BEFORE THE TAMIL NADU REAL ESTATE APPELATE TRIBUNAL (TNREAT)

(Tamil Nadu, Puducherry, Andaman & Nicobar Island)

(Under the Real Estate Regulation and Development Act 2016)

Dated : 28.02.2020

Coram : Mr.Justice B.Rajendran, Chairperson
Mr.N.Balasubramanian, Judicial Member
Ms.Leena Nair, Administrative Member

Appeal No. 64 of 2019

1. Dominic Savio.S
2. Clotine Marie. D
   (Represented by Dominic Savio.S) ... Appellants

Vs

M/s. Phoenix Serene Spaces Pvt. Ltd
(represented by its Chairman,
Mr.Suresh Chukkapalli) ... Respondent

This appeal was filed on 30.10.2019 and came up for final hearing on 3.2.2020 and the appellant appeared in person and the respondent appeared through counsels Mr. T. Sai Krishnan, Mr. Poovendra Perumal and Mr. K. Kumaraguru. Having heard the arguments of both sides and having stood over for consideration of this Tribunal till this date and deliver the following:

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ORDER

The appellants are the complainants before the Adjudicating Officer and claiming compensation, interest and cost from the respondent. Learned Adjudicating Officer negatived the claim of the complainants by dismissing the complaint on 30.7.2019. Aggrieved upon that, the complainants preferred this appeal on 27.9.2019.

2. The appellants and respondent entered into agreements for purchase of a flat in the project of respondent namely village township. The total consideration for the flat was fixed at Rs.75,18,232/-. The respondent agreed to complete the apartment by 31.12.2015 with a grace period of 6 months. The respondent failed to deliver the apartment agreed by him. During March 2015 on the suggestion of the respondent, the appellants opted for transfer of allotment to villa type of house in the project of the respondent which involved additional cost of Rs.10,00,000/- As on 15.2.2016 the appellants paid Rs,52,62,762/- to the respondent. The said amount was retained by the respondent towards advance for the villa. On 26.2.2016 both the appellants and respondent entered into agreements for villa and a total consideration was fixed at Rs.85,67,283/-. The appellants paid Rs.78,60,554/-. The respondent agreed to complete the villa within 18 months with a grace period 6 months. Again the respondent failed to deliver on time. The respondent by way of mail extended the delivery time. Hence the appellants frustrated over the delay and asked the respondent to cancel the agreement and sought for refund of the amount. The respondent failed to reply. The respondent agreed to cancel the allotment on 5.5.2018 and refunded the principal amount in three installments. In December 2018, the appellants approached the respondent for refund of interest, for which the respondent refused. Hence the appellants came forward with a complaint for

interest and compensation before the Adjudicating Officer and after contest the Adjudicating Officer dismissed the complaint. Hence the appellants came forward with this appeal on the ground that on 15.3.2018 the respondent visited the home and office of the appellants to deliberate on the refund process. Due to mental pressure and undue influence exerted by the respondent the appellants were forced to accept forgoing interest and compensation and agree for refund of principal only to free themselves from mental agony they were undergoing.

3. The respondent has taken unfair advantage due to his dominant bargaining position. Meanwhile there was talk amongst other buyers to initiate legal action. Before initiating legal action, the appellants sent a final e-mail to the respondent requesting for interest refund. Since respondent refused to accept they preferred complaint.

4. The appellant as party-in-person would submit that as a first time on 9.4.2017 the appellant requested the promoter to exit from the project. Thereafter more than 25 times nearly about 11 months the appellant was asking the respondent for cancellation and refund. During this period the appellants have not even once given the undertaking to forego due interest and compensation. On 10.1.2018 the respondent informed them that they will not be able to handover the property even by the grace period deadline. Subsequently upon undue influence by the respondent the appellants were forced to give the undertaking to forego other claims and seek refund of principal amount alone. Only after this undertaking was given, the respondent initiated action for refund and cancelled the allotment on 5.5.2018 and refunded the principal amount in 3 installments by 31.5.2018 but the learned Adjudicating Officer misunderstood the above said facts.

5. The appellant further submitted that the learned Adjudicating Officer erroneously found that there is no word 'undue influence' was used in the

complaint. The substance over form and the actual facts have to be taken into account and factual circumstances have to be looked into in totality.

6. The appellant further submitted that the learned Adjudicating Officer erroneously invoked promissory estoppel and waiver in favour of the respondent. The promissory estoppels though discretionary is an equitable doctrine and there is no inequity to the respondent if the appellants were to go back on promise. Further the requisite condition for invoking the promissory estoppel was not met. Furthermore importantly the promise from the appellant was extracted under duress.

7. The appellant further submitted that the learned Adjudicating Officer erroneously found that the complaint was filed several months after settlement and it is an afterthought. The appellants had intention to seek legal remedy even much earlier and they had approached RERA, but got no response. Furthermore there was a talk among the buyers to initiate a unified legal action, but it was not progressing satisfactorily. Again they tried to engage a lawyer to represent their case, but their experiences with them were not encouraging. Therefore they decided to represent their case by themselves and took sometime to understand the laws better and prepare themselves. Hence the delay caused. So there is no afterthought in it.

8. The appellant further submitted that the learned Adjudicating Officer failed to consider that the respondent failed to complete and handover the property within the promised timeline as mentioned in the agreement. Further as per the agreement the respondent did not cancel and refund the money within one month. Above all the respondent miserably failed to exhibit reasonable readiness and willingness to fulfill his part of the obligations as required both by the agreement and as per RERA Act. Hence the order of the learned Adjudicating Officer has to be set aside.

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9. The learned counsel for the respondent would submit that the allotment of flat by the respondent to the appellant happened much prior to 1.5.2016. Hence the complaint itself is not maintainable. The appellant who got the full refund of the entire booking amount from the respondent after cancellation of the agreement on 7.5.2018 have chosen to file this complaint purely by way of afterthought. Due to cancellation this respondent had lost the business opportunity by having blocked the said unit No.105 for the appellant Anyhow, the respondent did not rise any issue at that point of time as a goodwill gesture and also did not resort to the forfeiture clause in the agreement entered into between the parties when that option was very well available to this respondent. The agreement dated 26.2.2016 provides for payment of damages at the rate of Rs.5/- per sq.ft of saleable area per month of delay in delivery of possession in the event of the delay in delivery after the grace period of 6 months, after the period of 18 months contemplated for delivery of possession. The respondent further would submit that clause-4.8 of the said agreement clearly stipulates that the developer is entitled from the amount paid by the purchaser a sum equivalent to 20% for the consideration for the construction towards the liquidated damages in the event of the purchaser cancelling the agreement. The appellant who is a party to the agreement is bound by the terms of the said agreement completely breached the terms of the agreement and sought for cancellation and demanded refund of the entire booking amount and requested the respondent not to enforce the forfeiture clause on the specific understanding that there would be no claims between the complainants and the respondent. On 6.4.2017 a staff of the respondent has sent an e-mail to the appellant stating that the construction is going on in full swing and the respondent would be in a position to complete and handover by September 2017. While so even prior to the expiry of the 18 months period in addition to the grace period of 6 months,

on a wrong assumption that there is going to be a delay in completing the project by the respondent, the appellant has sent a reply mail dated 9.4.2017 that he is looking to exit out of the investment and sought for the advise of the respondent on the same. It is for their personal reasons the appellants chose to terminate the said agreement even though the semi attached villa was ready for delivery. Hence in any event the appellants are not entitled to claim interest or compensation from the respondent since the appellants waived their right. The learned Adjudicating Officer rightly negatived the claim of the appellants.

10. Points for consideration :-

1. Whether the plea of the appellants that the respondent used his dominant position to put the appellant in severe mental stress and duress to undue influence their free will is true?
2. Whether the claim of the appellants is an afterthought?
3. Whether the appeal is deserves to be allowed?

Point No. 1 :-

11. Both the appellants and respondent entered into an agreement of sale and construction on 26.02.2016. As per the email of the respondent dated 30.03.2018, totally the appellants paid personally Rs.17,53,646/- and on behalf of the appellants bank disbursed Rs.61,06,908/- and totally a sum of Rs.78,60,554/- paid by the appellant and received by the respondent (as per typeset page 121). In terms of agreement dated 26.02.2016, the construction to be completed within 18 months from the date of agreement with grace period of 6 months. So, the Villa has to be delivered on or before 25.08.2017 and the grace period of 6 months ended on 25.02.2018. These are the admitted facts and no dispute at all.

12. Before going to the merits of the case the communication between the appellants and the respondent have to be analysed, which is described in the following columns.

Date of communication	Brief content of the communication	Page no. of typeset
9.4.2017	I am looking to exit out of the investment that I made in the commune semi independent village. Please advise how I can exit.	79
22.4.2017	I don't want to further invest for my home in this project as I am getting adverse reports : (1) Please let me know **how to exit out.**	80
9.5.2017	I had been discussing with some of the folks who had invested in the Phonix project. After careful thought, I am still of the opinion that I do not want to progress further. Please recommend **how I can exit**.	81
21.10.2017	Please advise how can I approach RERA for solving my grievance with the builder	84
23.10.2017	I need a help from you – **for personal reasons** I would like to not peruse purchasing the Aster property. Please could you **cancel my allotment or resell** it to someone who is interested	85
28.12.2017	I am unhappy with the purchase of a villa at the Commune project, Chennai **for many omissions** by Phonix and I have been **wanting to exit** for the past one year.	89

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5.1.2018	After my e-mail to your chairman with a Vidyamurtty called by to solve my problems. Is he in Chennai now? He said he will get the payment and such details from you and advise my exit from the project.	90
11.2.2018	I do not wish to peruse further in concluding purchase of my Aster villa. Please cancel allotment of the villa and **refund the moneys** due to me **without any deduction**. On my side **I am not enforcing any compensation,** although I have incurred severe financial losses by virtue of loan interest and rental returns.	95
17.2.2018	Please could you rush me the non completion certificate urgently, urgently by today. When you folks wanted bank to sanction the dispersal amount you call me and e-mail me thousand times a day and when the same bank wants a non completion certificate you chose to be radio silent. Why?	97
24.2.2018	I had a detailed discussion with my financial director with regard to your exit plan ... He has requested time till Wednesday next week to work it out and let me know ... I shall definitely get back to you by Wednesday or latest by Thursday	100
06.03.2018	For the records, if this has to go legal, **I am ready and seek suitable compensation money** from the village.	109
08.03.2018	As per our agreement, terms even the grace period for handing over completed building is over and I will like it	111

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	to keep it on record that I have been asking for an exit for more than a year, just in case **we get into RERA, CREDAI, consumer court litigation etc.,** please note that I cannot be held responsible for, such dilly dallying acts and eventually dumping the property on him.	
16.03.2018	I am expecting complete refund of money I paid to phoenix. **I am willing to forego the interest.** I have paid to my bank and the loss of money due to investment in my project for so many years without getting any benefit.	117
24.03.2018	So once again, please **confirm to me that the complete refund of money (without any penalty** because you have not stood by the agreed terms) will be completed by May 31st. and show me you are really serious by refunding Rs.10 lakhs immediately as discussed.	118
29.03.2018	I am willing to **forego the loss as a good will based on the promise** that the entire money will be refunded by May 15th 2018. **If** it gets **delayed** beyond that I will not reciprocate the good will and **will look to recover my money including applicable interests and damages.**	120
17.04.2018	**As per the legal advice,** I would like to make it clear that if there is **further willful delay in refund** beyond May 15th, **I will be seeking compensation for the interest paid** (close to Rs.7 lakhs) **as well as**	122

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	other associated loss and expenses, apart from the refund amount due to me.	
05.05.2018	As mutually discussed and agreed between us we hereby cancelled and terminate the agreement of sale and construction agreements. The purchaser hereby declares and confirms that from the date of execution of this agreement, the purchaser shall not have any rights and/or any powers granted to them in relation to, in respect of the schedule property.	127

13. According to the appellants the cause of action for the dispute is the mail of the respondent dated 6.4.2017, mentioning delay in handing over of the villa. In response to which, the appellants asked for cancellation of allotment and refund of money on 9.4.2017. As per the agreement, respondent all together will refund the money within one month. On the contrary, for the next 11 months the respondent ignored their request to cancel and refund of Rs.78,60,554/-. The respondent did not even exhibit readiness and willingness and thereby causing them mental stress. If the respondent had refunded the money in time, there is no chance for litigation. The respondent used his dominant position to put the appellants in severe mental stress and duress to undue interest of their free will. These are the main reasons for the complaint of the appellants. The appellants seeking refund of money as per the terms of the agreement, namely, within a month. The non-payment of amount has caused mental stress and the dominant position of the respondent put to the appellants severe mental stress and obtained free will of the appellants by using duress and undue influence. Whether the above said reasons adduced by the appellants are sustainable have to be analysed. Now let us see the agreement between the

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parties with regard to the relevant clause namely refund of money and delay in delivery.

14. The refund of money described in Clause No.4 runs as follows:

" 4) Payment Schedule, Delay/Default (at page-64 of typeset)

4.1 ...
4.2 ...
4.3 ...
4.4 ...
4.5 ...
4.6 ...
4.7 ...

4.8) In case the purchaser/s cancel/s this agreement, the developer herein is entitled to forfeit from the amounts paid by the purchaser/s or recover from the purchaser/s a sum equivalent to 20% (twenty percent) of the consideration for construction stipulated herein as liquidated damages and refund the balance sum due, if any, under this agreement within one month from the date of termination of this agreement and such forfeiture/recovery as aforesaid by the developer will be automatic without any further notice to the purchaser/.

Clause-5 Completion and delivery of possession (at page No.64 and 65 of typeset):

5.1 ...
5.2 ...

5.3) In case of delay in delivery of the schedule row house for reasons other than what is stated above, the developer is entitled to a grace period of 5 months and if the delay persists, the developer shall, subject to deduction of applicable taxes, pay the purchaser/s damages at Rs.5/- (Rupees five only) per sq.ft. of saleable area per month of delay in delivery of possession of the schedule row house, provided the purchaser/s has/have paid all the amounts payable as per this agreement within the stipulated period and has not violated any of the terms of this

agreement and agreement to sell. However, if the delay is on account of purchaser/s seeking modifications in schedule row house, there shall no liability on the developer to pay any damages as aforesaid".

15. In the agreement clause-4.8 it has been specifically agreed that in case the purchaser cancel this agreement, the developer is entitled to forfeit 20% of the amount paid as liquidated damages and refund within one month from the date of termination of this agreement. In this case the appellants insisted the respondent to refund the amount without any deduction. On 9.4.2017, the appellants seeking the advice of the respondent to exit (at page 79 of typeset). Again on 22.4.2017 the appellants in their e-mail stated that ***"I don't want to further invest for my home in this project as I am getting adverse reports: (i) please let me know how to exit out".*** Again on 9.5.2017, the appellants sent a mail and further requested the respondent as "please recommend how I could exit". On 23.10.2017 also the appellants sought the help from Real Estate Regulatory Authority for solving the grievance with the builder. On 23.10.2017 again the appellant sent an e-mail in which he has specifically stated that ***"I need a help from you – for personal reasons I would like to not peruse purchasing the Aster property. Please could you cancel my allotment or resell it to someone who is interested".*** On 28.12.2017 in another mail it has been subsequently mentioned as ***"I am unhappy with the purchase of a villa at the Commune project, Chennai for many omissions by Phoenix and I have been wanting to exit for the past one year".*** On 11.2.2018, the appellant subsequently informed the respondent that ***"please cancel allotment of the villa and refund the moneys due to me without any deduction. On my side I am not enforcing any compensation, although I have incurred severe financial losses by virtue of loan interest and rental returns"*** which is find place in page-95 of typeset. This is the first e-mail of the appellants with regard to cancellation of the allotment. Before that from 9.4.2017 to 5.1.2018, the appellants have not expressed their willingness about the cancellation of the

allotment. Till then they are seeking ways and means and also advise for cancellation of allotment. The appellants came to a conclusion and directly requested to cancel the allotment only on 11.2.2018. In this mail itself, the appellants clearly, categorically and specifically mentioned that ***"refund the moneys due to me without any deduction. On my side I am not enforcing any compensation".*** Before 11.2.2018 the appellants sent mail on 9.4.17, 22.4.17, 9.5.17, 21.10.17, 23.0.17, 28.12.17 and 5.1.2018. In all these mails, the appellants have not disclosed the cancellation or have not asked or requested the respondent directly to cancel the allotment. Till 11.2.2018, the appellants were asking the respondent how he can exit. In the subsequent e-mail on 17.2.2018, the appellants insisted for the non-completion certificate from the respondent. On 6.3.2018 the appellant subsequently stated that he is ready to seek suitable compensation from the respondent, when the respondent not specifically sent the non-completion certificate. Again on 8.3.2018, the appellants sent a mail in which he has specifically stated that ***"I have been asking for an exit for more than a year just in case we get into RERA, CREEDAI, Consumer Court, etc. please not that I cannot be held responsible".*** Again on 16.3.2018, the appellant subsequently mentioned in the mail that ***"I am expecting complete refund of money I paid to Phoenix. I am willing to forego the interest".*** Again on 24.3.2018 by e-mail stated that ***"please confirm to me that the complete refund of money (without any penalty because you have not stood by the agreed terms) will be completed by May 31st".*** Again on 29.3.2018 ***"I am willing to forego the loss as a good will based on the promise that the entire money will be refunded by may 15th 2018. If it gets delayed beyond that I will look to recover with interest and damages".*** Again on 17.4.2018, the appellants subsequently stated that as per his legal advise if further delay in refund he will be seeking compensation and for other expenses. So all these e-mails, from 11.2.2018 to 17.4.2018 the wordings used by the appellants as a good will based on the promise that the entire

money will be refunded, for the refund of the entire money without forfeiture of 20%, the appellants seeking all along. In the above said communications the appellants have not whispered any single word with the respondent by using undue influence obtained the free will of the appellant to forego the interest and compensation. The above said communications reflect that, from 9.4.2017 to 10.2.2018, the appellants were seeking advice to quit from the project. On 11.2.2018 he expressed his willingness for cancellation of allotment. On 17.2.2018 seeking for non-completion certificate to get a concession from the Bank. As on 2.3.2018, site progress was informed by the respondent to the appellants as per page Nos.102 to 107 of typeset reveals that the respondent has informed about the progress of the construction. For 17.2.2018 mail, the respondent sent progress of construction as on 2.3.2018. Subsequent to that, the appellant expressed his possibilities for seeking legal action for claiming compensation through RERA, CREDAI and Consumer Court. Even then on 16.3.2018 he was voluntarily willing to forego the interest if complete refund is made. So in any angle the communication between the appellants and respondent does not reflect undue influence or duress. The above said communications also reflects that the appellants voluntarily asked the respondent to cancel the allotment, refund the money without any deduction, for which he promised to forego his claim of interest and compensation. So, the plea of the appellant with regard to undue influence, duress is not true. Point No.1 is answered accordingly.

Point No.2 :-

16. According to the appellants the learned Adjudicating Officer misunderstood the core point of the litigation. To substantiate the above said arguments, the appellants would submit that on 10.1.2018 the respondent

informed about the delay in handover beyond the grace period deadline. Subsequently upon undue influence by the respondent the appellants were forced to give the undertaking to forego other claims and seek principal amount alone. Once this undertaking was given the respondent initiated action. How far this statement is true has to be analysed. With regard to undue influence in point no.1, the plea of the undue influence is decided as not true. Further on 6.4.2017 mail sent by the respondent by stating that we shall be in a position to complete the tower for fit outs by September 2017. After this mail the appellant asked the respondent as 'to advise how I can exit'. Subsequent mails dated 22.4.17, 9.5.17, 21.10.17, the appellants searching for the advise to exit. On 23.10.2017 mail the appellant stated that for **personal reasons** they would like to not peruse purchase the Aster property and requested the respondent to cancel allotment or resell. On 28.12.17 mail also the appellants 'wanting to exit'. On 5.1.2018 mail also the appellants clearly and categorically admitted that Chairman Vidyamoorthy called him to solve his problems and also he said that he will get the details and advise regarding exit from the project. On 11.2.2018 mail alone the appellants directly asked to cancel allotment of the villa and sought for refund without deduction and also not willing to enforce any compensation. As per the 5.1.2018 mail of appellant the Chairman himself promised to solve the issue after getting details. After one month the appellant himself expressed that he is not enforcing any compensation. In between 5.1.2018 to 11.2.2018 no communication to show that there was undue influence, duress, etc. on 5.5.2018 the respondent accepted the claim of the appellant to refund without deduction and paid entire refund in three installments. In the meantime the appellant sought for non completion certificate on 17.2.2018 for getting concession from the bank. For which the respondent has not furnished the certificate as required by the appellant and

issued the non completion certificate to the extent of they have not completed. The appellant not satisfied with that certificate and stated that he is ready and seeks suitable compensation money from the village and also remind the respondent about the possibilities of getting remedy through RERA, CREDAI, Consumer Court, etc. the above said fact disclosed through mails dated 6.3.2018, 8.3.2018. Further the appellant has also got legal advice in this aspect for seeking compensation for the interest paid as well as other associated and expenses apart from the refund amount, etc. the above said facts disclosed through mails dated 29.3.2018, 17.4.2018. But contrary to this fact the appellant has stated that to seek remedy through RERA approached RERA but got no response, there was a talk among the buyers to initiate unified legal action, but not progressive, tried to engage a lawyer to represent their case, but their experience with them were not encouraging. These are the reasons adduced by the appellant for the delayed claim. As per the admission of the appellant himself that he got legal advice for claiming compensation. The appellant has not produced any piece of paper that he has put forth claim before the RERA. RERA is not an authority for giving legal advice to the aggrieved parties. If really the appellant was willing to engage any other lawyer other than the lawyer, who met him, for advice he can very well approach another lawyer or approach the State legal services authority for legal advice. But he has not done so. In the mail dated 17.4.2018 he has stated that he got legal advice. So the appellant has knowledge about his right to claim compensation or interest, etc. Even then he has not claimed anything till the entire amount was refunded. The appellant approached the RERA under Form-N on 8.2.2019, i.e. after 8 months and 7 days. Hence the learned Adjudicating Officer came to a conclusion that the claim of the appellant is an afterthought. The findings of the learned

Adjudicating Officer, whether justifiable according to law or not has to be analysed.

17. The main contention of the appellant is that the doctrine of promissory estoppel, waiver invoked by the learned Adjudicating Officer is not in proper way. Further due to constraint and duress created by the respondent the appellants were constrained to forego the claim of interest and compensation. Furthermore the appellant would submit that the respondent have not completed and hand over the villa within the promised time line as per the agreement, after cancellation of the allotment respondent failed to refund the money within one month from the date of cancellation as per the agreement. The respondent failed to exhibit reasonable willingness and readiness to fulfill his part of the obligations, hence the attitude of the respondent defeats the very spirit of RERA Act. In such a circumstances though promissory estoppels is discretionary is an equitable doctrine and there is inequity to the respondent if the appellant were to go back on promise. Before answering the above said points it is relevant to mention the legal position laid down by the Apex Court.

(2004) 8 SCC 229

Krishna Bahadur Vs Purna Theatre

9. The principle of waiver although is akin to the principle of estoppels: the difference between the two, however, is that whereas estoppels is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an

agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.

1968 AIR 933

Associated Hotels of India Limited, Delhi
Vs S.B.Sardar Ranjit Singh

A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of *such rights.

18. The apex Court laid down the law with regard to invoking of waiver. In Associated Hotel case the Apex Court has held that there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights. The appellants themselves sent number of mails in which they have clearly and categorically admitted that they are having knowledge about the claiming of interest and compensation. They have also obtained legal advice to that effect. Even then they failed to invoke legal action against the respondent. The appellants voluntarily stated in their mails dated 11.2.2018, 16.3.2018 that they would forego the claiming of interest and compensation. But the appellants have stated that they have constrained to forego the right of claiming interest and compensation due to duress, undue influence. In the previous paragraph it has been found that no such duress and undue influence as alleged by the appellants.

19. The appellants entered into an agreement on 26.2.2016 with the respondent for construction. Time for completion of construction fixed at 18 months with grace period of 6 months which ended on 25.2.2018. The

appellants expressed their dissatisfaction with the respondent on 9.4.2017 and sought the advice for exit. Within 13 months and 11 days from the date of agreement the appellants were dissatisfied with the performance of the respondent. On 6.4.2017 mail the respondent informed the appellant that:

> ***"The work is happening in full swing and we shall be in a position to complete the tower for fit outs by September 2017. The commune handing over will also start as per agreed schedule".***

20. For the above said mail communication the appellant replied on 9.4.2017 and expressed his first non satisfaction as follows:

> ***"I am hearing adverse reviews about the village project, like extraordinary delay in handing over the constructed property, frequent changes in the investors etc. poor construction quality, etc. This has created lack of confidence for me on the project and it does not look attractive for me now. I am looking to exit out of the investment that I made in the Commune semi independent villa. Please advice how I can exit".***

21. The above said mail reveals that the appellant was hearing adverse reviews about the respondent project namely delay in handing over, poor construction quality, frequent changes in the investors. These are the reasons adduced by the appellant for his exit. The adverse opinion heard by the appellant only after 13 months and 11 days from the date of agreement. An ordinary prudent man, used to enquire about the promoter and his performance in the field of construction, experience, quality and timeliness in completion, etc. then only he invests into the project. It is on the principles of 'buyer the beware'. After the investment by way of entering into construction agreement and loan agreement with the bank, etc., sudden departure from the agreement leads to set back not only to the respondent, but also to the other investors.

Because the promoter is not a dealer. The dealer purchasing goods and sold for profits. But here, the promoter putting initial investment for purchasing land and develop the plots and obtained project approval, etc, on the face of that by disclosing facilities by attractive advertisements invite the investors. The investors paying the money then and there and the developer developed the land into flats and villas stage by stage, phase by phase, with the amount of the investors by paying for men and materials. If some of the investors withdrawn from the project certainly the promoter alone cannot complete the remaining project and he is answerable for the remaining investors. That is why there is a specific clause contemplated in the construction agreement namely (1) contractor for construction, (2) specifications, (3) consideration, taxes, deposits, etc. (4) payment schedule, delay/default, (5) completion and delivery of possession (6) first charge (7) common area maintenance (8) obligations of purchasers, (9) contingency, (10) co-terminus agreement (11) assignment (12) notices, (13) specific performance, arbitration and jurisdiction (14) intelligence, (15) complete agreement, (16) amendment, (17) severability, (18) rules of interpretation, (19) custody and then schedule of properties. In this agreement between the appellants and the respondent there is a specific clause with regard to cancellation of agreement as clause-4.8 and regarding delay in delivery as clause-5.3 respectively:

22. The appellants seeking to cancel the agreement without forfeiture clause. The appellant has also having remedy for the delayed delivery by way of damages at the rate of Rs.5/- per sq.ft of saleable area per month. For both the purchaser and developer there are specific safety measures were contemplated in the agreement itself. But the appellant without following the terms of the agreement put forth his premature claim of cancellation and sought for refund without deduction. If the appellant claimed the cancellation after the stipulated

period namely 25.2.2018, the claim of the appellants can be a justifiable one. The respondent is having opportunity and time to complete the construction within February 2018. That is why the appellant himself disclosed in his mail dated 23.10.2017 for personal reasons he would like to not peruse. In the said mail, the appellant has not stated any grievance against the respondent. After repeated mails to the developer they agreed to exit the appellant from the project and paid the amount as agreed between them without any deduction. The appellant narrated about his interest loss due to investment and the respondent to avoid the loss and inconvenience to other investors they have agreed to refund without any deduction since the appellant agreed to forego the claims. The mails of the appellant dated 6.3.18, 8.3.18, 16.3.18, 29.3.18, 17.4.18 will clearly disclose the agreement between the appellant and respondent to forego the interest and compensation and forfeiture clause respectively. The agreement between the appellant and the respondent is only a reciprocal. The appellant offers to forego the interest and compensation for the consideration of forfeiture of 20%.. So the offer of the appellant was accepted by the respondent for the consideration of foregoing interest and compensation. Therefore it is not only a valid contract, but also a concluded contract between the appellant and the respondent. The appellant is having legal right to claim interest and compensation for refund. Moreover the appellant was also having knowledge about the said legal right. It was also disclosed in the mails. Before 5.5.2018 the appellant used to say that he is having chance to claim interest and compensation, but he is not willing to claim as a goodwill based on the promise. The appellant means the promise that is the above said reciprocal promise between the appellant and the respondent. The Apex Court has laid down the Law in this aspect which was cited by the respondent's side above referred 2004 SCC-229 – Krishna Bahadur vs Poorna Theatre and others case:

10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.

23. So, in this case the appellant and the respondent entered into a compromise for refund of money without deduction, for cancellation of the agreement and for which the appellant agreed to forego the interest and compensation. So the appellant waived his right due to agreement with the respondent and after completed the agreement the appellant is estopped from claiming again. The appellant having accepted a part of the benefit could not be permitted to approbate and reprobate nor can they be permitted to resile from their earlier stand. Therefore this Tribunal comes to conclusion that there is no infirmity in the finding of the learned Adjudicating Officer. So the claim of the appellant is certainly an afterthought. The point is answered accordingly.

Point No.3:

24. In Point No.1 it is decided that due to undue influence respondent forced to give the undertaking to forego the claims of interest and compensation is not true and in point No.2 it is decided that the claim of the appellants is an afterthought. In such circumstances there is no chance for interference in the findings of the learned Adjudicating Officer. Therefore this Tribunal comes to a conclusion that this appeal is not deserves to be allowed. Point is answered accordingly.

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25. In the result this appeal is dismissed. No costs. The order of the Adjudicating Officer in CCP No.65/2019 dated 30.7.2019 is confirmed.

This order is dictated to the stenographer directly to the computer and typed by her and corrected and pronounced in the open court on the 28th day of February 2020.

Sd/- xxx
CHAIRPERSON

Sd/-xxx
ADMINISTRATIVE MEMBER

Sd/- xxx
JUDICIAL MEMBER

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