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 28.01.2022

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

Appeal No. 71 of 2021

1. M/s. Alliance Projects
   Rep. by its POA, Ravindranath Singh

2. M/s. Alliance Orchid Tech Park Pvt. Ltd.
   Rep. by its POA, Ravindranath Singh

... Appellants

-Vs-

Uma Maheshwari .... Respondent

This appeal was taken on file on 28.06.2021 and came up for final hearing on 10.01.2022 in the presence of M/s. AAV Partners, P.H.Manoj Pandian, N.Zahid Ahmed and Sonali.J, Counsels for the appellants and M/s. RRN Legal, N.Alagunarayanan, R.Alvin Manojraj, R. Aneesan and M. Prakash kumar, Counsels for the Respondent. Having heard the arguments of both sides through

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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 promoters against the order of the Adjudicating Officer in C.C.P.No.263 of 2019 dated 23.02.2021. The home buyer preferred a complaint before the Adjudicating Officer for the relief of refund of sale consideration of Rs.74,49,847/- along with interest and compensation. After contest the Adjudicating Officer allowed the complaint in part and directed the promoter to refund the sale consideration paid by the finance company first and then pay the balance to the home buyer with interest at the rate of 10.05% per annum and awarded compensation for mental agony a sum of Rs.5,00,000/- and litigation cost Rs.20,000/- to the home buyer. Aggrieved upon the same the promoters preferred this appeal. Hereinafter, the appellants and respondent are called as per their original rankings as promoters and home buyer. The promoters have preferred this appeal on the following main grounds:

- The home buyer failed to make payments according to the payment schedule stipulated in the construction agreement hence not entitled for any interest and compensation.
- Sale deed would be registered only upon complete payment of the consideration amount.

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- As per Section 72 of the Real Estate (Regulation and Development) Act, 2016 the complainant is not justified in receiving compensation in the absence of proof under this provision.
- Despite the demand notices and reminder mails and payment follow up calls for the payment due the home buyer failed to make the payment.
- The finance company declared the home buyer as a non performing asset and further called upon the home buyer to make all pending payments and for the appellant to cancel the allotment made to the home buyer.
- The home buyer is suffering from financial constraint which is the reason why they were unable to make payments towards housing loan obtained and failed to make timely payments towards balance sale consideration.
- The question of enforceability of the agreements was not raised by the home buyer for more than 7 years after which the home buyer had preferred to file the present complaint.

2. The learned counsel for the promoters would submit that the above grounds were not properly appreciated by the learned Adjudicating Officer. The home buyer miserably failed to comply with the payment schedule even the first installment of amount after the completion of the foundation. The sale agreement and construction agreement entered on 5.10.2012 between the promoter and home buyer even on that date itself payment schedule payments

were not complied by the home buyer. Subsequent payments were also made belatedly. But the learned Adjudicating Officer without considering the above said facts mechanically ordered for the payment of interest and compensation which is against section 72 and Rule 19 of the Real Estate (Regulation and Development) Act, 2016 and Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 respectively. Therefore this appeal has to be allowed.

3. The learned counsel for the home buyer would submit that out of total consideration of Rs.1,07,58,000/- the home buyer paid a sum of Rs.74,49,847/- it is nearly 69% of the total sale consideration. Even then the promoter unilaterally cancelled the agreement and also sent a false letter as if they have sent the balance refund amount by way of cheque. That letter of the promoter itself is a clinching evidence for the motive behind it for cancellation. Hence the learned Adjudicating Officer rightly rejected the contention of the promoter and directed the promoter to refund the amount along with interest and compensation. There is no infirmity in that findings hence this appeal has to be dismissed.

4. The promoter has solely relied upon the construction agreement default clause and cancelled the construction agreement and retained the 15% as cancellation charges Rs.11,17,477/- and was ready to refund the balance by way of cheque Rs.63,32,370/-. It was also informed to the home buyer on 22.1.2014 by way of letter and further stated that "the refund cheque is attached with this cancellation letter". But according to the home buyer no cheque was attached

with that letter. In the same default clause there is a specific clause is incorporated at the discretion of the promoter as "the developer at their discretion may agree to receive the unpaid sums will be calculated at the rate of 24% per annum from due date stated in the demand till entire payment of sums". Considering the above pleas the following points are raised for points for consideration.

5. Points for consideration:

1. Whether invoking of part of construction agreement and ignoring part of construction agreement by the promoter is legally sustainable?
2. Whether the appeal deserves to be allowed or not?

Point No.1:

6. The home buyer entered into construction agreement with the promoter on 5.10.2012. The promoter agreed to hand over of possession within 24 months from the date of obtaining building sanction approval with grace period of six months. As per typed set page No.1 of the appellant final completion certificate for blocks 6 & 7 applied on 28.3.2017 and final completion certificate was issued on 22.12.2017. According to the promoter, though they have sent the demand notice dated 10.5.2013, 14.7.2013, 5.9.2013, 21.10.2013 and 7.12.2013 for the payment of Rs.74,49,847/-. Further they made reminders through mails and payment follow up calls for the payment due the home buyer failed to comply the

same hence the promoter cancelled the sale and construction agreements dated 5.10.2012 and the refund cheque was attached with the cancellation letter. Further stated that they are entitled to detect 50% of the cost of the unit as per the agreement as cancellation charges. The above said letter was sent to the home buyer on 22.1.2014. The payments were made by the home buyer from 1.4.2007 to 21.7.2018 shown in the ledger of the promoter is as follows:

Date	Amount
17.07.2012	3,00,000/-
11.10.2012	5,00,000/-
19.10.2012	5,00,000/-
05.11.2012	5,00,000/-
10.11.2012	7,00,000/-
11.01.2013	8,51,600/-
05.03.2013	5,00,000/-
26.03.2013	5,00,000/-
28.05.2013	28,00,097/-
04.7.2013	24,98,150/-
Total	96,49,847/-

7. As per the cancellation letter dated 22.1.2014 the alleged demand notice dated 10.5.2013, 14.7.2013, 5.9.2013, 21.10.2013 and 7.1.20213 for the payment of Rs.74,49,847/-. Before the cancellation letter the demand notice amount to the tune of Rs.96,49,847/- was paid by the home buyer on 4.7.2013 itself as per the ledger produced by the appellant

at typed set page No.33 to 35. But in the above said ledger the total amount is mentioned as Rs.74,49,847/- as wrongly. Even then the promoter cancelled the agreement as if the home buyer failed to pay the payments as per the payment schedule. Now let us see the relevant clause of the construction agreement regarding payments which runs as follows:

DELAY/DEFAULT IN PAYMENT/CANCELLATION/TERMINATION

In the event of delay/default by the Second Party to pay the balance cost of construction and payment Schedule, the Developer is entitled to terminate this Agreement by issuing a notice upon the Second Party to pay the unpaid amounts due within Fifteen days from the date of such notice and if the Second Party fail to pay the same even after receipt of such notice Agreement shall be terminated at the discretion of the Developer.

In the event of termination as aforesaid or at the instance of the Second Party, the Developer is entitled to recover from the Second Party 15% of the total cost of construction reserved liquidated damages by adjusting the same against the amounts paid by the Second Party till the termination and refund the balance, if any, within Sixty days from the date of cancellation of Agreement. In which event the Agreement to Sell also stands terminated automatically the terminus in nature after forfeiture of 15% of sale price stipulated therein and 15% of cost of Schedule 'C' Property stipulated therein.

Upon termination of this Agreement, the Second party shall not have any claim over the Schedule Apartment and on the Agreement to Sell and on the Schedule 'B' property and the Developer entitled to deal with the same as they may deem fit for their benefit without reference to Second Party.

If however, the Second Party pays up the arrears within the time stipulated in the notice of termination the right to terminate this Agreement would lapse for such default alone and this Agreement to be valid.

However the Developer at their discretion may agree to receive the unpaid sums with calculated at the rate of 24% per annum from due date stated in the demand till entire payment sums.

8. In the above delay/default in payment/cancellation/termination clause there are five separate clauses were incorporated. The first part if the home buyer failed to pay the unpaid amount after the notice from the promoter the promoter is entitled to terminate at his discretion. The second part of this clause with regard to promoter is entitled to recover from the home buyer 15% of the total cost of construction in the event of termination of the agreement. The third clause with regard to upon termination the promoter is entitled to deal with the property and the home buyer has no claim over the property after the termination. The fourth clause with regard to the promoter pays the arrears amount within the time stipulated in the notice of termination the right to terminate would lapse. The fifth clause with regard to the promoter's discretion may agree to receive the unpaid sums with interest at the rate of 24% per annum. As per page 37 of the typed set of the appellant the first payment request that the 'foundation has been completed for Palam Block. You are requested to release an amount of Rs.52,59,889/-. The home buyer paid as per the column up to 3.12.2012 a sum of Rs.25,00,000/- only. On 25.1.2013 payment due reminder was sent by the promoter. On 10.5.2013 another payment request third floor slab has been completed and requested to release Rs. 37,96,965/-. Another payment request on 29.6.2013 requested to release Rs.25,00,000/- for the same third floor slab has been completed. On 14.7.2013 another request letter for the 6th floor slab has been completed and demanded Rs.17,40,344/-. On 6.12.2013 payment reminder for a sum of Rs.27,21,105/-. The above said payment demand notices only produced by the

appellant/promoter. But in the termination notice at page No.63 of the typed set of the appellant has stated that the demand notices were sent on five dates . The above said dates are not correlated with the demand notices produced by the appellant. The appellant/promoter can choose any one of the mode contemplated in the default clause of the construction agreement. On the first demand notice itself the promoter demanded Rs.52,59,889/- on that date the home buyer so far paid only Rs.25,00,000/-. In such circumstances the promoter can very well invoke the termination clause but he has not done so. The promoter has opted the last clause namely discretion clause to receive the unpaid sums with interest at the rate of 24% per annum. As per the payment schedule at page No.25 of the typed set of the appellant are as follows:

Stage wise payment	Amount in Rs.
Advance	1,00,000/-
Payment at the time of agreement	15,22,800/-
Within 10 days from the date of agreement	19,75,333/-
On completion of foundation	25,13,233/-
On completion of third floor slab	6,45,480/-
On completion of sixth floor	6,45,480/-
On completion of ninth floor	6,45,480/-
On completion of 12th floor	6,45,480/-
On completion of 15th floor	6,45,480/-
On handing over	5,37,900/-
Total	98,76,666/-

9. Out of Rs.98,76,666/- as per payment schedule the home buyer paid Rs.96,49,847/- which amounts to more than 95% of the total cost the balance

amount only to the tune of Rs.2,26,819/- along with interest at the rate of 24% per annum to be paid. This is as per the default clause of the agreement as per discretion of the promoter. Even though the home buyer paid least amount even at the first demand notice payment the promoter has not taken any steps to terminate the agreement. The promoter received the amount from the home buyer and the financier then surprisingly on 22.1.2014 he has terminated the agreement. How far the termination is legally sustainable has to be analyzed? As per the doctrine of election the promoter either choose the termination at the first instance or choose the discretion clause. In this regard, the Honble Supreme Court has guided as follows regarding doctrine of election:

Supreme Court of India
Ireo Grace Realtech Pvt. Ltd. vs Abhishek Khanna

20.10 The doctrine of election was discussed in A.P. State Financial Corporation v. M/s GARRe-rolling Corporation,10 in the following words :

15. The Doctrine of Election clearly suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different.

10. As per the above verdict of the Hon'ble Supreme Court two remedies are available for the promoter either to choose the termination or choose the discretion to receive the amount with interest. In this case the promoter has opted the second choice i.e., received the payments from the home buyer and the financier and sent payment demand notice with interest. After that the promoter cannot choose the termination clause by sending termination notice dated 22.1.2014. The above said notice itself is against the verdict of the Hon'ble Supreme court. Therefore this Tribunal comes to a conclusion that the

termination notice itself is not sustainable according to law. Point No.1 is answered accordingly.

Point No.2:

11. The main contention of the promoter is that the awarding of compensation is not according to Section 72 of the RERA Act. According to the promoter in the absence of proof for awarding compensation is not justified. Further contention is that admittedly the home buyer is the defaulter in payment of the payment schedule amounts hence as per The Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 Rule 19 (2) proviso the home buyer is not entitled to the right of claiming interest and compensation. How far the argument is tenable has to be analyzed?

12. According to the ledger of the appellant/promoter up to 4.7.2013 total amount paid by the home buyer is Rs.96,49,847/- but total mistake shown as Rs.74,49,847/-. As per the default clause of the agreement, as chosen by the promoter, the last discretion clause with interest at the rate of 24% per annum the promoter is entitled to recover interest from the home buyer for delayed payment. The promoter has no locus standi or right to cancel the agreement since as per the payment schedule the home buyer paid Rs.96,49,847/- and the balance only Rs.2,26,819/- with interest. In such a situation the promoter has no right to cancel the agreement. Furthermore, the promoter even though signed tripartite agreement with the financier to the home buyer and the home buyer and agreed to complete the construction within the stipulated time but failed to

complete the construction even in the year 2016 hence the finance company has sent a legal notice on 31.3.2016 in that notice it has been specifically stated by the finance company that "the third of view has not completed the construction of the property at apartment No.12 A 09, 13th floor, Lilac Type, Palam Tower". In the above said tripartite agreement it has been specifically agreed between the parties at page No.47 of the appellant typed set which runs as follows:

> ***"The financier will be entitled to recall the loan in case the completion of the construction of the building in question is delayed beyond six months from the completion date indicated by the developer and such a decision to recall shall be in the sole discretion of the financier"***
>
> ***"The financier shall be entitled to call upon the developer to cancel the housing construction agreement"***

13. According to the above said agreement in case of default by the home buyer to the financier the developer firstly pay the financier the amount received by the promoter from the financier as in respect of the house construction agreement plus the amount of interest. But the promoter has not only adhered to the tripartite agreement but also failed to pay the balance amount even though the promoter has arrived at Rs.63,32,370/- as payable amount to the home buyer as per the notice dated 22.1.2014 at page No.64 of the typed set of the appellant. Even accepting the arguments of the promoter for argument shake, as the home buyer is not entitled to interest and compensation, has the promoter complied with as stated in his notice dated 22.1.2014. But unfortunately the promoter has miserably failed to return the amount after detecting cancellation charges and also falsely alleged that he has sent the

refund cheque. It is crystal clear from the attitude of the promoter that he is not willing to neither refund the amount nor deliver the constructed house. Now the home buyer suffered loss of her hard earned money which were paid to the promoter and for the financier paid amount the home buyer has to pay the EMI to the tune of Rs.79,000/- per month. In addition to that the home buyer is not able to get her dream home. Certainly it caused mental agony to the home buyer and more over the promoter received the amount of disproportionate gain and the amount of loss caused as a result of the default of the promoter and furthermore it is repetitive nature of the default from the year 2014 onwards hence absolutely the promoter is liable to pay the compensation to the home buyer. The learned Adjudicating Officer has rightly come to a conclusion that the home buyer is entitled to compensation of Rs.5,00,000/- is only meager amount since mental agony cannot be measured in terms of money. Further the promoter has enriched unlawfully from the amount of the home buyer as well as the financier and in turn the home buyer has to repay the loan amount to the financier with interest. Therefore the awarding of interest as per Rule 18 of the Tamil Nadu Real Estate (Regulation and Development) Rules, 2017 for the refund amount is permissible under law. Therefore this Tribunal comes to a conclusion that the findings of the learned Adjudicating Officer have no infirmity and there is no chance for interference. Hence the appeal is not deserves to be allowed. Point No.2 is answered accordingly.

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14. In the result, this appeal is dismissed. No costs. The order of the Adjudicating Officer in C.C.P.No.263/2019 dated 23.2.2021 is confirmed. 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 28th Day of January 2022.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
ADMN. MEMBER

Sd/- xxxx
JUDL. MEMBER

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