BEFORE THE TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL

(Tamil Nadu, Puducherry, Andaman &Nicobar Islands)

(Under the Real Estate (Regulation and Development) Act 2016)

Friday the 23rd day of December 2022

CORAM : Hon'ble Mr. Justice M.Duraiswamy, Chairperson
Ms.Leena Nair, Administrative Member
Mr.R.Padmanabhan, Judicial Member

Appeal No.14 of 2022

M/s Jain Housing and Construction Ltd.,
represented by it's Managing Director
Sandeep Kumar Mehta ...Appellant

-Vs-

1. R.Ravi
2. Yamuna Ravi ...Respondents

This appeal has been filed U/s 44(1) of the Real Estate (Regulation and Development) Act 2016 as against the Order passed by the Adjudicating Officer attached to the Tamil Nadu Real Estate Regulatory Authority in C.C.P.No.11/2020 dated 30.11.2021 and the same was taken on file on 22.07.2021.

The matter came up for final hearing on 16.11.2022 in the presence M/s. S.Kamalesh Kannan and Sai Sathya Jith, Counsels for the appellants and M/s Mani Sundargopal and J. Anushya, Counsels for the respondents. Having heard both sides and having stood over for consideration till this date, this Tribunal delivered the following:

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ORDER

1. The respondent / promoter, who suffered an order to pay compensation at the hands of the Learned Adjudicating Officer attached to TNRERA, in C.C.P.No.11/2020 dated 30.11.2021, is the appellant herein.

2. It is the case of the appellant company that they have promoted an apartment project namely 'Jains Adwitya' at Ambattur, Chennai. The said project was completed in the year 2016 and completion certificate was also issued by the competent authority on 17.05.2017. The 1st respondent is the sole proprietor of M/s. Carewell Enterprises and doing electrical contract works. Earlier the 1st respondent was engaged by the appellant,on contract basis, for doing electrification works in their previous residential project namely 'Jains West Minister' during the year 2015. The monetary value of the said contract work was fixed at Rs.1,39,58,316/-. The 1st respondent had also executed the said electrical contract work as per the agreement entered into between both the parties. While settling the payment there arose some dispute between the parties over the quantum of amount. While the 1st respondent claimed a sum of Rs.59,39,871/- vide invoice dated 03.02.2015 was due, the appellant was disputing the same. After several rounds of negotiation, the parties themselves arrived at a final settlement. As such a settlement agreement was also executed between the parties during July 2018.

3. As per the said written agreement for settlement, the appellant agreed to pay Rs.20,00,000/- and the 1st respondent also agreed to

receive the same towards full and final settlement. However instead of paying the settled amount of Rs.20,00,000/-the appellant came forward to allot a flat in block 3, bearing No.73, 2nd floor, in favour of the respondents in the disputed housing project namely "Jains Adwitya", Ambattur, Chennai, at a cost of Rs.67,78,131/- excluding other incidental charges.The appellant had further agreed to give immediate credit of the said amount of Rs.20,00,000/- to the flat booking account of the 1st Respondent as booking advance.

4. Within a month thereafter, a Construction agreement was entered into between the appellant and the respondents 1 and 2 (the 2nd respondent is none other than the wife of the 1st respondent)on 29.08.2018. As per the terms of the said Construction agreement the cost of undivided share of land (UDS portion) was fixed at Rs.13,50,412/- and the cost of the flat was fixed at Rs.54,27,719/-. In all the total cost payable by the 1st respondent comes to Rs.67,78,131/- excluding other charges. After adjusting the booking advance of Rs.20,00,000/- as stated above, the 1st respondent had agreed to pay the balance amount of Rs.47,78,131/- along with other incidental charges within a period of one month i.e on or before 28.09.2018.

5. The learned Counsel for the appellant contended that the respondents paid a sum of Rs.51,50,000/-(including all charges) to the appellant only on 27.11.2018 with a delay of two months. As per the statement of calculation prepared by the appellant on 11.12.2018, the respondents are yet to pay a balance amount of Rs.12,883/-. A copy of the statement of calculation was furnished to the respondents upon acknowledgement. Again the respondents with a delay of 10 months

came forward to pay this amount of Rs.12,883/-and sent a Demand Draft for Rs.14,171/- (including interest)along with a notice dated 03.10.2019. The appellant returned the said demand draft vide their letter dated 14.10.2019. The respondents are yet to pay the said balance amount of Rs.12,883/- with future interest. According to the learned Counsel for the appellant, since the respondents committed default in making the full payment, the appellant is not bound to hand over the possession of the flat. Consequently, the appellant is also not liable to pay any compensation to the respondents the counsel argued.

6. The learned Counsel for the appellant further argued that the learned Adjudicating Officer has awarded compensation by way of interest which was not at all prayed for by the respondents. With this the counsel for the appellant prayed to allow this appeal and to set aside the order passed by the learned Adjudicating Officer.

7. On the other hand the learned Counsel for the respondents argued that it is true that the respondent had agreed to pay the balance amount of Rs. 47,78,131/- on or before 28.09.2018. However because of the delay caused by the appellant in registering the Construction agreement and the Sale deed in respect of the UDS portion, the respondents could not get the loan amount released for effecting payment to the appellant. Unless and until the appellant complete the registration of the Construction agreement and the Sale deed in respect of the UDS portion and unless and until the respondents executed a memorandum of deposit of title deed in favour of the bank, the loan amount will not be released by the bank. After several requests, both, the Construction agreement dated 29.08.2018 and the Sale deed dated 09.11.2018 in

respect of the UDS portion, were registered on the same day i.e on 23.11.2018 as document No.16001 and 16002 of 2018 respectively at the Ambattur Sub-Registrar's Office.

8. The learned Counsel for the respondents further submitted that on the same day the respondents had executed a memorandum of deposit of title deeds in favour of the HDFC Bank and the same was also registered as document No.16022 at the same Sub Registrar Office, immediately on the same day i.e on 23.11.2018 itself. Within four days thereafter, the HDFC bank released the loan amount of Rs.51,50,000/- and the same was credited to the appellant's account on 27.11.2018. In all the respondents have paid Rs.71,50,000/- including all the incidental charges such as maintenance, Corpus fund, Service Tax, and Registration expenses as demanded by the appellant. According to the learned Counsel for the Respondents there was no unjustifiable and inordinate delay on the part of the respondents in paying the balance amount.

9. The learned Counsel for the respondent also contended that in so far as the statement of calculation dated 11.12.2018 is concerned the appellant have improperly levied maintenance charges from 01.02.2018 to 31.07.2019. According to the learned Counsel for the respondents, the charging of Rs.58,815/- towards maintenance charges from 01.02.2018 to 31.07.2019 and the proportionate service Tax of Rs.10,587/- even before the handing over of possession is against the principles of equity.

10. The learned Counsel for the respondent submitted that with a view to give a quiteous, the respondents decided to pay off the balance amount of Rs. 12,883/- as demanded by the appellant along with interest

calculated at Rs.1,288/-. The respondents issued a legal notice and encloseda demand draft for a sum of Rs.14,171/- along with the said notice dated 3.10.2019. To the shock and surprise of the respondents the appellant returned the said demand draft without assigning any reasons. No reply notice was also issued. The appellant have returned the demand draft with some ulterior motive. Thereafter the respondents left with no other option except to file a complaint in form "M" before TNRERA seeking direction to hand over the possession of the flat. Subsequently, the respondents also filed another complaint in Form "N" before the Adjudicating Officer seeking compensation for the delayed handing over of possession. According to the counsel for the respondents the order passed by the learned Adjudicating Officer was a well-considered order and need not be set aside. With this the learned counsel for the respondent prayed to dismiss the appeal with costs.

11. Heard both sides at length. Entire case records perused carefully. It is an admitted fact that in connection with a dispute in respect of an earlier electrical contract work done by the 1st respondent, a settlement agreement was executed between the parties during July 2018. It is also an admitted fact that as per the said agreement the appellant agreed to pay a sum of Rs.20,00,000/- to the 1st respondent towards full and final settlement. However instead of paying the amount of Rs.20,00,000/- to the respondents, the appellant offered a residential flat bearing No.73, in block 3 in the disputed project promoted by the appellant namely 'Jains Adwitya' at Ambattur, Chennai at a cost of Rs.67,78,131/-.

12. Further as per the terms of the said settlement agreement, the appellant had specifically agreed to adjust by account transfer, the said amount of Rs.20,00,000/- towards booking advance immediately on the same day. But as found from the booking account statement filed by the appellant along with the waiver application in M.A.No.46 of 2022,the appellant gave credit of the said sum of Rs.20,00,000/- belatedly after four months i.e on 20.11.2018.This delay of four months in giving credit of Rs.20,00,000/- to the booking account of the respondents may appears to be simple but led to consequential delays on either side, one after the other as a chain of events.

13. Be that as it may. Let us now consider the question who was responsible for the alleged delay of two months in paying the balance amount. After the execution of the settlement agreement during July 2018, a Construction agreement was executed between the parties on 29.08.2018 (herein after referred to as the Construction agreement) Later, a Sale deed in respect of the UDS portion (hereinafter referred to as the Sale deed) was also executed between the parties on 09.11.2018. It is true that as per the terms of the Construction agreement the respondents agreed to pay the balance amount (Rs.67,78,131-20,00,000) of Rs.47,78,131/- on or before 28.09.2018. It is also true that the respondents paid the balance amount of Rs.51,50,000/- including other incidental charges in one lump sum through bank loan only on 27.11.2018. As already stated, violating the specific clause in the settlement agreement, the appellant gave credit of the settlement amount of Rs.20,00,000/- i.e on 20.11.2018 with a delay four months.This simple delay of four months in giving credit of

Rs.20,00,000/- to the booking account of the respondents led to cause consequential delays on either side, one after the other as a chain of events. After such credit of the amount of Rs.20,00,000/- on 20.11.2018, for accounts sake, the appellant took steps to register the Construction agreement and the Sale deed on 23.11.2018. It may be noted that those documents were actually executed earlier on 29.08.2018 and on 09.11.2018 respectively. For simple fund transfer within his own accounts, the appellant took four months time by ignoring the terms of the settlement agreement.

14. As stated above both the construction agreement dated 29.08.2018 and the sale deed dated 09.11.2018 were registered on the same day i.eon 23.11.2018 as document No.16001 and 16002 of 2018 respectively at the Ambattur Sub-Registrar Office. Immediately after getting those documents registered on 23.11.2018, to avoid any delay on their part, the respondents had acted swiftly and executed a memorandum of deposit of title deeds in favour of the HDFC Bank and got registered as document No.16022 at the same Sub Registrar Office on the very same day i.e on 23.11.2018 itself. Within four days thereafter the HDFC bank released the already sanctioned loan amount of Rs.51,50,000/- and the same was credited to the appellant's account on 27.11.2018. In all the respondents have paid Rs.71,50,000/- inclusive of all charges such as maintenance amount, Corpus fund, Service Tax, and Registration expenses as demanded by the appellant.

15. The learned Counsel for the appellant contended that there was a delay of two months in paying the balance amount. The learned Counsel for the appellant conveniently forgotten, that the initial delay of

four months in giving credit of the settlement amount of Rs.20,00,000/- and the consequential delay in registering the Construction agreement and the Sale deed caused by the appellant, led to the delay in making the balance payment by the respondent. As rightly pointed out by the learned Counsel for the respondents, unless and until the appellant complete the registration of the Construction agreement and the Sale deed and unless and until the respondents executed a memorandum of deposit of title deed in favour of the bank, the loan amount will not be released by the bank. Therefore we are of the considered view that there was no delay on the part of the respondents in making the payments as argued by the learned Counsel for the appellants.

16. During the course of arguments the learned Counsel for the appellant also contended that the respondents are yet to pay a sum of Rs.12,883/- as per the statement of calculation prepared by the appellant on 11.12.2018. According to the learned Counsel for the appellant, without paying the said amount of Rs.12,883/- the respondents are not entitled to expect handing over of possession of the flat. The said statement of calculation was found available in page 24 of the typed set Vol. II of the appellant filed along with the appeal and the same was perused carefully. In the said statement of calculation dated 11.12.2018 the appellant had levied maintenance charges of Rs.58,815/-and also levied proportionate Service Tax of Rs.10,587/-for 18 months from 01.02.2018 to 31.07.2019 aggregating to Rs.69,402/-. Admittedly the Construction agreement and the Sale deed in respect of the UDS portion were registered on 23.11.2018. Above all the possession of the flat said to have been handed over to the respondents during April 2022 during

the pendency of this appeal. Therefore, the question of levying maintenance charges and Service Tax for a period 18 months even prior to the handing over of possession of the flat does not arise. As per Section 13 of the Real estate (Regulation and Development) Act 2016, a promoter shall not accept even the advance payment or application fee from an allottee before entering into a registered agreement for sale. Therefore the alleged balance amount of Rs.12,883/- shall be adjusted in the maintenance charges amount of Rs. 69,402/-arbitrarily collected from the respondents. The learned Counsel for the respondents fairly conceded that the respondents have not preferred any cross appeal in this regard. Therefore, we are of the considered view that the respondents are not liable to pay the said amount of Rs.12,883/- as demanded by the appellant. For all the above reasons, the contentions raised by the learned Counsel for the appellant in this regard are hereby rejected

17. Having received the entire amount including all the charges, the appellant has not come forward to hand over possession. The respondents have been driven from pillar to post for taking possession of their dream house. At one stage the respondents,out of frustration,came forward to pay the said sum of Rs.12,883/- along with interest at Rs.1288/- aggregating to Rs.14,171/- by way of demand draft and sent the demand draft along with the legal notice dated 03.10.2019.The appellant has simply returned the said demand draft without assigning any reasons. No reply notice was also issued. All these aspects would go to show that the appellant having themselves caused all the delays had also delayed the handing over of possession unreasonably and attempted

to put the blame on the respondents. Something was fishy in the minds of the appellant. The appellant by standing behind the screen, attempted to portray the respondents as the person responsible for causing the delay. But the above circumstances clearly established that the respondents are actually the victims of the delay.

18. Lastly the learned Counsel for the appellant contended that the learned Adjudicating Officer had awarded random compensation which was not at all prayed for by the respondents. We have carefully perused the complaint filed by the respondents before the Adjudicating Officer. As rightly pointed out by the learned Counsel for the appellant the learned Adjudicating Officer, instead of considering and adjudging the actual rental loss caused to the respondents on the basis of the pleadings and proof, had awarded a random compensation by way of interest @ 10.20% per annum, on Rs.71,50,000/- from the date of the Construction agreement till date of handing over of possession. The learned adjudicating Officer had not considered Section 72 of the Real Estate (Regulation and Development) Act 2016.The Section 72 is reproduced hereunder:

> ***72. Factors to be taken into account by the adjudicating officer.***
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> *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.

Further it may be relevant to mention here the judgment of the Hon'ble Supreme Court rendered in M/s Newtech Promoters and developers Pvt. Ltd. Vs State of U.P. &Others, reported in **2021 SCC online SC 1044.** At paragraph No.81,the Hon'ble Supreme Court had discussed in detail as to how the Adjudicating Officer has to adjudge the compensation within the parameters envisaged under Section 72. The relevant paragraph No. 81 is reproduced hereunder for ready reference.

81. The opening words of Section 71(1) of the Act make it clear that the scope and functions of the adjudicating officer are only for "adjudging compensation" under Sections 12, 14, 18 and 19 of the Act. If the legislative intent was to expand the scope of the powers of the adjudicating officer, then the wording of Section 71(1) ought to have been different. On the contrary, even the opening words of Section 71(2) of the Act make it clear that an application before the adjudicating officer is only for "adjudging compensation". Even in Section 71(3) of the Act, it is reiterated that the adjudicating officer may direct "to pay such compensation or interest" as the case may be as he thinks fit, in accordance with provisions of Sections 12, 14, 18 and 19 of the Act. This has to be seen together with the opening words of Section 72 of the Act, which reads "while adjudging the quantum of compensation or interest, as the case may be, under Section 71, the adjudicating officer shall have due regards" to the broad parameters to be kept in mind while adjudging compensation to be determined under Section 71 of the Act.

19. The respondents, in their Complaint before the Adjudicating Officer, have claimed compensation on the basis of the monthly rent paid by them with effect from December 2018 @ of Rs.25,000/- per month in respect of the rented premises occupied by them for their residential

purpose. They have also produced the bank account statement to prove their claim of rental loss caused to them @ Rs.25,000/- per month from December 2018 onwards. During the course of argument it was admitted by both the counsels that the flat was handed over to the respondents during April 2022 i.e. during the pendency of this appeal. The appellant is liable to compensate the monthly rental loss caused to the respondents for 40 months from December 2018 to March 2022 at the rate of Rs.25000/- per month. If calculated (25,000 X 40) it comes to Rs.10,00,000/-. The appellant is liable to pay this amount of Rs.10,00,000/- to the respondents, of course with interest @ 10.20%, at least from the date of the complaint i.e. 23.12.2019 till the actual payment is made.

20. In the result the appeal is allowed in part to the extent modified as above. Consequently the order of the learned Adjudicating Officer passed in CCP No.11 of 2020 dated 30.11.2021 is modified as detailed below.

a. The appellant is directed to pay Rs.10,00,000/- to the respondents as compensation towards the rental loss caused to the respondents along with interest @ 10.20% per annum from the date of the Complaint i.e 23.12.2019 till realization.
b. The appellant is also directed to pay Rs.25,000/- to the respondents towards legal expenses incurred by them in defending this appeal in addition to the costs of Rs.25,000/- awarded by the Adjudicating Officer .
c. Further **after the expiry of appeal time** the respondents are at liberty to withdraw the entire amount payable by the

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appellant, as modified by this Tribunal, from and out of the amount of Rs.26,08,616/-already deposited by the appellant to the credit of this appeal as per Section 43(5) of the Act. The balance amount, if any available, shall be refunded to the appellant.

21. Accordingly, with the above modifications, the appeal is partly allowed. Connected Miscellaneous applications if any pending are hereby closed.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
ADMNINISTRATIVE MEMBER

Sd/- xxxx
JUDICIAL MEMBER

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