BEFORE THE TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL
CHENNAI
Friday the 17th Day of June 2022

Coram : Ms.Leena Nair, Administrative Member
&
Mr.R.Padmanabhan, Judicial Member

Appeal No. 130 of 2021

1. M/s. Cenotaph developers LLP,
   Rep. by Chandrakanth Metha and its Partners

2. M/s. Olympia Tech Park Chennai Pvt. Ltd.,
   Formerly known as M/s. KSM Housing Pvt. Ltd.
   Rep. by its Directors ... Appellants

Vs

Vinny Sawhney ... Respondent

This is an Appeal preferred as against the order of the Adjudicating Officer attached to the Tamil Nadu Real Estate Regulatory Authority in C.C.P.No.264/2019 dated 19.08.2021. The Appeal was taken on file on 18.11.2021 and came up for final hearing on 08.06.2022 in the presence of M/s.Fox Mandal & Associates, Jayaprakash Padmanaban, Hishita Madan, K.Lakshmi and Vijay.R.Sekar, Counsel for the appellants and M/s.Mothilal & Goda Advocates, S.Mothilal, G.Revathy, M.Ravikiran and U.Umamaheswari, Counsel for

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Respondent. After hearing both sides through video conferencing and having stood over for consideration till this date, this Tribunal delivered the following,

ORDER

The common facts that are relevant for the disposal of this appeal in brief are as follows:

1. At the outset there is no dispute between the parties about the booking of a flat, execution of agreements, making payments by the respondent with the appellants in their project named "The Good Wood Residence" at No.3, Cenotaph Road, Chennai. The dispute is only with regard to repayment of Service Tax component amount of Rs. 12,77,539/- consequent to the cancellation of the flat booking by the allottee namely the respondent herein. The respondent initially offered to purchase the proposed flat No.3D, Third floor, measuring 2348 sq. ft. approximately at the rate of Rs.19,000/- per sq. ft. If calculated the total cost of the said flat alone comes around Rs.4,46,12,000/- excluding the UDS area. The respondent on various dates from April 2016 to June 2017, paid a sum of Rs.3,63,36,841/- to the appellant towards booking amount and the Construction costs.

2. Subsequently, during April 2017 the respondent decided to cancel the booking due to some personal reasons. The same was conveyed to the appellant and in fact the appellant also fairly repaid Rs.3,50,59,302/- on various dates to the respondent. The last such repayment was made on 13.08.2018. The respondent also executed a

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letter in favour of the appellant on the same day. The liability to repay the remaining balance amount of Rs.12,77,539/- is in dispute. Claiming this amount with interest and compensation, the respondent preferred a complaint before the Adjudicating Officer attached to the Tamil Nadu Real Estate Regulatory Authority, Chennai in C.C.P.No. 264 of 2019.

3. After hearing both parties the learned Adjudicating Officer passed an order directing the appellant to refund the balance amount of Rs.12,77,539/- along with interest at the rate of 10.25%. Further, a sum of Rs.50,000/- towards compensation for mental agony and Rs.25,000/- towards legal expenses was also ordered in favour of the respondent and as against the appellant. Both the appellants were directed to pay either jointly or severally. Before the Adjudicating Officer, the respondent produced eight documents and marked as Ex.A1 to Ex.A8 while no documents were produced on behalf of the appellants.

4. After filing this appeal the appellant filed some additional documents vide M.A.No.33 of 2022 and M.A.No.57 of 2022. Since those documents are considered necessary for arriving a just decision in this appeal, those additional documents are received and the above M.A.Nos.33 and 57 of 2022 hereby allowed subject to proof and relevancy. As such those additional documents were marked on the side of the appellant as Ex.B1 to Ex.B8.

5. Heard both sides. The counsel for the appellant emphatically argued that the balance amount of Rs.12,77,539/- was already remitted by them towards Service tax, Swach Bharat Cess and Krishi Kalyan

Cess. The break up details are as follows. Out of 12,77,539/- a sum of Rs. 11,92,369/- was remitted towards Service Tax, Rs.42,585/- was remitted towards Swach Bharat Cess and a sum of Rs.42,585/- was remitted towards Krishi Kalyan Cess. As per the stage demand invoices marked as Ex.B2 to Ex.B4 the construction cost was collected from the allottee namely the respondent herein on various dates. Based on the construction cost collected from the allottee namely the respondent herein, on various dates, the Service Tax, Swach Bharat Cess (herein after referred to as SBC) and the Krishi Kalyan Cess (herein after referred to as KKC) was calculated and remitted to the Central Board of Excise and Customs without any delay. In order to prove such remittances to the Central Board of Excise and Customs, the learned senior counsel would rely upon Ex.B8 which is the certified copy of the Tax Remittance Details along with the Service Tax Returns and its annexure.

6. According to the learned senior counsel the difficulty arose because of the introduction of the Goods and Services Tax Act which replaced the earlier Service Tax regime. After the introduction of the Goods and Services Tax (GST) regime, it became impossible for the appellants to get refund of the Service Tax component from the Central Board of Excise and Customs, the counsel argued.

7. The learned senior counsel further argued that inclusive of Rs 87,22,461/- paid as per Ex.A4 letter dated 13.08.2018, the respondent was paid in all a sum of Rs.3,50,59,302/- till 13.08.2018. According to

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the learned Counsel, the respondent had received the said amount of Rs.87,22,461/- towards full and final settlement. Therefore, the respondent cannot now claim the balance amount of Rs.12,77,539/- as the same was already remitted to the Central Board of Excise and Customs with the knowledge of the respondent.

8. **Per contra,** the counsel for the respondent would argue that the appellants ought to have taken steps to get refund of the amount of Rs.12,77,539/- remitted by them with the Central Board of Excise and Customs, immediately after the cancellation of the booking by the respondent during April 2017 itself. The learned counsel further argued that the appellant company as an assessee to the Service Tax they alone can claim refund of the Service Tax component citing the cancellation of the booking by the respondent. The respondent has no role to play in claiming the refund of Tax amount as he is not an assessee to the Service Tax. It is the fault of the appellants for which the respondent cannot be penalized. The counsel further argued that there is no evidence to show that the appellants have not claimed refund of the service Tax component from the Central Board of Excise and Customs.

Points for consideration:

1. Whether the appellants are bound to repay the Service Tax component to the respondent consequent to the cancellation of booking of the flat ?

2. Whether this appeal is to be allowed?

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Point No.1:

9. Excluding the previous payments towards booking amount / construction costs, the respondent paid a further sum of Rs.50,00,000/- (fifty lakhs) on 29.06.2017 by Cheque bearing serial number 016670 dated 28.06.2017(Refer Ex.B8 Audit Report @ Annexure II) towards the construction cost. Inclusive of this amount the respondent paid in all a sum of Rs.3,63,36,841/-. Thereafter he decided to cancel the booking. It is stated in the complaint that the respondent sent an email regarding cancellation to the appellant during May 2017. But no such email copy was filed by the complainant. There is no serious dispute on this aspect of cancellation. The appellant accepted the cancellation and repaid the entire amount less the Service Tax component. On various dates and upto 13.08.2018 the appellants repaid a sum of Rs.3,50,59,302/- out of Rs.3,63,36,841/- they received from the respondent. There is no dispute on this aspect also. The dispute is with regard to the balance amount of Rs.12,77,539/- being the Service Tax component remitted to the Central Board of Excise and Customs. It may be noted that the appellant, though entitled to charge Cancellation charges at 10% of the construction costs, has not made any Counter Claim either before the Adjudicating Officer or before this Tribunal for the reasons best known to them only.

10. The learned counsel for the appellants took much pain to establish that this amount was already remitted to the Central Board of Excise and Customs towards Service Tax components. As per Ex.B8

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now produced before this Tribunal as an additional document it is proved by the appellants that the said amount of Rs.12,77,539/- has been remitted to the Central Board of Excise and Customs during April 2017 and June 2017 on the basis of the construction cost collected from the respondent. There is no doubt on it. However consequent to the cancellation of the flat booking, the appellants, as an assessee, ought to have taken steps to get refund of the Service Tax component from the concerned authorities and paid to the respondent. Having failed to apply for refund of the Service Tax Component by furnishing the necessary details, the appellants cannot escape from the liability to pay the balance amount of Rs.12,77,539/-. The person who collects and remits the service tax component to the Government, alone can claim refund from the Government. Irrespective of the fact that whether the appellant claimed refund of Service Tax component or not they are liable to pay the amount to the respondent.

11. Lastly we don't find any force in the argument put forth by the counsel for the appellant with regard to Ex.A4 letter dated 13.08.2018. According to the counsel for the appellants by executing this letter dated 13.08.2018 the respondent agreed to receive the amount of Rs.87,22,461/- mentioned therein, towards full and final settlement of the amount payable due to cancellation. We have carefully perused the last paragraph of the letter which reads as follows:

"We are agreeable to receive our cancellation amount as full and final settlement of Rs.87,22,461/- without any other financial charges or

deducting any penalty for cancellation. We note that this amount is payable to us after deducting the service tax component which has been paid to Revenue while raising stage demand."

There is nothing to show that the respondent has specifically agreed to forego the balance amount of Rs.12,77,539/-. Unless there is a specific waiver of this service tax component by the respondent, the term "full and final settlement" cannot be construed as waiver of the service tax component amount of Rs.12,77,539/-. Moreover the respondent was at the receiving end at the time of execution of the letter in Ex.A4 dated 13.08.2018.

12. Even after the execution of the letter dated 13.08.2018 the respondent was very much particular in getting back the service tax component amount of Rs.12,77,539/-. The "whatsapp chatting" between the appellants and the respondent has been marked as Ex.A7. On 10.10.2018, both the respondent and the appellants chatted with each other in respect of the repayment of the service tax component amount which is extracted hereunder:

"10.10.2018 7:30:09 pm Vinny: Good Evening CK Bro I had been to the Commissioner Office of GST and discussed the issue I am facing. I was told the builder has an ongoing account with the department and could easily adjust or even ask for a refund as the service has not been availed. I request you to please do the needful Bro as I am out of work each and every penny is important. I value our relationship and friendship. I am sure you can help.

10.10.2018 7:32:13 pm CK: We will formally respond to your mail."

The Whatsapp chat extracted above clearly shows that the respondent was all along insisting for the payment of Rs.12,77,539/- by requesting the appellants for refund of the service tax component amount from the department.

From the above discussions we answer this point No.1 in the affirmative and direct the appellants to repay all the amounts as per the order of the Learned Adjudicating Officer in C.C.P.No.264 of 2019 dated 19.08.2021.

Point No.2:

13. In view of the finding given by us for point No.1 we hold that this appeal is liable to be dismissed.

14. In the result, the appeal is hereby dismissed. Consequently it is hereby ordered that after the expiry of appeal time fixed under Section 58 of the T.N.Real Estate (Regulation and Development) Act 2016 the respondent is entitled to withdraw the entire amount deposited by the appellant under section 43(5) of the T.N.Real Estate (Regulation and Development) Act 2016 along with accrued interest. In the facts and circumstances of this case the parties are directed to bear their own costs. Connected Miscellaneous Applications if any pending are hereby closed.

This Order is dictated to the Stenographer and typed by her directly in the computer, corrected and pronounced by us in the open court on 17th Day of June 2022.

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDICIAL MEMBER

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Documents produced by the appellants vide MA.No.33/2022 and M.A.No.57 of 2022 are marked as follows:

Exhibits	Date	Description
Ex.B1	27.02.2017	Letter of Allotment sent to the respondent
Ex.B2	21.04.2017	Stage Demand Invoice
Ex.B3	06.06.2017	Stage Demand Invoice
Ex.B4	29.06.2017	Stage Demand Invoice
Ex.B5	-	Ledger Statement of the Appellant
Ex.B6	13.08.2018	Certificate Acknowledged by Respondent
Ex.B7	-	Audit report of the Chartered Accountants
Ex.B8	-	Details of Service Taxes remitted

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDICIAL MEMBER

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