

**BEFORE THE HARYANA REAL ESTATE APPELLATE
TRIBUNAL**

Appeal No. 610 of 2022
Date of Decision: 01.12.2022

DSS Buildtech Pvt. Ltd., Regd. Office at:- 506 5th Floor, Time Square Building, B-Block, Sushant Lok-1, Gurugram, Haryana.

...Appellant

Versus

1. Jagir Singh, R/o J-1/38, Second Floor, DLF, Phase-2, Gurugram, Haryana-122008.
2. Kanwar Deep Singh, R/o J-1/38, Second Floor, DLF, Phase-2, Gurugram, Haryana-122008.

...Respondents

CORAM:

**Shri Inderjeet Mehta,
Shri Anil Kumar Gupta,**

**Member (Judicial)
Member (Technical)**

Argued by:

Shri Ashwarya Sinha, Advocate,
Ld. counsel for appellant.

Shri Ishwar Singh Sangwan, Advocate,
Ld. counsel for respondents.

ORDER:

Anil Kumar Gupta, Member (Technical):

The present appeal has been preferred under Section 44(2) of the Real Estate (Regulation and Development)

Act, 2016 (hereinafter called the 'Act') against order dated 15.02.2022 passed by the Ld. Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called 'the Authority'), whereby complaint No. 1310 of 2021 was disposed of with the following directions:-

“i. The respondent/promoter is directed to refund the entire amount paid by the complainants along with prescribed rate of interest @ 9.30% p.a. from the date of payment of each sum until the date of its actual realization within 90 days from the date of this order as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017.

ii. The cost imposed during the proceedings on either of the party to be part of the decree sheet.”

2. The respondents-allottees filed the complaint before the Ld. authority and pleaded that the appellant is developing a residential group housing complex “The Melia” (hereinafter referred as the ‘Said project’) situated within the revenue estate of village Mohanmadpur Gurjar, Sector-35, Sohna, Gurugram, Haryana, consisting of residential units in accordance with the layout plan approved and sanctioned by DTCP bearing license no. 77 of 2013 dated 09.08.2013. The brochures issued by the appellant, represented, assured, and promised the public at large that the project will be completed

and possession of the residential units will be handed over within the time period of 48 months.

3. It was further pleaded in the complaint that on the representations made and assurance given by the officials of the appellant, the respondents initially booked a unit bearing no. A-506, a 3-BHK apartment and later changed it to a 4-BHK apartment bearing no. I-802, measuring 2400 sq. ft. (hereinafter referred as the 'said unit') in the said project and paid a sum of Rs. 41,81,746/- for it.

4. It was further pleaded that the appellant issued an allotment letter dated 28.03.2016 in respect of the said unit to the respondents on the terms and conditions set out in the apartment buyer's agreement (hereinafter called "Agreement") dated 09.05.2016 which was duly signed by the parties. As per demand raised by the appellant, the respondents continuously paid the amount to the appellant well within time.

5. It was further pleaded that the appellant has failed to perform their part of the agreement and the construction work of the project has not yet commenced. The respondents several times visited the construction site but the work at the construction site was not going on as per construction linked payment plan. The respondents requested to the appellant to complete the work and handover possession at the earliest. The respondents booked the said unit believing the representations made by the appellant that it shall handover

the said unit to them within 48 months plus 180 days as grace period. The respondents made several visits to the office of the appellant and met its concerned officials, but it was of no avail.

6. It was further pleaded that the appellant did not even bother to respond to the genuine requests of the respondents. Since then, they have continued to meet the appellant's officials till date, pursuing their request for the refund of their money with interest, but to no avail.

7. It was further pleaded that that the appellant is in utter breach of its contractual obligation towards them and has failed to handover possession of the said unit within prescribed time period. The appellant is liable to refund to the respondents the amount paid by them towards sale consideration along with prescribed rate of interest, the rate, at which the appellant is charging on delayed installments from the respondents-allottees. The appellant has no authority, in law or otherwise, to withhold the said deposited amount and refund with interest. Section 18 of the Act entitled the respondents to seek the refund of the amount paid by them to the appellant with interest as the appellant has failed to give possession of the said unit to the respondents in accordance with the terms of the agreement.

8. With the above said pleas, the respondents-allottees sought the following relief in the compliant:-

“Direct the respondent to refund total amount of Rs. 42,81,746/- and further be directed to pay interest @ 18% per annum on the said amount from the date of deposit of each amount till its actual realization.”

9. The complaint was resisted by the appellant on the grounds that the appellant namely ‘The Melia’ is duly registered under the Act and the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter called the “Rules”) vide HRERA Registration No. 288 of 2017 dated 10.10.2017.

10. It was further pleaded that the respondents approached the appellant and submitted an application dated 02.11.2015 for booking of 4-BHK flat admeasuring 2399.92 sq. ft. at the basic sale price of Rs. 4,750/- per sq. ft. and paid a sum of Rs. 25,00,000/- as booking amount. The respondents had agreed and signed the plan for payment of installments dues as per a construction linked plan.

11. It was further pleaded that the pursuant to the application form the appellant allotted the respondents a unit bearing no. I-802 on 8th floor in the said project, vide allotment letter dated 28.03.2016, for the basic sale consideration of Rs. 1,14,00,000/- plus all other charges, service tax, levies, and other allied charges as per the payment plan.

12. It was further pleaded that the respondents and the appellant had executed an agreement on 09.05.2016 for the above mentioned unit.

13. It was further pleaded that as per the agreement, the respondents are obligated to pay the installments within the time agreed there in and any delay in making payment was to be chargeable with 15% simple interest as per clauses 11.1.1 and 11.1.2.

14. It was further pleaded that as per the payment plan, there was an outstanding amount of Rs. 16,099/- along with interest of Rs. 63,189/- up to 31.07.2021 to be paid by the respondents. Further, as per clause 14.1 of the agreement and subject to other conditions thereof the tentative timeline given was 48 months with grace period of 180 days from the date of receiving the last approvals required for commencement of construction.

15. It was further pleaded that the appellant has duly complied with all applicable provisions of the Act and rules and that of agreement for sale qua the respondents and other allottees. Since, the commencement of the development of the said project the customer care department of the appellant is in regular touch with the buyers for providing them assistance and updates on the progress of the said project.

16. With these pleas, the appellant pleaded that there is no merit in the complaint and the same is required to be dismissed.

17. After hearing the parties, the ld. Authority passed the impugned order, the relevant part of which has already been reproduced in the upper part of this appeal. Aggrieved with the findings in the impugned order, the present appeal has been preferred by the appellant.

18. We have heard Shri Ashwarya Sinha, Advocate, Ld. counsel for the appellant and Shri Ishwar Singh Sangwan, Advocate, Ld. counsel for the respondents-allottees and have carefully gone through the record of the case.

19. Opening the arguments, ld. counsel for the appellant contended that as per clause 14.1 of the agreement dated 09.05.2016 executed between the appellant and respondents, the possession had to be delivered within 48 months + further period of 180 days from the date of the last approval for commencement of the construction.

20. It was further contended that the appellant received the consent to establish on 12.11.2016, which was the last approval required for the commencement of the construction work, therefore, the due date for the possession was 12.05.2021 but the respondents filed the complaint

seeking refund amongst other reliefs on 03.03.2021. The ld. Authority ought to have dismissed the complaint on the sole ground that it was premature in nature.

21. It was further contended that the ld. Authority failed to consider the fact that vide order dated 14.07.2022, the Authority itself, in other complaints filed by the identical situated allottees, permitted the appellant to forfeit 10% of the sale consideration as per clause 8.1 of the agreement and refund the balance amount along with an interest from the date when they had sought cancellation from the appellant. The respondents in the present case did not seek cancellation of their unit, however, to mislead the ld. Authority, just prior to the due date of possession, they had chosen to file the complaint seeking refund amongst other reliefs which clearly reflects that they do not want to perform their obligations as per the Agreement dated 09.05.2016. It was further pleaded that the date of filing of the complaint should have been treated as date of cancellation in the present case. Furthermore, the ld. Authority cannot take a contrary view where the issue at hand is identical in nature. It was further contended that the agreement dated 09.05.2016 expressly provides a force majeure clause 11.2 which states that if the completion of the project is delayed by any reason of force majeure for handing over of possession of the unit, the

buyers agrees to the same and confirms not to claim any compensation of any nature whatsoever.

22. Per Contra, ld. counsel for the respondents contended that the appellant had not even started the construction, though, the due date of possession has already elapsed on 12.05.2021. He has vehemently contended that there is no merit and the same is liable to be dismissed with costs.

23. We have duly considered the aforesaid contentions of the parties.

24. There is delay of 85 days in filing of the present appeal. The appellant has moved an application for condonation of delay which is duly supported by an affidavit of Shri Paras Kumar Jain, Authorised Representative of the appellant-company.

25. Ld. counsel for the respondents has vehemently opposed the application for condonation of delay and has contended that the application for condonation of delay has been filed without any justifiable reason. It has been filed just to delay the execution proceedings pending before the ld. Adjudicating Officer. It is noted here that the appellant has deposited a sum of Rs. 69,34,589/- to comply with the Section 43(5) of the Act and has shown its bona fide to contest the impugned order. In order to provide substantial justice, it is always preferable that the Lis between the parties

is decided on merits, rather than on technicalities. So, in the interest of justice, the delay of 85 days in filing of the present appeal is hereby condoned.

26. The brief facts of the case are that the respondents-allottees have booked the unit No. I-802, 8th Floor, measuring 2400 sq. ft. in the project of the appellant promoter at Sector 35, Sohana, Gurugram. The appellant issued allotment letter dated 28.03.2016 for the said unit for a total sale consideration of Rs. 1,38,16,400/-. The clause no. 14.1 of the agreement dealing with the period and date of handover the possession of the unit to the respondents-allottees is reproduced as below:-

“14.1 Subject to the terms hereof and to the Buyer having complied with all the terms and conditions of this Agreement, the Company proposed to hand over the possession of the Apartment within a period of 48 (forty eight months) from the date of receiving the last Approvals required for commencement of construction of the project from the Competent Authority and or the date of signing the agreement whichever is later and to this period to be added for the time taken in getting Fire Approvals and Occupation Certificates and other Approvals required before handing over the possession of the Apartment or for such other requirements/conditions as may be directed by the DTCP. The resultant period will be called as “Commitment Period”. However, this Committed Period will automatically stand extended by further grace period of 180 days for issuing the Possession

*Notice and completing other required formalities
("Due Date of Possession")".*

27. The agreement between the parties was executed on 09.05.2016. As per the above said clause 14.1, the possession of the unit is to be delivered within 48 months from the date of receiving the last approval required for commencement of construction of the project from the competent authority and or the date of signing the agreement whichever is later. As per the pleadings of the appellant itself the last such approvals i.e. the consent to establish was obtained by it on 12.11.2016. The consent to establish being the later date than the date of agreement i.e. 09.05.2016, therefore as per the clause 14.1 of the agreement the period of 48 months for handing over the possession would start from 12.11.2016 and elapses on 11.11.2020. As per the above said clause 14.1 of the agreement, the Appellant is entitled to a further period of 180 days grace period for issuing possession notice and completing other required formalities. The Ld. authority has granted 180 days of grace period on account of COVID-19 restrictions. The appellant has not provided any evidence to the effect that due to Covid restrictions the progress of his work has suffered. The Appellant has not controverted the pleadings of the respondents-allottees that the project has not even started. The only pleadings of the appellant available in the file, regarding the status of work is that after completion of

excavation the appellant started construction of the project on 01.12.2016. Thus, the inevitable conclusion is that the project is still in the infancy state even after the expiry of periods of 48 months required for offering of possession to the respondents-allottees and the project is stand still since the start of the work on 01.12.2016. In the circumstances when there is no evidence that there has been any actual work done before, during or after COVID-19 then how can it be assumed that the work of the appellant suffered during the Covid period. The Appellant becomes entitled for further grace period of 180 days only when his project reaches the stage of offering of possession notices. Since, that stage is yet to arrive and possession of the unit is not likely to happen in the near future, therefore, in our opinion the appellant is not entitled for any grace period. Thus, the scheduled date of possession of the unit comes out to 11.11.2020. The respondents-allottees filed the complaint before the Ld. authority on 03.03.2021. Thus, the complaint filed by the respondents-allottees is not premature as contended by the Appellant.

28. The other argument of the appellant is that in other complaints filed by the identically situated allottees, the Ld. authority permitted the Appellant to forfeit 10% of the sale consideration as per Clause 8.1 of the agreement and ordered refund of the balance amount along with an interest from the date when they sought cancellation from the

Appellant. The appellant has sought parity with those case. The cases being referred by the applicant are not before us. Every case has its own merits. Those cases in which the Ld. authority is being said to have decided differently will be decided on their merit as and when those are put up before us for adjudication. At this stage we cannot grant any benefit to the appellant on account of the cases which have been decided differently than the present case by the Ld. authority.

29. In the authoritative pronouncement by the Hon'ble Apex Court in ***“Newtech Promoters and Developers Private Limited vs State of U.P. and ors.” 2022 (1) RCR (Civil) 357***, it has been held as under:-

“Para 25: and was observed that in terms of Section 18 of the Rera Act, if a promoter fails to complete or is unable to give possession of the apartment duly completed by the date specified in the agreement, the promoter would be liable, on demand, to return the amount receive by him in respect of that apartment if the allottee wishes to withdraw from the project. Such right of the allottee is specifically made without prejudice to any other remedy available to him”. The right so given to the allottee is unqualified and if availed the money deposited by the allottee has to be refunded with interest as such rate as may be prescribed”.

30. Respondents-allottees intend to withdraw from the project and are well within their right to do the same. As per the aforesaid pronouncement of the Hon'ble Apex Court, the right of the allottee is unqualified and the amount deposited by the allottee is to be refunded with interest at the prescribed rate if the promoter fails to complete or is unable to give possession of the apartment by the due date as specified in the agreement. In the instant case the appellant will not be able to give possession to the respondents-allottees in the near future as the project of the appellant is still in the infancy stage of construction though the due date of handing over the possession has already elapsed on 11.11.2020.

31. No other point was argued before us.

32. Thus, in view of our aforesaid discussions, we do not find anything wrong in the order of the Ld. Authority in granting refund of the entire amount paid by the respondents- allottees along with prescribed rate of interest @ 9.3% per annum from the date of each payment till its realization. As such, there is no merit in the appeal and the same is hereby dismissed.

33. The amount deposited by the appellant-promoter i.e. Rs.69,34,589/- with this Tribunal to comply with Section 43(5) of the Act be remitted to the ld. Authority along with interest accrued thereon for disbursement to the

respondents-allottees as per their entitlement, in accordance with law/rules and of course subject to tax liability.

34. No order to cost.

35. Copy of this order be sent to the parties/Ld. counsel for the parties and Ld. Haryana Real Estate Regulatory Authority, Gurugram.

36. File be consigned to the record.

Announced:
December 01, 2022

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

Anil Kumar Gupta
Member (Technical)

Rajni Thakur