**BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL**

Appeal No.291 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.1084 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. 26.07.2014 till the 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 each subsequent month.*
iii. *The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed charges.*
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 Mrs. Kalpana Pujar (first owner/allottee) booked a flat measuring 1975 sq. ft. in the project Emerald Floors Premier-III, Sector 65, Gurgaon on 09.06.2011. The Flat Buyer's Agreement (further called, the FBA) was executed on 26.04.2012 between Mrs. Kalpana Pujar-first allottee/owner and the appellant-promoter. She sold the above said flat to Mr. Jatin Sehgal and Mrs. Kawaljit Kaur (second owners/allottees) on 20.04.2012. The FBA was endorsed in the name of the second allottees by the appellant-promoter. The respondents-allottees namely Mr. Ved Prakash Ahuja and Mrs. Ved Ahuja purchased the above said unit from second owners/allottees on 03.12.2012. The appellant-promoter endorsed the name of the respondents-allottees in its record and also on the FBA. The total sale consideration of the flat was Rs.1,41,64,501/- and the respondents-allottees had already paid Rs.1,26,90,934/- as per statement of account dated 26.03.2019. As per Clause No.11(a) of the FBA, the possession was to be handed over within a period of 24 months from the date of execution of FBA i.e. 26.04.2012 plus grace period of 03 months for applying obtaining the CC/OC in respect of the unit and/or the project, which comes out to be 26.07.2014. It was

further pleaded that the respondents-allottees have paid over 92% of the actual amounts of the unit, but the appellant-promoter failed to deliver the possession of the fully constructed and developed unit. It has been more than 8 years from the date of booking and even the construction of all units is not complete, which clearly shows the negligence on the part of the builder.

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

> i. *Direct the respondent parties 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.*
>
> *ii. Direct the respondent to handover the possession of the floor to the allottee immediately complete in all respects and execute all required documents for transferring/conveying the ownership of the respective flat allotted.*
>
> *iii. Direct the respondent from giving effect to the unfair clauses unilaterally incorporated in the flat buyer's agreement.*

4. Appellant 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 first allootte (Mrs. Kalpana Pujar) had approached the promoter in June 2011 for purchase of an apartment in its project. The first allottee was allotted an apartment bearing No.EFP-III-39-0301, vide allotment letter dated 14.09.2011. The allotment was transferred in favour of the second allottees (Mr. Jatin Sehgal and Mrs. Kawaljit Kaur). The second allottees transferred the apartment in favour of the respondents-allottees on the basis of transfer documents executed by both the parties.

6. It was further pleaded that the terms and conditions of the FBA have to be read in conjunction with the affidavit executed by the respondents-allottees whereby the respondents-allottees have agreed and admitted that they are not entitled to any compensation, discount etc. from the appellant due to delay in delivering the possession. Further, the purchase of the unit in question is re-sale, knowing fully well that start of construction of the unit had been delayed for reasons beyond the control of the appellant-promoter, in conjunction with the affidavit executed by the respondents-allottees, clearly indicated that the respondents-allottees have waived all requirement of the time bound delivery of the unit.

7. The appellant-promoter further submitted before the Ld. Authority as under:-

> *"14.That without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainants and without prejudice to the contentions of the respondent, it is submitted that the project has got delayed on account of following reasons which were/are beyond the power and control of the respondent.*
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> *15. That the building plans for the apartment/tower in question was approved by the competent authority under the then applicable National Building Code (NBC) in terms of which buildings having height 15 mtrs. or above but having area of less than 500 sq. mtrs. on each floor, were being approved by the competent authorities with a single staircase and construction was being carried out accordingly.*
>
> *Subsequently, NBC was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e. buildings having height of 15 mtrs. and above), irrespective of the area of each floors, are now required to have two staircase. Furthermore, it was notified vide gazette published on 15.03.2017 that the provisions of NBC 2016 supersede those of NBC 2005.*
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> *That the Fire Department is seeking to retrospectively apply the said provisions and while processing the Fire NOC application has been insisting on two staircase in all high-rise buildings even in cases where the building plans stood approved with a provision for a single staircase and which have been constructed*

*accordingly. The Fire Department has issued a provisional Fire NOC with the requirement that the second staircase would be constructed by the developer within one year from the date of issuance of provisional Fire NOC…*

*17. That the fire department…*

*Eventually, so as not to cause any further delay in the project and so as to avoid jeopardizing the safety of the occupants of the buildings in question including the building in which the apartment in question is situated, the respondent has taken a decision to go ahead and construct the second staircase will be completed in a year's time. Thereafter, upon issuance of the OC and subject to force majeure conditions, possession of the apartment shall be offered to the complainants."*

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 Premier III at Emerald Estate, Sector 65, Gurugram is being developed by the appellant-promoter. A unit No.EFP-III-39-0301, 3rd Floor, Building No.39 in the above said project was allotted to the respondents-allottees and FBA was executed on

26.04.2012. The due date of possession as per above said FBA is 26.04.2014 plus three months of grace period. The appellant applied for grant of Occupation Certificate on 16.07.2020.

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. It was further contended that the building plans for the apartment/tower in question was approved by the competent authority under the then applicable National Building Code 2005 (NBC 2005) in terms of which buildings having height 15 mtrs. or above but having area of less than 500 sq. mtrs. were required to have only one staircase. Subsequently, NBC 2005 was revised in the year 2016 wherein all high-rise buildings (i.e. buildings having height of 15 mtrs. and above), irrespective of the area of each floors, are required to have two staircases. Furthermore, it was notified vide gazette published on 15.03.2017 that the provisions of NBC 2016 supersede those of NBC 2005. It was further contended that the

Fire Department is seeking to retrospectively apply the said provisions and while processing the Fire NOC application, the Fire Department is insisting on two staircases in all high-rise buildings even in cases where the building plans are already approved to have single staircase. The Fire Department has issued a provisional Fire NOC with the requirement that the second staircase would be constructed by the developer within one year from the date of issuance of provisional Fire NOC. It was further contended that, so as not to cause any further delay in the project and so as to avoid jeopardizing, the safety of the occupants of the buildings in question including the building in which the apartment in question is situated, the appellant has taken the decision to go ahead and construct the second staircase. It was further contended that this plea has been taken by the appellant in its reply to the complaint filed by the respondents-allottees but the Ld. Authority has decided the matter without taking any cognizance of this plea.

15. 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.

16. 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.

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

18. The undisputed facts of the case are that the Mrs. Kalpana Pujar (first owner/allottee) booked a flat in the project Emeral Floors Premier-III, Sector 65, Gurgaon on 09.06.2011. The FBA was executed on 26.04.2012 between first allottee and the appellant-promoter. Flat was subsequently purchased by Shri Jatin Sehgal and Mrs. Kawaljit Kaur on 20.04.2012. This unit was subsequently purchased by the respondents-allottees from the second allottees and the FBA was endorsed by the appellant-promoter in the name of the respondents-allottees. Total sale consideration of the flat was Rs.1,41,64,501/- and the respondents-allottees had paid Rs.1,26,90,934/- as per statement of account dated 26.03.2019. As per the terms and conditions of the Agreement, the appellant-promoter was to handover the possession within a period of 24 months plus grace period of three moths from the date of execution of FBA i.e. 26.04.2012, however to appellant failed to deliver the unit within the schedule period. The appellant has applied for occupation certificate on 16.07.2020.

19. 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.

20. 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."*

21. 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.

22. 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.

23. 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."*

24. 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.

25. 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.

26. 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.

27. 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.

28. The other contention of the Ld. counsel of the appellant is that the building plans for the apartment/tower in question was approved by the competent authority under the then applicable National Building Code 2005 (NBC 2005). According to the provisions of NBC 2005 buildings having height of 15 mtrs. but having area of less than 500 sq. mtrs. were required to have only one staircase. Subsequently, NBC was revised in the year 2016 and in accordance with this all high-rise buildings having height of 15 mtrs. and above, irrespective of the area of each floor, are now required to have two staircases. The provisions of NBC 2016 supersedes the provisions of NBC 2005 vide gazette published on 15.03.2017. The Fire Department is insisting for two staircases. The Fire Department has issued a provisional Fire NOC with the requirement that the second staircase would be constructed by the developer within one year from the date of issuance of provisional Fire NOC.

Therefore, this has resulted in delay in delivery of possession of the apartment to the respondents-allottees. She contended that though this plea was taken up by the appellant before the Ld. Authority in the reply to the complaint, but the same plea was not considered by the Ld. Authority while adjudicating the complaint.

29. We have duly considered the aforesaid contention; the appellant has not provided any document relating to the grant of provisional Fire NOC. From the contentions of the appellant itself, it is quite evident that the provisions of two staircases as per NBC 2016 for the building which already stood approved in accordance with NBC 2005 is not mandatory in case the buildings plans are already approved with one staircase prior to the applicability of NBC 2016. As per the averments of the appellant, the provisional Fire NOC stood already issued. Therefore, there is no delay in applying and obtaining the occupation certificate on account of any hinderance from the fire department on account of the requirement of two staircases as per provision in NBC 2016. It is not clear from the pleadings of the appellant as to when their building was ready, when did they apply for Fire NOC, and how the provisional fire NOC has delayed for grant of occupation certificate. The due date of delivery of possession was 26.04.2014, the NBC was revised in the year 2016 and the notification of the Gazette superseding

the provisions of the NBC 2005 by provisions of NBC 2016 was issued on 15.03.2017. The Occupation Certificate was applied on 16.07.2020. The appellant could not make out any case for delay in completion of the unit allotted to the respondents on account of change in the provisions of NBC due to its revision in 2016. We are not convinced that the revisions of NBC 2005 with the NBC 2016 has caused any delay in completion of the project and obtaining the occupation certificate.

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

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

32. The amount of Rs.79,86,735/- 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.

33. No order as to costs.

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

35. 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*