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 18.03.2022

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

A.No. 106/2021

M/s. Alliance villas Pvt. Ltd.,
Rep. By its Managing Director,
Manoj Namburu ... Appellant

-Vs-

Rajesh ... Respondent

This Appeal has been preferred against the order of Adjudicating Officer in C.C.P.No.189/2019 dated 30.03.2021. This Appeal was taken on file on 20.10.2021 and came up for final hearing on 7.3.2022 in the presence of M/s. AAV Partners, P.H.Manoj Pandian and N.Zahid Ahmed, Counsels for the appellant and M/s. T.Raghavan, M.Rajarajan and T.R.Sudarsanan, Counsels for the respondent. 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. The appellant is the promoter and respondent is the home buyer. Herein after in this appeal the appellant is called as promoter and the respondent is called as home buyer as per their original rankings.

2. The home buyer booked a row villa with the promoter in their project namely Alliance humming Gardens Phase II at Thaiyur, Kelambakkam Post, OMR, Chennai District. On 23.2.2019 the home buyer and the promoter entered into agreement for undivided share land and construction agreement. As per the summary schedule for payment the home buyer has to pay Rs.4,92,504/- towards booking amount and at the time of agreement the home buyer has to pay Rs.14,77,513/-. The home buyer paid a sum of Rs.4,18,000/- in total on various dates. Subsequent to that the home buyer has not paid any amount and on 18.7.2019 the home buyer sent a mail to the promoter by stating that he wants to cancel his row villa 576 and requested for refund. Again on 5.8.2019 the home buyer sent a mail by stating that because of GST problem and some other issues sought for refund. For the above said mails the promoter sent a letter for cancellation by relying on the construction agreement clause 5(a)1 and section 19 (6) of RERA Act stating the balance payable as Nil. Hence the

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home buyer made a complaint before the Adjudicating Officer in C.C.P.No.189 of 2019 for the relief of refund with interest, compensation and for costs. After contest the Adjudicating Officer directed the promoter to refund Rs4,18,000/- with interest at the rate of 10.05% and awarded compensation Rs.50,000/- and litigation costs Rs.25,000/-. Aggrieved upon the same the promoter preferred this appeal on the following main grounds:

- As per the GST council meeting an option was given to the promoter in respect of ongoing project to pay GST at the old rates at 12% and consequently to avail permissible credit of inputs taxes.
- GST 12% will be charged on the entire consideration amount and cannot charge higher than 12%.
- While awarding compensation under Section 71 the factors contemplated under Section 72 of the Act have to be fulfilled by way of pleading and proved by the home buyer.
- As per construction agreement dated 23.2.2019 the home buyer has agreed to forfeit the booking amount paid in lieu of cancellation charged by virtue of clause 5(a) in page No.6 of the said agreement in the event of cancel or withdraw from the project except for the default of the promoter which is all in accordance with the RERA norms.
- The construction agreement was in accordance with Rule 9 and annexure A of the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017.

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3. The learned counsel for the appellant would submit that the above grounds were not properly appreciated by the learned Adjudicating Officer. Furthermore, the home buyer without assigning any reason for withdrawal sought for refund. The promoter by quoting the relevant agreement clause and relevant provisions of the RERA Act had denied the refund. Aggrieved upon the same the home buyer preferred a complaint before the Adjudicating Officer but the learned Adjudicating Officer without considering the provisions and the agreement clause and failed to consider the mail communication between the parties with regard to GST. Therefore, the appeal has to be allowed.

4. The learned counsel for the home buyer would submit that the learned Adjudicating Officer after elaborate discussion of both sides evidences and came to a correct conclusion and there is no infirmity in that findings. Therefore this appeal is liable to be dismissed.

5. Point for consideration:

Whether the appeal deserves to be allowed or not?

Point:

6. According to the promoter, as per the construction agreement clause 5(a) the promoter is entitled to deduct booking amount and refund the balance to the home buyer within 90 days. But the home buyer has paid only a sum of Rs.4,18,000/- which is less than the booking amount Rs.4,92,504/-. Therefore the home buyer is not entitled to any amount towards refund. In such

circumstances the awarding of interest, compensation and litigation costs are all against the construction agreement.

7. According to the home buyer, due to charging of 12% GST by the promoter leads to withdraw from the project. Furthermore, the promoter has concealed the real facts with regard to levy of GST to the tune of more than 5%.

8. According to the findings of the learned Adjudicating Officer, the cost of the villa in Ex.B8 mentioned as Rs.30,79,862/- only and GST is arrived at Rs.5,95,144/- which is nearly 19% of the cost of villa. Therefore the promoter has not only charged higher amount under GST but never revealed the complainant the benefit under the ITC available on GST or assured to pass the benefit to the complainant. Further found that the construction agreement clause 5(a) is vague, unfair and one sided and not binding on the complainant and the promoter has given in correct and false information on GST, hence not entitled to forfeit. Therefore it is directed to refund with interest and costs.

9. Perused, the contentions of both sides and the findings of the learned Adjudicating Officer. On perusal it reveals that the promoter has charged 19% of the cost of the villa as GST but the promoter has stoutly denied the same. Now let us see which one is correct. According to the promoter in page No.7 of its counter in paragraph No.'l' and 'm' about the GST rates are as follows:

Cost of the Unit before GST	GST of 12%	Total cost including GST
Rs.49,71,984/-	Rs. 596,638/-	Rs.55,68,622/-

(l). "The respondent submits that in the meantime, the GST Council in its 34th meeting held on 19.3.2019 at New Delhi and recommended as follows:

Option in respect of ongoing projects:

2. The promoters shall be given a one-time option to continue to pay tax at the old rates (effective rate of 8% or 12% with ITC) on ongoing projects (buildings where construction and actual booking have both started before 01.04.2019) which have not been completed by 31.03.2019.

3. The option shall be exercised once within a prescribed time frame and where the option is not exercised within the prescribed time limits, new rates shall apply".

(m). The respondent submits that since the subject project was ongoing on 01.04.2019 and the Developer/Promoter has an option for all the ongoing projects to either continue with the old scheme of 12% GST with Input Tax Credit (ITC) or switch to new scheme of 5% without ITC and the Respondent had chosen to go with old scheme of 12% with ITC and accordingly 12% GST was being charged from the customers and the same are remitted to the Government as per norms."

10. In addition to that the promoter has produced Ex.B15 before the Adjudicating Officer which was issued by the Government of India, Ministry of Finance, Department of Revenue (Tax Research Unit) in F.No.354/32/2019-TRU dated the 7th May 2019, New Delhi.

"Subject: FAQs on real estate-reg.

A number of issues have been raised regarding the new GST rate structure notified for real estate sector effective from 01-04-2019. A compilation of Frequently Asked Questions (FAQs) is presented below. The answers to the FAQs have been given in simple language for guidance and easy understanding of all stakeholders in the real estate sector. They do not have force of

law. In case of conflict, the gazette notifications, which have legal force, shall have precedence.

<table>
<tr><th>S.No</th><th>Question</th><th>Answer</th></tr>
<tr><td>1</td><td>What are the rates of GST applicable on construction of residential apartments?</td><td>With effect from 01-04-2019 effective rate of GST applicable on construction of residential apartments by promoters in a real estate project are as under:
<table>
<tr><th>Description</th><th>Effective rate of GST (after deduction of value of land)</th></tr>
<tr><td>Construction of affordable residential apartments</td><td>1% without ITC on total consideration.</td></tr>
<tr><td>Construction of residential apartments other than affordable residential apartments</td><td>5% without ITC on total consideration.</td></tr>
</table>
The above rates are effective from 01-04-2019 and are applicable to construction of residential apartments in a project which commences on or after 01-04-2019 as well as in on-going projects. However, in case of on-going project, the promoter has an option to pay GST at the old rates, i.e. at the effective rate of 8% on affordable residential apartments and effective rate of 12% on other than affordable residential apartments and consequently, to avail permissible credit of inputs taxes; in such cases the promoter is also expected to pass the benefit of the credit availed by him to the buyers.</td></tr>
</table>

11. As per the above passage from 1.4.2019 for ongoing project option was given to the promoter to choose old rates or new rates of GST with/without ITC. The promoter has opted old rate of GST as 12% with ITC. So, the promoter has charged 12% towards GST on the total consideration. The learned Adjudicating Officer has found in page No.5 at paragraph No.7(d) that cost of villa is given as Rs.30,79,862/- and the GST is arrived Rs.5,95,144/-

which is nearly 19% of the cost of the villa. According to the promoter they have chosen old rate of GST at 12% with ITC on total consideration.

12. With regard to GST already there were mail communications between the home buyer and the promoter on various dates from page No. 26 to 29 marked as Ex.A4 as follows:

On 15.5.2019 at 10.33 am promoter sent mail to the home buyer:

As discussed, pleased find the attached clarification on GST which has been published from Credai.

Hope this clarifies your queries and also forward the same to your concern representative to understand the GST @ 12% is applicable for your villa.

On 15.5.2019 at 11.28 am promoter sent mail to the home buyer:

Please find attached the highlighted points for your reference towards GST.

On 18.7.2019 at 9.05 am the home buyer sent a mail to the promoter:

"Hai Madam, I want to cancel my row villa 576. And please refund my payment as soon as possible"

On 5.8.2019 at 6.55 pm the home buyer sent a mail to the promoter:

"Hai Madam, I have already given mail about my refund. Because of GST problem and some other issues. I have paid 419000 rs till now. So make me refund as soon as possible. Or I will take legal action through TNRERA and some others. Please talk to your management team and reply me as soon as possible.

On 6.8.2019 at 10.40 am promoter sent mail to the home buyer:

"Further to the trial mail we wish to reiterate that we have explained several times about the GST and if you want more clarification kindly come to our office."

13. On 8.8.2019 the home buyer came forward with the complaint in Form 'N' before the Adjudicating Officer and stated reason in his complaint as point No.4 in the facts of the case paragraph which runs as follows:

> ***"Now respondent saying that which was 12% GST during the agreement time but the central Government has reduced the GST from 12% to 5%. But I am forcing to pay by respondent 12% of GST and also giving other wrong information of TNRERA. Due to lack of genunity of respondent I am cancelling the booked house."***

14. The home buyer sent a first mail on 18.7.2019 by stating that he wants to withdraw from the project and sought for refund. Particularly in the above said mail the home buyer has not stated any reason for withdrawal. Subsequently on 5.8.2019 the home buyer has added reasons that GST problem and some other issues. On the side of the promoter the home buyer was called for to the office for further clarification on the next day morning. But the home buyer without getting any further clarification from the promoter had straight away filed the complaint by stating the reason that Central Government has reduced GST from 12% to 5% and the promoter demanded 12% so he wants to withdraw from the project. The Central Government had issued clarification on 7.5.2019 as stated supra and the Government has also given option to the promoter either to choose new one without ITC or old one with ITC and the promoter chosen the old rate of GST with ITC. The above said clarifications were given by the Government of India itself. After two months from the said clarification on 18.7.2019 the home buyer sent a mail for

withdrawal without mentioning the GST problem. Subsequently, he has added GST problem. But the learned Adjudicating Officer found that the promoter has charged higher amount of GST and failed to reveal the benefit under the ITC. As per the construction agreement (At page No.20 of the Typed set of the appellant) at page No.3 cost of the villa mentioned as Rs.30,79,862/- and GST mentioned as Rs.5,95,144/- total construction cost Rs.37,21,948/-. In the same typed set at page No.16 summary schedule for payment, the promoter has specifically stated USDL Rs.18,45,180/-, Construction cost Rs.30,79,862/- and total amount to be paid mentioned as Rs.49,25,042/- in which booking amount mentioned as Rs.4,92,504/-. In the above said schedule GST has not been mentioned. In the construction agreement under the head of construction cost includes cost of the villa including TNEB, water, basic amenities and infra structure, GST, corpus fund, maintenance fee for 12 months. But in the schedule of payment not only the GST but also the other costs corpus fund, maintenance fee were also not included and the above said payments when will be paid is also clearly mentioned in the bottom of the summary schedule of payment. It has to be paid at the time of possession. Further stated that GST as applicable to be paid extra along with every milestone payment at actual GST rates are indicative and will be charged as per actual prevailing rates. Levying of GST is the policy of the Government of India and as per the rate only the promoter is liable to collect and remit and the promoter cannot collect more than the prescribed rate by the GST department. Furthermore, Input Tax credit (ITC) will be calculated at the end through documentary evidences and the

promoter is liable to give benefit to the buyers. In such circumstances, the mere allegation as GST problem alone is not sufficient to come to a conclusion that the promoter failed to provide correct information to the home buyer under Section 12 of the RERA Act is not sustainable.

15. The next ground relied by the learned Adjudicating Officer in paragraph 7(e) of his judgment that:

> ***"as per the clause 5 (a) of the construction agreement, the respondent is liable to refund the amount collected from the allottee subject to deduction of booking amount. Such a clause is vague, unfair and one sided not binding on the complainant. Therefore the respondent is not entitled to forfeit the entire amount to booking advance paid by the complainant".***

16. Now we have to analyze whether the above said finding is legally sound or not? For which the relevant clause of the agreement and relevant provision of RERA Rules have to be looked into and they are as follows:

Construction agreement dated 23.2.2019 between the promoter and home buyer (at page no. 6 of the construction agreement):

> ***5. Breach of terms and its remedy:***
>
> ***(a) Allottee Covenant:***
>
> **1. In the event of the allottee failing to pay the afore 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 fifteen (15) days to the allottee is entitled to cancel this agreement and reallot the villa/row house, to the other party and the allottee shall thereafter have no right, interest or claim over the villa or row house. Consequent to such**

termination, subject to deduction of the booking amount, the promoter shall refund the monies collected from the allottee within ninety (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.

The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017

9. Agreement for sale and construction agreement.-

(1) For the purpose of sub-section (2) of section 13 of the Act, the agreement for sale of undivided share of land or plot of land and construction agreement for construction of apartment, as the case may be, shall be in the Form in Annexure 'A'.

(2) to (4) .. ..

ANNEXURE 'A'
CONSTRUCTION AGREEMENT

5. BREACH OF TERMS AND ITS REMEDY:

(a) Allottee's COVENANT: 1. In the event of the Allottee failing to pay the aforesaid 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 (----) days to the Allottee is entitled to cancel this Agreement and reallot the Apartment, to the another party and the Allottee shall thereafter have no right, interest or claim over the Apartment. Consequent to such termination, subject to deduction of the booking amount, the Promoter shall refund the 86 87 monies collected from the Allottee within (----) 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.

17. As per the above said agreement clause 5(a)1 in the event of the allottee failing to pay the amount as per the payment schedule the promoter at their discretion after due notice of 15 days to the allottee is entitled to cancel this agreement and consequent to such termination, subject to deduction of the

booking amount the promoter shall refund the monies collected from the allottee within 90 days without interest. The promoter has sent demand note and reminders on 7.3.2019, reminder dated 13.5.2019, 24.7.2019 and 22.8.2019 to the home buyer even then the home buyer failed to pay the amount hence canceled the agreement by a letter for cancellation dated 1.10.2019. In the construction agreement the clause 5(a) is incorporated as per Rule 9 of TNRERA Rules. In Rule 9 of TNRERA Rules Annexure-A point No.5 model agreement was strictly followed by the promoter and incorporated the same in the construction agreement. So the promoter has followed the Rule 9 of The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 and cancelled the agreement. In such a situation, the findings of the learned Adjudicating Officer as such a clause is vague, unfair and one sided not binding on the complainant are all absolutely against the provisions of the TNRERA Rules 2017. Therefore the finding of the learned Adjudicating Officer is legally not sustainable.

18. The clause containing the construction agreement between the parties and the model agreement as given under the Rule 9(1) Annexure-A in the RERA Act is identical. Both the clauses are in parametria with each other. The promoter having followed the model agreement clause in his agreement, it cannot be stated as a vague one or unfair especially when the buyer in this case has failed to pay even the minimum booking amount in spite of all the demands made by the promoter. Further, the purchaser alone has voluntarily

withdrawn and not due to any default or fault on the part of the promoter. In this peculiar circumstance of the case definitely the purchaser cannot claim the amount for refund especially when he has not chosen to pay even the booking amount as admitted by both of them in the construction agreement and as per their communications. It is also brought to the notice that even at the time of payment of booking amount he was further liable to pay the 1st installment. Admittedly those amounts have also not been paid. Even the booking amount was paid in installments alone and not the full amount is paid. Therefore he is not entitled for the refund as claimed by him.

19. As per the Rule 9 of TNRERA Rules, 2017 and construction agreement clause 5(a)1 the promoter is absolutely entitled to deduct booking amount while cancelling the agreement for sale and construction. In this case, the promoter is entitled to deduct the booking amount Rs.4,92,504/- as per summary schedule for payment (page No.16 of typed set of appellant) and the home buyer paid only a sum of Rs.4,18,000/- which is less than the booking amount hence the promoter has deducted Rs.4.18,000/- towards cancellation charges and shown balance as nil in the cancellation letter dated 1.10.2019. Therefore, the claim of the promoter to deduct booking amount as per Rule 9 of TNRERA Rules is legally sustainable. In such circumstances, the order of the learned Adjudicating Officer to refund Rs.4,18,000/- along with interest at the rate of 10.05% along with compensation of Rs.50,000/- and awarding of litigation costs Rs.25,000/- are all legally not sustainable and unwarranted.

Hence this Tribunal comes to a conclusion that this appeal is deserves to be allowed. The point is answered accordingly.

20. In the result, by allowing this appeal the order of the Adjudicating Officer in C.C.P No.189 of 2019 dated 30.03.2021 is set aside and complaint of the home buyer is dismissed. No costs.

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 18th Day of March 2022.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
ADMN. MEMBER

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