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 21.02.2022

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

Appeal No. 37 of 2021

M/s. North Town Estates Private Limited
Rep. by its Director O.P. Madhav ... Appellant

-Vs-

1. Julian Abraham
2. Deepa Lucia Julian
3. M/s. PVP Ventures Limited
   (Formerly known as M/s. SSI Limited) .... Respondents

This appeal was taken on file on 26.03.2021 and came up for final hearing on 16.2.2022 in the presence of M/s. G.Vivekanand and T.S.Thevaraj, ASLF Law Offices, Counsels for the appellant and M/s. S. Siva Shanmugam and P. Ravi Shankar, Counsels for 1st and 2nd respondents. 3rd Respondent called absent. Having heard the arguments

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of both sides through video conferencing and having stood over for consideration till this date and this Tribunal delivered the following:

ORDER

1. This appeal has been preferred by the 2nd respondent in the complaint against the order of the Adjudicating Officer in CCP No.113/2019 dated 23.10.2020. The 3rd respondent in the appeal was also the 3rd respondent in the complaint in the lower court below has remained absent. Respondent 1 and 2 in the appeal are the complainants. Heard all the parties.

2. According to the appellant the complaint is not at all maintainable mainly on the ground that there is no default on the part of the promoter/appellant giving a cause of action for the complainant/home buyer to seek the remedy before the adjudication officer. He would mainly contend that the respondents 1 and 2/complainants herein has not paid their dues in accordance with the agreement with the parties as he himself is a defaulter in the payment of money as contemplated under the agreement he has no legal right to unilaterally call for the refund of the amount. He would also mainly point out that his recent to go out of the project and ask for the money is not due to the delay in the construction of the project but it was because of the fact that he himself has opted to buy another flat in a different place and that is why he has chosen to withdraw

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from this project on his own volition. If that is the case then he is also not entitled to any interest as claimed by him and as awarded by the court below. He would also further contend that they originally entered into an agreement mainly with an understanding that he should pay in accordance with the installments. Later on, in the year 2015 it was altered amended agreed between the parties that the payment should be made in accordance with the actual construction or stage wise construction payment. When the accounts were settled on the basis of the due date payments and thereafter reverted to the stage wise payment the builder has voluntarily agreed that at that stage when it was changed there was an excess payment of Rs.34,00,000/- in 2015 that amount would be adjusted in regard to the future payment of the installments to be made by the buyer. According to the builder/appellant he had also given this adjustment in the future payment and has not claimed interest for the delayed payment up to the period this excess payment was adjusted. Thereafter he had completely constructed the project, completed the project and even obtained the completion certificate from the appropriate authority as early as on 8.2.2019. Therefore, it was incumbent on the part of the buyer respondent herein to have paid the balance of sale consideration even at least at the time of completion of the project and obtaining of the completion certificate. He did not pay when this was demanded by the builder and also as per the agreement the interest for the delay in payment was demanded the conveniently without even giving

a notice either to calling upon to pay back the amount or cancelling the agreement without any reason or rhyme the home buyer has come forward with a frivolous compliant before the adjudication officer. In fact they will not be entitled to any interest first of all and even in the principal amount as per the agreement they are even entitled to deducted the portion of the amount and then only repay. This vital point was not at all taken into consideration by the court below. Furthermore, he would also mainly contend that the Adjudication officer himself has no legal authority to conduct the case as in respect of the repayment interest only the RERA authority has to decide and especially after the judgment of the Unitech Judgment the Adjudication Officer has no authority therefore also the order is not maintainable. In view of the matter pursuant to the order this Hon'ble Tribunal the appellant has deposited totally Rs.64,24,691/- Therefore the appellant would only contend the appeal has to be allowed setting aside the interest, compensation and the cost as awarded by the court below.

3. The counsel for the home buyer mainly would contend that as agreed between the parties when there was a change from the monthly payment schedule to the stage wise payment they have arrived at settlement of accounts whereby the amount paid an advance of Rs.34,00,000/- . This happened in 21.3.2015 in fact at this point of time the appellant has changed the flat to the 14th floor of course at the request

of the home buyer. After the adjustment and after the change in the flat the promoter did not raise any demand for payment. The buyer was under the bonafide impression that only after the adjustment of extra payment of Rs.34,00,000/- The promoter would request him to pay and if any such demand is made they were prepared to pay the amount and it is also the contention of the home buyer that they were not aware of either of the completion of the construction or the completion certificate being obtained by the promoter as it was not informed to them in writing. He was only upset over the delay in the completion of the project as the project started way back in the year 2013 and it has take n a long time in the meanwhile he had also obtained a new flat for which also he is paying the EMI through bank loan hence he has sought for the return of the amount. Of course he is entitled to the interest as fixed by the RERA as there has been a long delay in the construction of the project and rightly the court below has ordered for the payment of interest and hence the order has to be confirmed.

4. After hearing both the counsels the point for consideration before the Tribunal is

1. Whether the amount paid by the home buyer has to be returned with interest to the home buyer?

2. Whether the amount ordered by the court below in respect of compensation is payable by the promoter?
3. Whether the appeal deserves to be allowed or not?

Point No.1:

5. The admitted facts in both sides are that the project commenced way back in 2011. Parties have agreed and entered into an agreement as early as on 19.12.2011. The period for construction is 36 months plus 6 months totally 42 months. The schedule of payment originally was agreed as per page No.49 is according to month payable every month. The first of the such installment falls on 7th August 2011 and 36 installment was due on 7th July 2014 at the monthly rate of Rs.1,93,630/-. In the very same agreement which is termed as an agreement for sale and construction the period of 36 months is specified plus 6 months is given. In clause No.11 there is a condition clause in regard to the payment

> ***11. Timely payment of the installment as said above shall be the essence of this Agreement. Any breach of any of the terms of this agreement or any default by the PURCHASER in payment of the entire consideration or any installment thereof on the due dates, for whatsoever reasons shall be construed as the breach of Agreement committed by the PURCHASER and without prejudice to any other rights the Developer ast its discretion/option may;***
>
> ***11(a) Either continue with this Agreement and claim the amounts in default/arrears with interest on the defaulted installments at the rate of 18% per annum from the date of default to the date of payment, and even after***

the amounts with interest are paid, the PURCHASER will not be entitled to timely possession of the Schedule-D Property along with Schedule C Apartment.

-OR-

11(b) If any breach continues for more than 90 days or any breach not being rectified within a period of 90 days for whatsoever reasons, the Developer at its discretion/option will be entitled to terminate this agreement and treat a sum equivalent to 25% being the amount paid (30% in case if the undivided share in the Schedule-B property is already conveyed in the name of the Purchaser) of the entire consideration which shall be forfeited and adjusted as liquidated agreements executed and entered into shall stand cancelled and the Developer shall be entitled to deal with the Schedule-D property, including selling the same to anybody, without any further reference to the PURCHASER. The purchaser shall extend all complainant-operation in executing any documents required or called up by the Developer and Land-Owner. The balance money, if any, due to the PURCHASER shall be paid back without any interest whatsoever within 60 days of the disposal of the Schedule-D property. Against the cancellation of this agreement by the Developer the PURCHASER's rights under this agreement, shall stand terminated immediately without any requirement of execution of any further documents.

6. According to this clause if the purchaser makes a default in the payment on the dues payable on the due date for whatever reasons it will be construed as a default and further it would entitle the builder to charge 18% interest on the defaulted amount installment due from the date of default to the date of payment and even after the amount of interest is paid the purchaser will not be entitled to the timely possession of the

property. According to the counsel for the appellant when there is a default in the payment by the home buyer even the construction period for giving possession is automatically extended. It is further cleared by the counsel that if the default continues for more than 90 days the developer has even got the discretion to terminate the agreement and further deduct of sum of 25% as liquidated damages and in the case where there is undivided share of the land is executed 30% can be deducted as liquidated damages. In this case even in the counter itself the builder has produced a payment schedule whereby he has given the installment number, installment amount, due date, Cheque received date, cheque number, drawn on amount, amount received adjusted in installments, number of days delayed and his right to claim interest has been specifically made out.

ANNEXURE

T27-1403-Payment Schedule

Instalment No.	Installment Amount	Due Date	Cheque Received date	Cheque No.	Drawn on Amount	Amount Received adjusted in installments	No. of Days Delayed	Int @ 18%
Booking Advance	100000	2011-08-09	2011-08-09	56121	Citi	100000	0	0
Amount payable within 30 days from the date of	1577661	2011-09-03	2011-08-26	56122	Citi	700000	0	0
			2011-12-02	162070	HDFC	977571	85	40978

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booking – 20%								
1st Installment	193630	2011-08-07	2012-05-16	619899	HDFC	1355410	283	27023
2nd Installment	193630	2011-09-07	2012-05-16	619899	HDFC		252	24063
3rd Installment	193630	2011-10-07	2012-05-16	619899	HDFC		222	21199
4th Installment	193630	2011-11-07	2012-05-16	619899	HDFC		191	182388
5th Installment	193630	2011-12-07	2012-05-16	619899	HDFC		161	15374
6th Installment	193630	2012-01-07	2012-05-16	619899	HDFC		130	12414

Instalment No.	Installment Amount	Due Date	Cheque Received date	Cheque No.	Drawn on Amount	Amount Received adjusted in installments	No. of Days Delayed	Int @ 18%
7th Installment	193630	2012-02-07	2012-05-16	619899	HDFC		99	9453
8th Installment	193630	2012-03-07	2012-08-06	277496	HDFC	958150	152	14514
9th Installment	193630	2012-04-07	2012-08-06	277496	HDFC		121	11534
10th Installment	193630	2012-05-07	2012-08-06	277496	HDFC		91	8689
11th Installment	193630	2012-06-07	2012-08-06	277496	HDFC		60	5729
12th Installment	193630	2012-07-07	2012-08-06	277496	HDFC		30	2865
13th Installment	193630	2012-08-07	2012-11-06	292372	HDFC	387260	91	8689
14th Installment	193630	2012-09-07	2012-11-06	292372	HDFC		60	5729
15th Installment	193630	2012-10-07	2013-02-06	305438	HDFC	387260	122	11650
16th Installment	193630	2012-11-07	2013-02-06	305438	HDFC		91	8689
17th Installment	193630	2012-12-07	2013-04-22	44143	HDFC	387260	136	12986
18th Installment	193630	2013-01-07	2013-04-22	44143	HDFC		105	10026
19th Installment	193630	2013-02-07	2013-04-22	43776	HDFC	387260	74	7066

Instalment No.	Installment	Due Date	Cheque Received	Cheque No.	Drawn on	Amount Received	No. of Days	Int @ 18%

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	Amount		date		Amount	adjusted in installments	Delayed	
20th Installment	193630	2013-03-07	2013-04-22	43776	HDFC		46	4392
21st Installment	193630	2013-04-07	2013-07-27	62204	HDFC	774520	111	10599
22nd Installment	193630	2013-05-07	2013-07-27	62204	HDFC		81	7735
23rd Installment	193630	2013-06-07	2013-07-27	62204	HDFC		50	4774
24th Installment	193630	2013-07-07	2013-07-27	62204	HDFC		20	1910
TOTAL	6424781					6424691		306341
Payment Schedule changed from Month wise to Construction Linked								
Amount Payable as on June 2015-(55%)- After completion of Ground Floor Roof	4746890	2013-07-31				6424691		0

Instalment No.	Installment Amount	Due Date	Cheque Received date	Cheque No.	Drawn on Amount	Amount Received adjusted in installments	No. of Days Delayed	Int @ 18%
Amount payable on completion of 3rd Floor Roof – 7.5%	740748	2015-06-30						0
Amount payable on completion of 9th Floor Roof – 7.5%	715748	2016-06-30						0
Amount payable on completion of 12th Floor Roof – 5%	448798	2017-03-31					791	88741

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On Casting of Top floor roof – 5%	697135	2017-10-31					577	198368

Instalment No.	Installment Amount	Due Date	Cheque Received date	Cheque No.	Drawn on Amount	Amount Received adjusted in installments	No. of Days Delayed	Int @ 18%
TOTAL	9288814					6424691		920689

7. A cursory perusal of the above said statement categorically states that the buyer has right from the 1st installment he has all along been making payment a delayed payment. But of course at the time of 24th installment when in during 2013 when the payment schedule was changed from month wise to construction linked payment as admitted by the appellant there was an excess payment. This amount also was adjusted even as per the statement for the amount payable 3rd floor roof and the 9th floor roof up to the year 2016. Thereafter when the 12th floor was completed as early as on 31.3.2017 only for the then balance amount payable by the builder they have claimed inter finally when the top floor roof was completed and the final amount was due since there was huge balance interest was due and payable. Totally the claim of interest as agreed between the parties is 18% worth around Rs.9,20,689/- The actual amount payable by the purchase was Rs.92,88,814/- but the actual amount paid by the purchaser is Rs.64,24,691/- The last payment was

made by the purchaser 24th installment which was atleast 5th installment due together was on 7.7.2013. Thereafter from 2013 to 2019 he has not chosen to pay a single pie. But conveniently, the purchaser has come forward with this compliant before the RERA Authority curiously on 3.4.2019 the date is very important. It is pertinent to point out here the builder has completed constructing the building and even obtained completion certificate as early as on 8.2.2019. The builder has also brought to the notice of the court regarding an email sent by the builder as early as in 2017 which is dated 1.7.2017 wherein in page 59 the email:

Dear All

We wish to bring to your kind notice that Requisition for modification/customization for the Towers – 23, 24, 27 & 33 of Chetna will be closed on 8th July 2017.

Requisition for modification/customization received after 08.07.2017 will not be accepted by our project team for the above mentioned towers.

If you need any modification to be done, you are requested to send mail/letter to our Teynampet office (or) you are requested to meet our technical enginner Mr.Venkatesan at site on or before 08.07.2017 to enable us to carry forward the same.

Also, plase note that we will accept only fininshing modification and not any civil alteration works in the above m entioned towers.

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This is for your information please.

Thanks &
Regards
SESHADRI K.S.
North Town Estates Pvt. Ltd.,
Arihant Foundations & Housing Ltd.,
New No.3, Old No.25, 3rd Lane,
Ganapathy Colony.

8. From that even in 2017 the builder has stated that whoever wants to put any customized alterations/additions in the flat before the completion they have to give intimation on or before 8.7.2017 itself. According to the counsel for the appellant this is a clear indication that the builder has already nearing completion and whoever wants to any change according to their wish or alternations has to bring to the notice on or before 8.7.2017. For this email according to the appellant there was no response. Whereas the buyer has not given any reply but suddenly without any notice has come forward with the plea for the refund of the amount. It is also pertinent to point out the buyer has not sent any demand notice calling upon the builder to refund the amount. But according to the builder after the completion of the project and after the completion certificate was obtained by him on 8.2.2017 when they demanded money from all the purchasers including the complainants herein to avoid payment and interest they have come forward with this false complaint. No doubt a point was raised by the respondent counsel that there was no written demand by

the builder calling upon to pay the amount especially after the adjustment. To which the answer of the counsel was neither party was in the process of giving writing because of the specific admission of the respondent himself that he used to the buyers were frequently visiting the office of the builder and site to observe the developments. The learned counsel brings to the notice of the court the very pleading in the complaint by the purchasers namely

> ***x. The Complainants submit that they were frequently visiting the office of the respondents and the site to observe the developments. To their chagrin, the phase of construction is slow and not upto the assured pace of the respondents. During 2016, the respondents to appease the complainants had offered to take an alternate apartment in the same block. Hence the complainants had opted for alternate apartment by moving from the 10th floor to the 14th floor in the same Tower bearing #1406. However, even after the last three years, there is no development and the phase of construction is in small phase, despite regular following up by the complainants. It is pertinent to mention here that the name of the project was changed from "Chaitanya" to "Chetna" during June 2017. Even after waiting for nearly 9 years, the construction is yet to be handed over to the complainants. The complainants are not interest ed in taking possession of the apartment booked by them, as the respondents have not adhered to the time frame accepted and fixed by them. From 2013, till date, the respondents have not demanded any payment and as such, the complainants feel that the need for which they booked the apartment is at naught.***
>
> ***X1. The Complainant submits that in the meanwhile, the complainants had purchased another 3-bedroom apartment of their choice and at present, the complainants are paying EMI's for the apartment which is still under construction by the respondents. It is very obvious that the respondents are not in a position to honour the contractual conditions imposed by it, and even after 9 years from the date of agreement and 5 years after the lapse of grace period as per***

the agreed terms, the respondents have not completed the project for the reasons better known to it. Hence, left with no effective alternative, the complainants requested the respondents in person to refund the amounts along with interest paid for the loan availed by them.

9. A cursory reading of these two paragraphs in the compliant at the earliest point of time which was filed by the purchasers even without any notice demanding for payment there is admission that the purchaser used to visit the officer of the respondent and also the site to see the developments that means they were very well aware of the progress of the building. He would also further point out that in the year 2015 he had agreed to change to 14th floor the letter has been produced in page No.53 of the appellant typed set.

Date: 21.3.2015
From
Mr.Julian Abraham
Heritage, Flat A1, I floor,
137/79, Varadammal Garden III Street,
Baracca Road, Kilpauk,
Chennai – 10.
To
The Director,
North Town Estates Pvt Ltd.
Kilpauk,
Chennai – 600 010.
Dear Sir,
Sub: Swapping of Flat No.T27-1003 to T27-1403

I would like to bring your notice that, I have booked a flat in M/s.North Town Estates Pvt Ltd., Chaitanya phase vide Flat No.T27-1003 and I would like to swap to another Flat i.e T27-1403 and I have paid Rs.64,26,691/- (Rupees Sixty Four Lakhs Six Thousand Six Hundred Ninety One Only) so far to my flat.

I request you to transfer the money from T27-1003 to T270-1403.
Kindly do the needful and oblige.
Thanking you,

Yours faithfully,
Julian Abraham.

10. It is rightly pointed out by the counsel for the appellant had it not been convinced by the purchase that the progress of the building was in proper he would not agreed to go to a higher floor for seeking of adjustment for his payment. Therefore the question of appellant withdrawing from the project cannot be on the only ground that there has been a delay on the part of the builder in paragraph No.11 he would further admit that the complainant has purchased another three bedroom apartment of their choice and at present he is paying for the EMI. Therefore the argument of the appellant counsel has to be admitted that the purchaser/complainant has voluntarily has withdrawn the project when the question arises whether he is entitled to interest as claimed by him and as awarded by the court below. No doubt in this case it has been clearly proved by the promoter that from day one he has not paid the installment properly whereby he is only liable to pay interest secondly the promoter had even the option to cancel the agreement and adjust up to 25% of the payment money as damages to him which is not been done in this case. Couple with the fact that the Rs.34,00,000/- excess payment as admitted by the promoter has been adjusted even though no payments had been made from 2013 in this peculiar circumstances of this case especially when

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the purchase has not even care to make the demand for the refund of the amount how he can be entitled to interest. Furthermore, the timing of the complaint especially after the completion of the project within two months thereafter without even notice would only prove the case of the appellant that only to circumvent the payment they have come forward with the complaint with the prayer.

11. Above all these grounds this is a peculiar case here the builder has completed the construction though of course belatedly he has even obtained the completion certificate from the Authorities even as early as on 8.2.2019. As the builder has fulfilled his part of the contract in completing the construction can he be burden with the cost of payment of huge interest in regard to the refund especially to a buyer who has never paid his installments due in the proper time.

12. Taking all these circumstances into consideration and the conduct of the parties and extraordinary circumstances in this particular case this Tribunal feels that this case has been filed only to circumvent the payment of interest payable by the buyer for the delay in payment and to circumvent his own fault in booking another apartment, thereby seeking to get some unrich enhancement from the promoter. At the same time the builder has not chosen to invoke his jurisdiction to claim interest for the delay payment nor the cancellation of the agreement or seeking for adjustment is only bound to refund of the entire amount as paid by the promoter though not with the full interest as granted by the court below. It

needs a reduction. Now the reduction also should be reasonable. The court below has given 8.05 % plus 2 % totaling 10.05% on the amount paid, we feel that in view of the voluntariness in the buyer withdrawing himself from the project especially after the completion of the project and after the completion certificate has been issued necessarily the interest should be reduced from 10.05% to a reasonable interest of 6% per annum. In this connection it is pertinent to point that the builder has already deposited Rs.61,81,119/- out of which sum Rs.49,81,119/- has already deposited with fixed deposit and the office is directed to deposit also Rs.12,00,000/- into fixed deposit the respondent home buyer will be entitled to with draw the amount on necessary application, of course, after the appeal time is over.

Point No.2:

13. In view of our finding in early paragraph that even the interest has got to be reduced especially the home buyer has not paid his dues in time and had he has voluntarily withdrawn from the project the compensation amount awarded by the court below Rs.21,00,000/- is reduced to Rs.1,00,000/- .

Point No.3:

14. In so far as to the argument of the appellant counsel that the adjudication officer has no jurisdiction even to try the matter definitely is not legally sustainable. First of all if the appellant is objecting to the

jurisdiction he should not have participated in the enquiry he should have raised it as a preliminary issue sought for a order on the preliminary issue having failed to do the same and having participated he cannot raise the plea in this appeal. Furthermore the Hon'be Supreme Court has passed its order only on 11.11.2021 whereas this case was heard on 1.10.2020 itself order has been reserved order has been pronounced on 23.10.2020 at that time the Hon'ble Supreme Court judgment was not even pronounced. Furthermore, in the judgment of the Hon'ble Supreme Court nowhere it is mentioned that in respect of the judgment passed already by any adjudicating officer that would be set aside in fact the Hon'ble Supreme Court has only used the word retroactive and not stated retrospectively. The impact of the judgment would be only in respect of judgments pronounced after 11.11.2021. Especially the question of maintainability cannot be raised for the first time in the appeal. Therefore the question of maintainability raised by the appellant cannot be entertained at this stage.

15. In view of the findings in point 1 and 2 the appeal has to be allowed in part excepting reducing the interest and compensation on the refund of the amount the orders of the adjudication officer is confirmed.

16. In the result the appeal is allowed in part the order of the adjudicating officer in C.C.P.No.113/2019 dated 23.10.2020 is partly set aside and partly confirmed as follows:

a) The appellant is directed to pay the balance of amount due and payable include the interest at the rate of 6% p.a on the original payment amount of Rs.64,24,691/- till the date of payment, adjusting the payment already made in the Tribunal on 23.7.2021 and on 4.2.2022.

b) The payment of compensation amount is reduced to Rs.1,00,000/-

c) Litigation expenses of Rs.25,000/- is confirmed.

d) Time granted for payment till 31.5.2022.

Connected Miscellaneous applications are closed.

This Order is directly dictated to the Stenographer, typed in the computer by her, corrected and pronounced by us in the open court on 21st Day of February 2022.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDL. MEMBER

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