BEFORE THE TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL (TNREAT)

(Tamil Nadu, Puducherry, Andaman & Nicobar Islands)

(Under the Real Estate Regulation And Development Act 2016)

DATED 21.06.2021

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

Appeal No. 64 of 2020

M/s. Alliance Villa Pvt. Ltd.,
Represented by its Managing Director
Manoj Namburu ... Appellant

-Vs-

1. Mohana Sundhari
2. Nagalingam .... Respondents

This appeal was taken on file on 29.10.2020 and came up for final hearing on 19.04.2021 in the presence of M/s.P.H.Manoj Pandian, N.Zahid Ahmed and R.Bavadharani, AAV Partners, Advocates for the appellant and M/s.J.Franklin, S.Karthick, Ramachandran.S. and S.Valarmathi, Advocates for the respondents.

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Having heard the arguments of both sides through video conferencing and having stood over for consideration till this date and this Tribunal delivered the following:

ORDER

1. This appeal has been preferred against the order of the Adjudicating Officer in C.C.P.No.257 of 2019 dated 01.09.2020, by directing the promoter to refund the sale consideration paid with interest and costs. The appellant/promoter is the respondent and the homebuyers/respondents are the complainants in the original complaint before the Adjudicating Officer. For easy understanding and to avoid confusion the appellant and the respondents are referred in this appeal as per their original rankings as home buyers and promoter.

2. According to the home buyers, the promoter offered to sell a villa in their project namely 'Humming Garden' at Thaiyur, Kelambakkam, Chennai. The total cost of the villa was fixed at Rs.1,34,24,731/-. The home buyers paid a sum of Rs.16,00,000/- in total. On the date of the sale agreement was entered between the promoter and the home buyers, the promoter has not furnished the copy of sale agreement and title deeds of the villa. Furthermore, till the date of preferring the complaint by the home buyers before the Adjudicating Officer no construction was made in the subject matter of the site. In addition to that due to financial position the home buyers sent an email for cancellation of the booking and the refund of the amount for which the respondent informed about the

deduction of 10% of the value of the villa. Hence the home buyers came forward with the complaint for refund with interest and costs. The promoter denied the allegations of the home buyers and contested the matter. Finally the Learned Adjudicating Officer directed the promoter to refund the advance amount with interest and costs. Aggrieved upon the same, the promoter has preferred this appeal on the following main grounds:

a) The home buyers miserably failed to satisfy the essential ingredients of Section 18(1) of the Real Estate (Regulation and Development) Act.
b) While claiming compensation or interest the home buyers ought to have plead and prove the ingredients contemplated under Section 72 of the Act.
c) The home buyers agreed to forfeit the booking amount in view of cancellation as per the agreement dated 25.01.2019.
d) On 15.10.2019, which is the date of complaint, the promoter has completed more than 81.25% stage of completion of the subject villa i.e., till 2nd floor roof slab has been completed.

3. The above said facts and law were not properly appreciated by the Adjudicating Officer. During the course of argument the learned counsel for the promoter would submit that Under Section 71 of the Act the purpose of Adjudicating compensation is conferred only under Sections 12,14,18 and 19 of the Act. But the Learned Adjudicating Officer exceeded his jurisdiction. Further would submit that the contradictory stands taken by the home buyers are not

properly appreciated by the Adjudicating Officer. Hence the appeal has to be allowed.

4. The Learned counsel for the home buyers would submit that the learned Adjudicating Officer has properly appreciated the oral and documentary evidences and came to a correct conclusion and there is no infirmity in the findings. Furthermore the learned counsel would submit that the promoter violated the provisions of the Real Estate (Regulation and Development) Act hence the learned Adjudicating Officer invoked Rule 19(2) of the Tamil Nadu Real Estate (Regulation and Development) Rules 2017 and directed the promoter for refund with interest. Hence the appeal has to be dismissed.

5. Points for consideration:

1. Whether the order of refund by the Adjudicating Officer is against Section 18(1) of the Real Estate (Regulation and Development) Act, 2016?
2. Whether awarding of interest by the Adjudicating Officer is against Section 72 of the Tamil Nadu Real Estate (Regulation and Development) Act, 2016?
3. Whether the appeal deserves to be allowed or not?

Point No.1:

6. The specific contention of the learned appellant's counsel is that the order of refund is against Section 18(1) of the Real Estate (Regulation and

Development) Act, 2016, since time for completion of the project will end only in October 2020 and this complaint was preferred on 15.10.2019. The learned Adjudicating Officer has negatived that contention on the following grounds namely by relying Rule 19(2) of the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017, non sending of demand for further payment subsequent to the agreement leads to the conclusion that the allegation of the home buyer as no construction activities started in the place allotted to the home buyers is found acceptable. Therefore the Learned Adjudicating Officer by relying Rule 19(2) and ordered for refund of entire amount. How far the contention and the finding are tenable has to be analyzed.

7. Before going to discuss the merits of the case the dates and events of the parties have to be analyzed. On 14.11.2018 as per Ex.A1, the home buyers paid a sum of Rs.3,00,000/-. On 15.11.2018 allotment letter Ex.A2 was issued by the promoter to the home buyers. On 29.12.2018 the home buyers further paid a sum of Rs.8,00,000/- through Ex.A3. Totally paid a sum of Rs.11,00,000/-. The home buyer and promoter entered into sale and construction agreement on 25.01.2019. The sale price agreed by the parties is Rs.1,34,24,731/-. The 10% of the sale price comes to 13,42,473/-. So on the date of agreement on 25.01.2019 the home buyers paid only Rs.11,00,000/- which is below 10% of the sale price. Subsequent to the agreement on 29.01.2019 the home buyers paid a sum of Rs.5,00,000/- through Ex.A4. Both the construction agreement and sale agreement were not produced by the home buyers and they were produced by

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the promoter as Ex.B5 and Ex.B6. In Ex.B5 construction agreement at page No.16 'D' schedule of payments mentioned as follows:

Sl. No.	Period of Payment	Percentage/(Amount without GST)
1	Booking amount	707411
2	Payment at the time of agreement	2122234
3	On completion of foundation of the respective unit	1061117
4	On completion of Ground floor roof slab	707411
5	On completion of 1st floor roof slab	707411
6	On completion of 2nd floor roof slab	442132
7	On completion of external and internal plastering	442132
8	On completion of floor tiling	442132
9	On hand over / possession of Unit	442132

8. In Ex.B6 UDS sale agreement at page No.7 'C' schedule of payments mentioned as follows:

Sl. No.	Period of Payment	Percentage/(Amount without GST)
1	Booking amount	482199
2	Payment at the time of agreement	1446597
3	On completion of foundation of the respective unit	723299
4	On completion of Ground floor roof slab	482199
5	On completion of 1st floor roof slab	482199
6	On completion of 2nd floor roof slab	301374
7	On completion of external and internal plastering	301374
8	On completion of floor tiling	301374
9	On hand over / possession of Independent villa	301374

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9. Admittedly, there is no specific dates mentioned in the above said both schedules for the payment. Stage wise construction completion was mentioned for the payment. While entering into an agreement the home buyers have not raised their little finger and questioned about the non-mentioning of the dates for payments, it implied that both the schedules were admitted by the home buyers. Hence non-mentioning of dates in the payment schedule is not fatal to the case of the promoter, since the Real Estate (Regulation and Development) Act, Rules and Regulations were enacted not only for the benefit of both the promoter but also to the home buyers and both of them can invoke and question the same. In the present case, the home buyers without questioning the non-mentioning of the dates in the schedule of payment in the agreement and they have simply accepted and signed the same. It amounts to admission and they are estopped to raise such a plea. Further the learned Adjudicating Officer found that non sending of demand notice for further payment leads to a conclusion that no construction activities by the promoter and not entitled to keep 10% of the value of the booked property. In the above said payment schedule of construction agreement and sale agreement there is no such specific clause that for every stage the promoter ought to have demanded the payment. In the above said schedules it has been specifically mentioned that on completion of the foundation, on completion of ground floor roof slab, on completion of first floor roof slab, on completion of second floor roof slab, on completion of plastering, on completion of floor tiling and at the time of handing over. Further, in Ex.B5 construction agreement, in clause 3 (c) Mode of payment it has been specifically stated as follows:

"The allottee hereby undertake/s and assure/s that based on the stage intimation letters issued/to be issued by the promoter to the allottee, the above payments shall be made by the allottee within the due date and without any further demand, as time for payment of the above said sums being the essence of the contract and the allottee is fully informed by the promoter that any default in the payment of the above said amount would affect the completion of the project;"

10. As per the above said clause the allottee undertakes to pay the amount based on the stage intimation letters issued or to be issued by the promoter without any further demand. In the present case, both sides have not stated about the stage intimation. As per the above clause there is no demand for payment and only stage intimation. Hence the finding of the learned Adjudicating Officer that non sending of any notice for further payment subsequent to the execution of agreement implied that there was no construction activities is not acceptable because the construction agreement entered into between the parties on 25.01.2019 the last payment made by the home buyer on 29.1.2019 a sum of Rs.5,00,000/- and till that date so far paid Rs.16,00,000/-. As per the schedule stated supra the home buyers have to pay on the date of agreement Rs.7,07,411/- + Rs.21,22,234/- and Rs.4,82,199/- + 1446597/- as per schedules respectively totally the home buyers should have paid on the date of agreement totally Rs.47,58,441/-. But the home buyers paid only Rs.16,00,000/- and balance Rs.31,58,441/- has to be paid by the home buyers on the date of agreement as per both agreements. On 10.04.2019 the home buyers sent an email which runs as follows:

"We booked villa No.631 in Humming Garden. But we have major money problem so we can't continue. Please cancel my villa booking and refund my money".

11. The promoter has proposed to construct villas, row houses and apartments in the total area measuring 14.03 acres and out of which 12.45 acres alone owned by the promoter and the remaining lands were gifted to the local body for formation of road and open space reservation. The above said huge area project to be developed by the promoter in joint venture with the allottees. The promoter cannot paid for entire construction cost from his pocket and the promoter invested his money for purchasing of project land and for other incidental expenses for getting approval, gifting of property to local body etc., subsequent to that further construction can be met out only from the payments made by the allottees hence in the above clause 'C' mode of payment it has been specifically mentioned as:

"Any default in payment of the above said amount would affect the completion of the project".

12. In the present case the home buyers on the date of agreement they have paid only Rs.11,00,000/- and subsequent to the agreement they have paid only Rs.5,00,000/- totally they have paid Rs.16,00,000/- instead of Rs.47,58,441/-.The home buyers sought for refund by cancelling the booking on 10.04.2019 i.e., within 43 days. If every home buyer paid some money and cancel the booking and demanded the invested money there is no possibility for the promoter to commence the foundation itself. The promoter doing construction work only on the payments made by the allottees that is why it is called joint venture. The promoter alone cannot invest and complete the project. The home buyers are also part and parcel of the joint venture and the home buyers also investors for the project is concerned. Now the fact is as such the learned

Adjudicating Officer invoking Rule 19(2) for the refund. It is appropriate to mention the Rule 19 which runs as follows:

> ***19. Timelines for refund.-***
>
> ***(1) Any refund of monies along with the applicable interest and compensation, if any, payable by the promoter in terms of the Act or the rules and regulations made thereunder, shall be payable by the promoter to the allottee within Ninety days from the date on which such refund along with applicable interest and compensation, if any, becomes due.***
>
> ***(2) In case of termination of the agreement as per the terms recorded therein, such refund and/or penalty and/or compensation shall be made by the party-in-breach to the other party simultaneous to the execution of appropriate cancellation agreement and registration, if required. If the defaulting party fails to come forward for execution of registration agreement, the Authority shall have the right to execute such agreement on behalf of the defaulting party.***
>
> ***The entitling allottee shall get full refund at any time if the builder has not followed the time schedule. The builder shall not keep 10% of the booked value of the property. If the allottee defaults in making timely payment as per terms of the agreement, the allottee shall not have the right of claiming any interest or compensation from the promoter.***

13. In the above said Rule 19(2) second part it has been specifically mentioned as the 'entitling allottee'. For getting full refund entitlement is mandatory. Now let us see whether the allottees herein are entitled for full refund has to be analyzed. For the refund of amount there is a specific provision contemplated in Section 18 of the Real Estate (Regulation and Development) Act, 2016 which runs as follows:

> ***18. Return of amount and compensation.***

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) .. .. ..

(3) .. .. ..

14. As per the above said provision there are two ingredients have to be complied with to invoke section 18(1). The first ingredient is that if the promoter fails to complete the building within the stipulated date mentioned in the agreement and the second ingredient is that if the promoter discontinues the business as a developer. In this present case the promoter has agreed to hand over the possession of the building only in October 2020 as per the agreement. The stipulated time for completion is not yet completed. So the first ingredient is not applicable. It is not the case of the home buyers that the promoter has discontinued the business as a developer. So the second ingredient is also not applicable. As per the agreement Ex.B5 and Ex.B6 payment schedule the home buyers have not complied the payment on the date of agreement and out of Rs.47,58,441/- paid only Rs.16,00,000/- and balance amount Rs.31,58,441/- due

from the home buyers. As per payment schedule stage wise intimation from the promoter to the allottee as per clause 3(c) of the agreement commences only after the initial payment of Rs.47,58,441/- on the date of agreement. On the date of agreement the home buyers have paid only Rs.11,00,000/- and subsequently after 4 days they have paid only Rs.5,00,000/- and the initial payment on the date of agreement itself is due from the home buyers. In such circumstances stage wise intimation does not arise. So the reason adduced by the learned Adjudicating Officer namely non commencement of construction in the site is not sustainable.

15. The next defence put forth by the home buyers as non furnishing of copy of agreement and documents and the reason adduced by the Learned Adjudicating Officer as section 13 (2) of the Real Estate (Regulation and Development) Act, 2016 was not followed. How far the above defence and reason is sustainable has to be analyzed.

16. The home buyers entered into an agreement on 25.01.2019 with the promoter and sought to cancel the agreement on 10.04.2019. Within 43 days the home buyers sought for cancellation on the ground as stated supra is 'major money problem'. The mail dated 10.04.2019 is the first communication between the home buyers and promoter in which the only reason for cancellation stated by the home buyers as major money problem. In the above said mail Ex.B7 there is no other reason namely non furnishing of documents, etc., not mentioned. The next communication is the legal notice issued by the home buyers on 22.6.2019 which was marked as Ex.A5 in which in para No.2 it has been specifically stated as follows:

" My clients state that even after repeated requests to hand over the agreement copy and also the title deeds with regard to subject matter of property my clients lost their hope on you and also due to financial crisis, my clients decided to cancel the sale agreement. Hence my clients sent an email to you on 10.04. 2019 stating that they are not in a position to pay the balance amount and requested you to cancel the agreement and to reimburse the amount of Rs.16,00,000/- paid by my clients"

17. On the side of the home buyers they have not produced even a single piece of paper to show that they have repeatedly requested for furnishing agreement copy and title deeds. For the first time the home buyers stated about the furnishing of copies only in their legal notice. If really the grievance of the home buyers for nonpayment of the initial payment on the date of agreement is non production of sale agreement copy and title deeds certainly the home buyers would not have paid Rs.5,00,000/- after the agreement. Hence the plea of non furnishing of documents is only an afterthought.

18. The learned Adjudicating Officer in the judgment in para No.7 (g) stated that "for payments without specifying the dates and the manner by which payments towards the cost of apartment are to be made, even though the period of payment, stages of construction and the amount to be paid are mentioned. Therefore, it is clear that the respondent has not followed Section 13(2)". Section 13(2) contemplates about the particulars to be mentioned in the agreement. In Ex.B5 and Ex.B6 the above mentioned particulars were given. In the payment schedule date was not mentioned and specifically stated in Ex.B5 clause 3(c) that:

"The allottee hereby undertake/s and assure/s that based on the stage intimation letters issued/to be issued by the promoter to the allottee, the above payments shall be made by the allottee within the due date and without any further demand, as time for payment of the

above said sums being the essence of the contract and the allottee is fully informed by the promoter that any default in the payment of the above said amount would affect the completion of the project;"

19. In the above said clause after stage intimation payment shall be made within the due date. According to the agreement the date for payment will be intimated later. Stage wise payment schedule clearly mentioned. The present case is concerned the default arose for the initial payment itself by the home buyer. Further, stage wise payment does not arise in this case hence the finding of the learned Adjudicating Officer as Section 13(2) of the Act is not followed is not sustainable.

20. The above said two pleas pleaded by the home buyers and reason adduced by the Learned Adjudicating Officer are not sustainable as stated supra. In such circumstances the ingredients contemplated in Section 18(1) namely failure to complete the project and discontinuance of business as a developer is not applicable to the project of this promoter and the home buyers are not the entitling allottee. Hence Section 18(1) of the Real Estate (Regulation and Development) Act, 2016 is not applicable to the facts of this case and the findings of the Learned Adjudicating Officer for refund of full advance amount is not sustainable and the parties are bound by the agreement dated 25.01.2019. The agreement Ex.B5 in clause 5(a)(1) it has been specifically agreed for the breach of terms and its remedies which runs as follows:

"5. Breach of terms and its remedies.

(a) Allottee covenant

1. In the event of the allottee failing to pay the above said sums, in the manner provided in schedule D or cancel/withdraw from the project except for the default of

the promoter, then the promoter at their discretion after due notice of 15 days to the allottee is entitled to cancel this agreement and re-allot the villa/row house, to the other party and the allottee shall thereafter have no right, interest or claim over the villa/row house. Consequent to such termination, subject to deduction of the booking amount, the promoter shall refund the monies collected from the allottee within 90 days of such cancellation without interest, simultaneous to the allottee executing necessary cancellation and registration of the agreement and/or sale deed by the allottee.....

21. In the above said clause itself there is a remedy for breach of terms. In the present case the home buyers themselves fail to pay the initial payment on the date of agreement and they themselves breached the terms of agreement and they are entitled to refund as per the terms of the agreement alone and Section 18(1) of the Act is not applicable. The point No.1 is answered accordingly.

Point No.2:

22. The specific contention of the learned counsel for the promoter that while awarding interest Section 72 of the Real Estate (Regulation and Development) Act, 2016 was not followed and the finding of the learned Adjudicating Officer is against Section 72. The learned Adjudicating Officer awarded 7.5% of interest for the refund amount as claimed by the home buyers. Section 72 of the Real Estate (Regulation and Development) Act, 2016 clearly speaks about the what are the facts to be taken into account while awarding interest and compensation which runs as follows:

72. Factors to be taken into account by the adjudicating officer

While adjudging the quantum of compensation or interest, as the case may be, under section 71, the adjudicating officer shall have due regard to the following factors, namely:—

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused as a result of the default;

(c) the repetitive nature of the default;

(d) such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.

23. Admittedly, the home buyers sought for cancellation of agreement and refund. It is permissible under the agreement Ex.B5 in clause 5(a)(1) . In the above said clause it has been specifically stated that ***"consequent to such termination subject to deduction of the booking amount, the promoter shall refund the monies collected from the allottee within 90 days of such cancellation without interest" ....*** So the promoter is entitled to return the advance amount after cancellation or withdrawal after deducting booking amount within 90 days without interest. In the present case the promoter has not returned as agreed in the agreement. The home buyers sought for cancellation and refund of amount on 10.04.2019. As per the above said clause the promoter has to utilize his option within 15 days and inform the home buyers. For the above said mail the promoter has not replied. After preferring complaint by the home buyers the promoter filed reply and stated in para 12 of the counter which runs as follows:

"It is respectfully submitted that the only reason for withdrawal of the project is due to the complainants own unfortunate financial position and not due to any default by the promoter hence in accordance with clause 5 (a) of the construction agreement dated 25.01.2019, the amount shall be forfeited by the complainant and the respondents would be exercising their lawful

right of retaining such amount of 10% of the total value of the villa".

24. The above said plea of the promoter is against clause 5(a)(1) of Ex.B5 agreement. In the above said agreement the promoter has agreed to refund after deducting booking amount within 90 days without interest. So far he has not returned the amount hence the promoter got disproportionate gain by defaulting to return and the above said default is also repetitive in nature. Therefore from 10.04.2019 to 24.04.2019 for the period of 15 days for sending notice and then for 90 days for returning the amount it ended on 23.07.2019. From 24.07.2019 the retaining of amount by the promoter and received unlawful and disproportionate gain and the said defect still continues. In such circumstances the home buyers are absolutely entitled to interest as contemplated in Rule 18 of Tamil Nadu Real Estate (Regulation and Development) Rules, 2017. But the home buyers themselves restricted their claim of interest to the tune of 7.5% per annum. Hence the claim of interest at the rate of 7.5% per annum by the home buyers is acceptable and tenable and the learned adjudicating officer has allowed the rate of interest only 7.5% per annum so there is no infirmity in that finding and it is not against Section 72 of the Real Estate (Regulation and Development) Act, 2016. Point No.2 is answered accordingly.

Point No.3:

25. In point No.1 it was decided that the home buyers are entitled to refund of advance amount as per their construction agreement dated 25.01.2019, Ex.B5. The learned adjudicating officer has ordered for full refund of

Rs.16,00,000/- under Rule 19(2) of the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017. In point No.1 it was further decided that Rule 19(2) of the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 is not applicable to this case and the home buyers are entitled to refund as per the terms of the agreement as contemplated in clause 5(a)(1). As per the covenant the promoter is entitled to deduct booking amount. In Ex.B1 summary schedule for payment the booking amount shown as Rs.4,82,199/- for UDS and for Rs.7,07,411/- for construction. The home buyer booked one villa only hence the promoter is entitled to deduct one booking amount namely the UDS Rs.4,82,199/- only. The balance amount viz. Rs.16,00,000/- less Rs.4,87,199/- totaling Rs.11,17,801/- the promoter shall refund with interest at the rate of 7.5% from 24.07.2019 to till date of realization. The sale price fixed for the villa as per Ex.B4 allotment letter it has been mentioned as total cost of the unit (inclusive of taxes) Rs.1,34,24,731/-. Even though in the schedule of payment two different booking amounts it is stated for the convenience of the promoter. The home buyers are concerned it is only one unit and one villa so two booking amount cannot be claimed by the promoter. Therefore this Tribunal comes to a conclusion that this appeal is deserves to be partly allowed. The point No.3 is answered accordingly.

26. In the result, this appeal is allowed in part with litigation cost of Rs.25,000/-. The order of the Adjudicating Officer in C.C.P.No. 257 of 2019 dated 01.09.2020 is modified with regard to quantum of refund and regarding rate of interest and litigation costs the order of the Adjudicating Officer is confirmed. The promoter is directed to refund to the home buyers a sum of Rs.11,17,801/- with

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interest at the rate of 7.5% per annum from 24.07.2019 till date of realization. The promoter is directed to pay the above said amount to the home buyer within a period of 30 days from the date of receipt of this order. Connected Miscellaneous applications are closed.

This Order is directly dictated to the Stenographer and typed in the computer by her, corrected and pronounced by us in the open court on 21st Day of June 2021.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDL. MEMBER

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