IN THE KARNATAKA REAL ESTATE APPELATE TRIBUNAL, BENGALURU

DATED THIS THE 23rd DAY OF APRIL, 2021

PRESENT

HON'BLE SRI K P DINESH, JUDICIAL MEMBER

AND

HON'BLE SRI P S SOMASHEKAR, ADMINISTRATIVE MEMBER

APPEAL (K-REAT) NO.104/2020

(Old RERA Appeal No.120/2019)

BETWEEN:

Mr. Verghese Stephen,
s/o late Sri C.M.Stephen,
aged about 60 years,
Private service (Retd).,
C-003, Tower-4,
Bougenvillea Adarsh Palm Retreat,
Deverebishanhalli,Varthur Hobli,
Bengaluru 560 013 **:APPELLANT**

(Appellant Party-in-person)

AND

1. M/s Total Environment Building Systems (P) Ltd.,
Imagine 78, ITPL Main road, EPIP zone,
Bengaluru 560 056,
Represented by its Managing Director,
After the Rain Phase I

2. Real Estate Regulatory Authority-Karnataka,
Represented by its Secretary,
Second Floor, Silver Jubilee Block,
Unity Building, CSI Compound,
3rd Cross, Mission Road,
Bengaluru - 560 027 :**RESPONDENTS**

(Smt Sujatha H H, Advocate for R.1; R.2 served, unrepresented)

This Appeal is filed under Section 44 of the Real Estate (Regulation and Development) Act, 2016, to set aside the order dated 18.06.2019 in Complaint No.CMP/190118/0001904 passed by the Adjudicating Officer, RERA- 2nd Respondent before the Interim Tribunal (KAT). On establishment of this Tribunal with effect from 2.01.2020, the appeal was transferred and renumbered as Appeal No.(KREAT) 104/2020.

This appeal having been heard and reserved, coming up for pronouncement of Judgment this day, the Judicial Member, pronounced the following:

J U D G M E N T

This appeal is filed under Section 44(1) of the Real Estate (Regulation and Development) Act, 2016 (herein after referred in short as (***"The Act"***) against the impugned order dated 18.06.2019 passed by the learned Adjudicating Officer, RERA -2nd respondent herein.

2. The facts of the Appellant's case in brief are that:

(i) The appellant has agreed to purchase a villa in the project "After The Rain Phase-II", a project promoted by the 1st respondent, by entering into an agreement dated 10.2.2014 by paying entire consideration amount of Rs.5,77,00,000/-. As there was no progress in the project, appellant demanded the refund of the amount along with the compensation. The appellant in order to make capital gain under the Income Tax Act, intended to invest the amount which he got by sale of his property. The appellant accepted the allotment of an alternate villa No.058 in Phase-I of the "After The Rain Phase-I" project by executing Term sheet dated 17.3.2016

followed by an agreement of sale and construction dated 30.3.2017. The appellant requested the 1st respondent to execute and register the sale deed in respect of a villa agreed to be purchased by him in order to comply with the requirement under Income Tax Act. Based on the said request, the 1st respondent executed the sale deed on 19.01.2018. The date for construction and completion of the villa as per the above agreement was 31.12.2017. It is contended that the construction of the project was not completed even upto January, 2019 and the appellant filed a complaint CMP No. 190118/0001904 before the 2nd respondent. During the scrutiny of the complaint, the A.O expressed the view that except under Sections 12,14,18 and 19 of the Act, he cannot deal with the complaint under other sections and accordingly the appellant had abandoned some of the reliefs and restricted his complaint only to the following reliefs:

> "(a) Grant delay compensation for not giving READY TO MOVE IN POSSESSION from the agreed possession date 01.01.2018 on amount INR 6,30,00,000 (INR Six crore Thirty lakhs) as provided u/s 18 (1) till possession with OC.
>
> (b) Direct the builder to refund maintenance fund of INR 20,48,000/- with interest @ 21% from 27.03.2015 till full payment and this amount was collected by the builder on 27.03.2015 by misrepresentation.
>
> (c) Grant compensation of INR 50,00,000/- for mental torture, INR 10,00,000 towards rental paid from January 2018 to April 2019 and INR 2,50,000/- per month towards rental from May 2019 till ready to move in possession is offered with CC/OC."

(ii) The 2nd respondent passed the impugned order dated 18.06.2019 allowing the complaint partly. Being aggrieved by the impugned order dated 18.06.2019 passed by the 2nd respondent the appellant assailing the same is before this Tribunal on the following grounds:

(iii) Grounds of appeal:

- That the impugned order is erroneous, contrary to facts on record and law and is liable to be set aside;
- It is contended that the impugned order suffers from legal infirmities and procedural irregularities;
- It is contended that the 2nd respondent having held that the 1st respondent failed to give possession on agreed date i.e., 31.12.2017, granted compensation at 10.75% only from 1.1.2018 to 18.1.2018 on the ground that the complainant's status changed from allottee to owner from 19.1.2018 in view of the sale deed;
- It is contended that from the date of execution of the sale deed, the complainant ceases to be an allottee is incorrect;
- It is also contended that the respondent No.1 has not complied with Section 17 and 19(10) of the Act and bound to pay delay compensation;

- It is contended that the compensation shall be provided on the total amount paid by the consumer who is waiting for completion of the project till he is an allottee;
- It is contended that the terms in the agreement to sell continues even after the sale deed is executed and till all amenities are provided;
- It is contended that appellant through a memo dated 25.4.2019 brought to the notice of the 2nd respondent that the sale deed was executed in violation of section 17 of the Act and thus the sale deed should not be considered while deciding the case. The title of the property will be conveyed to the appellant only when all the requirements under Section 17 of the Act are fulfilled;
- It is contended that mere execution of the sale deed will not absolve the liability of the developer. Section 17 of the Act requires the promoter has to deliver possession of the villa by executing the sale deed after obtaining the occupancy certificate;
- It is contended that the 1st respondent has collected maintenance fund of Rs.20,48,000/- on 27.3.2015 in violation of the terms of agreement of sale. It is contended that as per clause (12) of the agreement the developer has to pay 9% interest on the amount which is not used by him;
- It is contended that as per the letter dated 29.1.2018, it is made clear that villa is not ready to move in, which is contrary to the recital in the sale deed regarding possession;

- It is contended that maintenance amount of Rs.20,48,000/- has been received in the year 2015 itself, but maintenance amount will be used only from the date of possession and till today the official possession has not been given.

On the above grounds, the appellant has sought to set aside the impugned order.

3. Heard arguments of the Appellant who appears as party-in-person and Smt Sujatha H H, learned counsel appearing for Respondent No.1. There is no representation on behalf of the 2nd respondent and hence, their argument is taken as nil.

4. After hearing the appellant, the learned counsel for Respondent No.1, perusal of the appeal Memo, impugned order, written submissions on both sides and the documents produced, following points arise for our consideration:

Point No.1: Whether the finding of the Adjudicating officer that the appellant/complainant ceases to be an allottee from the date of execution of the sale deed and is not entitled for compensation under section 18 of the Act, is sustainable under law?

Point No.2: Whether the appellant is entitled for refund of the maintenance amount with interest?

Point No.3: Whether the appellant is entitled for rentals by way of compensation due to delay in handing over possession of the villa?

Point No.4: Whether the impugned order dated 18.06.2019 passed by the Adjudicating Officer suffers from infirmity which warrants interference from this Tribunal?

Point No. 5: What order?

Our answer to the above are as under for the following:

R E A S O N S

5. The sum and substance of the case of the appellant is that he has agreed to purchase a village in the project "After the Rain Phase II" by executing agreement dated 10.2.2014 with the 1st respondent for a total consideration of 5,77,00,000/-. As there was no progress in the project and construction of the villa, the appellant opted for an alternate villa in the same project "After the Rain Phase I" rather than seeking refund of the amount as he wanted to make capital gain under the Income Tax Act by investing the money he got from sale of his property. Admittedly, the appellant has paid the entire sale consideration amount of Rs.5,77,00,000 and also maintenance amount of Rs.20,48,000/-. It is also not in dispute

that the appellant opted for villa No.058 alternately in Phase I of the project "After the rain Phase I" by executing the Term Sheet dated 17.3.2016 followed by an agreement of sale and construction dated 30.3.2017 and the time stipulated for completion of the project was 31.12.2017. It is also not in dispute that on the request of the appellant, the 1st respondent executed the sale deed on 19.1.2018 to get the benefit of capital gain under the Income Tax Act by investing the amount which he got by sale of his property. It is also not in dispute that there was delay in completing the project as per the agreement dated 30.3.2017.

6. Now, the finding of the A.O is that by virtue of the sale deed dated 19.1.2018 appellant ceases to be an allottee and is not entitled for compensation under section 18 of the Act. It may be recalled that the sale deed was executed on 19.1.2018 at the instance of the appellant to get a capital gain. Admittedly, on the date of sale deed, the project was not completed and the promoter has not obtained Occupancy certificate. The existence of the sale deed dated 19.1.2018 is purely an understanding between the allottee and the developer.

7. For better appreciation of the law on the point, we deem it fit to refer to the relevant provisions of the Act to the extent relevant for the case, by reproducing the same:

"Section 2- Definitions.- In this Act, unless the context otherwise requires.-

xx xxx

(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may, is given on rent;

x xx xx

Section 17- Transfer of title,- (1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may, and hand over the physical possession of the plot, apartment or building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws;

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate."

"Section 19,-Rights and duties of allottees,-(1)xx xx

(10)-Every allottee shall take physical possession of the apartment , plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be"

A cursory look at Section 2(d) reveals that if a person is an allottee will always remain as allottee and his or her successors-in-interest will also remain as an allottee, except a tenant. Hence, under Section 2(d), the only exception is a tenant who has obtained the premises on rent from the allottee. No doubt, when once sale deed is executed in favour of a particular person and that person in favour of whom the sale deed is executed becomes a owner for the purpose of transfer of title as per the provision of Transfer of Property Act. However, under the RERA Act, the relationship is that of a promoter and an allottee and for the limited purpose of title only, an allottee is a owner and as far as other obligation under the agreement is concerned, the relationship existing is one of promoter and allottee.

8. Further, the plain reading of Section 17(1) and proviso abundantly makes it clear that the promoter shall execute a registered conveyance deed in favour of the allottee by physically handing over possession of the plot, apartment or the building, as the case may be, along with the other title documents within three months from date of issue of occupancy certificate. Section 17(2) contemplates that after obtaining the occupancy

certificate and after handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to hand over necessary documents and plan including common areas, to the Association of the allottees or competent authority, as the case may be, as per the local law.

9. Section 18 of the Act contemplates that if the promoter fails to complete or is unable to give possession of an apartment, plot or building:

> (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
>
> (b) due to discontinuance of his business as developer on account of suspension or revocation of the registration under this Act or any other reason,
>
> He shall be liable on demand to the allottees, in the case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act;
>
> Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

Admittedly, the project is an ongoing project, in the appeal on hand and all the provisions of the RERA Act are applicable.

10. A plain reading of Section 17 of the Act, it is clear that to conclude the sale of the villa mere execution of sale deed in favour of allottee is not sufficient and the sale should be coupled with actual delivery of possession of the property after obtaining Occupancy Certificate from the competent authority. Keeping in view of the provisions of Section 17 of the RERA Act, the finding of the learned Adjudicating officer that the appellant ceases to be an allottee from the date of sale deed i.e., 19.1.2018 is a total misconception of law. Further, the finding of the A.O that from the date of sale deed, the appellant is not entitled for compensation is also not correct in the peculiar circumstances of the present case. It is pertinent to note that the A.O in the impugned order granted delay compensation at the rate of 10.75% p.a on the total amount paid by the appellant from 1.1.2018 considering the delay from 31.12.2017 for completion and delivery of possession as per the agreement, till 18.1.2018. The learned A.O in paras 15 and 16 of the impugned order has opined that the appellant is not entitled for delay compensation under Section 18 by virtue of the sale deed, but however, granted delay compensation at the rate of 10.75% p.a on the total amount as prescribed under Rule 16 of the Karnataka Real Estate (Regulation and Development) Rules, 2017(for short, the Rules). The above finding of the A.O is contrary to the discussion made in para 16 of the

impugned order. Further, A.O has opined that appellant is entitled for delay compensation under Sections 17 & 19(10) of the Act which is unacceptable for the reason that Sections 17 & 19(10) are silent about delay compensation.

11. The learned counsel for R.1 in the written submission has contended that after obtaining partial OC, communicated the same to the appellant on 20.12.2019 and the appellant has sent a reply that as per the impugned order dated 18.6.2019 of the A.O, Respondent No.1 cannot compel the appellant to obtain possession of the property without obtaining Occupancy certificate. Admittedly, there was neither partial OC nor OC on the date of the impugned order as well as on the date of sale deed and the appellant is justified in not taking possession of the villa much against the order of the A.O. The Respondent No.1 has obtained partial OC subsequent to the execution of the sale-deed. The photo-copy of the partial OC is produced by Respondent No.1 along with written submission at the time of argument. The said document is dated 17.12.2019. The learned counsel for R.1 contended that the partial OC is valid as per the bye-laws of the BBMP and when the project consists of different phases, the local body issues partial OC in phased manner and there is no provision to grant final OC for the entire project even after completion. We agree that when a project involves different phases, granting of partial OC phase-wise may be permissible, but after completion of the entire project, the promoter is

supposed to get a final OC of the entire project as required under the provisions of the RERA Act. It may be noted that concept of partial OC is not known to RERA statute and the statute recognizes only the OC. Hence, there is some force in the submission of the appellant that OC is necessary to take possession of the property.

12. The learned counsel for R.1 has contended that the appellant has executed customization agreement after the sale deed extending the date for completion of the project by 31.12.2018. However, the counsel for respondent no.1 in her written submission has categorically stated that the amount mentioned in the customization agreement has not been paid by the appellant. Hence, it is an agreement without consideration and is void under law. The Respondent No.1 cannot take advantage of extension of time under a void document. So, viewed from any angle, it cannot be said that the villa of the appellant was fit for occupation on the date of the sale deed as could be seen from the official communications between appellant and the promoter, which are available on record. Further, the cut-off date taken by the A.O for grant of compensation is also not correct and contrary to his observations in para 16 of the impugned order. Hence, we hold that the appellant is entitled for delay compensation under Section 18 of the Act read with Rule 16 of the Rules by way of interest at the rate of 10.75% p.a on a sum of Rs.5,77,00,000/- from the date of payment till the appellant takes virtual possession of the villa.

13. It may be noted that a commission was taken at the instance of the parties for negotiating the settlement in the matter. However, both parties have filed their objections to the Commission Report and subsequently, parties did not agree for the settlement. In view of non-settlement of the dispute between the parties, the Commissioner's Report is of no significance in the case.

Accordingly, Point No.I is answered in the negative.

Point Nos.II & III:

14. The appellant has sought for refund of the maintenance amount with interest and also refund of the rentals by way of compensation for delay in handing over possession of the villa. Admittedly, the appellant has paid maintenance amount of Rs.20,48,000/- on 27.3.2015 to the 1st respondent. The contention of the appellant is that the maintenance deposit shall be made only after taking possession of the premises and the Respondent No.1 has collected the same much prior to the execution of sale deed. The learned counsel for 1st respondent contended that the appellant has voluntarily paid the maintenance deposit and there was no compulsion on the part of the 1st respondent. Now, the appellant seeks refund of the maintenance deposit along with interest. It is true that maintenance deposit shall be collected only after taking possession of the premises on execution of sale deed and question of such deposit before occupation of the premises by the allottee does not arise at all. Even under

the maintenance contract the date of commencement for maintenance shall be the date on which unit is virtually complete or the date on which the customer takes possession of the unit, whichever is earlier, under the terms of the construction agreement or sale deed executed by the parties. Even as per the construction agreement dated 30th March, 2017 it is clearly mentioned under clause 5(c)-Maintenance fund, that the said fund is non-refundable. It is also pertinent to note that the appellant is not withdrawing from the project and is not entitled for refund of the maintenance deposit. No doubt the appellant has deposited the maintenance amount much earlier to the date on which he was supposed to deposit the said amount. Hence, the appellant is entitled for interest on the said amount from the date of deposit till he virtually takes possession of the premises. The learned A.O while referring to Clause 12 of the maintenance agreement granted 9% interest on the maintenance deposit. Clause 12 of the said agreement pertains to utilization of the maintenance fund and it does not say that appellant is entitled for interest at the rate of 9% on the maintenance deposit made by him. The inference drawn by the learned A.O on the above point is not correct. However, the percentage of interest awarded by the A.O is not exorbitant and the 1st respondent has not disputed the same by filing appeal or cross-appeal against the impugned order. In view of the above, the rate of interest awarded by the A.O on the maintenance fund is reasonable and acceptable.

15. No doubt, the appellant is certainly entitled for a reasonable rate of interest for the maintenance deposit. We are of the view that interest at the rate of 9% per annum on the maintenance deposit from date of deposit i.e., 27.3.2015 till the appellant takes virtual possession of the premises would be reasonable and appropriate, in the fitness of the case.

16. The appellant has sought for delay compensation of Rs. 10,00,000/- towards the rentals paid by him during the period from January 2018 to April 2019 and Rs.2,50,000/- per month towards rentals from May 2019 till ready to move in possession is offered with CC/OC, on account of delay in handing over possession of the villa. Apart from the above, the appellant has also sought for compensation of Rs.50,00,000/- for mental torture.

17. It may be seen that the appellant in support of his claim for rentals paid by him has produced photocopies of the lease agreement dated 1st February 2015 executed by Mr. Balasubramaniam Chandrashekaran and Mr Verghese Stephen (PAN No.ACUPS1635D) and one more lease agreement on 1st February 2018 executed by Mr. Balasubramaniam Chandrashekaran and Mr Verghese Stephen, which were produced before A.O. The lease agreements dated 1.2.2015 and 1.2.2018 are executed between one Balasubramaniam Chandrashekaran and the appellant for a period of 12 months and 11 months on monthly rent of Rs.44,000/- and Rs.49,775/- respectively. As far as the lease agreement of rental

agreement dated 1st October, 2018 is concerned, it is executed by one Mrs. Mamatha K V as a Lessor on one part and Mr Tarun Chandy Verghese (Pan No. AMTPV2265R) and Mr.Ishan Stephen Verghese (Pan No. AMTPV2264Q) as Lessees on the other part. The names of the Lessees differ from the name of the appellant. Further, the father name of the Lessees is also not mentioned in the rental agreement. The pan number of the lessees shown in the rental agreement dated 1.10.2018 differs from the pan number shown in the lease agreements dated 1.2.2015 and 1.2.2018.

18. First of all the above documents are not proved by the appellant in accordance with law by examining witnesses before the A.O. However, the degree of proof as required under the Evidence Act, is not contemplated under the RERA Act. Under the circumstance, the agreement of lease dated 1.2.2015 and 1.2.2018 can be accepted for the purpose of rent paid by the appellant during the relevant periods. As far as the other rental agreement dated 1.10.2018 is concerned, it cannot be accepted for the simple reason that lessees are different from that of the appellant. Further, it may be noted that the appellant has not produced any rental receipts also.

19. Thus, we are of the view that the compensation payable to the appellant towards rental is restricted to 12 months in respect of lease agreement dated 1.2.2015 i.e, 44,000X 12 (Rs.5,28,000/-) and for a period of 11 months in respect of lease agreement dated 1.2.2018 i.e.,49,775X11 (Rs.5,47,525/-) totaling Rs.10,75,525/-.

20. The appellant has claimed compensation in a sum of Rs.50,00,000/- for mental torture. The learned A.O declined to grant compensation towards mental agony by relying upon the Judgments of the Hon'ble Supreme court in the case of GHAZIABAD DEVELOPMENT AUTHORITY Vs. UNION OF INDIA and LUCKNOW DEVELOPMENT AUTHORITY case, and the said finding of the learned A.O is well founded and needs no interference.

21. Thus Point No. II is answered partly in the affirmative in so far as the interest is concerned and partially negative in so far as the refund of the amount is concerned and Point No.III is answered partly in the affirmative.

22. Before parting with the case, we would state that the appeal could not be disposed of within 60 days as per the requirement of Section 43(5) of the Act due to the time consumed in securing the parties before the court and also negotiating for settlement and so also the lockdown due to COVID-19 pandemic.

23. Point No.4: What order:

In view of our discussion and findings on the above points, the following :

ORDER

i) The appeal filed by the appellant is partly allowed.

ii) The impugned order dated 18.06.2019 in Complaint No.CMP/190118/0001904 passed by the Adjudicating Officer, RERA- 2nd Respondent is modified.

iii) The promoter-1st respondent is directed to pay delay compensation to the appellant by way of interest at the rate of 10.75% i.e., 2% above MCLR rate on a sum of Rs.5,77,00,000/- from the date of payment till the appellant takes actual possession of the villa after obtaining Occupancy certificate by the 1st respondent under Section 18 of the Act Read with Rule 16 of the Rules.

iv) The promoter-1st respondent is directed to pay to the appellant interest at the rate of 9% per annum on the maintenance deposit from date of deposit i.e., 27.3.2015 till the appellant takes actual possession of the premises.

v) The promoter-1st respondent is directed to pay to the appellant rentals which is restricted to 12 months in respect of lease agreement dated 1.2.2015 i.e, 44,000 X 12 (Rs.5,28,000/-) and for a period of 11 months in respect of lease agreement dated 1.2.2018 i.e., 49,775 X 11 (Rs.5,47,525/-) totaling Rs.10,75,525/-.

vi) The promoter-1st respondent is directed to handover virtual possession of the villa to the appellant and the appellant shall take possession of the same within two months from

the date of occupancy certificate as per Section 19(10) of the Act;

vii) The Registrar of the Tribunal is directed to comply with Section 44(4) of the Real Estate (Regulation and Development) Act, 2016.

viii) The office is directed to return the records to the 2nd respondent.

No order as to cost.

Sd/-
HON'BLE JUDICIAL MEMBER

Sd/-
HON'BLE ADMINISTRATIVE MEMBER