filing objections. On evaluation of the materials on record, by the impugned order, the said complaint has been rejected by the Authority. The operative portion of the impugned order reads thus:

“In exercise of the powers conferred under Section-31 of the Real Estate (Regulation and Development) Act, 2016, the complaint filed by the Zenith Residents Association is hereby rejected.

And further in exercise of the powers conferred under Section-3, 4 of the Act read with Rule 4(1)(iv) of the Real Estate (Regulation and Development) Rules, 2017, it is hereby ordered that the project “Zenith Residences” is exempted from registration under the provisions of the Act”

Being aggrieved by the said order, homebuyers association has preferred the present appeal.

5. We have heard Sri. E. Suhail Ahmed for M/s Trial Base, learned counsel appearing for the appellant-association, Sri. Abhishek for M/s Dua Associates, learned counsel appearing for the 1st respondent-promoter, Sri. Robert D’Souza, learned counsel appearing for the 2nd respondent-RERA and perused the records.

Submissions of the parties:

6. Sri. E. Suhail Ahmed, learned counsel appearing for the appellant submits that the appellant is an Association of the

apartment owners comprising all the apartments of residential building called "ZENITH RESIDENCES" constituted under the provisions of Karnataka Apartments Ownership Act 1972, by virtue of deed of declaration along with the Bye-Laws of dated 30.11.2021 registered in the office of Sub-Registrar, Gandhinagar (Hebbal), Bangalore. The appellant association has been given charge of the maintenance and upkeep of the common areas and facilities of the real estate projects by the 1st Respondent on 14.12.2019. It is submitted that on the basis of the brochure/prospectus, the appellant signed the booking form expressing their members interest to purchase undivided share in schedule A Property and for construction of their respective apartments with the Respondent No.1 by paying a token advance ranging from 5 lakhs to 10 lakhs and 1st Respondent has issued allotment letters in this regard. It is the submission of the learned counsel for the appellant that the project developed by the 1st Respondent includes amenities and facilities like club house which includes Gymnasium, Meditation room, Billiards room, Jacuzzi, Home theatre, Library, dance & Music hall, Relaxation health club, Laundry room, Doctor's clinic, Café, Saloon, Kid's Pool, Swimming Pool, Creche, Aerobics and Terrace Golf. The appellant has also entered into an agreement to sell with the 1st Respondent and the 1st Respondent offered to sell and the

appellants had accepted to purchase their share in the schedule A property described as schedule B in the agreement. The 1st Respondent has also entered into a construction agreement with the appellant to construct residential apartment which was described in schedule C as per the specifications mentioned in the Schedule D of the said agreement for a consideration specified in schedule E of the said agreement. The amenities that were to be provided by the 1st respondent amongst other things included i) A fully equipped Club House with lounge, ii) Swimming Pool and a separate children pool, iii) Health Club with a gymnasium, steam room, sauna and Jacuzzi, iv) Indoor badminton and squash court, v) Games room with billiards table, table tennis, card games, etc, vi) Party hall, vii) Cafe, and viii) Premium Lounge at 13th Floor in Block 'A' and 'C'. It is submitted that the 1st respondent had obtained the Occupancy Certificate on 14.12.2017, without completing all the external and internal development works though the project was an ongoing project required to be registered under the Section 3 of the Act. It is the submission of the learned counsel that the 1st respondent has inserted the clauses in Sale Deed and unilaterally executed a deed of declaration reserving a right and use of the club house and other facility in the project in perpetuity, having collected the money from the appellant in the project towards the cost of the club house and

in contravention of provisions of the Act, which requires that all common areas as defined under Section 2(n) of the Act be transferred to the Association of the allottee under Section 17 of the Act. The appellant having invested huge sum of money for purchase of their respective share of undivided interest in the schedule A property were in a subservient position to the 1st Respondent and as such the Apartment Owners are not in a position to negotiate the change of clauses at the risk of losing the investment made by them. As per the terms of the construction agreement the cost of club house, party halls and the premium lounges were borne by the Apartment Owners and 1st respondent has no right, title and interest over the same. It is submitted that during the course of the proceedings before the Authority appellant filed interlocutory application under Section 35 of read with Rule 29(f) of the Karnataka RERA Rules seeking a direction and 1st respondent has also filed objection to the same but the authority has not passed any order. The Authority below after raising two points i.e one regarding the club house and the other regarding registration of the project under the Act rejected the complaint as one without merit and held that the project is exempted from registration under Sections 3 and 4 of the Act read with Rule 4(1)(4) of the Act.

7. On the contrary the learned counsel for the 1st Respondent submitted that the project in question is not required to be registered under the RERA Act as per Section 3(2)(b) where the promoter has received completion certificate prior to the commencement of the RERA Act. It is submitted that all developmental work have been completed as per the Act and certified by the competent agency and the application has been filed with the competent Authority for issuance of completion certificate/occupancy certificate in view of the explanation (iv) to Rule 4(1) of RERA Rules. It is the submission of 1st Respondent that all developmental works have been completed under the Act and the project is exempted from registration. It is the submission of the learned counsel for 1st Respondent/promoter that the Respondent No.1 has obtained the completion certificate on 20.10.2015 and the required application for grant of occupancy certificate was filed on 22.08.2016 and the BBMP officers issued an endorsement on 27.04.2017 after inspecting the project that the developmental works are all completed and that the issuance of occupancy certificate is under consideration. R1 had obtained the completion certificate and filed an application to BBMP for issuance of occupancy certificate and the BBMP had issued an endorsement regarding completion of developmental works prior to 01.05.2017. Thus the

Real Estate project of the R1 clearly falls under the explanation (iv) to Rule 4 and is not liable to be registered under Section 3 of the Act. It is the submission of the learned counsel for 1st Respondent that under section 428 of KMC Act 1976 the building bye Laws of BBMP have been framed and published by the Government of Karnataka. Issue of completion certificate, occupancy certificate and the authority empowered to issue such certificate is specified in the bye laws under rule 5.6.1 of the building bye laws. The competent Authority for issuance of completion certificate is the registered architect/engineer. The Competent authority to issue occupancy certificate is the commissioner or any other officer to whom powers are delegated by the commissioner under rule 5.6 read with 2.7 of BBMP bye laws.

8. Both appellant and the 1st Respondent relied on certain Judgments in support of their contentions.

9. In view of the above, following points arise for our consideration:

Point No.1:- Whether the project in question falls under Rule 4(i)(iv) of Karnataka RERA Rules and does not require registration under Section-3(1) of the Act? If so, whether the provisions of the Act and Rules can be made applicable to such project?

Point No.2:- Whether the impugned order dated 11.05.2021 passed by the learned Authority calls for interference by this Tribunal?

Point No.3:- What Order?

REASONS

10. **Points No (1) & (2):**

Since points No. (1) & (2) involve common question of law and facts they are taken up together for discussion in order to avoid repetition. Before advertng to the above issue, it is just and necessary for this Court to refer to the provisions of Section-3 of Chapter-II of the RERA Act, which contemplates registration of a real estate project as well as exemption from such registration, as contained in the RERA Act, which reads as under:

Prior Registration of Real Estate Project with Real Estate Regulatory Authority.

Section 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 the stage of registration.

(2)xxx

(a) xxx

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

(c) xxx

(Emphasis supplied)

It is also relevant to refer to 'common areas and facilities' as defined under Section-3 (f) (7) of the Karnataka Apartment Ownership Act, 1972, which reads thus:

"3. Definitions-

(f) 'Common areas and facilities', unless otherwise provided in the Declaration or lawful amendments thereto, means-

- (1) the land on which the building is located;
- (2) the foundations, columns, girders, beams supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire-escapes, entrances and exits of the building;
- (3) the basements, cellars, yards, gardens, parking areas and storage spaces;
- (4) the premises for the lodging of janitors or persons employed for the management of the property;
- (5) installations of central services, such as power light, gas, hot and cold water, heating, refrigeration, air-conditioning and incinerating;
- (6) the elevators, tanks, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for common use;
- (7) such community and commercial facilities as may be provided for in the Declaration; and
- (8) all other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use"

The word 'common areas' is also defined under Section-2 (n) of the RERA Act which reads thus:

2. (n) "common areas" mean—

- (i) the entire land for the real estate project or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase;
- (ii) the stair cases, lifts, staircase and lift lobbies, fire escapes, and common entrances and exits of buildings;
- (iii) the common basements, terraces, parks, play areas, open parking areas and common storage spaces;
- (iv) the premises for the lodging of persons employed for the management of the property including accommodation for watch and ward staffs or for the lodging of community service personnel;
- (v) installations of central services such as electricity, gas, water and sanitation, air-conditioning and incinerating, system for water conservation and renewable energy;
- (vi) the water tanks, sumps, motors, fans, compressors, ducts and all apparatus connected with installations for common use;
- (vii) all community and commercial facilities as provided in the real estate project;
- (viii) all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use;

As provided under Section-17 of the RERA Act, the promoter is bound to execute a registered conveyance deed in favour of the allottee along with undivided proportionate title in the common areas to the association of the allottees within three months from the date of issue of occupancy certificate. Section-17 of the RERA Act reads thus:

“17. Transfer of title.—(1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment or

building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

(2) After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to hand over the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws:

Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the occupancy certificate."

It is relevant to note that the 1st respondent-promoter filed a memo dated 16.03.2022 which reads thus:

"The undersigned counsel most respectfully submits as follows:

1. The Respondent NO.1 has retained ownership of the Club House and Premium Lounges-1 and 2 in terms of the respective sale deeds with the purchasers and the Deed of Declaration (as amended) dated 30.11.2018 (as per the Karnataka Apartment Ownership Act,

1972). The respondent No.1 has retained and continues to be the absolute owner of the Club House and Premium Lounges-1 and 2 along with the proportionate Undivided Share in the land. In terms of the said documents the purchasers/residents of Zenith Residences are entitled to use the Club House facilities on payment of the initial membership fee, monthly subscription fee and upon adherence of all the rules, regulation and covenants in the above-mentioned documents.

2. The Respondent No.1 submits that, in the event of the future sale of the Club House to a third-party purchaser, the covenants pertaining to the Club House as embodied in Clause 27 to the Deed of Declaration (as amended) shall specifically incorporated as a covenant in such transfer deed so as to be binding on a subsequent purchaser of the Club House.

11. The main thrust of contentions raised by the learned counsel for the appellant/complainant is that the project in question is an "ongoing project" and all developmental works as per the Act have not been completed and the project requires registration under the provisions of the Act. It is the further contention of the appellant that the respondent/promoter having given charge of the maintenance and upkeep of the common areas and facilities of the project is precluded from retaining the ownership of the club house

and other amenities under sale deed and deed of declaration which are unilateral in nature. The learned counsel for 1st Respondent/promoter contended that the appellant has agreed for retention of the ownership of the clubhouse as per the construction agreement, sale deed and deed of declaration and having taken possession of the respective flats now cannot come around and demand handing over of the ownership of the clubhouse. It is further contended by the learned counsel for the 1st Respondent that the project in question was completed much prior to the advent of the KRERA Act and the project is not liable to be registered, as it does not fall within the purview of "ongoing project" and alternatively contended that even if the project in question is an "ongoing project" it falls within the exemption 4(1)(iv) of the Rules and not subjected to registration.

12. In the back drop of this submission let us examine the case on hand. Since the question of registration of the project is involved in the case on hand the same has to be taken up for discussion on priority as it goes to the root of the case. First proviso to Section-3 (1) of the Act provides that the projects which were ongoing on the date of commencement of the Act and for which, the completion certificate has not been issued, shall make an application to the learned Authority for registration of the said project within a

period of three months from the date of commencement of the Act. The position further becomes clear from Section-3 (2) (b) of the Act that registration of a real estate project shall not be required where the promoter had received the 'completion certificate' for the said project prior to the commencement of the Act. Thus, if we read section-3 of the Act, it is evident that only those projects are excluded from the purview of the 'ongoing project' which had received the 'completion certificate' prior to the commencement of the Act and such projects would not require registration. It is the submission of the learned counsel for the promoter that the project was completed prior to the advent of RERA Act and Rules and hence, the project is exempted from registration, and the promoter is totally absolved from the obligation of the provisions of the Act.

13. Admittedly, project was completed and completion certificate was obtained by the promoter on 20.10.2015 as per document No.5 in appeal memo page No.378 from the competent Agency much prior to the commencement of the Karnataka RERA Act and Rules. According to the promoter project was completed in all respect and the apartments were sold to the prospective allottees and also physical possession of the entire project was handed over to the apartment owners association on 14.12.2019. The contention of the promoter is that the RERA Act came into force in from 1st day

of May, 2016 and the provisions of the Act applicable only for the new projects and the project which are ongoing as on the date on which it came into force and that the Authority ought not to have entertained the complaint filed by the allottee.

14. Section-3 of the Act provides for registration of a real estate project with the Real Estate Regulatory Authority and Section 3 (1) mandates that no promoter shall advertise, market, book sell or offer for sale, or invite persons to purchase in any manner any flat, 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 the Act. The proviso to Section-3 (1) mandates that the project 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. The parliament intended to bring within the fold of the statute the 'ongoing real estate project' in its wide amplitude used the term 'converting and existing building or a part thereof into apartment' including every kind of developmental activities either existing or upcoming in future under Section-3 (1) of the Act, the intention of the legislature by necessary

implication and without any ambiguity is to include those projects which were ongoing and in cases where completion certificate has not been issued within the fold of the Act. Section-3 (1) which was mandated that such of the projects which are ongoing on the date of commencement of the Act and more specifically the project in respect of which completion certificate is not issued, such promoter is under the obligation to make an application to the Authority for registration of the said project within a period of three months from the date of commencement of the Act. Certain exemptions being granted to such of the projects covered under proviso to Section-3(1) of the Act, as a consequence, on such home buyers agreements which have been executed by the parties inter se have to abide by the legislative mandate in completion of their ongoing projects. The term 'ongoing project' has not been so defined under the Act, the expression 'real estate project' is defined under Section 2 (zn) of the Act. The expression 'ongoing project' has been defined under explanation to Rule-4 (1) which reads thus:

"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.

15. The expression 'completion certificate' has been defined under Section-2 (q) and 'occupancy certificate' under Section-2 (zf) of the Act which reads as under:

"2 (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;

2 (zf): 'occupancy certificate' means the occupancy certificate, or such other certificate by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity;"

16. The above provisions of the statute by necessary implication, *ex facie* and without any ambiguity include all those projects which were 'ongoing' where 'completion certificate' or 'occupancy certificate' remain pending, legislature intended that those projects have to be registered under the Act. Therefore, the ambit of the Act is to bring all those projects in respect of which either 'completion certificate' or the 'occupancy certificate' as the case may be have not been issued. Section-3(2)(b) which expressly excludes those projects where completion certificate has been

received prior to commencement of the Act such project need not be registered under Section-3(2)(b) of the Act and, therefore, the intent of the Act hinges on whether or not the project has received a 'completion certificate' on the date of commencement of the Act. The Hon'ble Apex Court in ***M/S Newtech Promoters and Developers Private Limited -vs- State of UP and others(2021 SCC On Line SC-1044)*** has held that the provisions of the Act is retroactive insofar as it relates to 'ongoing projects' but retroactive does not mean retrospective. The relevant passages of the Judgment of the Bombay High Court in ***Neelkamal Realtors Suburban Private Limited*** observed that the Legislators were conscious of the impact that the Act would have on such 'ongoing project'. A collective reading of Section-3 with Section-2(o) and 2 (zn) indicates that the care was taken to specify which of the project would stand exempted. Section-3(2)(b) of the Act is categorical that no registration of the project would be required where the promoter has received the completion certificate for a Real Estate Project prior to commencement of this Act'. From the scheme of the Act, 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and, therefore, vested or accrued rights, if any, in no manner are

affected. At the same time, it will apply after getting the 'ongoing projects' and 'future projects' registered under Section-3 would prospectively follow the mandate of the Act, 2016. As has been discussed, the project in question has been completed and for which 'completion certificate' dated 20.10.2015 has been issued by the competent agency. Under the statute while defining Section-2(q) and Section-2(zf) it has been clearly stated that 'completion certificate', 'occupancy certificate' or by such other certificate by whatever name called issued by the competent agency/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.

17. As far as the state of Karnataka is concerned the authorities to issue the completion certificate and occupancy certificate are specifically mentioned under BBMP building bye laws and same has been mentioned in Rule 5.6.1 of building bye laws, of competent agency/authority (BBMP) is the registered Architect/Engineer as per schedule VIII and competent authority is BBMP as per schedule IX of the building bye laws. The Authority empowered to issue occupancy certificate is the commissioner under Rule 5.6 of building bye laws or any other officers to whom power are delegated by the commissioner as per Rule 2.7 of the BBMP bye

Laws. The learned counsel Sri Suhail Ahmed for appellant contended that the issuance of completion certificate and filing application for occupancy certificate on the basis of the same itself is not completion of all the developmental work as per the Act and any such document issued by the Authority is a bogus document. It is further contended that the internal and external works are not completed and the completion certificate issued by the architect does not satisfied the requirement of Rule 4(1)(iv) of the Karnataka RERA Rules. Admittedly, the 1st Respondent/promoter procured completion certificate from the registered architect on 20.10.2015 as per the requirement of Section 3(2)(b) of the Act. The promoter has filed an application for occupancy certificate along with the completion certificate before the competent Authority (BBMP) on 22.08.2016 much prior to the advent of Section 3(1) of the Act and the competent Authority in turn issued the confirmation letter dated 27.04.2017 to the promoter stating that work in respect of the project is completed and the Authority is in the process of issuing occupancy certificate. The endorsement dated 27.04.2017 issued by the competent Authority (BBMP) discloses that Authority has inspected the project on 22.04.2017 and satisfied that the developmental work is completed as per the sanction plan and other specification contemplated in the license. The competent Authority

(BBMP) issued the occupancy certificate in respect of the project in question on 14.12.2017. The learned counsel for the promoter at the initial stage of his argument claimed exemption of the registration of project under Section 3(2)(b) and subsequently he has alternatively contended that the project is also exempted under Rule 4(1)(iv) of the Karnataka RERA Rules. The promoter being a defendant/Respondent before the Authority as well as this Tribunal can take inconsistent or alternative defenses. However according to the appellant/complainant in the present case on hand the project is an on-going project and falls within the purview of Section 3(2)(b) or Rule 4(1)(iv) of the Act. Hence whether project falls within Act or Rules or both is a matter for consideration in the appeal. For better appreciation of the Karnataka Real Estate (Regulation & Development) Rules same is reproduced here under:

Rule 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 per cent of the apartments/house/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.

18. It is born out from the records that the promoter has procured the completion certificate issued by the competent agency/architect much prior to the date of commencement of Section 3(1) of the Act. However as could be seen from the very document completion certificate at page number 378 of the appeal memo document No.5 discloses that the principle engineer has only certified that the building is designed based on the architectural plans and reference to BBMP plan approval dated 25.07.2012. The above said document doesn't divulge that all development works have been completed as per the Act as required under Rule 4(1)(iv)

of the Rules. So to say that the completion certificate dated 20.10.2015 document No.5 is only a certificate issued by an architect that the building is erected as per the sanctioned plan. Hence, the said document can be a supportive document for the promoter to apply for occupancy certificate with the competent authority (BBMP). Act is a central Act and in northern part of the states "Completion Certificate" is prevalent and different states have distinct nomenclature as the case may be for the certificate to be issued by competent authorities/local bodies. It may be in the above contest the legislature has used the phrase completion certificate/occupancy certificate by whatever name in the definition of completion certificate and occupancy certificate which made the legislature to insert the word completion certificate in section 3(1) and 3(2)(b) of the Act. Since the act is pan India considering the various nomenclature used by different parts of the State the word "completion certificate" used in Section 3(1) and 3(2)(b) of the Act. The above fact is evident from Rule 4(1)(iv) of Karnataka RERA Rules phrase "completion certificate/occupancy certificate" is used. But in Karnataka as already discussed above the Authority for issuance of "completion certificate" and "occupancy certificate" are different i.e. competent agency and competent authority as per the building bye law and Rules of BBMP. Therefore in Karnataka the

phrase "completion certificate" in section 3(1) and 3(2)(b) is to be read as "occupancy certificate" issued by the competent authority (BBMP). Accordingly we find that the present case tilts much on Rule 4(1)(iv) of the Rules rather than Section 3(2)(b) of the Act. Further ***the Hon'ble High Court of Adjudicator at Bombay in M/s Microtech Developers Ltd while accepting the submission of the learned senior counsel for the petitioner observed that the scope of proviso to Section 3(1) and Section 3(2)(b) can never be the same or overlapping and that would amount to or attributing surplusage to legislature which could never have been the intention.***

19. The above stated Rule 4(1)(iv) mandates that all developmental works of the project have been completed as per the Act and certified by the competent agency and the application has been filed by the promoter with the competent Authority for issuance of completion certificate/occupancy certificate. In the case on hand the promoter after obtaining the completion certificate from the Registered Architect/Engineer has applied for Occupancy Certificate to the competent local Authority i.e., BBMP. The Competent Authority has inspected the project and issued an endorsement dated 27.04.2017 stating that the construction work is completed and the issuance of Occupancy Certificate is in the

process. The fact that the promoter has filed the application for issuance of Occupancy Certificate on the basis of the Completion Certificate issued by the competent Agency and the developmental work of the project is done in accordance with the sanction plan and specification and whether it is open for the appellant to contend that the document issued by the competent authority under the Act is bogus and cannot be considered by the RERA Authority/Appellate Tribunal constitute under the RERA Act. It appears that the appellant is virtually disputing the completion certificate and the occupancy certificate issued by the competent agency and the competent Authority. The appellant if at all is aggrieved and is disputing the completion certificate and Occupancy Certificate issued by the competent agency and Authority as the case may be under the relevant provisions of the Act governing the subject the recourse open to respondent is to challenge the same under the relevant provisions of the said Act and the RERA Authority/Appellate Tribunal constituted under the RERA Act cannot sit on the said order of the competent Authority. The RERA Authority or this Tribunal cannot attempt to dissect the said certificate which amounts to usurping the Jurisdiction of the Appellate Authority constituted under the provisions of the BBMP Act having jurisdiction over the matter. The promoter procuring the completion certificate from the competent

agency having applied for occupancy certificate with the competent authority prescribed under the Act has done his part of the duty as required under Rule 4(1)(iv) of the RERA Act. It is also pertinent to note that it is not the case of the appellant that promoter has obtained the completion certificate and the occupancy certificate from the concerned agency/authority by illegal means. Under the circumstance it is for the competent agency/authority to go into the details of the other requirement of Rule 4(1)(iv) while issuing the above said certificates. If the appellant has got any grievance regarding the manner in which the competent agency/authority acted in issuing the completion certificate/occupancy certificate the course would be open to challenge the same. Admittedly, no steps are taken by the appellant association against the competent authority which issued the occupancy certificate pursuant to the issuance of the completion certificate. On facts the appellant's association has taken charge of the maintenance and up keep of common areas and facilities of Real Estate Project on 14.12.2019. The sale deed in respect of the flats of the residence association was executed by the respondent No.1 on 28.09.2018 and subsequently "Zenith Residences" was constituted under the provisions of KAO Act 1972 by a deed of declaration along with bye laws on 30.11.2021. It is born out from the record that before execution and registration of

the sale deed a draft has been provided to the allottees by the promoter and the allottees were acquainted with the contents of the draft sale deed. The appellant allottees knowing fully well the contents of the sale deed have consented for the same and now disputing the recitals in the sale deed regarding the club house and premium lounges 1&2 by filing complaint in question dated 10.07.2020. Hence, it is made out that on facts also the appellant is not diligent in prosecuting the complaint. The 1st Respondent/promoter has obtained the completion certificate on 20.10.2015 and filed application for grant of occupancy certificate on 22.08.2016 and BBMP officers issued an endorsement on 27.04.2017 after inspecting the project that the developmental works are all completed and the issuance of occupancy certificate is under consideration itself is a clear compliance of Rule 4(1)(iv) of Karnataka RERA Rules. For above said position of law and facts we find no substance in the contention of the appellant that the completion certificate and occupancy certificate issued by the competent authority is a bogus certificate and on the contrary we incline to hold that the project in question of the promoter falls squarely within the ambit of Rule 4(1)(iv) of the Karnataka RERA Rules and totally exempted from registration under Section 3(1) of the Act.

20. Now coming to the second part of the point No.1 when registration of the project is exempted and the project in question doesn't required registration then whether the provisions of the Act is to be made applicable to the project is a matter for consideration in this appeal. In this regard it is relevant to state the second proviso to section 3(1) of the Act and same is reproduced hereunder

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 there under, shall apply to such projects from the stage of registration.

21. If the above proviso is perused it is abundantly clear that provisions of the Act or Rules and regulations made thereunder shall apply to such project from the stage of registration. That means to say that provisions of the Act or Rules and regulations made thereunder shall apply to the projects stated in the said proviso from the stage of registration. Hence, the registration of the project is the decisive factor to make the application of the provisions of the Act and Rules. This issue has been dealt by ***the Hon'ble High Court of Adjudicator at Bombay in Neelkamal Realtors Suburban Private Limited*** observed as under:

The provision of the Act is retroactive in so far as it relates to "ongoing" project but retroactive does not mean retrospective. Section-3(2)(b) of the Act is categorical that no registration of the project would be required where 'if the promoter has received the completion certificate for real estate project prior to the commencement of this Act'. From the scheme of the Act, 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and, therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the 'ongoing projects' and 'future projects' registered under Section-3 would prospectively follow the mandate of the Act, 2016.

22. From the above it is clear that no registration and no application of the provisions of the Act. When such being the case the 2nd Respondent-RERA Authority ought not to have entertaining the complaint filed by the Appellant/Complainant. We understand that it is little harsh to take such a legal stand but to give a logical end to the situation there is no other option except to keep the project which are not required to be registered outside the purview of the Act.

23. Now coming to the operative portion of the impugned order passed by the 2nd Respondent we notice that in the 1st part the 2nd respondent-Authority has rejected the complaint and on the 2nd Part the project in question has been exempted from registration under the provisions of the Act by referring to Section 3 and 4 of the

Act read with Rule 4(1)(iv) of the RERA Rules. We have noticed that the 2nd Respondent has raised two issues:

- 1) Whether the club house was part of the transaction of sale in favour of the homebuyers.
- 2) Whether the project "Zenith Residences" is required to be registered under the provisions of the Real Estate (Regulation and Development) Act, 2016.

24. The 2nd respondent ought to have taken the 2nd issue on priority for discussion as the same goes to the root of the case however, the learned Members have taken up 1st issue for discussion when it depends on the outcome of the 2nd issue. Further it could be seen from the impugned order at the bottom of the page 28 it is observed that promoter has created a permanent interest on the common area by way of deed of declaration registered with sub-registrar, Gandhinagar. This needs to be dealt with by competent court. The above finding of the Authority is per se contrary to the provisions of the Act. Under Section 79 of the Act there is a total bar of Jurisdiction of the Civil Court in respect of the subject covered by RERA Act. In this appeal it may not be relevant to go in to the legality of the sale deed or deed of declaration as the project is not required to be registered under the Act and hence, no application of the provisions of the Act. When such is the position the Authority ought not have dealt with the first issue at the first instance.

Coming to the operative portion of the impugned order the Authority at first para rejected the complaint and that at 2nd para exempted the registration of the project referring to section 3 and 4 of the Act read with Rule 4(1)(iv) of the Karnataka RERA Rule. As already discussed above Section 3 and Rule 4 are quite different and distinct and not over lapping. The impugned order is not clear whether the project was exempted under Section 3(2)(b) or Rule 4(1)(iv) of the Rules and hence requires modification and the points are answered accordingly.

25. Before parting with the case we state that as per Section 44(5) of the Act, the appeal shall be disposed of within sixty days from the date of receipt of appeal. The appeal on hand originally filed before the interim Tribunal and same was transferred to this Tribunal in January, 2020. Thereafter to secured the appearance of the parties sufficient long time was taken. Further there was a lock down due to Covid-19 pandemic and for all forgoing reasons the appeal could not be disposed of within time prescribed under Section 44(5) of the Act.

26. **Point No. (3):-** For the reasons recorded above, we proceed to pass the following:

ORDER

- i) The appeal is disposed off accordingly;
- ii) The impugned order dated 11th May 2021 in complaint No. CMP/UR/200710/0006128 passed by the First Additional Bench, RERA is modified;
- iii) The project of the 1st Respondent "Zenith Residences" is exempted from registration under Section 3(1) of the Act as per Rule 4(1)(iv) of the Karnataka Real Estate (Regulation & Development) Rules, 2017 and consequently complaint filed by the Appellant is dismissed as not maintainable.
- iv) In view of disposal of this appeal all pending IAs if any, stand disposed off;
- v) The Registry to comply with the provisions of Section-44 (4) of the RERA Act and to return the records;

No order as to the cost.

Sd/-
HON'BLE CHAIRMAN

Sd/-
HON'BLE JUDICIAL MEMBER

Sd/-
HON'BLE ADMINISTRATIVE MEMBER