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 22.10.2021

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

Appeal No. 30 of 2021

M/s.Ozone Projects Private Limited
Rep. by its Sr. DGM Mr.K.Krishnan ... Appellant

-Vs-

1. C.Venugopal
2. Radha Venugopal .... Respondents

This appeal was taken on file on 5.3.2021 and came up for final hearing on 20.09.2021 in the presence of M/s.BFS Legal, P.V.Balasubramaniam, D.Ferdinand, K.M.Aasim Shehzad, Meera.M., Counsels for the appellant and M/s.Vikram Ramakrishnan and D.Balasubramanian, Counsels for the 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:

ORDER

1. The appellant/developer preferred this appeal against the order of the Adjudicating Officer awarding compensation in favour of the home buyers in C.C.P.No.265/2019 dated 31.12.2020. The appellant is the respondent in the complaint filed by the complainant and in this appeal the complainants are the respondents. Hence to avoid confusion in this appeal the parties are called as per their original rankings namely homebuyers and developer.

2. The home buyers and developer entered into construction agreement dated 9.11.2017 with respect to residential unit number F-502 in Tower-F. On the same day the developer has registered the sale deed conveying the proportionate UDS for the said flat to the home buyers. The developer agreed to hand over possession in April 2018 including a grace period of 3 months. Since the developer failed to hand over the completed flat within the stipulated time and handed over the flat in July 2019 with delay of 15 months, hence the home buyer filed a complaint before the learned Adjudicating Officer in C.C.P.No.265 of 2019 for the relief of delay compensation, compensation for mental agony and for litigation costs. After contest the claim of the home buyer was partly allowed by awarding compensation by way of interest at the rate of 7% p.a. under the head of delay compensation, and also awarded a sum of Rs.1,00,000/- towards compensation for mental agony with litigation costs Rs.25,000/-. Aggrieved upon the same the developer preferred this appeal.

3. The developer has stated that the home buyer has paid only Rs.1.71 crores out of 2.16 crores and a sum a Rs.45,00,000/- is due and payable for more than 2 years. Further, upon possession invite being given by the developer on 25.6.2019 the home buyer paid the balance only on 27.6.2019. There has been a huge delay of 588 days in making payments as per the construction agreement. As there is a delay by the home buyers, they are not entitled for contractual compensation and similarly as per section 19 (6) of RERA, 2016 r/w Rule 19(2) of Tamil Nadu Rules 2017, the home buyers were not entitled to any compensation from the developer on account of their failure to make payment as per the terms of the construction agreement. In addition to the above facts the developer has also raised the following important grounds:

- As per the registered construction agreement between the parties, the timely payment of installments as per the payment schedule specified in the Annexure 1A is the essence of transaction.
- The home buyer having failed in making timely payment is not entitled for any compensation as per section 19(6) of the RERA 2016 and 19(2) of the Rules, 2017.
- When there is no proof submitted by the home buyers the entire claim towards mental agony and inconvenience is not sustainable. Further it cannot be awarded on an assumption granting relief to the home buyers.
- While awarding compensation to the home buyers, who have taken all the benefits from the developer namely alternate

accommodation in the same project for more than one year has to be taken in account.

4. The learned counsel for the developer has vehemently put forth his arguments on the above said grounds and emphasized the 4th ground and further submitted that the learned Adjudicating Officer without considering the above said points simply awarded without any proof and without any reason hence, the order has to be set aside by allowing this appeal.

5. The learned counsel for the home buyer would submit that both the parties mutually entered into a construction agreement on 9.11.2017 in which there is a specific clause under the head of breach of terms and its remedy in clause 5 and in the said clause there is a specific proviso clause for payment of compensation by way of interest at the rate specified in the rules for every month of delay till the handing over of possession of the apartment. The learned Adjudicating Officer has followed the Rules as contemplated in the mutual agreement between the parties. Hence, there is no infirmity in the findings. Therefore this appeal is devoid of merits and it has to be dismissed.

6. Perused both side contentions. On perusal of the grounds of appeal, on the side of the developer has raised 14 grounds against the order of the Adjudicating Officer. The following are the main grounds to decide the issue:

- Non consideration of additional accommodation provided by the developer to the home buyer.

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- Without pleading and proof mere prayer alone was considered and granted relief.
- Defaults in making timely payment as per the terms of the agreement the home buyer shall not have the right of claiming any interest or compensation.

7. Point for consideration:

Whether the appeal deserves to be allowed or not?

Point:

8. The appellant/developer and the home buyer/allottee entered into construction agreement on 9.11.2017. The developer agreed to hand over possession in April 2018 including a grace period of 3 months. The developer failed to hand over the completed flat within the stipulated time and handed over the flat in July 2019 with a delay of 15 months. These are all admitted facts.

9. According to the home buyers the flat was handed over with the delay of 15 months hence as per clause 5 of the agreement dated 9.11.2017 the home buyers are entitled for compensation. According to the developer for the delayed period the developer arranged for alternate accommodation to the home buyers and the developer paid rent on behalf of the home buyers. Regarding alternative arrangement made by the developer the home buyers

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have stated in their email dated 28.8.2018 which was marked as Ex.A8 which runs as follows:

> ***"I had approached you regarding delay in final hand over of my apartment F-502 and you and the ground team were kind enough to facilitate alternate accommodation at Metro zone, for which I am grateful."***

10. So the alternative accommodation made by the developer for which, the home buyers have not paid anything. In this regard, the home buyer No.1 has stated in his proof affidavit in paragraph No.6 to 8 before the Adjudicating Officer regarding other facilities which runs as follows:

> ***"As our apartment was sold and handed over, there was no place to keep our household furniture and belongings. The respondent came up with the concept of "Fit out" handover, wherein the apartment alone is completed with no water or electricity provision, just to enable the completion of fitouts in the apartment, with the promise that by the time the fitouts are over, the full apartment and tower would be complete in all respects for occupation.***
>
> ***Having completed the fit outs, but the apartment or tower not ready having no other choice, moved out household goods and belongings to the incomplete apartment at Metro zone for safe keeping. They then proceeds abroad for 3 months on the promise of the respondent that their apartment would be ready for occupation on our return in 3 months i.e by June 2018***
>
> ***On our return from abroad in June 2018 we found that no progress has been made in the completion of their apartment or the tower, Having no home to stay on desperate appeals to the respondent, as a temporary arrangement the respondent allotted a 2.5 BHK***

apartment to us in June 2018 with assurance that their apartment will be delivered within 90 days i.e. September 2018."

11. In the mail sent by the home buyer Mr.Venugopal the alternate accommodation arranged by the developer and ground team but in the proof affidavit it has been specifically stated that it was arranged after desperate appeals to the developer. It is self contradictory.

12. According to the developer delay of 588 days in the payment made by the home buyer in support of the claim Ex.B4 was marked by the developer. On the side of the home buyers there is no specific denial regarding the delay. As per the construction agreement dated 9.11.2017, Ex.A2, the home buyers are liable to pay 18% interest for delayed payment. But the home buyers in their proof affidavit in paragraph No.9 has specifically stated as follows:

"No escalation charges was claimed from the complainants.

No penal interest for the delayed payment was charged from the complainants."

The developer himself waived the claim of penal interest hence it is immaterial.

13. Now the only question is when the home buyers accepted the alternative accommodation in lieu of interest/compensation how they are entitled for compensation? Before going to discuss the merits of the case, the

relevant provision in this regard is contemplated in Section 72 of the Real Estate (Regulations and Development) Act, 2016.

> 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.***

14. As per Section 72 while awarding interest and compensation the above four factors have to be taken into account. In the present case on 1.7.2019 possession was handed over. As per the construction agreement possession has to be handed over in April 2018. Admittedly there is delay of 15 months. The alternative accommodation provided by the developer to the home buyers was from June 2018. In paragraph No.10 of the proof affidavit of the home buyers they claimed interest from April 2018 to June 2019 for 15 months. Out of 15 months from June 2018 to June 2019 for 13 months alternative accommodation has been provided by the developer for which no

amount was paid from the home buyers pocket. For the remaining period namely April and May 2018 the home buyers paid rent from their pocket. For the above said two months, the amount of loss caused by the developer to the home buyers and for the said period the developer is liable to pay delay compensation by way of interest as per Ex.A3 agreement. From June 2018 to June 2019 the default of the developer has not repeated and the developer had suitably compensated the loss by providing alternative accommodation. Further, the developer considering the situation of the home buyers namely, no safety place is available for the home buyers to protect the belongings of the home buyers the developer provided them safety place under the concept of fit outs. These are all against Section 72(b) (c) and (d) of The Real Estate (Regulations and Development) Act, 2016. According to the home buyers they claimed Rs.21,60,929.90 as compensation from the developer. Even though the home buyers enjoyed the alternative accommodation on free of cost in lieu of interest even then the home buyers claimed to that extent. It is against Section 72 (a) of The Real Estate (Regulations and Development) Act, 2016. The learned Adjudicating Officer without considering the above said facts and Section 72 awarded 7% interest as compensation. Hence this Tribunal comes to a conclusion that the awarding of 7% interest as compensation to the home buyers is not sustainable as per Section 72 of The Real Estate (Regulations and Development) Act, 2016.

15. The next point for consideration is awarding of compensation under the head of mental agony and inconvenience to the tune of Rs.1,00,000/- is

justifiable or not. The home buyers stated about the compensation towards mental agony and inconvenience caused by the respondent to the tune of Rs.25,00,000/- is inserted in the prayer column of Form N filed by the home buyers before the Adjudicating Officer. Nowhere in the paragraph No.4 in the body of the complaint has been stated about the mental agony and inconvenience caused by the developer. The learned Adjudicating Officer has also answered in a single line without any discussion or reasoning and simply stated in paragraph No.8 (d) of the order that "the complainants are entitled for a sum of Rs.1,00,000/- towards mental agony and inconvenience". How the learned Adjudicating Officer arrived at compensation of Rs.1,00,000/- under the head of mental agony and inconvenience are not discussed and arrived at a conclusion. The compensation how to be calculated and the compensation arrived at must be just and reasonable it is the basic principle as per the following verdict of the Hon'ble Supreme Court:

(2003) 7 SCC 197

Divisional Controller, KSRTC vs Mahadeva Shetty and another

> ***It has be 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***

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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.

16. As per the above apex court verdict while fixing compensation what are the facts taken into consideration and it should not be a wind fall and not a source of profit. In this case the home buyers have not stated how they are affected by mental agony and inconvenience. The learned Adjudicating Officer also has not stated how he arrived at Rs.1,00,000/- as compensation. In such circumstances this Tribunal comes to a conclusion that the compensation awarded by the learned Adjudicating Officer under the head of mental agony and inconvenience is not sustainable and acceptable.

17. The home buyers really suffered a loss by way of paying 2 months rent from their pocket for that period certainly they are entitled for compensation by way of interest as per the agreement dated 9.11.2017, Ex.A2. For that period the home buyers claimed in page No.7 of the Form N itself as Rs.1,40,385.237 each. For two months the home buyers are entitled to Rs.2,80,770.47 as round off Rs.2,80,770/- only as per the agreement dated 9.11.2017. For the remaining period the home buyers were compensated by way of alternative accommodation. The home buyers stated reason for further loss namely paying rent for furniture but failed to mention about the

accommodation of their belongings in their incomplete apartment. It is not the case of the home buyers that the developer prevented them from using their own furniture. In such circumstances the claim of the home buyers as loss by way of rent is not sustainable. Therefore this Tribunal comes to a conclusion that the home buyers are entitled to compensation by way of interest only for two months as per the agreement dated 9.11.2017, Ex.A2 as contemplated in Rule 18 of The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 .

18. Therefore, this Tribunal comes to a conclusion that for the above said reasons and as per Section 72 of The Real Estate (Regulations and Development) Act, 2016 the order of the learned Adjudicating Officer is liable to be modified and this appeal is liable to be allowed in part. The point is answered accordingly.

19. In the result, this appeal is allowed in part. The order of the Adjudicating Officer in C.C.P.No.265/2019 dated 31.12.2020 is partly set aside and partly modified & confirmed is as follows:

a) Compensation granted by the Adjudicating Officer for mental agony and inconvenience is set aside.

b) The claim of the home buyers for compensation in Form 'N' for mental agony and inconvenience is dismissed.

b) The order of the Adjudicating Officer with regard to delay compensation is modified to a sum of Rs. 2,80,770/- only instead of 7% interest.

c) The order of the Adjudicating Officer with regard to litigation expenses is confirmed.

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 22nd Day of October 2021.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDL. MEMBER

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