

**BEFORE THE HARYANA REAL ESTATE
APPELLATE TRIBUNAL**

Appeal No.299 of 2022
Date of Decision: 09.12.2022

Fantasy Buildwell Pvt. Ltd., 11th Floor, Paras Twin Towers,
Tower-B, Golf Course Road, Sector 54, Gurugram.

...Appellant-Promoter

Versus

1. Gaurav Manohar Negi;

2. Mrs. Ritushka Negi

Both are residents of 1138, Sector C, Pocket-1, Vasant Kunj,
New Delhi-110070

...Respondents-Allottees

CORAM:

Shri Inderjeet Mehta
Shri Anil Kumar Gupta

Member (Judicial)
Member (Technical)

Argued by:

Shri Amandeep Singh Talwar, Advocate,
Ld. counsel for the appellant-promoter.

Shri Rishab Jain, Advocate,
Ld. counsel for the respondents-allottees.

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 (further called as, 'the Act') by the appellant-promoter against impugned order dated 31.03.2021 passed by the Haryana Real Estate Regulatory Authority, Gurugram (for short, 'the Ld. Authority') whereby the Complaint No.5728 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. 9.30% p.a. for every month of delay from due date of possession i.e. 16.04.2017 till the date of offer of possession i.e. 19.11.2020.*
- ii. *The arrears of delayed possession charges be adjusted in the ledger account of complainants.*
- iii. *The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.*
- iv. *It is directed to the respondent that he shall not charge any extra amount which is not mentioned in builder buyer agreement.*
- v. *It is directed that no holding charges shall be payable to the respondent."*

2. As per averments of the respondents-allottees in the complaint, it was pleaded that respondents-allottees booked an apartment No.PL-3/2902 at 29th Floor, Iconic Tower, measuring 6000 sq. ft.in the project of the appellant-promoter "Paras Quartier" at Sector 2, village Gawal Pahari,

Gurugram, Haryana on 14.01.2013. The Builder Buyer Agreement (further called, the Agreement) was executed on 03.07.2013 between the parties for total sale consideration of Rs.6,51,20,000/-, out of which a total sum of Rs.6,31,55,224/- has been paid by the respondents-allottees as on the date of filing of the complaint. As per Clause 3.1 of the agreement the possession of the unit was to be handed over to the respondents-allottees within 42 months from the date of execution of Agreement with additional grace period of six months. However, even after a delay of more than two years and ten months the appellant-promoter has failed to offer legal and rightful possession of the apartment to the respondents-allottees. The respondents-allottees filed the complaint and sought the following reliefs:

“(i) A sum of Rs.5,34,188/- (five lakh thirty four thousand one hundred and eighty-eight) should be paid by the respondent per month for delay of possession, at the rate of 10.15 per centum as per the prevailing MCLR plus 2 per centum, till the rightful legal possession is handed over to the complainants. Further, the respondent is liable to pay a sum of Rs.1,36,61,409/- (One crore thirty six lakh sixty one thousand four hundred and nine) towards the delay caused, which has been calculated from 03.07.2017 to 18.11.2019.

(ii) Direct the respondent to complete the construction and hand over the possession of the apartment to the complainants immediately.

(iii) Direct the respondent to complete the construction of common areas infrastructural facilities and amenities like club, park, etc. for the complainants and other buyers of the project.”

3. The complaint was resisted by the appellant-promoter on the grounds that the respondents-allottees are not genuine flat purchaser or consumers and are investors, who have purchased the apartments for purpose of selling it in future.

4. It was further pleaded that the respondents-allottees did not adhere to payment schedule and most of the payments were made by them after the expiry of due dates of payment which is a violation of clause No.3.1 of apartment buyer agreement.

5. It was further pleaded that the present complaint is not maintainable since the possession had to be handed over to the complainants in terms of Clause 3.1 and 3.2 of the builder buyer agreement which clearly provides that subject to the complainants complying with all the terms of the apartment buyer agreement and making timely payments of the installments as and when they fall due, the appellant-promoter is to offer the possession of the apartment

within a period of 51 months from the date of execution of the apartment buyer agreement or the date of obtaining all licences or approvals for commencement of construction, whichever is later, subject to force majeure. Moreover, all the approvals for commencement of the construction work were received around the end of the year 2013 and the construction work began only in November, 2013. Thus, it is clear that the complaint has been filed in contravention of the provisions of the apartment buyer agreement dealing and therefore complaint deserves outright dismissal.

6. It was further pleaded that Section 19 of RERA Act, 2016 lays down the rights and duties of the respondents-allottees and sub-clause (6) of Section 19 provides that the respondents-allottees shall be responsible to make payments in the manner and as per the time specified in the agreement between the parties. In the present case, it has been admitted by the respondents-allottees that they have failed to make the complete payment, therefore, the respondents-allottees are in breach of the Act and the Haryana Real Estate (Regulation and Development) Rules, 2017 (for short, the Rules).

7. It was further pleaded that the Hon'ble Supreme Court of India in the case of *Saradmani Kandappan and Ors. Vs. S. Rajalakshmi and Ors.* Decided on 04.07.2011 having citation (2011) 12 SCC 18 in para 33 and 34, while

interpreting similar contracts involving performance of reciprocal promises in respect of immovable properties has interpreted sections 52, 53 and 54 of the Indian Contract Act, 1872, to hold that in case of a contract wherein payments are to be paid by the purchaser in a time bound manner as per the agreed payment plan and he fails to do so then the seller shall not be obligated to perform its reciprocal obligations and the contract shall be voidable at the option of the seller alone and not the purchaser. The said dictum is applicable in the present case as well since not only does the order of performance of reciprocal performances as per the agreement mandate timely payments by the complainants but also since the complainants admitted in the complaint to not having paid the due and payable installments.

8. It was further pleaded that the Hon'ble National Consumer Disputes Redressal Commission in the case of *Manas Developers Vs. Madhur Arjun Bhabal*, bearing Revision Petition No.1563 of 2011 decided on 09.03.2015, had held that in cases where the complainants have failed to pay the amounts in accordance with the agreement and are defaulters then the builder cannot be held liable for delayed possession since the builder is not obligated to give possession without getting the entire payment with interest.

It is further held that defaulter should not be rewarded for their wrongs.

9. It was further pleaded that the Hon'ble Supreme court of India in the case of *Supertech vs. Rajni Goyal*, decided on 23.10.2018, reported as 2018(14) Scale 187, has held that consumers cannot be allowed to reap the benefits of their own wrong by not taking possession when the same has been offered by the Builder and the computation of interest also closes on the said date.

“Furthermore, the period of interest should close on April, 2016 when the Full Occupancy Certificate was obtained as per the admission of the respondent-purchaser herself in para (40) of the Consumer Complaint, wherein she has admitted that the appellant-builder had obtained the Completion Certificate as late as April, 2016. The respondent-purchaser could not have any further grievance after April, 2016 with respect to delay in handing over possession. The respondent-purchaser ought not to be allowed to reap the benefits of her own delay in taking possession.”

10. With these pleas, it was pleaded that the respondents-allottees does not have any valid or subsisting cause of action to file the present complaint and pleaded for dismissal of the complaint.

11. We have heard Shri Amandeep Singh Talwar, Advocate, Ld. counsel for the appellant-promoter and Shri Rishab Jain, Advocate, Ld. counsel for the respondents-allottees and have carefully examined the record.

12. Opening the arguments, Ld. counsel for the appellant contended that the respondents No.1 and 2 are the allottees, who have purchased the apartment/unit bearing unit No.2 at 29th Floor, Iconic Tower, in the project of the appellant "Paras Quartier" at Sector 2, village Gawal Pahari, Gurugram, Haryana having tentative super area of 6000 Sq. ft. The total sale consideration of the said unit is Rs.6,51,20,000/-. The Agreement was executed on 03.07.2013. The respondents-allottees, as per the complaint, had paid an amount of Rs.6,31,55,224/- till 30.06.2018.

13. It was contended that the Ld. Authority did not adhere to the procedure as envisaged in Rule 28(2)(d) of the Rules by virtue of which the Authority was duty bound to record the plea of the appellant-promoter, to effect whether it pleaded guilty or wanted to contest the complaint. However, no such plea was ever recorded under the aforesaid Rules.

14. It was further contended that the construction of two towers of present project was stopped on the orders of DTCP, Haryana and, therefore, the same could not be

completed in time. The delay is not attributable to the appellant-promoter and rather the construction activity could not be completed on account of orders from DTCP freezing construction of the said towers. The DTCP vide order dated 28.07.2015 had freezed the construction of two blocks of appellant-promoter's on account of alignment of a Nallah and it was ordered that no construction whatsoever shall take place of the two blocks mentioned therein included the block where the respondents-allottees' flat is situated. Thereafter, the construction was de-freezed and the appellant-promoter was allowed to construct the towers vide DTCP order dated 20.04.2016.

15. During arguments, Ld. counsel for the appellant has supplied the printout of news article of 'India Today' dated 29.12.2019 to this Tribunal and has stated that the appellant-promoter could not do construction on account of the orders of the Hon'ble Supreme Court of India w.e.f. 4th November, 2019 to 9th December, 2019.

16. It was further contended that as per clause 3.1 of the agreement dealing with the possession of the apartment, the appellant-promoter is entitled for a grace period of six months and further period of 90 days.

17. With these contentions, he has contended that the order of the Ld. Authority may be set aside and the present appeal may be allowed.

18. Per contra, Ld. counsel for the respondents-allottees contended that during the period in which it is being contended that the appellant-promoter could not do construction on account of the orders of DTCP freezing construction of the said towers, the appellant-promoter had been asking for payments which clearly shows that during the said period the construction was going on and there was no effect of the order dated 28.07.2015 of the DTCP. He further contended that this plea has not been taken by the appellant-promoter before the Ld. Authority, and, therefore, the same is not maintainable.

19. It was further contended that the plea that the Hon'ble Supreme Court of India had banned the construction in the New Delhi NCR region between 04th November, 2019 to 09th December, 2019 was neither taken before the Ld. Authority while replying the complaint nor it has been taken in the grounds of the appeal, and, therefore, cannot be relied upon.

20. It was further contended that the order of the Ld. Authority is as per the Act and Rules. The appeal has no merits and the same is required to be dismissed.

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

22. The respondents-allottees booked an apartment No.PL-3/2902 at 29th Floor, Iconic Tower, measuring 6000 sq. ft.in the project of the appellant-promoter "Paras Quartier" at Sector 2, village Gawal Pahari, Gurugram, Haryana on 14.01.2013. The agreement was executed on 03.07.2013 between the parties for total sale consideration of Rs.6,51,20,000/- and out of which an amount of Rs.6,31,55,224/- has been paid by the respondents-allottees on the date of filing of the complaint. The possession of the unit was being delayed, therefore, the respondents-allottees filed the complaint for possession and delayed possession interest. Regarding the date of possession and period of possession the Clause 3.1 of the agreement is reproduced as below:

"3.1. Subject to clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the Seller and any restraints/restrictions from any courts/authorities and subject to the Purchaser(s) having complied with all the terms and conditions

of this agreement and not being default under any of the provisions of this agreement and having complied with the provisions, formalities, documentation, etc. as prescribed by the Seller, whether under this agreement or otherwise, from time to time, the Seller proposes to offer to hand over the possession of the Apartment to the Purchaser(s) within a period of 42 (Forty Two) months with an additional grace period of 6(Six) months from the date of execution of this agreement or date of obtaining all licences or approvals for commencement of construction, whichever is later, subject to Force Majeure. The Purchaser(s) agrees and understands that the Seller shall be entitled to a grace period of 90 (Ninety) business days, after the expiry of grace period, for offer to handover the possession of the Apartment to the purchaser. Any application for the occupation certificate in respect of the project shall be filed in the due course. The Seller shall give Notice of Offer of Possession in writing to the Purchaser(s) with regard to the handing over of possession, where after, within 30(Thirty) days, the purchaser(s) shall clear his outstanding dues and complete documentary formalities and take physical possession of the apartment. In case, the purchaser(s) raises any issue with respect to any demand, the same would entitle the Purchaser(s) for an extension of the time for taking over possession of the Apartment. In the event the Purchaser (s) fails to make all payments and accept and take the possession of the Apartment

within 30 (thirty) days of the Notice of Offer of possession, the purchaser (s) shall be deemed to be custodian of the Apartment from such due date indicated in the Notice of Offer of possession and the Apartment shall be held by the Seller solely at the risks and costs of the Purchaser (s), including but not limited to applicability of the appropriate Holding Charges as defined in Clause 3.3 below and interest. The obligation of the Seller to offer possession to the Purchaser under this clause shall be subject to Force Majeure.”

23. The above said Clause 3.1 stipulates that the appellant-promoter will handover the possession of apartment to the respondents-allottees within the period of 42 months with an additional grace period of six months. Thus, the total period as per the said Clause 3.1, to handover the possession is 48 months. The Ld. Authority fell in error in clubbing the six months of grace period and further grace period of 90 days. The grace period of six months is for completion of the unit and is different for the 90 days grace period which is for the time required for offering possession to the respondents-allottees. Since, the appellant could not provide the possession within the stipulated period, therefore, is not entitled to claim 90 days grace period which is also very fairly admitted by the Ld. counsel for the appellant-promoter. Hence, the appellant is entitled for the 42 months and a grace period of six months stipulated for

completion of the unit. Thus, the grace period of six months is allowed and the total period for handing over the possession comes out 48 months. The date of start concededly being 16.10.2013, being the date of issue of consent to establish, therefore, the appellant was to handover the possession of the unit upto 16.10.2017.

24. As per the contention of the appellant that it could not execute the work on account of the order dated 28.07.2015 of the DTCP freezing the construction of the block in which the respondents-allottees unit is situated and, therefore, is seeking extension in time for handing over of the possession for the period from 26.07.2015 upto the date of order dated 26.04.2016 when the DTP defreezed and allowed the construction. The appellant-promoter has not taken this pleas in the reply to the complaint before the Ld. Authority. The appellant-promoter has provided no evidence to the effect that the respondents-allottees unit is situated in the block where construction was freezed by the order dated 26.07.2015 of DTP. Also, as per the appellant-promoter own customers account statement dated 09.08.2019, the appellant-promoter has received payments of Rs.20,95,687/- , Rs.35,80,310/-, Rs.57,334/-, Rs.35,80,310/-, Rs.21,02,169/-, Rs.57,399/- on 22.10.2015, 21.10.2015, 23.10.2015, 26.02.2016, 28.02.2016 and 29.02.2016 on

completion of the 6th floor roof slab, on completion of the 8th floor roof slab, TDS, on completion of the 14th floor roof slab again on completion of 14th Floor slab and TDC etc. respectively. This clearly indicates that during this period the construction of the project was going on and there was no effect of the order of DTCP dated 28.07.2015 freezing the construction of the block in which the unit of the respondents-allottees is situated.

25. The appellant-promoter, on the basis of the news article of 'India Today' dated 29.12.2019, the printout of which was supplied during arguments on 29.11.2022 has contended that the appellant-promoter could not do construction on account of the order of the Hon'ble Supreme Court on India which stopped construction between 04th November, 2019 to 09th October, 2019 to control pollution. The appellant-promoter has not taken this plea either in its reply to the complaint or now in the grounds of appeal. Also, the appellant-promoter has not supplied any order of the Hon'ble Supreme Court which shows that the construction was stopped between 04th November, 2019 to 09th December, 2019. The printout of the news item supplied to this Tribunal cannot be relied upon in the absence of the order of the Hon'ble Supreme Court of India. The appellant-promoter has not provided any evidence to show that the progress of

construction of its works has been affected by the orders of the Hon'ble Supreme Court as its project may be in its finishing stage and may not be affected by the said order of the Hon'ble Supreme Court.

26. We also do not find any merit in the contention raised by the appellant-promoter that the Ld. Authority has not complied with the Rule 2(d) which requires the authority to give an opportunity to the respondent (herein appellant-promoter) to plead guilty/or not guilty. The appellant-promoter, during adjudication of the complaint has been given due opportunity to submit its reply to the complaint and thereafter, due opportunity has been given to the appellant-promoter to explain its case by way of arguments. In our opinion there is no violation of any rule by the Ld. Authority in adjudicating and deciding the complaint and finally issuing the direction in the impugned order. Moreover, what prejudice has been caused to appellant-promoter in case of not following of any Rules by the Ld. Authority in adjudicating the complaint is also not mentioned in the grounds of appeal.

27. The total sale consideration of the unit is Rs.6,51,20,000/- against which the respondents-allottees have already paid an amount of Rs.6,31,55,224/-. The due date of possession as observed by this Tribunal in appeal is

16.10.2017. The offer of possession was issued much later on 19.11.2020. A huge amount on account of delay possession interest on account of delay in handing over the possession had accrued in favour of the respondents-allottees. The appellant had deposited with this Tribunal an amount of Rs.1,27,94,757/- to comply with the provision of Section 43(5) of the Act, on account of delay possession interest given by the Ld. Authority as per the impugned order. However, physical possession was not given to the respondents-allottees, therefore, vide our order dated 23.05.2022, the appellant was directed to handover the possession to the respondents-allottees, the relevant part of the order of this Tribunal dated 23.05.2022 reads as under:-

“10. Ld. counsel for the appellant has pleaded for staying the operation of the impugned order. However, on receiving instructions from Sh. Aditya, Legal Officer of the appellant/promoter, Ld. counsel for the appellant states that the appellant/promoter has undertaken to deliver the physical possession of the unit allotted to the respondents/ allottees, before 20.07.2022, the date fixed in the execution proceedings before the Ld. Authority. He further contended that as the appellant has deposited more than the amount as required to comply with the provisions of Section

43(5) of the Act, the bank account of the appellant/promoter may be de-freezed as the appellant being a developer has to carry out the construction activity and has various monetary obligations.

11. Ld. counsel for the respondents has pleaded that in view of the said undertaking given by the appellant/promoter, he does not press the application of the respondents/allottees for issuing direction to deliver the physical possession, however, the appellant should comply with its undertaking.

12. We have no reason to doubt the intention of the appellant to fulfill the undertaking given to this Tribunal.”

28. The appellant-promoter did not comply with the undertaking given before this Tribunal on 23.05.2022 to hand over the physical possession of the unit to the respondents-allottees. Therefore, vide our order dated 01st August, 2022, the appellant-promoter was again directed to handover the physical possession to the respondents-allottees on or before the 25th August, 2022. Again, the appellant-promoter did not handover the physical possession of the unit to the respondents-allottees, therefore, vide our order dated 06th September, 2022, the appellant-promoter was again directed to handover the

physical possession to the respondents-allottees on or before the 28th September, 2022. The appellant-promoter again did not handover the physical possession of the unit to the respondents-allottees, therefore, vide our order dated 24th September, 2022, the appellant-promoter was again directed to handover the physical possession of the unit to the respondents-allottees in a habitable condition within four weeks. The appellant-promoter did not handover the physical possession of the unit to the respondents-allottees, despite our clear directions in the above said orders. It is felt that appellant-promoter is deliberately not handing over the physical possession to the respondents-allottees being in dominant position having received almost whole of the consideration, rather much amount being due to the respondents-allottees on account of the delayed possession interest, therefore, a costs of Rs.5,000/- per day is imposed on the appellant-promoter payable to respondents-allottees, w.e.f. 20.07.2022 the date up to which it was ordered for the first time on 23.05.2022 to hand over of the possession, till the date possession is actually handed over to the respondents-allottees.

29. Consequently, the appeal is partly allowed with the aforesaid observation and the impugned order dated 31.03.2021 is modified to the extent that the due date of

delivery of the unit shall be considered as 16.10.2017 instead of 16.04.2017.

30. The respondents-allottees have filed number of applications seeking possession of the unit. The possession of the unit was ordered to be handed over firstly vide order dated 23.05.2022 and, subsequently, on 01.08.2022, 06.09.2022 and 28.09.2022, but the said order was not complied with. All the applications filed by the respondents-allottees seeking possession during the pendency of appeal stand disposed of. The appellant-promoter is directed to handover the possession within one month from date of this order.

31. Vide our order dated 23.05.2022, the 50% of the amount i.e. Rs.63,97,378.50 out of Rs.1,27,94,757/- was remitted to the Ld. Authority for disbursement to the respondents-allottees. The remaining amount of Rs.63,97,378.50 deposited by the appellant-promoter with this Tribunal as pre-deposit to comply with the provisions of Section 43(5) of the Act along with interest accrued thereon, be remitted to the Ld. Authority for disbursement of the same to the respondents-allottees as per their entitlement, excess amount may be remitted to the appellant, subject to tax liability, if any, as per Act, Law and Rules.

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

33. File be consigned to the record.

Announced:
December 09, 2022

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

Anil Kumar Gupta
Member (Technical)

Manoj Rana