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 19.01.2022

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

Appeal No. 36 of 2021

M/s. Akshaya Pvt. Ltd.,
Rep. by its Director, J.Ravi ... Appellant

-Vs-

N. Dinesh .... Respondent

This appeal was taken on file on 26.03.2021 and came up for final hearing on 20.12.2021 in the presence of M/s.Mani Sundargopal and Shree Aadya.S, Counsels for the appellant and M/s.A.Smrithi, N.Vasanth Kumar and N.Gnanambigai, 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:

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ORDER

1. This appeal has been preferred by the promoter against the order of the Adjudicating Officer in C.C.P.No.169 of 2019 dated 23.03.2020. To avoid confusion, herein after, the parties are called in this appeal, as per their original rankings as home buyer and promoter.

2. The appellant is the Real Estate promoter and has promoted a project named 'Today' launched in November 2012 comprising of 1612 apartments consisting of four blocks B,C, D and E. The respondent is the home buyer. Both of them entered into sale and construction agreement on 5.2.2013 through which undivided share of land to an extent of 225.06 sq. ft. was agreed to be conveyed to the home buyer for the construction of the residential apartment with a built up area measuring 617 sq. ft. bearing apartment No. E3, 1204, 12th Floor, E-Block in the project 'Today' and total sale consideration agreed between the parties is Rs.19,58,450/- the home buyer paid Rs.2,00,000/- on 25.11.2012 and paid a sum of Rs.1,91,690/- on 21.1.2013 towards booking advance. After that no payment was made as per the payment schedule in spite of repeated reminders. Hence the appellant was constrained to issue notice for cancellation on 24.6.2014 and email dated 25.6.2014. Since the respondent has not even responded to the notice of cancellation the appellant was constrained to issue a letter dated 16.7.2014 cancelling the allotment made to the home buyer. The respondent alleging that there was a delay in construction of the apartment, approached the Adjudicating Officer, Tamil Nadu Real Estate Appellate Authority in

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C.C.P.No.169/2019 for the relief of refund along with interest, compensation for mental agony and for litigation expenses. After contest the Adjudicating Officer allowed the complaint in part and directed the promoter to refund Rs.4,16,690/- along with interest at 10.05% and litigation costs Rs.25,000/- and negatived the claim of compensation. Aggrieved upon the same the appellant/promoter preferred this appeal on the following main grounds:

- As per Tamil Nadu Real Estate (Regulation and Development) Rules, 2017, Rule 4 Explanation I 'any agreement already entered between the promoter and the allottee before commencement of these rules shall not be affected.' In this case the promoter and the home buyer entered into an agreement on 5.2.2013 before this Act and Rules came into force. Hence the home buyer cannot invoke the provisions of real estate Act even though several reminders were sent to the home buyer for making stage wise payments.
- In the absence email communications dated 25.6.2014, 16.7.2014 (Exhibit B14 and Exhibit B15) the communication in Ex.B16 dated 2.9.2014 cannot be treated as one in supersession of the previous communications.
- The citation relied by the Learned Adjudicating Officer in ILR 1992 KANT 644 is only account of the will, the agreement to sell was held to be kept alive. Whereas in the present case there were no documents to show that the letter in Ex.B15 has been subsequently rescinded or that the earlier agreement was

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kept alive for proceeding with transactions between the home buyer and the promoter.

- The period of three years would commence from the date of the breach of the contract itself i.e in the year 2014 when the home buyer failed to adhere to the time schedule.

3. The learned counsel for the appellant would submit that the learned Adjudicating Officer without considering the above said main grounds simply accepted the claim of the home buyer on the basis of the Ex.B16, communication by the customer care department of the promoter company. Further would submit that the promoter has sent reminders through email on 12.4.2013, 13.5.2013 16.7.2013, 3.10.2013, 22.11.2013, 30.11.2013, 30.12.2013, 23.1.2014, 11.3.2014, 24.6.2017 and 29.9.2014 to which the home buyer had turned a blind eye. Hence the promoter was constrained to issue notice for cancellation on 24.6.2014 and email dated 25.6.2014 attaching the notice of cancellation. The above said facts was not properly appreciated by the learned Adjudicating officer. Hence the order of the Adjudicating Officer has to be set aside.

4. The learned counsel for the home buyer would submit that the learned Adjudicating Officer after elaborate discussion and considering both sides documentary evidence and came to a correct conclusion, hence there is no infirmity in that finding therefore this appeal has to be dismissed.

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5. Point for consideration:

1. Whether the claim of the home buyer is barred by Limitation?
2. Whether the appeal deserves to be allowed or not?

Point No.1:

6. Perused both side contentions. On perusal the scope of this appeal is very limited. The home buyer paid booking advance only to the tune of Rs.3,91,690/- along with Rs.25,000/- referral bonus as per the account statement produced by the promoter. The home buyer has not paid any further payment as stated in the Annexure I of the construction agreement namely on Bhoomi Pooja Rs.4,18,552/- and stage wise payment @ Rs.97,922/- and subsequent stage wise payments stage No.2 to 11 upto completion of flooring in apartment Rs.58,754/- were not paid and the promoter sent a letter as well as email by cancelling the allotment and offered to return the advance amount as per the agreement. These are all admitted facts.

7. According to the home buyer since the project got stalled for a long time the home buyer asked the promoter to return his booking advance Rs.3,91,690/- but the promoter continued to evade the requests of the home buyer. Hence he sought for return of money along with accumulated interest @ 12% p.a and with referral bonus. But the promoter denied the allegations of the home buyer that the project got stalled is false and has stated that as per the agreement the home buyer is entitled to refund amount without interest after deducting 10% of cost of construction as liquidated damages and all refunds shall be made only after

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identifying an alternate purchaser and receipt of the sale consideration from the prospective purchaser and shall carry no interest for the interim period. These are the disputed facts.

8. Admittedly on 5.2.2013 the home buyer and the promoter entered into construction agreement. Cost for construction of the apartment is fixed as Rs.14,95,700/-. Towards the booking advance the home buyer paid to the promoter a sum of Rs.3,91,690/- only. The above said amount paid by the home buyer on 25.12.2012 a sum of Rs.2,00,000/- and on 21.1.2013 a sum of Rs.1,91,690/- after that no payment was made. It is not disputed. The only reason adduced by the home buyer for the nonpayment and claim of refund is that the project got stalled for a long time. Before going to discuss the merits of the case the relevant clause for the construction agreement have to be looked into. They are as follows: (The typed set of papers produced by the promoter at page No.64, the construction agreement clause 5.1 and 5.2)

> ***"5.1. The first party shall make the payments on due dates without any demand from the second party.... Any delay in payment on due dates will attract interest at the rate of 12% per annum from the date of default till the date of payment....***
>
> ***5.2. In the event of the first party failing to pay the aforesaid sums, in the manner provided in the Annexure-I, the second party may at their discretion after due notice of 15 days to the first party cancel this agreement and dispose of the schedule c property of the first party shall thereafter no right, interest or claim over the apartment and such proceeds. In such an event the second party shall refund such sums of money as received from the first party without interest under this agreement, however after deducting 10% of cost of constructions as liquidated damages apart from all expenses incurred to dispose of the schedule c property. All refunds shall be made only after identifying an alternate purchaser and receipt of the sale consideration from the prospective purchaser and shall carry no interest for the interim period".***

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9. As per the above said default clause the promoter is liable to refund the advance amount after deducting 10% towards liquidated damages and after deducting the expenses incurred to dispose the said property and after disposal to the third party the amount will be refunded without interest. Now the home buyer claimed 12% interest in the complaint. The learned Adjudicating Officer has awarded 10.05% interest for the refund of money. According to the promoter the award of interest is against the agreement between the parties. The relevant Rule and the finding of the Adjudicating Officer is as follows:

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

Rule 4(1) Explanation I:

"Any agreement already entered between the promoter and the allottee before commencement of these rules shall not be affected."

The learned Adjudicating Officer gave a finding in this regard that

"It is held that the complainant is entitled to repayment of the entire amount paid to the respondent without any deduction and is not entitled to claim any interest or other compensation for the amount paid till the date of filing of the complaint. The complainant is entitled to claim interest for the amount paid only from the date of filing of the complaint till repayment of the amount by the respondent.

10. According to the Adjudicating Officer the home buyer is not entitled to interest from the date of payment till date of filing the complaint by relying the agreement dated 5.2.2013, clause 5.2 but after filing the complaint the learned Adjudicating Officer granted interest 10.05%. But the promoter claimed that as per the agreement the home buyer is not entitled to any interest. How far the arguments are sustainable?

11. The learned Adjudicating Officer accepted the contentions of the promoter with regard to the agreement. As per the agreement the promoter is bound to refund after deducting 10% of liquidated damages after selling the apartment. The promoter in its counter dated 6.9.2019, before the Adjudicating Officer, has clearly and categorically admitted in page No.3 of its counter that

> ***"Thereafter the apartment was reallocated to one Mr.Kushal Sengupta in February 2015".***

12. The home buyer filed the complaint before the Adjudicating Officer only on 23.7.2019. The promoter has not chosen to refund the amount even though sold the apartment allotted to the home buyer reallocated to one Mr.Kushal Sengupta in the year 2015. As per the construction agreement the promoter shall refund after deducting 10% of the cost of construction as liquidated damages then returned the same without interest. Even though the promoter has resold the property in the year 2015 the promoter has not chosen to repay the amount. But the learned counsel for the appellant could submit that as per the provision of Limitation Act Article 55 the period of limitation three years would commences from the date of breach of contract itself. Hence the claim is barred by Limitation.

13. The Limitation Act Article 55 runs as follows:

> ***Article 55 of the Limitation Act.***
> ***55. For compensation for the breach of any contract, express or implied not herein specially provided for.***
> ***Three years.***
> ***When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is***

instituted occurs or (where the breach is continuing) when it ceases.

14. The learned counsel for the home buyer would submit that the learned Adjudicating Officer has rightly relied ILR 1992 Kant 644 Parvathama Vs. Lokanath, the division bench of the Hon'ble Kannada High Court in the above said case, that "where a period of one year was fixed for performing the agreement, but promise are did not execute the sale deed within the said period and he executed will in which he referred to the agreement for the sale and stated that after receiving from the purchaser the balance amount, sale has to be executed, held that the agreement was kept alive and the Limitation did not start to run". Hence the learned Adjudicating officer found that in this case the claim is not barred by Limitation. How far the contentions are tenable has to be analyzed.

15. In this regard our Apex Court has guided with regard to cancel of agreement is concerned which is reported in AIR 1993 SC 1120 which runs as follows:

Supreme Court of India
Smt. Thakamma Mathew vs M. Azamathulla Khan And Others

We find considerable force in the aforesaid contentions of the learned Counsel. In order that decree for specific performance of a contract may be passed it is necessary to consider whether such a relief can be granted in view of Section 16 of the Specific Relief Act, 1963. In other words the person seeking such a decree has to satisfy that Section 16 of the Specific Relief Act does not bar the grant of such a relief and the person against whom the decree is passed can show that the relief of specific performance cannot be granted in view of the provisions of Section 16 of the Specific Relief Act. Clause (c) of Section 16 postulates that the person seeking specific performance of the contract must file a suit wherein he must aver and prove that he has performed or has always been ready and willing to perform the

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essential terms of the contract which are to be performed by him. Moreover, in view of Article 54 of the Limitation Act, 1963, a suit for specific performance of contract has to be filed within three years of the date fixed for the performance or if no such date is fixed where plaintiff has notice that performance is refused. In the present case, the appellant by his notice dated February 10, 1975 had clearly indicated that he had cancelled the agreement and had forfeited the advance amount of Rs. 18,000 deposited by the defendant. By the said notice, it was clearly indicated that the appellant was no longer willing to perform the agreement to sell dated November 12, 1974. In the circumstances, it was incumbent upon the defendant to have filed a suit for specific performance of the contract within a period of three years from the date of the said notice dated February 10, 1975 and if such a suit had been filed by the defendant, it would have been open to the appellant to show that it was barred by the provision contained in Section 16 of the Specific Relief Act. The defendant did not choose to adopt that course and remained content with defending the suit filed by the appellant for cancellation of the agreement to sell dated November 12, 1974 and for recovery of the possession of the property. Even if it is found that the appellant was not entitled to succeed in the said suit and the said suit is liable to be dismissed, it would not entitle the defendant to obtain a decree for specific performance of the contract in those proceedings. The High Court, with due respect, was not right in invoking its discretionary power under Order 7 Rule 7 C.P.C. to grant such a relief to the defendant. The said power conferred on the court does not enable it to override the statutory limitations contained in Section 16 of the Specific Relief Act, 1963 and Section 54 of the Limitation Act, 1963 which preclude the grant of the relief of specific performance of a contract except within the period prescribed by the section.

16. As per the above verdict the home buyer ought to have taken steps to get the relief of the specific performance or refund of advance amount paid by him within three years from the date of cancellation. In this case admittedly the home buyer filed the complaint only on 23.07.2019. The promoter cancelled the agreement on 16.07.2014. So within three years from 16.07.2014 this will be ended on 15.07.2017.

Within that period the home buyer ought to have taken steps to get back the amount but the home buyer miserably failed to do so and came forward with the plea of refund after the Real Estate Act came into force on 01.05.2017. Hence the claim of the home buyer has already barred by Limitation and the home buyer cannot invoke the provisions of the Real Estate Act. Therefore this Tribunal comes to a conclusion that the claim is barred by Limitation. The Point No.1 is answered accordingly.

Point No.2:

17. In Pont No.1 it was decided that the claim of the home buyer for refund is barred by Limitation. What the claimant cannot achieve through a civil court as it is barred by Limitation merely because of the advent of the new law viz. RERA which come into force on 01.05.2017 he has not applied the same immediately. He has further taken another two years even to seek for the refund. Further as pointed out earlier he has never even sent any reply for the cancellation notice. Therefore he is not entitled for refund. Hence the order of the Adjudicating Officer is not sustainable and liable to be set aside. Therefore this Tribunal comes to a conclusion that the order of the Adjudicating Officer is liable to be set aside. Hence this appeal deserves to be allowed. Point No.2 is answered accordingly.

18. In the result, this appeal is allowed and the order of the Adjudicating Officer in C.C.P.No.169/2019 dated 23.03.2020 is set aside and the complaint is dismissed as barred by Limitation. No cost.

Connected Miscellaneous Applications are closed.

This Order is dictated to the Stenographer, transcribed by her and typed in the computer by her, corrected and pronounced by us in the open court on 19th Day of January 2022.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDL. MEMBER

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