HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 814 OF 2020

Vinay Gupta ...Complainants.

Versus

M/s B.P.T.P. Ltd. ...Respondent.

CORAM: Rajan Gupta **Chairman**
Dilbag Singh Sihag **Member**

Date of Hearing: 01.06.2022

Hearing: 4th

Present: - Shri Rishabh Jain, Ld. counsel for the complainant through VC.

Shri Hemant Saini and Shri Himanshu Monga, Ld. counsels for the respondent

ORDER: (DILBAG SINGH SIHAG-MEMBER)

1. While perusing case file, it is observed that complainant has sought relief of refund of the amount of Rs. 7,25,062/- paid by him to the respondent along with applicable interest. Initially Authority had not been hearing the

matter in which relief of refund was sought on the ground of jurisdiction dispute to deal which was sub judice before Hon'ble Supreme Court.

2. Now position of law has changed on account of verdict dated 13.05.2022 passed by Hon'ble Supreme Court in SLP Civil Appeal no. 13005 of 2020 titled as M/s Sana Realtors Pvt Ltd vs Union of India & others whereby special leave petitions were dismissed with an observation that relief that was granted in terms of paragraph 142 of the decision in M/s. Newtech Promoters & Developers Pvt. Ltd. v. State of UP & Others, reported in 2021 (13) SCALE 466, in rest of the matters [i.e. SLP © No.13005 of 2020 Etc.) disposed of on 12.05.2022 shall be available to the petitioners in the instant matter.

3. Consequent upon the decision of above referred SLPs, issue relating to the jurisdiction of Authority stands finally settled. Accordingly, Authority hereby proceeds with dealing with this matter on its merits.

4. Case of the complainant is that he had booked an apartment in respondent's project named 'Princess Park', sector-86, Faridabad, on 05.12.2005 by paying an amount of Rs. 3 lacs. An allotment letter for Flat No. 1905, Tower E with 1289 sq. Ft. area was issued by the respondents in favour of complainant on 22.02.2007. No builder Buyer Agreement (BBA) was executed between the parties. Complainant had paid an amount of Rs. 7,25,062/- till 06.12.2006. Complainant alleged that respondent had changed his flat unilaterally from 1905, Tower E to 1902, Tower-C. No approval or consent was sought for said change. Project has been abandoned since construction activities

did not start at project site. Complainant sent various letters dated 19.08.2019, 13.11.2019, 23.12.2019, 24.12.2019 and 06.01.2020 to the respondent for providing statement of accounts but said letters were not answered by the respondent.

5. In view of the above facts, complainant has prayed for refund of the amount paid by him along with permissible interest.

6. On the other hand, respondents tried to defend themselves in broad and general terms. Averments made by the respondents in their reply are summarized as follows: -

(i) That booking application was signed much prior coming into force of Real Estate (Regulation and Development) Act, 2016. (RERA Act in brief) and it was cancelled by the respondent on 14.01.2011. Therefore, RERA does not apply to cancellation prior to coming into force of the Act;

(ii) Respondent informed complainant about the change in unit vide letter dated 08.09.2007;

(iii) Respondent has received Occupation certificate way back on 06.09.2012;

(iv) Complainant has made default in making payments and is in contravention of section 19(6) and 19(7) of RERA Act. He has been given many opportunities to pay outstanding amount vide reminder letters dated 10.10.2017, 05.11.2007, 21.12.2009 and 14.01.2011 and in the last respondent had terminated the unit on 14.01.2011. No protest has been done by the complainant from 2011 till 2019;

7. Both parties have argued their case at length. In nutshell Ld. counsel for the complainant argued that respondent has changed his unit without seeking his consent. Further respondent failed to return money to him even after terminating complainant's allotment.

8. Ld. counsel for the respondent referred to para 54 of judgement passed in Newtech Promoters & Developers Vs State of Uttar Pradesh in Civil Appeal no. 6745/679 of 2021. He submitted that project has already received occupation certificate on 06.09.2012. He argued that as per para 54 of judgement, application of RERA Act is retroactive in nature and the projects which are completed or where completion certificate has already been granted does not fall under its purview. Therefore, the present complaint is exempted from the adjudicatory process of this Authority. Para-54 of the judgement of Hon'ble Supreme Court as reproduced below:-

> "54. From the scheme of the Act, 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the on-going projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016." (emphasis supplied).

9. Authority has gone through respective written submissions as well as verbal arguments put forth by both sides while passing following orders:

(i) While questioning contention of learned counsel for the respondent, Authority had observed that the orders of Hon'ble Supreme Court have not been understood by the respondent in correct perspective. Authority observed that the entire orders especially Paras 32, 33, 34, 40, 53 and 87 should be read with Para 54. Said Paras are reproduced below for reference:

> "32. The issue concerns the retroactive application of the provisions of the Act 2016 particularly, with reference to the ongoing projects. If we take note of the objects and reasons and the scheme of the Act, it manifests that the Parliament in its wisdom after holding extensive deliberation on the subject thought it necessary to have a central legislation in the paramount interest for effective consumer protection, uniformity and standardisation of business practices and transactions in the real estate sector, to ensure greater accountability towards consumers, to overcome frauds and delays and also the higher transaction costs, and accordingly intended to balance the interests of consumers and promoters by imposing certain duties and responsibilities on both. The deliberation on the subject was going on since 2013 but finally the Act was enacted in the year 2016 with effect from 25th March, 2016.
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> 33. Under Chapter II of the Act 2016, registration of real estate projects became mandatory and to make the statute applicable and to take its place under subSection (1) of Section 3, it was made statutory that without registering the real estate project with a real estate regulatory authority established under the Act, no promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner a plot, apartment or building, as the case may be in any real estate project but with the aid of proviso to Section 3(1), it was mandated that such of the projects which are ongoing on the date of commencement of the Act and more specifically the projects to which the completion certificate has not been issued, such promoters shall be under obligation to make an application to the authority for registration of the said project within a period of three months from the date of commencement of the Act. With certain exemptions being granted to such of the projects covered by subsection (2) of Section 3 of the Act, as a consequence, all such home buyers agreements which has been

executed by the parties inter se has to abide the legislative mandate in completion of their ongoing running projects.

34. The term "ongoing project" has not been so defined under the Act while the expression "real estate project" is defined under Section 2(zn) of the Act which reads as under: "2(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;"

"40. Learned counsel further submits that the key word, i.e., "ongoing on the date of the commencement of this Act" by necessary implication, exfacie and without any ambiguity, means and includes those projects which were ongoing and in cases where only issuance of completion certificate remained pending, legislature intended that even those projects have to be registered under the Act. Therefore, the ambit of Act is to bring all projects under its fold, provided that completion certificate has not been issued. The case of the appellant is based on "occupancy certificate" and not of "completion certificate". In this context, learned counsel submits that the said proviso ought to be read with Section 3(2)(b), which specifically excludes projects where completion certificate has been received prior to the commencement of the Act. Thus, those projects under Section 3(2) need not be registered under the Act and, therefore, the intent of the Act hinges on whether or not a project has received a completion certificate on the date of commencement of the Act."

"53. That even the terms of the agreement to sale or home buyers agreement invariably indicates the intention of the developer that any subsequent legislation, rules and regulations etc. issued by competent authorities will be binding on the parties. The clauses have imposed the applicability of subsequent legislations to be applicable and binding on the flat buyer/allottee and either of the parties, promoters/home buyers or allottees, cannot shirk from their responsibilities/liabilities under the Act and implies their challenge to the violation of the provisions of the Act and it negates the contention advanced by the appellants regarding contractual terms having an overriding effect to the retrospective applicability of the

Authority under the provisions of the Act which is completely misplaced and deserves rejection."

"87. It is the specific stand of the respondent Authority of the State of Uttar Pradesh that the power has been delegated under Section 81 to the single member of the authority only for hearing complaints under Section 31 of the Act. To meet out the exigency, the authority in its meeting held on 14 th August 2018, had earlier decided to delegate the hearing of complaints to the benches comprising of two members each but later looking into the volume of complaints which were filed by the home buyers which rose to about 36,826 complaints, the authority in its later meeting held on 5th December, 2018 empowered the single member to hear the complaints relating to refund of the amount filed under Section 31 of the Act."

To answer the questions posed by the learned counsel for the respondents, reference is also drawn to Section-79 and Section-89 of the RERA Act as reproduced below:

"**Section 79: Bar of jurisdiction** - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

"**Section 89: Act to have overriding effect** - The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

Conjoint reading of Paras referred to above and Sections 79 and 89 of the RERA Act leads to unmistakable conclusion that the provision of this Act will have over riding effect notwithstanding anything inconsistent therewith contained in any other law. Further after coming into force of RERA Act,

exclusive jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority is empowered under this Act to determine shall be that of the RERA only and not of any other court.

Question that arises herein is that numerous complaints are filed before this Authority by allottees who have booked/purchased apartments in all kinds of projects including compleed projects, under construction projects, registered projects as well as unregistered projects. An unregistered project can be a completed project which has not received Occupation Certificate or an ongoing project which has not been registered by the promoter in gross violation of Section 3 of the RERA Act. Further, allottees of incomplete or completed, as well as registered and unregistered projects have variety of grievances against the promoters. Such grievances includes the grievances like excess money demanded by promoters over and above agreed sale consideration; common facilities not being provided; deficiencies in construction due to which the apartments are inhabitable; change of plans made at the level of the promoters thus adversely affecting rights of the allottees; apartments having been delivered after delay of 5-10 years and promoters refusing to pay to the allottees interest/compensation admissible as per law; even though possession is handed over but conveyance deeds not being executed, etc.etc. These are but only a few illustrations of the grievances of the allottees against the promoters. Such grievances relate to registered as well as unregistered projects, and in fact even relates to completed projects.

A considered view of this Authority is that two distinct kinds of jurisdictions have been conferred upon the Authority by the RERA Act,2016. The first jurisdiction is in relation to registration of the projects. Section 3 of the Act mandates that all new projects shall be registered with the Authority before an advertisement for booking of plots/apartments is issued. Further, all those projects which are ongoing and have not received a completion certificate from the competent authorities shall be registered within a period of 3 months. Section 4 of the Act provides for a long list of disclosures to be made by promoters for getting the project registered. The purpose and intention of the law in this regard is to bring about transparency in the functioning of real estate promoters. They are bound to disclose full details of ownership of the land of the project; details regarding development plans got approved from competent authorities; the timelines within which project is proposed to be completed; specifications of the apartments to be constructed, etc. Further, the process of registration mandates that 70% of money collected from allottees shall be spent only on development of the project. In the event of violation of provisions of law and stipulations made by Authority, registration of the project can be cancelled. A consequence of cancellation of registration is that alternate mode for getting the project completed can be explored, including by handing it over to association of allottees.

The process of registration, therefore, is meant to bring in transparency, and to bring full facts about the project as well as its promoters in public

domain to enable prospective allottees to make informed decision of making investment of their hard-earned money for their future homes. Sections 3 and 4 read with certain provisions relating to respective obligations of promoters and allottees are meant to provide level playing field for both sides.

In the above context it is relevant here to briefly discuss the concept of completion/occupation certificate. What is a completed project or a project fit to be granted occupation certificate has not been defined anywhere in the RERA Act, 2016. These concepts have been somewhat defined in relevant laws of different states of the country. The completion certificates and occupation certificates are granted by the State Government authorities as per their own laws and policies. Grant of completion/occupation certificate by State Government authorities only signifies that relevant project has fulfilled certain requirements stipulated by certain laws enacted by State Government. It does not signify that the promoter has fulfilled its obligations towards allottees in terms of builder buyer agreements.

The agreements executed by promoters of real estate projects with home buyers-allottees stipulates many more obligations then provided for in the relevant laws regulating the subjects of grant of completion/occupation certificates. It is reiterated that grant of completion and occupation certificate only mean that certain parameters of laying infrastructure facilities under set laws of the State Government have been complied with by the promoters. They do not in any manner certify that the promoters have fulfilled their obligation

towards allottees. The obligation towards the allottees as enlisted in the builder-buyer agreements relate to numerous additional subjects like the consideration to be exchanged; specifications of the apartments; timeline within which the project would be completed; obligation to execute conveyance deeds; obligation to hand over the completed project to the association of allottees; laying of infrastructure facilities and handing them over to the association of allottees in the manner prescribed etc.etc. The promoters of completed as well as unregistered projects could be defaulting in respect of such obligations. If a promoter illegally and unjustifiably demands additional amount over and above the agreed sales consideration, dispute will have to be settled by some court of law. After coming into force of this Act and in view of the provisions of Section 79 and 89, RERA and Consumer Court only will have jurisdiction to deal with such disputes.

Authority is of the considered view that respondents are completely misreading provisions of the Act and Para-54 of the judgement of the Hon'ble Supreme Court passed in Newtech Promoters' matter. The question as to which forum will redress the grievances of the kinds listed above of allottees pertaining to ongoing or completed or registered or unregistered projects was not before the Hon'ble Supreme Court in Newtech Matter. In considered view of this Authority operative part in para-54 of the judgement of the Hon'ble Supreme Court is that "....therefore, vested or accrued rights, if any, in no manner are affected". Such vested or accrued rights could pertain to new

projects, ongoing projects, completed projects, registered projects or unregistered projects. In considered view of this Authority, genuine grievances of the allottees in any kind of project have to be redressed. Therefore, there has to be a forum for this purpose. Such forum is RERA in terms of provisions of the Act, especially Section 79 and Section 89 of the Act. In this regard relevant portion of the judgment dated 09.08.2019 of Hon'ble Supreme Court passed in Writ Petition (Civil) no. 43 of 2019 titled as Pioneer Urban land & Infrastructure Ltd. & Anr. versus Union of India & Ors is reproduced below:

> "86(ii). The RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over the RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code."

Looked at from another angle, promoter of a project which should be registered but the promoter is refusing to get it registered despite the project being incomplete should be treated as a double defaulter, i.e. defaulter towards allottees as well as violator of Sector 3 of the Act. The argument being put forwarded by learned counsel for respondent amounts to saying that promoters who violate the law by not getting their ongoing/incomplete projects registered shall enjoy special undeserved protection of law because their allottees cannot avail benefit of summary procedure provided under the RERA Act for redressal of their grievances. It is a classic argument in which violator of law seeks protection of law by misinterpreting the provisions to his own liking.

The Authority cannot accept such interpretation of law as has been sought to be put forth by learned counsel of the respondent. RERA is a regulatory and protective legislation. It is meant to regulate the sector in overall interest of the sector and economy of the country as well. It is also meant to protect rights of individual allottee vis-a-vis all powerful promoters. The promoters and allottees are usually placed at a highly uneven bargaining position. If the argument of learned counsel for respondent is to be accepted, defaulter promoters will simply get away from discharging their obligations towards allottee by not getting their incomplete project registered. Protection of defaulter promoters is not the intent of RERA Act. It is meant to hold them accountable. The interpretation sought to be given by learned counsel for respondent will lead to perverse outcome.

For the foregoing reasons, Authority rejects the arguments of respondent company.

(ii) There is no denial to the fact of Rs. 7,25,062/- having been paid by the complainants to the respondents. Payment of this amount is further adequately proved from the receipts annexed by the complainant in his complaint.

(iii) One of the averments of respondents is that provisions of the RERA Act will not apply on the agreements/transactions executed prior to coming into force of RERA Act,2016. Accordingly, respondents have argued that relationship of builder and buyer in this case will be regulated by the agreement

previously executed between them and same cannot be examined under the provisions of RERA Act.

In this regard Authority observes that after coming into force the RERA Act, 2016, jurisdiction of the Civil Court has been barred by Section 79 of the Act. Authority, however, is deciding disputes between builders and buyers strictly in accordance with terms of the provisions of Builder-Buyer Agreements.

In complaint No. 113 of 2018, titled 'Madhu Sareen Vs. BPTP Ltd.' Authority had taken a unanimous view that relationship between builders and buyers shall be strictly regulated by terms of agreement, however, there was a difference of view with majority two members on one side and the Chairman on the other in regard to the rate at which interest will be payable for the period of delay caused in handing over of possession. The Chairman had expressed his view in the said complaint No. 113 of 2018 as well as in complaint No.49 of 2018 titled 'Parkash Chand Arohi Vs. Pivotal Infrastructures Pvt. Ltd.' The majority judgment delivered by Hon'ble two members still holds good as it has not been altered by any of the appellate courts.

Subject to the above, argument of learned counsel for the respondents that provisions of agreement are being altered by Authority with retrospective effect, do not hold any ground.

(iv) Factual position reveals that unit was allotted in favor of the complainant on 22.02.2007 however no builder buyer agreement was executed between the parties after receiving a payment of Rs. 7,25,062/- from complainant. Respondent had sent various reminders letters dated 2017, 05.11.2007, 21.12.2009 and 14.01.2011 for making payments and thereafter Complainant's unit was terminated on 14.01.2011. No protest letter was sent by the complainant from January 2011 till 2019. It is only in the year 2019 complainant had sent various letters dated 19.08.2019, 13.11.2019, 23.12.2019, 24.12.2019 and 06.01.2020 to the respondent for providing statement of accounts. Complainant was sleeping over his rights from 2011 to 2019. Default is on the part of complainant as well.

Further, the obligation which was left on the part of the respondent was to refund the amount paid by the complainant after deducting earnest money. Respondent has failed to discharge his obligation of returning the money. In furtherance of termination of allotment, the respondent was under obligation to return remaining amount after deduction of earnest money which has not been done till date and as such there is no reasonable justification provided by respondent for withholding the amount of complainant from last 11 years.

RERA provides for Earnest money of 10% of Basic cost price of the unit. This is also a standard market practice. Respondent can be allowed to deduct only 10% of basic sale price as earnest money and return remaining amount to

the complainant. In this case agreement has not been executed however on perusal of a demand notice dated 03.12.2009 5 % basic sales price is mentioned to be Rs. 90,230/-. On calculation the basic sales price works out to be Rs. 18,04,600/-. 10 % earnest money will be deducted from the basic sales price.

Since both parties are at fault and contributories to the frustrated contract, the Authority in order to maintain equity between the parties decides to dispose of this case with direction to respondent to refund the paid amount after deduction of earnest money to tune of 10% of basic sales price. Basic sales price is Rs 18,04,600/- and 10% of it works out to 1,80,460/-.

10. In furtherance of aforementioned observations, complainant being entitled to refund of the amount of Rs. 5,44,602/- (total paid amount Rs 7,25,062/- - earnest money Rs 1,80,460/-). Authority orders the refund of the said amount along with interest prescribed in Rule 15 of HRERA Rules,2017 for the period ranging from date of termination i.e., 14.01.2011 till date of this order.

The total interest for the period ranging from date of termination to date of this final order (01.06.2022) in terms of Rule 15 of HRERA Rules,2017 i.e. @ 9.50% payable by the respondents to the complainants works out to Rs. 5,89,237/- The Authority hereby orders that the respondents shall refund the principal amount of Rs. 5,44,602/- plus interest amount of Rs. 5,89,237/- to the

complainant, within a period of 90 days of uploading of this order i.e., the period prescribed under Rule 16 of the RERA Rules, 2017.

Disposed of in above terms. File be consigned to record room.

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RAJAN GUPTA
(CHAIRMAN)

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DILBAG SINGH SIHAG
(MEMBER)