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 04.02.2022

Coram : Mr.Justice B.Rajendran, Chairperson
Mr.N.Balasubramanian, Judicial Member

Appeal Nos. 108 to 113 of 2021

1. Neeraj Agarwal
2. Poonam Agarwal (A.Nos.108 and 109 of 2021)

Vineeta Agarwal (A.No.110/2021)

1. Dilip Kumar Jain
2. Nidhi Jain (A.No.111/2021)

1. Ashish Kumar
2. Shweta Agrawal (A.No.112/2021)

Navita Bihani (A.No.113/2021) ... Appellants

-Vs-

1. M/s. Ozone Projects Private Limited
   Rep by its Managing Director

2. The Managing Director
   M/s. Ozone Projects Private Limited ...Respondents

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These appeals were taken on file on 22.10.2021 and came up for final hearing on 28.1.2022 in the presence of Mr. S.Shujath, Counsel for the appellants and M/s.BFS Legal, P.V.Balasubramaniam, D.Ferdinand, K.M.Aasim Shehzad, Akhil R Bhansali and M.Meera, Counsels for respondents. 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:

COMMON ORDER

1. These appeals have been preferred against the order of the Adjudicating Officer in C.C.P.Nos. 38 to 43 of 2020. Since all the appellants are related to the same project and against the common order the appellants preferred these appeals hence in these appeals common order is pronounced. The appellants are the home buyers and the respondents are the promoters. In these appeals hereinafter the parties are called as per their original rankings as home buyers and promoters.

2. The home buyers booked flats with the promoters in their project namely Metro Zone at Koyambedu, Chennai and the home buyers paid part amount from their pocket and balance amount was paid by availing home loans. The promoters agreed to deliver the flats in May 2018. The promoters and two home buyers entered into subvention scheme the loan was availed and the banker consented to accept only interest on the loan amount from the promoters till the delivery of the property. Separate tripartite agreements were

entered between the parties and the bank. Since the promoters failed to start the construction work at the site the banker withdrew from the scheme hence the home buyers are now compelled to service the debt with the principal amount. The promoters were irregular in payment of monthly interest on the loan. Therefore the home buyers came forward with the complaint for the return of the amount with interest and compensation along with the litigation cost. After contest the learned Adjudicating Officer allowed the complaint in part directed the promoters to return the amount paid by the home buyers along with interest at 10.20% per annum along with compensation @ Rs.1,00,000/- each along with litigation cost Rs.25,000/- each. Aggrieved upon the same the home buyers preferred these appeals on the following main grounds:

- The order of the Adjudicating Officer failed to speak on the money paid by the home buyers to the banker directly on account of respondent EMI.
- The respondents had defaulted from paying to the banker the EMI interest from September 2019 onwards.
- The builders payable interest money adjudged by the RERA is far below than the money generally collected by the builder on default of payments by the buyers.
- Awarding of Rs.1,00,000/- towards compensation for mental agony was so meager compared to the mental agony the buyer had gone through.

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- The builders arrogance in non returning of the buyers money even after shelving the project long back and diverting of such funds elsewhere - a corrupt practice performed by the builder.
- The forum has not stayed their sale of land by the builder to third parties for which it had collected money from the home buyers.

3. The learned counsel for the appellants would submit that the learned Adjudicating Officer failed to consider the above said facts and moreover failed to compare the interest rate charged by the builder from the home buyers and failed to consider the mental torture suffered by the home buyers. By mere awarding meager amount alone is not sufficient hence these appeals are to be allowed as prayed for.

4. The learned counsel for the builder would submit that the learned Adjudicating Officer has come to a correct conclusion after considering the both sides documentary evidences therefore there is no infirmity in that findings hence these appeals have to be dismissed.

5. Points for consideration:

1. Whether the alleged compensation pleaded by the two home buyers in A.No.110/2021 and A.No.113/2021 were erroneously discarded by the lower forum are sustainable?
2. Whether the appeals deserve to be allowed or not?

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Point No.1 :

6. The home buyers in A.No.110/2021 and A.No.113/2021 have pleaded that the compensation arrived between the parties were not considered by the learned Adjudicating Officer and erroneously discarded. The home buyers have produced receipts for the payments from page Nos.41 to 49 in A.No.110/2021 and page Nos.42 to 50 in A.No.113/2021 in their typed sets. They have not produced any receipts issued by the promoters. Instead of that in page No.49 and 50 for A.No.110/2021 and A.No.113/2021 respectively the alleged compensation amount mentioned as delay compensation and then another amount shown as final amount payable is shown. The home buyers have not produced any piece of paper that delay compensation arrived at between the home buyers and promoters for T1202 and T1401 flats were carry forwarded to the new flats transactions. The home buyers alone have shown the above said amount as compensation in their complaints and memorandum of arguments before the Adjudicating Officer. The promoters have not issued any confirmation for the acceptance of the above said amount for the new allotment of flats. Now let us see the legal position whether the home buyers are entitled to compensation. As per Section 18 of the Real Estate (Regulation and Development) Act, 2016 if the allottee does not intend to withdraw from the project he shall be paid by the promoters interest for every month delay till the handing over of possession. In this case the home buyers have withdrawn from that project and opted for another project hence they cannot claim any delay compensation this is the legal position and it was properly explained by the learned Adjudicating Officer in his order at page No.6. Hence the learned Adjudicating Officer discarded that amount and included the remaining amount

and came to a conclusion and there is no infirmity in that finding. Hence the plea of the home buyers is not sustainable. The point No.1 is answered accordingly.

Point No.2:

7. The home buyers and the bank and the promoters have entered into four agreements namely sale agreement, construction agreement, tripartite agreement and supplemental agreement. The first two agreements entered on 31.8.2015 and the third agreement entered between the parties on 25.9.2015 and fourth agreement entered on between the home buyer and the promoters on 27.10.2016. The promoters agreed to deliver constructed flat on May 2018. As per the agreement the promoters failed to deliver possession of the flat consequently the banker closed the tripartite agreement and the promoters failed to pay the pre EMI interest from September 2019 onwards. These are the admitted facts.

8. Even though the learned Adjudicating Officer decided the complaint in favour of the home buyer, the home buyer came forward with this appeal on five grounds. The first ground is with regard to the order failed to speak on the money paid by appellants to the banker directly on default of paying interest by promoters. The second ground is with regard to interest rate. The third ground is with regard to meager award of compensation for mental agony. Fourth ground is with regard to non refund by promoters even after order and diverting the funds. The last ground is with regard to prevent the promoters by order of stay from selling to third party.

9. Except the first ground all other four grounds are related with legal impact. Let us discuss the ground Nos.2 to 5 first. The second ground is with regard to the interest rate awarded by the RERA is far below. Regarding interest is concerned it has been specifically contemplated in Section 18(1)(b) of The Real Estate (Regulation and Development) Act, 2016 which runs as follows:

> ***18. Return of amount and compensation.***
> ***(1) If the promoters 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 promoters, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.***

> ***18. Rate of interest payable by the promoters and the allottee.- The rate of interest payable by the promoters to the allottee or by the allottee to the promoters, as the case may be, shall be the State Bank of India highest Marginal Cost of Lending Rate plus two per cent:***
> ***Provided that in case the State Bank of India Marginal Cost of Lending Rate is not in use it would be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.***

10. As per Section 18 of the Real Estate (Regulation and Development) Act, 2016 and as well as Rule 18 of the Tamil Nadu Real Estate (Regulation

and Development) Rules, 2017 contemplated the rate of interest to be awarded to the allottee by the promoters. Against these provisions, the Adjudicating Officer or the Regulatory Authority or the Appellate Tribunal cannot pass orders or fix higher rate of interest than the rate prescribed by the provisions. Therefore, the order passed by the Adjudicating Officer regarding awarding of interest is concerned there is no infirmity. Therefore the arguments of the appellants' side are not sustainable.

11. The next ground with regard to the allegation as meager award for mental agony. What is meant by just compensation is explained by the Apex court in the following verdict and what are the factors to be taken into account while awarding compensation is contemplated in Section 72 of this Act. The Apex court verdict and Section 72 are as follows:

(2003) 7 SCC 197

Divisional Controller, KSRTC vs Mahadeva Shetty and another

It has to be borne in mind that the compensation is not expected to be a wind fall for the victim. Statutory provisions clearly indicate the compensation must be "just" and it cannot be a bonanza; not a source of profit but the same should not be a pittance. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a side discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and

reasonableness, and non- arbitrary. If it is not so it cannot be just.

Section 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.

As per the verdict of the Hon'ble Supreme Court just compensation is:

not expected to be a wind fall for the victim and the expression "just" denotes equitability, fairness and reasonableness, and non- arbitrary. If it is not so it cannot be just.

12. These are the principles while awarding compensation to be followed. In this Act also in Section 72 what are the factors have to be taken in account while awarding compensation is explained. By applying these principles we have to analyze the award passed by the learned Adjudicating Officer.

13. Admittedly already 10.20% interest was awarded, for the total amount paid by the home buyer on the amount the home buyer is entitled for return around Rs.25 lakhs, for which interest comes to Rs.2,55,000/-. By way of compensation for mental agony awarding of Rs.1,00,000/- equal to 4% and total interest comes to 14.20%. The learned Adjudicating Officer totally awarded 14.20% towards interest as compensation. Even in any commercial transaction awarding of interest more than 12% is highly

excessive. If the home buyer invested his money in any security or business certainly he could not have received more than 12%. At this juncture already the promoters was penalized for the delay in completion of project at the rate of 10.20% and again penalizing the promoters by awarding 18% interest as claimed by the home buyer will amount to double jeopardy. Hence it is unfair as per the above verdict of the Supreme Court. As per Section 72 of the Act the amount of loss caused as a result of the default can be proved by way of evidence. In this case the home buyer admitted that he obtained home loan and paid the amount to the promoters. But the home buyer has not stated that how much amount he has paid towards interest to prove as loss caused as a result of the default. But there is no doubt that if housing loan in obtained certainly the borrower has to pay interest for the bank. When there is no specific amount has been shown as interest or loss etc., it has to be compensated with reasonable amount. But it need not be parallel to the amount already awarded by way of interest at the rate of 10.20%. Admittedly the home buyers paid around 25 lakhs to the promoters. Till date the home buyer has not get back the return. So certainly it would cause mental agony and it cannot be measured in terms of money. Therefore this Tribunal comes to a conclusion that a reasonable compensation will heal the wound of mental agony. Hence this Tribunal comes to a conclusion that the compensation of Rs.1,00,000/- awarded by the learned Adjudicating Officer is reasonable and just compensation. Therefore the arguments of the appellants' side are not sustainable.

14. The next two grounds with regard to not returning of buyers' money and stay of sale of land. According to the home buyers even after the passing of the order by the Adjudicating Officer for the return of the amount, the promoters without returning the amount and diverting the same for other projects it amounts to corrupt practice and the promoters should not be permitted to sale of flats allotted to these home buyers. The home buyers felt that everything to be done immediately and simultaneously. Practically it is not possible. Furthermore, the Act and court cannot behave like a 'Kanthu Vatti' people (Usury interest) if the borrower defaulted immediately throttle the builder and prevent him from moving towards anywhere. For everything there is a procedure is contemplated in the Act and Rules. After the passing of the order there must be a reasonable opportunity to the defaulter to comply with the order. Within a reasonable time if the defaulter failed to comply then there is a procedure contemplated in this Act under Section 40 of The Real Estate (Regulation and Development) Act, 2016 and Rules 26 & 27 of The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017. Even after sufficient time granted the promoters failed to comply the manner of implementation of recovery as well as implementation of Act are contemplated by way of Tamil Nadu Revenue Recovery Act or by way of Civil Court to execute the order. Against these provisions the Adjudicating Officer cannot pass an order straight away preventing the promoters from selling the flats. Therefore the claim of the home buyers are against the procedure and it has to be done step by step. Furthermore, the learned Adjudicating Officer instead of granting stay he has passed an order by creating a charge on the flats booked by the home buyers till their payment. Hence instead of stay, charge has been created. Thereby

sufficient safeguard has been given by the Adjudicating Officer for the repayment of payment. When a charge is created in the property it will not be possible for him to sell without clearing the payment. Therefore, the arguments of the learned counsel for the appellants in this aspect are not sustainable.

15. The last and only ground put forth by the home buyers with regard to the order of the Adjudicating Officer is that nothing is said about the money paid by the home buyers to the banker directly on the default of the promoters to adhere supplementary agreement. Before discussing the merits of the point the supplementary agreement has to be looked into which runs as follows (page Nos.40 and 41 of the typed set of the appellants):

SUPPLEMENTAL AGREEMENT dated 27th October 2016

"***WHEREAS the Purchaser(s) have opted for a Subvention Scheme and as per the arrangement between Ozone and the Purchaser, Ozone had agreed to assume the liability of the Purchaser(s) to pay the pre-EMI interest to Axis Bank Ltd (the Bank) for the housing loan availed by the him/her/them for a period till May 2018, the date of handover of possession of Unit AF1004.***

WHEREAS the Purchaser(s), have requested Ozone to pay the pre-EMI interest on their behalf to AF1004 directly in case of any delay in handing over possession of unit beyond May 2018 subject to force majeure.

NOW IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES AS FOLLOWS:

1. ***Ozone hereby clarifies to the Purchaser(s) that the residential unit AF1004 will be ready and be handed***

over on or before May 2018, the assumed liability to pay pre-EMI interest to the Bank shall be till May 2018. However, in the rare event of handing over getting delayed beyond May 2018, Ozone assures to pay the Pre-EMI Interest payments directly to the Bank on or before due date or to the Purchaser(s) 3 days prior to the same falling due, till such time Ozone intimates the Purchasers that the unit is ready for handover.

2. ***In the rare event where bank insist to start the EMI, subject to banks confirmation the interest part of the EMI charges will be borne by Ozone and Ozone assures to pay the EMI interest payments, directly to the Bank on or before due date or to the Purchaser(s) 3 days prior to the same falling due, till such time Ozone intimates the Purchaser that the unit is ready for handover.***
3. ***This arrangement to extent the assumed liability will be effective till the date of intimation for handover of the unit once the unit is ready. The Purchaser(s) are requested to take the possession within 10 days from the date of intimation ad any further delay in taking over of the unit by the purchaser will not be considered, post which the Purchaser(s) shall be liable to repay the loan as per the terms and conditions indicated in his/her/their Loan Agreement.***

16. The above said supplemental agreement entered between home buyers and the promoters on 27.10.2016 in which the home buyers opted for a subvention scheme as per the arrangement between promoters and the

purchasers and the promoters agreed to pay the pre EMI interest to the bank for a period till May 2018, the date of hand over of possession. The promoters have further agreed that in the rare event of handing over getting delayed beyond May 2018, the promoters assures to pay the pre EMI interest payments directly to the bank. These are the agreements between the parties. According to the promoters, under subvention scheme the interest for the loan amount of Rs.40 Lakhs was paid by the promoters till August 2019. Further, the promoters has filed written arguments before the Adjudicating Officer in which the promoters has prayed that "to grant time till December 2021 to close housing loan availed by the home buyer and refund the own contribution paid by the home buyers". The promoters has not denied the liability of payment of pre EMI interest and only sought for time till December 2021. Now the time for repayment by the promoters already lapsed i.e. December 2021 for the pre EMI interest. The learned Adjudicating Officer while passing orders granted 60 days time for the payment. But unfortunately there are no specific wordings in the order of the Adjudicating Officer with regard to the repayment of pre EMI interest as agreed between them in the supplemental agreement. The promoters are liable to pay the pre EMI interest as agreed in the supplemental agreement. Even though the home buyers withdrew from the project and sought for refund by way of complaint to the Adjudicating Officer, even then the promoters agreed to pay the pre EMI interest and sought for further time for payment. In such circumstances permitting the promoters to pay the pre EMI interest within the period of reasonable time will serve the purpose. Therefore this Tribunal comes to a conclusion that the appeal is liable to be allowed in part by modifying the relief with regard to the payment of pre

EMI interest to the bank by the promoters on behalf of the home buyers and remaining part of the order of the Adjudicating Officer is confirmed. Point No.2 is answered accordingly.

17. In the result, these appeals in A.Nos.108 and 109/2021 are allowed in part without costs and the order of the Adjudicating Officer in C.C.P.Nos. 39 and 40 of 2020 dated 30.7.2021 is modified with regard to supplemental agreement and remaining portion of the order is confirmed as follows:

a) The respondents/promoters are directed to pay the balance pre EMI interest payable to the bank on behalf of the home buyers within a period of two months.

b) Remaining portion of the order of the Adjudicating Officer is confirmed.

18. In the result, these appeals in A.Nos. 110 to 113 of 2021 are dismissed without costs and the order of the Adjudicating Officer in C.C.P.Nos 38, 41 to 43 of 2020 dated 30.7.2021 are confirmed.

Connected Miscellaneous applications are closed. No costs.

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 4th Day of February 2022.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
JUDL. MEMBER

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