BEFORE THE TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL (TNREAT)

(Tamil Nadu, Puducherry, Andaman & Nicobar Islands)

Under the Real Estate (Regulation And Development) Act, 2016

Reserved on: 04.10.2023

Delivered on: 11.10.2023

Coram : Hon'ble Mr.Justice M.Duraiswamy, Chairperson
Mr.R.Padmanabhan, Judicial Member

Appeal No.63 of 2023

S.V.Ramesh
Rep. by his Power Agent S.V.Suresh ... Appellant

- Vs -

M/s. Emerald Haven Realty Developers
(Paraniputhur) Pvt. Ltd.,
rep. by its Managing Director. ... Respondent

Prayer: The appeal has been filed under Section 44 of the Real Estate (Regulation and Development) Act, 2016 to set aside the disallowed portion of the order passed by the learned Single Member, TNRERA, passed in C.C.P.No.233 of 2021 dated 26.04.2023.

For Appellant : M/s. S.Revathy

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ORDER

The brief facts that are relevant for the disposal of the above appeal are as follows:

1. The Appellant is an Allottee of a real estate project, namely, "TVS Emerald Green Enclave" situated at Paraniputhur village, Pallavaram Taluk. The Respondent is the Promoter of the said real estate project. Initially, the Appellant/Allottee booked a 4 BHK type flat bearing Flat No.B-102, having carpet area of 1263 sq. ft. The total construction cost of the apartment, including GST, registration charges, 5 years maintenance charges and also the value of the undivided share was fixed at Rs.1,03,74,276/-. A Construction Agreement was executed between the parties on 27.01.2020. The Appellant/Allottee paid a sum of Rs.47,08,604/- on various dates towards the total cost of the apartment.

2. Subsequently, during September 2020, the Appellant/ Allottee's father passed away due to ailments. The Appellant/Allottee was working at Kuwait at that time. Due to Corona pandemic, the salary of the Appellant/Allottee was reduced by 50%. In these circumstances, the Appellant/Allottee thought of withdrawing from the project. After negotiating with the Respondent/Promoter, the Appellant/Allottee with a view to avoid loss of 10% cancellation charges, accepted the suggestion made by the Respondent/Promoter and agreed to swap the 4 BHK flat bearing No.B-102 to a 2 BHK flat bearing Flat No.D-103 for a total cost of Rs.59,50,821/-.

3. Following the said swapping arrangement, the earlier Construction Agreement dated 27.01.2020 was mutually cancelled by a Cancellation Agreement dated 19.01.2021. The amount of Rs.47,08,604/-

already paid by the Appellant/Allottee was agreed to be adjusted with the cost of 2 BHK Flat No.D-103. Since, the Appellant/Allottee was in Kuwait at the relevant time, no Construction Agreement was executed in respect of the 2 BHK Flat No.D-103. Only a draft Construction Agreement was furnished to the Appellant/Allottee's brother for perusal. The Appellant/Allottee, upon perusal of the draft Construction Agreement, came to know that there was no covered car park attached with the 2 BHK Flat No.D-103. According to the Appellant/Allottee, the Respondent/ Promoter, earlier, assured to provide a covered car park for the 2 BHK Flat No.D-103 also. The Appellant/Allottee felt cheated by the Respondent and wanted to withdraw from the project. The Appellant/ Allottee informed the Respondent about his intention to withdraw from the project, vide e-mail dated 28.02.2021 and demanded immediate return of the amount paid by him with interest.

4. In reply, the Respondent/Promoter, vide their e-mail dated 30.04.2021, gave two options to the Appellant/Allottee, either to swap and choose from the available units in 2 or 2.5 BHK or to continue with 4 BHK Flat No.B-102. In the said communication, the Respondent/ Promoter once again made it clear that in the event of the Appellant/ Allottee withdrawing from the project, there will be 10% deduction towards cancellation charges as per the Agreement. However, the Appellant/ Allottee was firm in his decision to withdraw from the project.

5. After exchange of legal notice and reply notice, the Appellant/Allottee preferred a complaint before the learned Single Member, TNRERA in C.C.P.No.233/2021 with a prayer to direct the Respondent to refund the entire amount of Rs.47,08,604/- with

interest @ 12% per annum and also to direct the Respondent/Promoter to pay compensation of Rs.5,00,000/- in respect of mental agony suffered by the Appellant/Allottee.

6. It is the case of the Respondent/Promoter, as found from their counter filed in C.C.P.No.233/2021, that as per Section 18(1)(a) of the Act, only if the Promoter fails to complete or is unable to give possession of the apartment within the date specified in the Agreement or due to discontinuation of business as a developer on account of suspension or revocation of registration under the Act, the allottee is entitled for refund of the entire amount with interest. The agreed date of handing over of possession expires only on 15.10.2023. Further, the Respondent/Promoter has not discontinued his business as a developer. As none of the contingencies exist, as contemplated U/s 18(1)(a) of the Act, 2016, the complaint is not maintainable.

7. The Respondent/Promoter already informed the Appellant/ Allottee well in advance during December 2020 itself that in case of cancellation, the Appellant/Allottee will have to incur cancellation charges as per the terms and conditions stipulated in the Agreement dated 27.01.2020. Thereafter, the Appellant/Allottee held negotiations with regard to swapping of apartments. The Respondent/Promoter agreed for swapping a 2 BHK apartment. The Respondent/Promoter also issued an allotment letter on 20.01.2021, allotting a 2 BHK apartment bearing Flat No.D-103 and also annexed the draft Agreement for Sale and Construction Agreement for the perusal of the Appellant/Allottee. The Respondent/Promoter also requested the Appellant/Allottee to execute,

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both the Construction Agreement and the Agreement for Sale, in respect of the 2 BHK flat for proceeding further.

8. It is the case of the Respondent/Promoter that citing the car parking issue, the Appellant/Allottee refused to execute the Construction Agreement and the Sale Agreement in respect of the 2 BHK flat. According to the Respondent/Promoter, they have clarified the Appellant/Allottee and his brother that there is no covered car parking available for 2 BHK apartments and only an open car parking facility is available for 2 BHK apartments. The Appellant/Allottee is solely responsible for his decision to withdraw from the project. The Respondent/Promoter is in no way responsible for the same.

9. The Respondent/Promoter communicated to the Appellant/ Allottee that they are entitled to deduct Rs.10,37,427/- towards cancellation charges @ 10% and Rs.11,40,376/- towards GST amount, aggregating to Rs.21,77,803/-. The Respondent/Promoter already issued a cheque for a sum of Rs.25,30,801/- towards the balance amount available for refund to the Appellant/Allottee, out of the total amount of Rs.47,08,604/- paid by the Appellant/Allottee. The Appellant/Allottee admitted the receipt and encashment of the cheque for Rs.25,30,801/- issued by the Respondent, only few days after preferring the Complaint.

10. After hearing both sides, the learned Single Member, TNRERA directed the Respondent to refund the GST amount of Rs.11,40,376/- only and dismissed the claim of the Appellant/Allottee with regard to the refund of Rs.10,37,423/- being 10% of the booking amount, deducted by the Respondent towards cancellation charges. As against the disallowed portion of the impugned order with regard to the claim of refund of the

10% of the booking amount, the Appellant/Allottee has preferred the present appeal before this Tribunal.

11. Heard the learned Counsel for the Appellant/Allottee. Perused the entire case records.

12. There is no dispute between the parties as to the fact that the Appellant/Allottee initially booked a 4 BHK type flat bearing Flat No. B-102, having carpet area of 1263 sq. ft. As per the Construction Agreement executed between the parties on 27.01.2020, the total construction cost of the apartment, including GST, registration charges, 5 years maintenance charges and also the value of the undivided share was fixed at Rs.1,03,74,276/-. There is also no dispute that the Appellant/Allottee paid a sum of Rs.47,08,604/- on various dates towards the total cost of the apartment.

13. The Appellant/Allottee, in his Complaint filed before the TNRERA, had clearly admitted that during September 2020, his father passed away due to ailments. The Appellant/Allottee was working in Kuwait at that time and due to Corona pandemic, his salary was allegedly reduced by 50%. In these difficult circumstances, the Appellant/Allottee thought of withdrawing from the project. After negotiating with the Respondent/Promoter during December 2020, the Appellant/Allottee, with a view to avoid losing his hard earned money towards cancellation charges, accepted the alternative suggestion made by the Respondent/ Promoter and agreed to swap the 4 BHK flat bearing No.B-102 to a 2 BHK flat bearing Flat No.D-103, for a total cost of Rs.59,50,821/-.

14. The earlier Construction Agreement dated 27.01.2020 was mutually cancelled by a Cancellation Agreement dated 19.01.2021. The

amount of Rs.47,08,604/- already paid by the Appellant/Allottee, was agreed to be adjusted with the cost of 2 BHK Flat No.D-103. The Appellant/Allottee himself admitted in his Complaint that he had signed the Construction Agreement dated 27.01.2020 and that the Cancellation Agreement dated 19.01.2021 was sent to him through courier as he was in Kuwait during the relevant period and after signing, he sent it back to his brother to hand over the same to the Respondent/Promoter. In the same way, a draft Construction Agreement dated 20.01.2021, in respect of the 2 BHK Flat No.D-103, was handed over to the Appellant/Allottee's brother for being forwarded to the Appellant/Allottee. The Appellant/ Allottee, upon perusing the draft Construction Agreement dated 20.01.2021, came to know that there was no covered car park attached with the 2 BHK Flat No.D-103 and started agitating with the Respondent/ Promoter.

15. The learned Counsel for the Appellant/Allottee contended that the Respondent/Promoter, earlier at the time of negotiation, assured to provide a covered car park for the 2 BHK Flat No.D-103. However, there is no proof to establish this averment. According to the Appellant/Allottee, he felt cheated by the Respondent/Promoter on the issue of car parking. So, it is crystal clear that it was the Appellant/Allottee, who decided to withdraw from the project on the issue of car parking. The Appellant/Allottee conveyed his decision to the Respondent/Promoter vide email dated 28.02.2021 and demanded immediate return of the entire amount of Rs.47,08,604/- paid by him with interest.

16. The Respondent/Promoter responded vide their e-mail dated 30.04.2021 and gave two options to the Appellant/Allottee, viz., the Appellant/Allottee can either swap and choose from the available units in 2 or 2.5 BHK or can continue with 4 BHK Flat No.B-102. The Respondent/ Promoter once again cautioned the Appellant/Allottee about the possible deduction of 10% cancellation charges, in the event of the Appellant/ Allottee withdrawing from the project. But the Appellant/Allottee was firm in his decision to withdraw from the project. All these aspects clearly establish that the Respondent/Promoter cannot be held responsible for the hasty decision taken by the Appellant/Allottee. After exchange of legal notice and reply notice, the Appellant/Allottee preferred a complaint before the learned Single Member, TNRERA in C.C.P.No.233/2021 with a prayer for refund of the entire amount of Rs.47,08,604/- with interest @ 12% per annum and also for compensation of Rs.5,00,000/- for the mental agony allegedly suffered by him.

17. As rightly contended by the Respondent/Promoter in their counter filed in C.C.P.No.233/2021, as per Section 18(1)(a) of the Act, only if the Promoter fails to complete or is unable to give possession of the apartment within the date specified in the Agreement or due to discontinuation of business as a developer on account of suspension or revocation of registration under the Act, the allottee is entitled for refund of the entire amount with interest. The agreed date of handing over, i.e., 15.10.2023 is yet to expire. The Respondent also has not discontinued his business as a developer. As none of the contingencies contemplated U/s 18(1)(a) of the Act 2016 exist in this case, the Respondent/Promoter cannot be directed to refund the entire amount

paid by the Appellant/Allottee. Moreover, from the facts and circumstances above narrated, it is clear that the Respondent/Promoter had given a long rope to the Appellant/Allottee to get out of the problem. If the issue regarding the car park was true, then the Appellant/Allottee should have prayed for allotment of one covered parking and not for refund of the amount.

18. After exchange of legal notices, the Respondent communicated to the Appellant/Allottee that they are entitled to deduct Rs.10,37,427/- towards cancellation charges @ 10% and Rs.11,40,376/- towards GST amount, aggregating to Rs.21,77,803/- The Respondent/Promoter also issued a cheque for the balance sum of Rs.25,30,801/- (47,08,604/- minus 21,77,803/-) available for refund. The Appellant/Allottee also admitted the receipt of the said amount of Rs.25,30,801/-by cheque.

19. The learned Single Member, TNRERA, after taking into consideration all the facts and circumstances involved in this case, had rightly directed the Respondent/Promoter to refund the GST amount of Rs.11,40,376/- to the Appellant/Allottee, as the Respondent/Promoter can get back the GST amount from the concerned authorities on the basis of the cancellation agreement dated 19.01.2021. In the same way, the learned Single Member, TNRERA had rightly dismissed the claim of the Appellant/Allottee with regard to the refund of Rs.10,37,423/- deducted by the Respondent/Promoter towards cancellation charges. For the reasons stated above, we find no ground to interfere with the order passed by the TNRERA. The appeal is liable to be dismissed as devoid of

merits. Accordingly, the appeal is dismissed at the admission stage itself. No costs.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
JUDICIAL MEMBER

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