BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.105 of 2019
Date of Decision: 16.09.2020

Dalip Chand s/o Late Puran Singh, R/o M-671, GF, Princeton Floors, Mayfield Gardens, M-Block, Sector-51, Gurugram, Haryana.

Appellant

Versus

M/s IREO Grace Realtech Pvt. Ltd., 5th Floor, Orchid Centre, Golf Course Road, Sector-53, Gurgaon, through its representative having its registered office at IREO Campus, Sector-59, Gurgaon-122101.

Respondent

CORAM:

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

Argued by: Shri Neeraj Gupta, Advocate, ld. counsel for the appellant (in person).
Ms. Mehak Sawhney, Advocate for Shri Vinod S. Bhardwaj, Advocate, ld. counsel for the respondent.
[The aforesaid presence of ld. counsel for the respondent recorded through WhatsApp Video Conferencing since the proceedings are being conducted in virtual court.]

ORDER:

JUSTICE DARSHAN SINGH (Retd.) CHAIRMAN:

The present appeal has been preferred by the appellant/allottee under Section 44(1) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act') against the order dated 17.10.2018 passed by the learned Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called 'the Authority'), in complaint Case No.123 of 2018.

2. The appellant/allottee filed complaint under Section 31 of the Act before the learned Authority on the grounds inter-alia that in and around March, 2013 the respondent/promoter approached the appellant/complainant and represented that they were developing the project namely "The Corridors" in Sector 67-A, Gurugram. The respondent had also issued the advertisement in the newspapers followed by the telephonic calls and personal visits of the officials of the respondent. As a result of allurement by the respondent, the appellant booked a flat with the respondent in the month of March, 2013 having super area of 1300 Sq. ft. in the said project and paid the booking amount of Rs.10,00,000/- vide cheque dated 05.03.2013. He paid the further amount of Rs.14,65,913/- vide cheque dated 02.06.2013. In this way, he has paid a sum of Rs.24,65,913/- in respect of the allotment in the aforesaid project.

3. The respondent/promoter issued the allotment offer letter dated 12.08.2013 (Annexure A-7, page 98 of the paper book) alongwith the payment plan but the appellant was shocked to see the payment plan wherein the basic price of the apartment was shown to be Rs.9200/- per sq. ft. and the same was unilaterally increased from Rs.8750/- per sq. ft. It was also agreed between the parties that the appellant will be accommodated somewhere at third to seventh floor, but the allotted unit was situated at the top floor. The appellant did not

accept the said offer and issued the protest letter dated 07.04.2014 (Annexure A-9, page 103 of the paper book) and demanded the rectification of the cost as per the agreed price and reducing the amount after deducting the amount of Rs.5,20,000/- in respect of the car parking space and to charge only the agreed price of Rs.8750/- per sq. ft. The said letter was responded by the respondent vide their letter dated 23.04.2014 (Annexure A-10, page 105 of the paper book) wherein it was mentioned that the basic sale price of Rs.8750/- was not inclusive of the charges of the car parking space.

4. The appellant again issued the protest letter dated 01.05.2014 (Annexure A-11, page 107 of the paper book). Ultimately, the respondent/promoter cancelled the allotment vide letter dated 11.02.2015 (Annexure A-12, page 111 of the paper book) and forfeited the amount of Rs.24,65,913/- deposited by the appellant. However, later on the respondent/promoter issued the letter dated 20.04.2015 (Annexure A-13, page 114 of the paper book) offering for restoration of the cancellation of the flat, but the appellant vide notice/reply dated 24.04.2015 (Annexure A-14, page 117 of the paper book) declined the offer and sought refund of the amount deposited by him alongwith interest @ 24% per annum and compensation amounting to Rs.2,00,000/- for causing mental agony and harassment. When the grievance of the appellant

was not redressed, he filed complaint before the learned Authority.

5. The complaint was contested by the respondent/promoter on the ground inter alia that the appellant was aware from the very inception that the total sale price of the unit was to be charged @ Rs.9200/- per sq. ft. and the basic price of Rs.8750/- per sq. ft. was not inclusive of the car parking space charges and the same was to be charged separately from the complainant.

6. It is further pleaded that the appellant failed to abide by his contractual obligations by not only failing to make the payment of the remaining instalments but also by not signing the booking application form and by not executing the Apartment Buyer's Agreement. On account of continuous defaults committed by the appellant, the allotment of the unit was terminated by the respondent vide letter dated 11.02.2015 and the amount deposited by the appellant was forfeited in accordance with the terms and conditions of the booking application form. The respondent/promoter has denied that the agreed price was @ Rs.8750/- per sq. ft. inclusive of the car parking space charges. It is further pleaded that as a gesture of goodwill, the respondent/promoter vide letter dated 20.04.2015 offered to restore the cancellation of the unit at the rate of Rs.8750/- per sq. ft. excluding the car parking space charges and other charges, but did not levy any penalty charges.

7. The respondent further pleaded that there is no question of any wrongful loss to the appellant/allottee. Rather, the respondent/promoter has suffered heavy losses on account of non-fulfilment of the agreed terms and conditions by the appellant and the amount deposited by him was forfeited in accordance with the terms and conditions of the allotment letter. All other pleas raised in the complaint were controverted and it was prayed that the complaint filed by the appellant may be rejected with heavy costs.

8. The appellant/allottee filed re-joinder to the reply filed by the respondent wherein the pleas raised by the respondent were denied and those of the complaint were reiterated.

9. After hearing learned counsel for the parties and appreciating the material on record, the learned Authority vide the impugned order dated 17.10.2018 disposed of the complaint filed by the appellant with the following directions: -

> *"(i) The authority is of the considered view that provisions of section 13 of the Real Estate (Regulation & Development) Act, 2016 prevails and the builder cannot forfeit more than 10% of the total consideration amount before signing of the agreement (since there is no signed agreement inter-se the parties on record).*
>
> *(ii) The builder is directed to refund the excess amount forfeited by the respondent to the complainant. No interest shall be payable in this context.*

(iii) No interest shall be payable in this complaint."

10. Aggrieved with the aforesaid order the present appeal has been preferred by the appellant/allottee.

11. We have heard Shri Neeraj Gupta, learned counsel for the appellant, Ms. Mehak Sawhney, Advocate for Shri Vinod S. Bhardwaj, learned counsel for the respondent and have meticulously examined the record of the case.

12. Shri Neeraj Gupta, learned counsel for the appellant has also filed the written submissions.

13. Initiating the arguments, learned counsel for the appellant contended that as per the oral negotiations between the appellant and the representative of the respondent/promoter, the price of the unit was agreed to be Rs.8750/- per sq. ft. but in the allotment offer letter dated 12.08.2013, the price of the unit was unilaterally increased to Rs.9200/- per sq. ft. The increased price included the car parking space charges, extra development charges and club membership charges etc. He contended that appellant immediately contacted the respondent and protested the conveyed payment plan but of no avail. Ultimately, he wrote the protest letters dated 07.04.2014 and 01.05.2014. The appellant has deposited a total sum of Rs.24,65,913/- with the respondent/promoter even before issuance of the allotment letter. He further contended that ultimately the allotment was

cancelled and the amount deposited by the appellant was forfeited.

14. He contended that there was no concluded contract between the parties. The application form Annexure-1 does not contain any condition for forfeiture of the amount and the offer letter dated 12.08.2013 was never accepted by the appellant/allottee. So, the respondent/promoter was not entitled for forfeiture of the amount deposited by the appellant. He contended that as per Section 74 of the Indian Contract Act, 1872, to forfeit any amount in any case of breach of contract, the specific amount has to be mentioned in the contract which is to be paid by the party breaching the contract, but in this case there was no concluded contract. No Apartment Buyer's Agreement was ever executed. Thus, he contended that the learned Authority has committed an error in allowing the forfeiture of 10% of the total sale consideration. He contended that the appellant is entitled for refund of the entire amount with the prescribed rate of interest. To support his contentions, he relied upon case ***Suresh Kumar Wadhwa Vs. State of M.P. & Ors, 2018(1) R.C.R. (Civil) 36***.

15. On the other hand, learned counsel for the respondent contended that it was never agreed that the basic sale price of Rs.8750/- per sq. ft. is inclusive of the car parking space charges and other charges. She contended that the basic sale price of the unit inclusive of the car parking space charges

was @ Rs.9200/- per sq. ft. which the appellant was liable to pay. She contended that the appellant has not fulfilled his obligations as per the terms and conditions of the allotment. He did not sign the booking application form and the Apartment Buyer's Agreement which was sent to him alongwith the offer of allotment. She contended that in the offer of allotment letter dated 12.08.2013, there is clear condition of forfeiture of the amount. She contended that the appellant/allottee had failed to make the payment of the instalments as per the payment plan and also failed to execute the Apartment Buyer's Agreement and the application form. So, ultimately the allotment was cancelled vide letter dated 11.02.2015 but as a gesture of goodwill, the respondent offered to restore the allotment vide letter dated 20.04.2015, but even that offer was not accepted by the appellant/allottee. Thus, she contended that the respondent/promoter was entitled to forfeit the entire amount deposited by the appellant/allottee as per the terms and conditions of the allotment, but the learned Authority while taking lenient view has allowed the forfeiture of only 10% of the basic sale price. Thus, she contended that the impugned order passed by the learned Authority does not suffer from any ambiguity.

16. We have duly considered the aforesaid contentions. The substantial question to be decided in this case is as to whether there was any valid and concluded contract for the

sale/purchase of the flat. If the first question is answered in affirmative, whether the respondent/promoter was justified to forfeit the amount deposited by the appellant/allottee.

17. At the very outset, it is pertinent to mention that no Apartment Buyer's Agreement was executed between the parties. In order to constitute a valid contract, there should be an offer or proposal. The said offer or proposal should be definite, specific and unequivocal. When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted and becomes a promise as provided in Section 2 of the Indian Contract Act, 1872. A contract is completed when an offer is accepted by the person to whom the offer is made. It is further the settled principle of law that the acceptance should be absolute and unqualified.

18. Thus, we are to determine as to whether there was any valid offer, if so by whom and whether there was any valid acceptance thereof, if so by whom. Learned counsel for the respondent/promoter has vehemently contended that the advertisement issued by the promoter will amount to offer but we are unable to persuade ourselves to accept this plea raised by her. The copy of the advertisement has been placed on record by the respondent in pursuance of our order dated 31.08.2020. This advertisement was published in "The Economic Times" on 07.08.2013. It is surprising to note that the respondent/promoter has received the booking amount of

Rs.10,00,000/- vide cheque dated 05.03.2013. The receipt thereof is Annexure A-5 at page 96 of the paper book. The second instalment of Rs.14,65,913/- was paid by the appellant to the respondent vide cheque dated 02.06.2013. The receipt thereof is Annexure A-6 at page 97. So, the respondent/promoter has already received a sum of Rs.24,65,913/- even before the publication of the advertisement of the project. Moreover, this advertisement is totally vague and indefinite; it does not contain the total number of units/flats to be constructed; it also does not contain the price of the unit; it also does not contain when the project is likely to complete and the possession is to be delivered. So, all the valid essential of the offer is missing. Thus, the advertisement got published by the respondent/promoter cannot be considered to be an offer by any stretch of imagination. At the most it can be an invitation to treat, in other words the invitation to the proposed buyers to buy the flats rather than an offer. To support this view, reference can be made to case ***Executive Engineer, Sundargarh vs. Mohan Prasad Sahu, AIR 1990 ORISSA 26.***

19. Then, there is an application for provisional registration of residential apartment filed by the appellant/allottee with the respondent/promoter. Copy of that application was attached by the respondent/promoter with the reply as Annexure-1 and has been supplied to us by the learned counsel for the appellant at the time of arguments which was

taken on record. This application runs into four pages. First three pages are just introductory in nature. This application only contains four conditions which read as under: -

> *"(a) I/We hereby acknowledge and understand that the Company shall cause a search through any authorized agency, institution, person into my/our credit worthiness, whether with reference to Credit Information Bureau (India) Limited (CIBIL) or otherwise. I/We further understand and agree that in case of a low CIBIL credit score, the Company may reject my Application for Provisional Registration made herein.*
>
> *(b) The Company at all times reserves its right to reject my/our Application and cancel my/our Provisional Registration without assigning any reason therefor.*
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> *(c) I/We understand that the Application for Provisional Registration does not guarantee, allotment of an apartment/villa/plot/commercial unit and the same is subject to availability.*
>
> *(d) In case my/our Application for Provisional Registration is accepted and the Company makes offer of booking subject to payment of the booking amount as intimated by the Company, then I/We undertake to execute all documents/agreements as per the Company's format and accept all the terms and conditions therein and pay all charges as applicable therein."*

20. The perusal of the aforesaid conditions shows that those have been drafted by the respondent/promoter in such a

manner to confer every right to it and no corresponding right/option has been given to the allottee. All these clauses are absolutely oppressive and unilateral to grant substantial rights in favour of the respondent/promoter. In this application form no date is mentioned. The price of the flat and other charges are also not mentioned. In such type of bargains the price of the property is the essential element to constitute a valid contract. The acceptance of the offer also depends upon the price being offered. Thus, in view of the absence of this essential ingredient in the application form Annexure-1, it is also quite vague and indefinite and cannot be considered to be an offer in the eye of law.

21. The third document being pressed into service by the respondent/promoter is the offer of allotment letter dated 12.08.2013 (annexure A-7, page 98 of the paper book). This letter has been issued by the respondent/promoter to the appellant offering the allotment of the apartment no.CD-C10-14-1404 in the project known as "The Corridors" situated in Sector 67-A, Gurgaon, Haryana. This allotment offer letter was accompanied with the payment plan (available at page 101 of the paper book) wherein the basic sale price has been mentioned as Rs.9200/- per sq. ft. The allottee was also required to pay the development charges, interest free maintenance security, interest bearing replacement fund and club membership. Thus,

this is a document wherein for the first time the price and other charges of the flat proposed to be allotted have been mentioned.

22. If we take the case from another angle and consider the application Annexure-1 as an offer by the allottee for the purchase of the flat, even then the allotment offer letter dated 12.08.2013 cannot be considered to be a valid acceptance as the acceptance has to be absolute and unqualified. But in this letter dated 12.08.2013 various conditions have been imposed and at the most this letter can be a counter offer. Reference can be made to case ***Claridges Infotech Pvt. Ltd. Versus Surendra Kapur and Ors. 2009 AIR (Bombay) 1***.

23. Once it is found that allotment offer letter dated 12.08.2013 is the offer or even the counter offer, the appellant/allottee got further right to accept this offer or the counter offer to conclude the contract. But it is established from the documents available on record that this offer was never accepted by the appellant/allottee. As per the case of the appellant/allottee, at the time of initial verbal negotiations it was made known to him that price of the unit shall be Rs.8750/- per sq. ft. inclusive of the other charges, whereas in the payment plan sent to him alongwith the allotment offer letter, the basic sale price of the unit has been mentioned as Rs.9200/- per sq. ft. besides the appellant was required to pay the other charges like development charges, interest free maintenance security, interest bearing replacement fund and club membership and

total sale price of the unit has been mentioned as Rs.1,28,31,283/-. As per the case of the appellant on receiving this letter he approached the respondent/promoter repeatedly through personal visits as well as telephonically, but his grievance was not redressed and finally he issued a protest letter dated 07.04.2014 (Annexure A-9 at page 103). He further wrote the protest letter dated 01.05.2014 (Annexure A-11 at page 107). In response to letter dated 07.04.2014 (Annexure A-9), the respondent/promoter issued the letter dated 23.04.2014 (Annexure A-10 at page 105) wherein it was mentioned that it was clarified to the appellant that the basic sale price of Rs.8750/- per sq. ft. was not inclusive of the charges for car parking space which was to be charged extra. So, the respondent/promoter has again stressed that the total sale price of the unit was Rs.8750/- per sq. ft. plus car parking space charges and other charges which was disputed and never accepted by the appellant/allottee.

24. Thereafter, certain demands were raised by the respondent/promoter for payment of the instalments, but it an admitted fact that no further amount has been paid by the appellant after 02.06.2013 and ultimately the respondent/promoter issued the letter dated 11.02.2015 (Annexure A-12 at page 111) cancelling the allotment of the apartment and forfeiting amount deposited by the appellant. However, later on the respondent offered to restore the allotment

vide letter dated 20.04.2015 but on the conditions that the appellant shall be required to pay Rs.8750/- per sq. ft. basic sale price exclusive of car parking charges and he was required to pay the other components of the price of the apartment including but not limited to preferential location charges, development charges, interest free maintenance charges, interest bearing replacement fund and club membership. The learned Authority has committed grave error in observing in para no.21 of the impugned order that the price mentioned in the offer for restoration of the allotment dated 20.04.2015, was agreed to by the appellant/allottee vide letter attached at page 53 of the record of the Authority.

25. We have requisitioned the record of the learned Authority and have received the photo copy of the record of the Authority. It shows that at page 53 of the record of the Authority, there is a letter which was purported to be despatched by the appellant/allottee to the respondent/promoter in response to the letter dated 20.04.2015. The copy of the said letter is also available at page 116 of the paper book of the appeal filed. It is very surprising to note that this letter is not signed by the appellant/allottee. The signature of the appellant Dalip Chand and his counsel appearing on this document is only to certify the true copy. If the appellant would have signed this letter to accept the offer of restoration of cancellation, then he should have signed below

the words “Yours faithfully” and above words “Mr. Dalip Chand”. But the space between the words “Yours faithfully” and “Mr. Dalip Chand” is lying blank. Thus, there is no ground to concluded that the offer for restoration of cancellation was accepted by the appellant vide this letter available at page 116 of the appeal file and at page 53 of the record of the Authority. Learned Authority has wrongly relied upon this document to determine the rights of the parties which shows its lack of judicious approach and improper appreciation of evidence.

26. This fact further becomes clear from the notice dated 24.04.2014 (Annexure A-14 at page 117) got issued by the appellant through his counsel which shows that the offer of restoration of cancellation was never accepted by the appellant, rather he has sought the refund of the amount deposited by him with interest and compensation. Thus, from the aforesaid material available on record there is no escape from conclusion that there was no valid and concluded contract between the parties.

27. Once, it is found that there was no concluded contract between the parties, the respondent/promoter was not entitled to forfeit the amount deposited by the appellant and the appellant was entitled to refund. Reference can be made to case ***J.K. Industries Limited Versus Mohan Investments and Properties Private Limited, AIR 1992 DELHI 305***.

28. Moreover, in order to justify the forfeiture of the earnest money or the advance payment, there has to be a specific forfeiture clause in the contract. But in the instant case as already mentioned there is no concluded contract between the parties.

29. The observations of the learned Authority in para no.23 of the impugned order are again non-application of the judicial mind. They have referred to the Clauses 10 and 12 of the booking application dated 10.04.2013 which reads as under: -

> *"In case my/our Application for booking of the said Apartment is accepted and the Company makes on allotment, then I/we undertake to execute all documents/agreements as per the Company's format and agree to accept and abide by all the terms and conditions therein and pay all charges as applicable therein and/or as demanded by the Company in due course."*
>
> *"I/We understand and agree that if I/We fail to execute the Apartment Buyer's Agreement or fail to execute the Apartment Buyer's Agreement or fail to return all the copies duly executed to the Company within 30 days from the date of the communication by the Company in this regard, then this Application is liable to be treated as cancelled/terminated at the sole discretion of the Company and the Earnest Money shall stand forfeited and I/we shall be left with no rights or interest or claims in the said Application/Apartment. No compensation or*

interest or any charges shall be paid by the Company to me/us."

30. We have carefully scrutinized the record of the Authority but we could not lay hands on any booking application form dated 10.04.2013 executed by the appellant/allottee. If there was any such application form, it was incumbent upon the respondent/promoter to place the same on record but the said document has been withheld and the only presumption which can be drawn by this Tribunal is that in fact no such document was in existence. With the close scrutiny of the record of the learned Authority we could only find the application Annexure A-1 attached with the reply to the complaint filed by the respondent. This application form is undated and contains conditions (a) to (d) which have already been reproduced in para no.18 of this judgment and there are no clauses 10 and 12 therein. The clauses mentioned in application Annexure-1 are entirely different from the clauses mentioned in the cancellation letter dated 11.02.2015. Thus, it is not known from where the learned Authority has referred these clauses in para no.23 of the impugned order and relied upon these conditions to impose the cut of 10% on the amount deposited by the appellant.

31. Thus, there is no escape from the conclusion that there is no valid and concluded contract between the parties, much less containing any forfeiture clause. The Hon'ble Apex

Court in case ***Suresh Kumar Wadhwa Vs. State of M.P. & Ors.2018(1) R.C.R. (Civil) 36*** as under: -

> *"23. Reading of Section 74 would go to show that in order to forfeit the sum deposited by the contracting party as "earnest money" or "security" for the due performance of the contract, it is necessary that the contract must contain a stipulation of forfeiture. In other words, a right to forfeit being a contractual right and penal in nature, the parties to a contract must agree to stipulate a term in the contract in that behalf. A fortiori, if there is no stipulation in the contract of forfeiture, there is no such right available to the party to forfeit the sum."*

32. In view of the aforesaid ratio or law, in the absence of any contract containing a condition for forfeiture, no such right is available to the party to forfeit the amount. In the instant case what to talk of condition for forfeiture, there was even no concluded contract between the parties. Thus, the respondent/promoter had no right to forfeit the amount deposited by the appellant with it. Thus, the learned Authority has committed grave error to allow forfeiture of 10% of the total consideration amount, rather the appellant was entitled for the refund of the entire amount deposited by him.

33. As the respondent/promoter has wrongfully withheld the amount payable to the appellant/allottee, the

appellant/allottee shall also be entitled to interest at the prescribed rate.

34. Thus, keeping in view our aforesaid discussions, the present appeal is hereby allowed. The impugned order passed by the learned Authority stands modified to this extent that the appellant/allottee shall be entitled to the refund of the entire amount of Rs.24,65,913/- deposited by him with the respondent/promoter with interest at SBI highest marginal cost lending rate plus two percent i.e. 9.3% per annum from the date of the institution of the complaint till realization. Consequently, the complaint filed by the complainant stands allowed accordingly.

35. No order as to costs.

36. Copy of this order be communicated to learned counsel for the parties/parties and the learned Authority for compliance.

37. File be consigned to the records.

Announced:
September 16th, 2020

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

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

Dalip Chand Vs. M/s IREO Grace Realtech Pvt. Ltd.

Appeal No.105 of 2019

Present: None.

Vide our separate detailed judgment of the even date, the present appeal is allowed. The impugned order passed by the learned Authority stands modified.

Copy of the detailed judgment be communicated to learned counsel for the parties/parties and the learned Authority for compliance.

File be consigned to the records.

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

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member
(Technical)

September 16th, 2020
CL