IN THE KARNATAKA REAL ESTATE APPELATE TRIBUNAL, BENGALURU

DATED THIS THE 25th DAY OF JUNE 2021

PRESENT

HON'BLE SRI B SREENIVASE GOWDA, CHAIRMAN

AND

HON'BLE SRI K P DINESH, JUDICIAL MEMBER

AND

HON'BLE SRI P S SOMASHEKAR, ADMINISTRATIVE MEMBER

APPEAL NO. (K-REAT) 120/2020
(RERA APPEAL (Old) NO.156/2019)

BETWEEN:

Sri Suneesh P.P
(Retired short service commissioned officer)
S/o Purushothaman,
Residing at 'Sathya Nikethan',
Kannadiparamba P.O,
Kannur District,
Kerala State-670 604. **APPELLANT**

(Rep. by Sri Nagesh Poojari. Y, Advocate)

AND

1. Director General
   Air Force Navel Housing Board,
   Air force Station, Race course Road,
   New Delhi, Central Delhi District
   Delhi State- 110 003.

2. Real Estate Regulatory Authority,
   Represented by Secretary, Department of Housing
   Second floor, Silver Jubilee Block,
   Unity Building,
   CSI Compound, 3rd Cross, Mission Road,
   Bengaluru- 560 027. **RESPONDENTS**

(Rep by Sri Ramachandar Desu, Advocate for R1)

(R2 served, unrepresented)

This Appeal is filed under Section 43(5) of the Real Estate (Regulation and Development) Act, 2016, before the Interim Tribunal (KAT) praying to set aside the order dated 25.06.2019 passed in CMP/190405/0002577 by the respondent No.2,-Adjudicating Officer and later transferred to this Tribunal on 02.01.2020 and re-numbered as Appeal (K-REAT) No.120/2020.

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

J U D G M E N T

The appellant/allottee aggrieved by the order passed by the learned Adjudicating officer in directing the developer to return the amount of the appellant without awarding interest on the said amount, has preferred this Appeal under Section 43(5) and 44 of the Real Estate (Regulation and Development) Act, 2016 r/w Rule 33 of Karnataka Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred in short as **'The Act and the Rules')** praying this tribunal to direct the developer to return the amount along with interest and compensation.

Facts of the case in brief are:

2. The appellant is a retired short service Commissioned Officer from Indian Navy. He has applied for a residential house in "JAL VAYU TOWERS" undertaken to be constructed by the Respondent No.1, Air Force Naval Housing Board (for short, AFNHB) which is a welfare society registered under the Societies Registration Act 1860 with the objectives of

providing residential houses to the serving Indian Air Force and Navy personnel, and war widows of these services. The society provides houses on "No profit no loss basis" under self-finance housing scheme.

3. As per the allotment letter dated 14.03.2013 issued by the Respondent No.1 it was promised to complete the project by the end of March, 2018. However, the date of completion specified by the developer in the application submitted to RERA for registration of the project is different from the one mentioned in the agreement.

4. As per the allotment letter, tentative date of completion of the project was mentioned as early as 2017, though the contract was not yet awarded to any contractor. Subsequent to the award of contract to the builder M/s GJS Infrastructure Pvt Ltd, Hyderabad, the 1st Respondent revised the cost of residential unit of the allottee as Rs. 58.1 lakh in 2017 and completion date of project was specified as March 2018.

5. According to the appellant, the AFNHB entered into a supplementary agreement with the builder without the consent and knowledge of members/allottees. The details of supplementary agreement was intimated to the allottees only on 15.04.2018 through web update. That under the supplementary agreement the respondent No.1 also agreed to transfer half of the units infavour of the contractor without obtaining the consent from the allottees. The appellant also submitted

that there was deviation in the construction of the project, from the sanctioned plan which lead to completion of the project in two phases against the sanctioned plan to develop the entire project in a single phase. Apart from this, payment schedule compels the allottees to make full payment, earlier to completion of the project. With this compulsion and circumstances, the appellant decided to withdraw from the scheme and filed a complaint under Section 31 of RERA Act 2016 against respondent No.1 for refund of his amount paid towards sale consideration with interest and compensation.

6. The learned Adjudicating officer after hearing both parties and considering the documents produced by them, held that there is delay in completion of the project and the act of respondent No.1 in transferring half of the units to the contractor is without the consent of the allottees and approval from RERA. Accordingly learned Adjudicating officer passed the impugned order allowing the complaint and directing the developer to return Rs.55,67,000/- received from the allottee within 60 days. If not from 61st day it will carry simple interest at 10.75% p.a till realization of entire amount.

7. The appellant/allottee being aggrieved by the impugned order in not awarding interest on the amount paid by him towards sale consideration from the respective date of payments, has preferred this

appeal seeking to set aside the impugned order and thereby direct the 1st respondent to pay interest and compensation.

8. Heard Sri Nagesh poojari, learned counsel for the appellant and Sri Ramachandar Desu, learned Advocate for respondent No.1 developer. Respondent No.2 RERA, though served, remained unrepresented.

9. The learned counsel for the Appellant apart from reiterating the grounds urged in the appeal memo, contended that the Respondent No.1 entered into a supplementary agreement with the contractor without obtaining prior consent from the allottees which is against the provision of RERA Act. It is further submitted that the date of completion of the project published by the Respondent No.1 on the website and date of completion mentioned in the RERA registration certificate are different. Thus, respondent No.1 by publishing different dates for completion of the project has mislead the allottees. Appellant also pointed out that respondent No.1 by entering into the supplementary agreement has agreed to transfer rights of 180 units infavour of a builder which defeated the scheme of construction of the project on "no profit no loss".

10. It is contended that Respondent No.1 by entering into supplementary agreement with a builder has transferred half of the units in favour of the builder without obtaining the consent from the allottees

and approval from RERA. It is also pointed out that the 1st respondent has made deviations in the construction of the project from the sanctioned plan and not providing financial status returns of the project to the allottees.

11. The learned counsel also submitted that in view of indefinite delay in completion of the project the appellant had no option than to withdraw from the scheme and requested for refund of his money with interest. Since his request was not considered, he was compelled to file a complaint under Section 31 of the RERA Act against respondent No.1 before RERA for refund of his money paid with interest and compensation.

12. It is submitted that the Adjudicating officer, RERA has passed the order directing the 1st respondent *to return the amount of Rs. 55,67,000/- received from the consumer (appellant) within 60 days. If not, from 61st day it will carry simple interest at the rate of 10.75% p.a till the realisation of entire amount, without awarding interest and compensation.*

13. Pursuant to the said order, 1st respondent has transferred an amount of Rs. 55,50,000/- to the account of appellant as against Rs.55,67,000/- received from the appellant. However during the pendency of this appeal, Respondent No.1 has returned the balance of Rs. 17,000/- to the appellant.

14. It is further urged that the impugned order is erroneous, contrary to the facts and law and principles of natural justice which is liable to be set aside.

15. It is contended that the order is passed without properly considering the complaint filed by the appellant and it is in violation of the provisions of RERA Act, 2016.

16. The appellant, with the above submissions has sought for setting aside the impugned order passed by the RERA and thereby to direct the 1st respondent to pay interest on Rs. 55,67,000/- which was paid by the appellant to the developer towards the cost of apartment unit and pay compensation.

17. Learned counsel for Respondent No.1 submits that Air Force Naval Housing Board is a welfare society registered under the societies Registration Act, 1860 with the objectives of providing residential house to the serving Air Force and Navy personnel and widows of these services on "No profit No loss basis". The scheme which is being implemented is under self-finance housing scheme, under which society collects contribution from allottees of the project as a resources/finance for implementation of the project. The amount collected from allottees is solely used for the

projects of their clients and not for investment or sale benefits like a business organization.

18. The said society has a mechanism of evolving final costing of the dwelling units after completion of the project. This costing exercise is carried out by final costing committee which includes the independent serving officers from Air Force and Navy and representatives of the Members of the particular scheme and two Auditors. After the final costing excess/unspent amount, if any, collected from the allottees is returned to the allottees and in case the cost is increased, the increased amount is collected from each allottee in proportionate share based on the size of dwelling units.

19. It is submitted that the Air Force Navy Housing Board launched Mysore scheme during October, 2012. The scheme was planned for construction of 388 residential houses. Initially 353 applications were registered for allotment. After completion of requisite approvals and tendering process for civil work, construction work started in August, 2015. The Respondent No.1 initially demanded the basic tentative cost and this was subject to change depending upon other factors like cost of award of contract, development charges, super area, parking area, cost of additional area, taxes etc. This was mentioned in paras 4 & 5 of the allotment letter dated 14.03.2013 issued to the appellant. It is also mentioned in the allotment letter that escalation is payable due to possible

increase in prices of land, material, labour, taxes and other mandatory charges and changes in other specific areas etc.

20. The learned counsel for Respondent No.1 while drawing our attention to Rules mentioned in allotment letter at para 16 and 0703 of chapter VIII of Master Brochure submitted that the appellant was informed of the same which reads:

> *"No withdrawal is generally permitted, if a waitlist does not exist. However, even if the withdrawal is permitted under special circumstances, the amount shall be refunded only when a new allottee joins in and pay the due installments. No interest shall be paid on such refunds and cancellation charges as mentioned in para 0702 above shall be deducted as per existing rules."*

21. Respondent No.1 further submitted that as on date 31 allottees have withdrawn from the scheme wherein 19 allottees have been refunded their amount in two installments and remaining 12 allottees are awaiting refund, as no funds are available with AFNHB. And remaining refund cases can be progressed and they will be able to make payment when all vacant units are subscribed by new allottees.

22. It is contended that when all the schemes of the Respondent-1 are self-financed and the payment of interest by way of compensation to the

appellant/allottees is not only burden with finance resources but respondent will have no option but to put this expenditure into project cost and ultimately recover it from the other allottees of the project. The respondents-1 denied that they have huge corpus fund which has come through profit from various projects. It is submitted that when there is no element of profit in the costing, then how such a huge amount can be collected.

Points for Consideration:-

23. That after hearing the learned counsel appearing for the parties and perusing the grounds of appeal, and documents produced along with the appeal and written arguments including the impugned order passed by RERA, the points that arise for our consideration is:-

(I) Whether the learned Adjudicating Officer was justified in not awarding interest on refund amount?

(II) Whether the appellant-allottee is entitled for interest on refund amount?

(III) What order?

R E A S O N S

24. **Point No.(I):-** It is evident from the records available before the Tribunal that there was inordinate delay on the part of developer in

completion of the project. The respondent No.1 failed to deliver possession of the dwelling units to the allottee within the prescribed period as per the agreement, and further it is also seen from the records and the order of learned Adjudicating officer that the project is not complete even at the time of consideration of the complaint in all respects. Therefore the learned Adjudicating officer has rightly ordered for return of amount to the allottee and pursuant to which the developer happily returned the amount of the allottee and has not chosen to carry the matter in appeal.

25. In this context, firstly, it is apt to extract the Rules mentioned in the allotment letter para 16 & 0703 of chapter VIII of Master Brochure:

> *"No withdrawal is generally permitted, if a waitlist does not exist. However, even if the withdrawal is permitted under special circumstances, the amount shall be refunded only when a new allottee joins in and pay the due installments. No interest shall be paid on such refunds and cancellation charges as mentioned in para 0702 above shall be deducted as per existing rules."*

That based on the above Rule, it appears that Respondent No.1 made clear to the appellant that the refund would be possible only when category is fully subscribed and new alottees join the scheme and pay their installments.

26. Now the question arises regarding payment of interest and compensation on the amount deposited by the allottee with the developer for purchase of a flat.

Section 18(1) of the Act reads:-

> **"**18 (1)**:** 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 a developer on account of suspension or revocation of the registration under this Act or for any other reason,
>
> he shall be liable on demand to the allottees, in 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 an 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.

27. Admittedly the project in question was launched in October 2012, and tendering process for civil work was started in August-2015 i.e., prior to RERA Act coming into force and it was not completed before the Act coming into force. As such, as per the provisions of the RERA Act, it is an ongoing project. Even though the project is initiated prior to RERA Act and agreements between developer and allottees have been made on terms and conditions of the concerned by-laws of the society then existing, the provisions of the Act and Rules of the RERA will apply as on the date.

In the case on hand, the allottee had withdrawn from the project since the developer had failed to complete the project in time and was unable to deliver possession of the apartment in accordance with the terms of the agreement for sale. Therefore the provisions of the RERA Act is applicable to the said project and the allottee is entitled to interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act. Even assuming that the allottee had not withdrawn from the project, proviso to Section 18 of the Act mandates 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.

28. It is also relevant to mention here that prior to commencement of the RERA Act, Karnataka Apartments Ownership Flats (Regulation of the Promotion of Construction, sale, Management and Transfer) Act 1972 was in force. Even under the said Act there was provision under Section 8 for refund of amount paid with interest for failure to give possession within the specified time.

29. It is an established fact that under Section 18 of the RERA Act when a developer has not completed the project as per the agreement, he is liable to pay compensation or refund deposited amount to the allottee with interest. Though Section 18 of the Act provides and allows the Authority to award interest by way of compensation, by the impugned order, the Adjudicating officer has directed the 1st respondent only to return the amount deposited by the appellant without interest by wrongly relying upon the submissions and pleadings made by the developer/respondent that the project is developed on "no profit no loss" basis.

30. The conditions mentioned in the letter of allotment and agreed by the developer and the allottee that in case of return of amount, the allottee is not entitled for interest on the said amount will not have over-

riding effect against the provision of Section 18 of the Act which provides for return of the amount with interest and compensation in the event of allottee withdrawing from the project for lapse and laches on the part of the developer in not delivering possession of the apartment within the time specified in the agreement. Further, it is also pertinent to mention that the 1st respondent-developer has not filed any appeal challenging the impugned order or applicability of the provisions of the Act and Rules to the projects undertaken by them.

31. Admittedly, the developer by entering into a supplementary agreement with a private Builder M/s GJS Infratech Pvt. Ltd., Hyderabad in 2017 itself has transferred 180 units out of the total units of 388 infavour the builder and, therefore the contention of the developer that the project is based on "No profit no loss basis" under self-finance housing scheme, cannot be accepted. Thus, the developer has failed to demonstrate and establish his case that the project is based on "No profit no loss basis" under self-finance housing scheme. Further entire amount collected from the allottee is spent for the development of the project by producing relevant material. Therefore, from a perusal of the impugned order and rival contentions of the parties the application of provisions of the Act and Rules to the project on hand cannot be overlooked. The reason and circumstances stated for withdrawal from the project by the appellant has to be accepted.

32. The very fact that the learned Adjudicating officer having satisfied with the case of the appellant that there was lapse and laches on the part of the developer in delivering possession of the apartment within the time specified in the allotment letter, rightly ordered for return of the amount paid towards sale consideration of the apartment, but erred in not awarding interest on the said amount.

33. Admittedly, respondent no.1 has paid entire amount of the appellant. Now, Appellant is entitled for interest on the said amount as per Section 18 of the Act read with Rule 16 of the Rules.

34. Before concluding with the case, we would like to state that the appeal could not be disposed of within 60 days as per the requirement of Section 44(5) of the Act, due to time consumed in securing the records and negotiating for settlement and so also the lockdown due to covid-19 pandemic.

35. Having regard to the facts of the case and for the reasons stated hereinabove, we answer:

Point No.1 in the negative, and

Point No.2 in the affirmative.

36. For the aforesaid reasons and taking into consideration the arguments of the learned counsel appearing on both sides, records and documents filed by the appellant and contesting respondent No. 1, we pass the following:

O R D E R

1) Appeal filed by the appellant is partly allowed.

2) The impugned order passed by the learned Adjudicating officer, RERA-2nd respondent, dated 25th June 2019 in CMP/190405/0002577, is modified and 1st respondent-developer is directed to return the amount of Rs. 55,67,000/- received from the appellant with interest at the rate of 9% per annum on the amount deposited by the appellant from respective dates of deposits till the date of coming into force of RERA Act i.e, 26.03.2016 and from 26.03.2016 at the rate of interest of State Bank of India highest marginal cost of lending rate plus two percent till the date of return of the amount by the 1st Respondent, after deducting the amount already paid to the allottee, within a period of two months from the date of receipt of this order.

3) In view of disposal of appeal, pending 1.As, if any stand disposed of as they do not survive for consideration.

4) The Registry is directed to comply provisions of Section 44(4) of the RERA Act 2016, and return the records to RERA, if any, received.

There is no order as to costs.

Sd/-
HON'BLE CHAIRMAN

Sd/-
HON'BLE JUDICIAL MEMBER

Sd/-
HON'BLE ADMINISTRATIVE MEMBER