BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.435 of 2020
Date of Decision: 08.09.2022

Emaar MGF Land Ltd. registered office at 306-308, Square One, C-2 district Centre, Saket, New Delhi-110 017

2nd Address Corporate Office, Emaar Business Park, MG Road, Sikandarpur, Sector 28, Gurugram (Haryana) 122 002

Appellant

Versus

1. Ved Prakash Ahuja (now deceased) through his legal heirs:
   a) Smt. Ved Ahuja wife of Late Shri Ved Prakash Ahuja;
   b) Smt. Varuna Ahuja daughter of Late Shri Ved Prakash Ahuja;
   c) Smt. Vishakha Amit Kishore, daughter of Late Shri Ved Prakash Ahuja;
2. Smt. Ved Ahuja wife of Late Shri Ved Prakash Ahuja;

   All the residents of House No.D-22, Saket Marg, Street No.13, Saket, Near Kotak Mahindra Bank, New Delhi 110 017.

Respondents

CORAM:

Shri Inderjeet Mehta **Member (Judicial)**
Shri Anil Kumar Gupta **Member (Technical)**

Argued by: Ms. Rupali Shekhar Verma, Advocate,
Ld. counsel for the appellant.

Shri Arun Sharma, Advocate,
Ld. counsel for the respondents.

O R D E R:

ANIL KUMAR GUPTA, MEMBER (TECHNICAL):

The present appeal has been preferred under Section 44(2) of the Real Estate (Regulation and Development) Act 2016 (further called as, 'the Act') by the appellant-promoter against impugned order dated 28.01.2020 passed by the Haryana Real Estate Regulatory Authority, Gurugram (for short, 'the Ld. Authority') whereby the Complaint No.1222 of 2019 filed by the respondents-allottees was disposed of with the following directions:

i. *"The respondent is directed to pay the interest at the prescribed rate i.e. 10.20% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 05.01.2019 till the offer of possession i.e. 05.04.2019.*
ii. *The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order.*
iii. *The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.*
iv. *The respondent shall not charge anything from the complainants which is not part of the buyer's agreement.*
v. *Interest on the due payments from the complainants shall be charged at the prescribed rate*

@10.20% by the promoter which is the same as is being granted to the complainants in case of delayed possession charges."

2. As per averments of the respondents-allottees in the complaint, it was pleaded that the first allottees (Mr. Jeevan Saini and Mrs. Vandana Saini) booked an apartment in respondent's project "Emerald Floors Select at Emerald Hills, at Sector-65, Gurugram, Haryana" on 01.11.2011. The Flat Buyer's Agreement (further called, the FBA) was executed on 22nd February, 2012 between Mr. Jeevan Saini and Mrs. Vandana Saini-first allottees/owners and the appellant-promoter. As per Clause 13(a) of FBA, the appellant-promoter was to give the possession of apartment within 24 months from the start of construction. As per statement of account dated 05.02.2019, the Construction/development work started on site on 05.10.2016. Therefore, the due date of possession comes out to as 05.10.2018. The total sale consideration is Rs.1,50,42,436/- against which as per statement of account dated 18.04.2019, the respondents-allottees have paid Rs.1,43,08,584/-. The above said flat was purchased by the respondents-allottees from Mr. Jeevan Saini and Mrs. Vandana Saini-first allottees/owners on 18.12.2017. The same was endorsed by the appellant-promoter in the name of the respondents-allottees and the appellant-promoter issued a

nomination letter in the name of the respondents-allottees on 14.03.2018.

3. With the above said pleadings, the respondents-allottees *inter alia* sought the following reliefs in its complaint:

> *i. "Direct the respondent to handover the possession of the independent floor to the allottees immediately, complete in all respect and execute all required documents for transferring/conveying the ownership of the respective floor allotted.*
>
> *ii. Direct the respondent to pay interest at the prescribed rate for every month of delay from due date of possession till the actual handing over the possession on amount paid by the complainants as per Section 18 of the Act.*
>
> *iii. Direct the respondent to refrain from giving effect to the unfair clauses unilaterally incorporated in the buyer's agreement."*

4. Appellant-promoter contested the complaint on the grounds that the complaint pertaining to compensation and interest are to be decided by the Adjudicating Officer under Section 71 of the Act read with Rule 29 of the Haryana Real Estate (Regulation and Development) Rules 2017 (further called as 'the Rules') and not by the Ld. Authority.

5. It was further pleaded that the respondents/allottees executed an indemnity-cum-undertaking whereby the

respondents-allottees admitted and acknowledged that they were not entitled to claim any compensation in delay in handing over possession or any rebate or discount from the appellant-promoter and further agreed and undertook not to raise any claim with regard to the same from the appellant-promoter.

6. It was further pleaded that the construction of the unit was completed, and the respondent applied for issuance of the occupation certificate from the competent authority on 04.02.2019. The occupation certificate was issued on 03.04.2019. The possession of the unit was offered to the respondents-allottees vide letter of offer of possession dated 05.04.2019.

7. It was further pleaded that as per Clause 15 of the FBA compensation for delay in delivery of possession shall be given to such allottees who are not in default of their obligations under the FBA and who have not defaulted in payment of instalments as per payment plan incorporated in the FBA. The original allottees, having defaulted in payment of instalments, and are thus not entitled to any compensation or any amount towards interest under the FBA. Consequently, the complainants cannot demand or claim any right which was not available to the original allottees.

8. After controverting all the pleas raised by the respondents-allottees, the appellant-promoter pleaded for dismissal of the complaint being without any merit.

9. We have heard, Ld. counsel for the parties and have carefully examined the record.

10. Initiating the arguments, it was contended by Ld. counsel for the appellant that the project named Emerald Floors Select at Emerald Hills, Sector 65, Gurugram is being developed by the appellant-promoter. A unit No.EFS-B-I-SF-169, 2nd Floor, in the above said project was allotted to the respondents-allottees and FBA was executed on 22.02.2012. As per clause 13(a) of the said agreement i.e. 24 months from the start of construction i.e. 05.10.2016 plus 3 months grace period comes out to 05.01.2019. The appellant-promoter applied for issuance of Occupation Certificate (OC) from the competent authority on 04.02.2019 and OC was received on 03.04.2019. The possession of the unit was offered to the respondents-allottees vide letter dated 05.04.2019.

11. It was contended that the Ld. Authority does not have the jurisdiction to grant interest as well as compensation. It is the adjudicating officer who has the power to adjudicate interest as well as compensation under Section 71 and Section 72 of the Act. It was further contended that the statutory interest

mentioned in Rule 15 is payable only in case of refund as envisaged in sub-Section 1 of Section 18 and sub-Section 4 of Section 19 of Act. However, the same fixed interest would not be payable in case the allottee invokes proviso to sub-Section 1 of Section 18 of the Act and seeks only possession. In such circumstances, the Adjudicating Officer will determine the interest as well as compensation taking into consideration factors enumerated in Section 72 of the Act and the Ld. Authority had no jurisdiction to adjudicate the matter and award prescribed interest for alleged delay in offer of possession.

12. It was contended that as per Section 62 of the Indian Contract Act, 1872, a contract is product of a free mind and an executed contract can be changed only with the consent of the parties unless the same is declared illegal in terms of Public Policy, which is not the case here.

13. It was further contended that the substantive legislation is always applicable with prospective effect and cannot be read into acts already executed. The provisions of the Act, cannot be read into the already executed contracts between a promoter and an allottee. The already executed contract carries substantive rights of the parties that were conferred upon each other at the time of execution of the contract. The contract had been executed taking into consideration technical and

financial parameters and these parameters, rights and obligations having the flavor of substantive rights cannot be changed. It is a settled law that legislative acts entailing change in substantive rights are made applicable prospectively.

14. With these contentions, it was contended by the Ld. counsel of the appellant that the present appeal may be allowed and the impugned order dated 28.01.2020 is set aside.

15. Per contra, Ld. counsel for the respondent contended that the impugned order dated 28.01.2020 passed by the Ld. Authority is perfectly in order and is as per the Act, Rules and Regulations and prayed for dismissal of the appeal.

16. We have duly considered the aforesaid contentions of both the parties.

17. The undisputed facts of the case are that the first allottees (Mr. Jeevan Saini and Mrs. Vandana Saini) booked an apartment in respondent's project namely "Emerald Floors Select at Emerald Hills, at Sector-65, Gurugram, Haryana" on 01.11.2011. The FBA was executed on 22nd February, 2012 between Mr. Jeevan Saini and Mrs. Vandana Saini-first allottees/owners and the appellant-promoter. Flat was subsequently purchased by the respondents-allottees from first allottees on 18.12.2017. As per Clause 13(a) of FBA, the due date of delivery of possession is 24 months from the start of

construction i.e. 05.10.2016 plus 03 months grace period and comes out to 05.01.2019. The total sale consideration of the flat is Rs.1,50,42,436/- against which as per statement of account dated 18.04.2019 the respondents-allottees have paid Rs.1,43,08,584/-. The appellant failed to deliver the possession within the scheduled period, therefore, the respondents-allottees has sought interest for delay in delivery of possession.

18. It is the contention of the appellant that the Ld. Authority did not have the jurisdiction to adjudicate and decide the complaint filed by the respondents-allottees as the respondents-allottees had sought possession of the unit along with delayed possession charges. As per the plea of the appellant that as per section 71 of the Act, it is the adjudicating officer who is empowered to adjudicate and decide the complaint with respect to delayed possession interest and compensation.

19. The Hon'ble Apex Court in ***M/s Newtech Promoters and Developers Pvt. Ltd. v. State of UP & others 2021 SCC Online SC 1044***, has laid down as under:-

> *"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a*

conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

20. The aforesaid findings of the Hon'ble Apex Court are a complete answer to the contentions raised by Ld. counsel for the appellant. The Hon'ble Apex Court has categorically laid down that it is the regulatory authority which has power to examine and determine the outcome of a complaint with respect to refund of the amount, and interest on the refund, or directing payment of interest for delayed delivery of possession.

21. It is the contentions of the appellant that the Act cannot be read into the already executed contracts between the

promoter and an allottee. The already executed contract carries substantive rights of the parties that were conferred upon each other at the time of execution of the contract. The further contention is that provisions of the Act, cannot be read into the already executed contracts between a promoter and an allottee. The already executed contract carries substantive rights of the parties that were conferred upon each other at the time of execution of the contract. The contract had been executed taking into consideration technical and financial parameters and these parameters, rights and obligations having the flavor of substantive rights cannot be changed. It is a settled law that legislative acts entailing change in substantive rights are made applicable prospectively.

22. The question regarding applicability of the Act and the Rules made thereunder to the pre-RERA agreements was also taken note of by the Hon'ble Bombay High Court in **Neel Kamal Realtors Suburban Pvt. Ltd. & anr. Vs. Union of India and others 2018(1) RCR (Civil) 298 (DB),** wherein it was laid down as under: -

> *"121. The thrust of the argument of the learned counsel for the petitioners was that provisions of Sections 3(1), 6, 8, 18 are* ***retrospective/retroactive*** *in its application. In the case of* ***State Bank's Staff Union V. Union of India and ors., [(2005) 7 SCC 584],*** *the Apex Court observed in paras 20 and 21 as under:-*

*20. Judicial Dictionary (13th Edn.) K.J. Aiyar, Butterworth, p. 857, state that the word "**retrospective**" when used with reference to an enactment may mean (i) affecting an existing contract; or (ii) reopening up of past, closed and completed transaction; or (iii) affecting accrued rights and remedies; or (iv) affecting procedure. Words and Phrases, Permanent Edn., Vol. 37-A, pp. 224-25, defines a "**retrospective** or **retroactive law**" as one which takes away or impairs vested or accrued rights acquired under existing laws. A **retroactive law** takes away or impairs vested rights acquired under existing laws, or create a new obligation, imposes a new duty, or attaches a new disability, in respect to transaction or considerations already past.*

*21. In Advanced Law Lexicon by P. Ramanath Aiyar (3rd Edition, 2005) the expressions "**retroactive" and "retrospective**" have been defined as follows at page 4124 Vol.4 :*

*"**Retroactive-Acting** backward; affecting what is past. (Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past. Also termed **retrospective.** (Blacks Law Discretionary, 7th Edn. 1999) '**Retroactivity'** is a terms often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called '**true retroactivity'**, consists in the application of a new rule of law to an act or transaction which*

was completed before the rule was promulgated. ***The second concept, which will be referred to as 'quasi-retroactivity', occurs when a new rule of law is applied to an act or transaction in the process of completion.....*** *The foundation of these concepts is the distinction between completed and pending transaction.…." (T.C. Hartley, The Foundation of European Community Law 129 (1981).*

*'**Retrospective**-Looking back; contemplating what is past.*

Having operation from a past time.

*'**Retrospective'** is somewhat ambiguous and that good deal of confusion has been caused by the fact that it is used in more senses than one. In general however the Courts regard as **retrospective** any statute which operates on cases of facts coming into existence before its commencement in the sense that it affects even if for the future only the character or consequences of transactions previously entered into or of other past conduct. Thus, a statute is not **retrospective** merely because it affects existing rights; nor is it **retrospective** merely because a part of the requisite for its action is drawn from a time and antecedents to its passing. (Vol.44 Halsbury's Laws of England, Fourth Edition, Page 8 of 10 pages 570 para 921)."*

122. We have already discussed that above stated provisions of the RERA are not

> ***retrospective*** *in nature.* ***They may to some extent be having a retroactive or quasi retroactive effect*** *but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having* ***retrospective*** *or* ***retroactive*** *effect. A law can be even framed to affect subsisting/existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports. As regards Article 19(1)(g) it is settled principles that the right conferred by sub-clause (g) of Article 19 is expressed in general language and if there had been no qualifying provisions like clause (6) the right so conferred would have been an absolute one."*

23. Moreover, the Hon'ble Supreme Court in case title **M/s Newtech Promoters' case (Supra)** while dealing with the scope that whether the Act 2016 is retrospective or retroactive in its operation, has clearly laid down that the scheme of the Act 2016 in its application is retroactive in character, and merely because enactment as prayed is made retroactive in its operation, it cannot be said to be either violative of Article 14 or 19(1)(g) of the Constitution of India.

24. As per the aforesaid ratio of law the provisions of the Act are retroactive or quasi retroactive to some extent. The second concept of quasi-retroactivity occurs when a new rule of law is applied to an act or transaction in the process of completion. Thus, the rule of quasi retroactivity will make the provisions of the Act or the Rules applicable to the acts or transactions, which were in the process of the completion though the contract/agreement might have taken place before the Act and the Rules became applicable. In the instant case, though the agreement for sale between the parties was executed prior to the Act came into force but the transaction is still incomplete and the contract has not concluded. It is an admitted fact that the present project was an ongoing project. The possession of the unit was not delivered on the date of filing the complaint. Some payments were also due against the respondent/allottee and the conveyance-deed has also not been executed so far. Thus, the concept of quasi retroactivity will make the provisions of the Act and the Rules applicable to the agreements for sale entered into between the parties.

25. Learned counsel for the appellant has contended that once the respondent is enforcing the provisions of the Act and the rules made thereunder, he cannot seek the original contract

to be performed. She relied upon Section 62 of the Indian Contract Act, 1872.

26. This contention of learned counsel for the appellant is again devoid of merits. Section 62 of the Indian Contract Act, 1872 reads as under:-

> *"**62. Effect of novation, rescission and alteration of contract** – if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."*

The above provision of law applies where the parties to the contract agree to substitute a new contract for the previous contract or to rescind or alter the provisions of the contract, in those conditions the original contract need not be performed. This provision applies to the willful and deliberate agreement between the parties for novation, rescission or alteration of the contract. Herein, the respondent has not lodged his claim on the basis of novation, rescission or alteration of the contract but on the basis of implication of law which has become applicable to the present subsisting transaction.

27. No other point was argued before us by Ld. counsel for the parties.

28. Thus, keeping in view of our above discussion, the present appeal has no merits and the same is hereby dismissed.

29. The amount of Rs.3,66,746/- deposited by the appellant-promoter with this Tribunal as pre-deposit to comply with the provisions of proviso to Section 43(5) of the Act, along with interest accrued thereon, be sent to the Ld. Authority for disbursement to the respondents-allottees, excess amount may be remitted to the appellant, subject to tax liability, if any, as per law and rules.

30. No order as to costs.

31. Copy of this judgment be communicated to both the parties/learned counsel for the parties and the learned Haryana Real Estate Regulatory Authority, Gurugram.

32. File be consigned to the record.

Announced:
September 08, 2022

Inderjeet Mehta
Member (Judicial)
Haryana Real Estate Appellate Tribunal
Chandigarh

Anil Kumar Gupta
Member (Technical)

Manoj Rana