

**BEFORE THE HARYANA REAL ESTATE APPELLATE
TRIBUNAL**

**Appeal No.349 of 2019
Date of Decision: 21.07.2020**

M/s Cosmos Infra Engineering India Pvt. Ltd., 5A, C, D, 5th
Floor, Vandhna Building 11, Tolstoy Marg, Delhi-110057

Appellant

Versus

1. Mrs. Teena Sood
2. Varun Sood

Apartment No.14B, Level 15, DLF Building, DLF Phase-
III, Cyber City, Gurugram.

Respondents

CORAM:

Justice Darshan Singh (Retd.)	Chairman
Shri Inderjeet Mehta	Member (Judicial)
Shri Anil Kumar Gupta	Member (Technical)

Argued by: Shri Gaurav Chopra, Advocate, Ld. Counsel
for the appellant.
Shri Abhay Jain, Advocate, Ld. Counsel for
the respondents.

ORDER:

JUSTICE DARSHAN SINGH (Retd.) CHAIRMAN:

The present appeal has been preferred by the appellant/promoter under Section 44 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act'), against the order dated 10.04.2019 passed by the learned Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called 'the Authority'), vide which the complaint

filed by the respondents/allottees was disposed of with the following directions:-

- “i. The respondent is directed to pay delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f. 02.09.2017 as per the provisions of section 18(1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession.*
- ii. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.*
- iii. Complainants is directed to pay outstanding dues if any, after adjustment of interest for the delayed period.*
- iv. The promoter shall not charge anything from the complainants which is not part of the BBA.*
- v. Interest on the due payments from the complainants shall be charged at the prescribed rate of interest i.e. 10.75% by the promoter which is the same as is being granted to the complainants in case of delayed possession.”*

2. The respondents/allottees filed complaint before the learned Authority with the allegations that they were allotted unit No.D-403, Sector-99, Tower-D, in the project “Cosmos Express 99” Gurugram, admeasuring 1310 sq. ft. for a total sale consideration of Rs.82,62,185/-. They paid a sum of Rs.65,68,596/- to the appellant/promoter. The “Flat

Buyers Agreement” (hereinafter called ‘the Agreement’) was executed on 02.03.2013. The possession of the unit was to be delivered within a period of four years from the date of execution of the agreement plus six months as a grace period. It is further pleaded that the appellant/promoter failed to complete the project within the stipulated period as per the terms and conditions of the agreement dated 02.03.2013. Thus, the respondents/allottees have suffered mental torture, agony and financial losses. They have sought the refund of the amount paid by them along with interest.

3. The complaint filed by the respondents/allottees was contested by the appellants/promoters on the grounds inter alia that the respondents/allottees have suppressed the material facts; that they did not make the timely payments as per the payment schedule; that the respondents/allottees are not the genuine customers as they invested the money to make profit by selling the unit at higher price; that 70% of the construction work has already been completed and possession will be delivered in a short span of time. All other averments made in the complaint were controverted and the appellant/promoter pleaded for dismissal of the complaint.

4. After hearing learned counsel for the parties and appreciating the material on record, the learned Authority disposed of the complaint with the directions as reproduced in the upper part of this judgment.

5. Aggrieved with the aforesaid order dated 10.04.2019, the present appeal has been preferred by the appellant/promoter.

6. We have heard Shri Gaurav Chopra, Advocate, learned counsel for the appellant; Shri Abhay Jain, Advocate, learned counsel for the respondents and have meticulously examined the record of the case.

7. Shri Gaurav Chopra, learned counsel for the appellant contended that the impugned order passed by the learned Authority is non-est and nullity. The respondents/allottees have filed the complaint for refund alongwith interest. As per the judgment of this Tribunal in **Appeal No.06 of 2018 "Sameer Mahawar Versus MG Housing Pvt. Ltd."** decided on 02.05.2019, the learned Authority had no jurisdiction to entertain and try the complaint wherein the relief claimed is refund alongwith interest. He contended that as the learned Authority was not competent to entertain the complaint, so the defect of jurisdiction strikes at the very competency of the Authority to pass the impugned order. The impugned order passed by the learned Authority being without jurisdiction is a *coram non judice* and such order is a nullity and is non-est. He further contended that such non-est order can be even challenged in the execution proceedings as the decree/order passed by the court having no jurisdiction is a nullity and non-est. To

support his contentions, he relied upon cases **Sushil Kumar Mehta Vs. Gobind Ram Bohra, 1990(1) PLR 182** and **Sarwan Kumar and another vs. Madan Lal Aggarwal, AIR 2003 SC 1475.**

8. He further contended that the statement made by the respondents/allottees during the pendency of this appeal, wherein they have given up the relief of refund, cannot cure the defect of jurisdiction. He contended that the jurisdiction of the court is to be determined on the basis of pleadings and not the relief. In the complaint filed by the respondents/allottees, they have claimed only the relief of refund. So, now they cannot be allowed to wriggle out from the legal consequences at the appellate stage by claiming only the interest to confer the jurisdiction as the jurisdiction of the Court cannot be conferred either by consent or by waiver. Thus, he contended that the impugned order passed by the learned authority is a nullity and non-est.

9. On the other hand, Shri Abhay Jain, Advocate, learned counsel for the respondents/allottees contended that the appellant/promoter could not complete the construction of the unit within the stipulated period, though they have paid the huge amount of more than Rs.65 lacs. So, they were compelled to file the complaint. He further contended that the respondents were satisfied with the order passed by the learned Authority granting interest for delayed possession,

instead of refund. He further contended that the learned Authority has not granted the relief of refund, rather only interest for delayed possession has been awarded for which the learned Authority has complete jurisdiction and the impugned order cannot be stated to be nullity or non-est.

10. He further contended that in the present appeal, the respondents have made the position clear. They have given up the relief for refund and have only claimed the interest for delayed possession. This statement made by them will relate back to the very institution of the case. Thus, he contended that the learned Authority has rightly awarded interest to the respondents/allottees for delayed possession.

11. We have duly considered the aforesaid contentions.

12. The main thrust of the contentions raised by the learned counsel for the appellant is that the impugned order is nullity and non-est having been passed by the learned Authority having no jurisdiction to entertain the complaint filed by the respondents/allottees to claim the refund and such defect in jurisdiction cannot be cured later on. There is no dispute with the proposition of law laid down in cases relied upon by the learned counsel for the appellant that the decree passed by a court having no jurisdiction is nullity and non-est and such objection can be even taken in the execution proceedings.

13. This Tribunal in case **Sameer Mahawar Versus MG Housing Pvt. Ltd.** (Supra) by taking note of various provisions of the Act and the Rules made thereunder, held that the learned Authority had no jurisdiction to adjudicate upon the issue regarding refund. But at the same time in another bunch of appeals, the lead **Appeal No.74 of 2018 "Ramprastha Promoters and Developers Pvt. Ltd. Vs. Ishwer Chand Garg"** decided on 29.07.2019, this Tribunal vide detailed judgment came to the conclusion that the learned Authority is competent to deal with the complaint where the claim is for grant of interest due to delay in delivery of possession.

14. In the instant case, though the respondents/allottees have filed the complaint for grant of the relief of refund, but the learned Authority has awarded only the relief of interest on account of delay in delivery of possession. The respondents/allottees did not agitate the relief granted by the learned Authority. Thereafter, they have accepted the award of interest for delayed possession granted by the learned Authority which impliedly shows that they had no intention to withdraw from the project; they want the delivery of possession obviously with interest for delayed possession. The position has been further made clear during the pendency of this appeal by the respondents/allottees

when they have made statement before this Tribunal on 04.03.2020 which reads as under: -

“That we give up the claim of refund sought in the complaint. We only want to pursue the case for grant of interest for delayed possession. The relief of refund mentioned in the complaint may be deemed to have been deleted. We are satisfied with the relief of interest for delayed interest awarded by the Id. Authority.”

15. Vide aforesaid statement, the respondents/allottees have given up the claim of refund sought in the complaint. They wanted to pursue the case only for grant of interest for delayed possession. They have further stated that the relief of refund mentioned in the complaint may be deemed to have been deleted and they are satisfied with the relief of delayed interest awarded by the learned Authority.

16. We do not find any substance in the contentions raised by the learned counsel for the appellant that the respondents/allottees could not give up the claim at the appellate stage. The claim can be abandoned or substituted or scale down at any stage of the lis. Though the strict provisions of the Code of Civil Procedure, 1908 (hereinafter called the ‘C.P.C.’) are not applicable to the proceedings under the Act, yet the principles provided therein are the important guiding factors. Order XXIII Rule 1(1) of the C.P.C. reads as under: -

“ *ORDER XXIII*

WITHDRAWAL AND ADJUSTMENT OF SUITS

[1. Withdrawal of suit or abandonment of part of claim— (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.”

17. The aforesaid provisions clearly show that at any time after the institution of the suit, the plaintiff may abandon his suit or a part of his claim against all or any of the defendants. Thus, the respondents/allottees being dominus litis can choose to abandon the relief of refund and to claim the alternative/substituted relief for grant of interest for delayed possession at any stage, which is clearly an exercise by the respondents/allottees within the purview of Order XXIII Rule 1(1) C.P.C. and is legally permissible. Reference can be made to cases **Shri Umakant B. Kenkre & Another Vs. Shri Yeshwant P. Shirodkar & others, 1999(3) BomCR 611** and **Gurmeet Kaur and others Versus Hardeep Singh and another, 2005(2) R.C.R. (Civil) 149.**

18. It is the settled principle of law that appeal is continuation of the suit. Reference can be made to case **Lakshmi Narayan Guin Versus Niranjan Modak, AIR 1985 SC 111**. The same principle of law has been laid down by the Hon'ble Jharkhand High Court in case **M/s Sahara India Commercial Corporation Limited and others Versus Uday Shankar Paul and others, 2013(54) R.C.R. (Civil) 1**.

19. Thus, the statement made by the respondents/allottees during the pendency of the appeal, vide which they have abandoned the claim of refund and have substituted the relief for grant of interest for delayed possession, will relate back to the very institution of the complaint. In view of our detailed findings in case **Ramprastha Promoters and Developers Pvt. Ltd. Vs. Ishwer Chand Garg** (Supra), the learned Authority has jurisdiction to deal with the complaint wherein the relief sought is interest for delay in delivery of possession. Thus, it can no longer be argued that the impugned order was without jurisdiction and is nullity, in view of the aforesaid statement made by the respondents/allottees.

20. If the defect of jurisdiction is curable, it can certainly be cured by abandonment of the claim which is beyond the purview of the Court/Authority dealing with the plaint/complaint. This is the general practice being followed

even in the Courts of Law. The abandonment of the claim to bring the lis within the jurisdiction of the Court/Authority is not conferment of the jurisdiction by consent or waiver. Moreover, such consent and waiver can only be on the part of the defendant/respondent and not by the plaintiff/complainant who had instituted the lis.

21. The learned Authority has directed the appellant/promoter to pay the delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum with effect from 02.09.2017 till the offer of possession. The appellant/promoter has also been awarded the same rate of interest on the due payments from the respondents/allottees. The aforesaid directions along with minor other directions given by the learned Authority do not suffer from any illegality or irregularity warranting any interference by this Tribunal.

22. Consequently, the present appeal is without any merits and the same is hereby dismissed. However, no order as to costs.

23. The amount deposited by the appellant/promoter i.e. Rs.4,64,912/- with this Tribunal to comply with the provisions of Section 43(5) of the Act, be remitted to the learned Haryana Real Estate Regulatory Authority, Gurugram for disbursement to the respondents/allottees after expiry of

the period of limitation to file appeal and in accordance with law.

24. The copy of this order be communicated to learned counsel for the parties/parties and the learned Authority for compliance.

25. File be consigned to the records.

Announced:
July 21st, 2020

Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

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