

**BEFORE THE HARYANA REAL ESTATE APPELLATE
TRIBUNAL**

**Appeal No.180 & 354 of 2019
Date of Decision: 13.12.2022**

Appeal No.180 of 2019

M/s Mapsko Builders Private Limited,

Corporate Office at: 6th Floor, No.1 Golf Course Road, Sector
56, Gurugram-122011.

Registered Office at: 52, North Avenue Road, Punjabi Bagh
(West), New Delhi-110026.

Appellant (Promoter)

Versus

M/s Micro Tradex Private Limited, B-35, South Extension,
Part-II, Lower Ground Floor, New Delhi-110049.

Respondent (Allottee)

Appeal No.354 of 2019

M/s Micro Tradex Private Limited through its Managing
Director, B-35, South Extension, Part-II, Lower Ground Floor,
New Delhi.

Appellant (Allottee)

Versus

M/s Mapsko Builders Private Limited, through its Director, 52,
North Avenue Road, Punjabi Bagh, New Delh.

Respondent (Promoter)

CORAM:

Shri Inderjeet Mehta,
Shri Anil Kumar Gupta,

Member (Judicial)
Member (Technical)

Appeal No.180 & 354 of 2019

Argued by: Shri Anurag Jain, Advocate, learned counsel for M/s Micro Tradex Private Limited.

Shri Akshat Mittal, Advocate, learned counsel for M/s Mapsko Builder Private Limited.

ORDER:

INDERJEET MEHTA, MEMBER (JUDICIAL):

This judgment of ours shall dispose of both these appeals i.e. appeal no.180/2019 titled “M/s Mapsko Builders Private Limited vs. M/s Micro Tradex Private Limited”, filed by promoter - M/s Mapsko Builders Private Limited, and Appeal No.354/2019 titled “M/s Micro Tradex Private Limited vs. M/s Mapsko Builders Private Limited” filed by allottee. Both these appeals have arisen out of the impugned order dated 18.12.2018, handed down by the learned Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called ‘the Authority’), in complaint no.748/2018 titled “M/s Micro Tradex Private Limited vs. M/s Mapsko Builders Private Limited”.

2. In order to avoid the confusion with respect to the identity of the parties, the appellant in appeal no.180/2019 and respondent in appeal no.354/2019, shall be referred as the ‘Promoter’. Similarly, the respondent in appeal

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no.180/2019 and appellant in appeal no.354/2019 shall be referred as the 'Allottee'.

3. M/s T.S. Enterprises, a partnership firm, predecessor-in-interest of the allottee had applied for allotment of an apartment in a project 'Mapsko Mount Ville' launched by the promoter, by paying the booking amount of Rs.15,18,677/-, vide Memorandum of Understanding (for short 'MoU') dated 27.09.2012. Thereafter, an apartment/unit no.1504 in tower 'G' admeasuring 1510 sq. ft., for a total consideration of Rs.89,82,180/- was allotted to M/s T.S. Enterprises. Subsequently, vide agreement dated 27.10.2012 said M/s T.S. Enterprises sold its booking to the allottee. Thereafter, an amount of Rs.7,59,339/- was paid by the allottee to the promoter on 15.11.2012 i.e. within 45 days from the date of booking, as per the payment plan provided by the promoter and the same was confirmed vide demand notice dated 08.06.2017. The allottee made timely payment of third and fourth instalments on 16.05.2013 by paying Rs.3,79,650/- and Rs.2,94,450/-, as per the demand raised by the promoter and the same was also confirmed in the demand notice dated 08.06.2017. In spite of taking more than 32% of the total sale consideration, the promoter did not execute any 'Flat Buyer's Agreement'.

4. Further, it was alleged that as per the terms of allotment of the said unit, the promoter was bound to hand over the possession within a period of 48 months and six months extension in case of force majeure from the date of 'Flat Buyer's Agreement'. After making the aforesaid payment, the officials of the allottee continuously tried to contact the promoter to enquire about the status of the project as well as tentative date of possession, but in vain. After receipt of the payment of next demand from the promoter, the officials of the allottee visited the project site to ascertain the status of the project before making the payment. However, to their utter shock and surprise, the construction of the project was moving at a very slow pace and the demand raised by the promoter was not in accordance with the 'Construction Linked Plan', which the allottee had opted. The allottee sought clarification in this regard from the promoter and as no reasonable clarification was given, so, having no other option, the allottee preferred the complaint before the learned Authority for refund of the deposited amount.

5. Upon notice, the promoter has admitted that M/s T.S. Enterprises, predecessor-in-interest of the allottee had applied for allotment of the unit by paying the booking amount of Rs.15,18,677/- vide MoU dated 27.09.2012 in a project

namely 'Mapsko Mount Ville' launched by the promoter. The factum of allotment of unit no.1504 in tower 'G' admeasuring 1510 sq. ft. as well as sale consideration of the unit to be Rs.89,82,180/- has been admitted. The promoter has also admitted that the allottee had opted for 'Construction Linked Plan' and had paid Rs.7,59,339/- on 15.11.2012 and the same was confirmed in the demand notice dated 08.06.2017.

6. However, the promoter has taken the stand that despite continuous reminders sent by the promoter, the allottee failed to make the payment towards the purchase of the unit and this fact has been clearly mentioned in the demand notice dated 08.06.2017 that the amount of Rs.64,77,637/- and as per the applicant ledger dated 17.10.2018, an amount of Rs.77,86,770/- was due and not paid by the allottee, as demanded by the promoter. The promoter denied that it had not executed any 'Flat Buyer's Agreement' even after taking 32% of the total sale consideration, rather, the allottee did not sign and execute the two original copies of Draft Flat Buyer's Agreement in spite of the fact that the same were sent to the allottee. Since, the allottee was merely an investor, so, it was not interested in execution of 'Flat Buyer's Agreement' and, rather, kept on waiting for escalation in the prices of the allotted unit.

However, it was pleaded that timely payment of due instalments, as specified in the opted payment plans, is essence of agreement, but the allottee failed to pay the due instalments on time. The promoter also alleged that structure work of all the towers in the project is complete, and brick work along with internal plaster is at completion stage and finishing work is going on. As per the present status of the construction, the promoter would be able to offer the possession of the flat within next few months. While denying all the other averments taken by the allottee in the complaint, the promoter prayed for dismissal of the complaint.

7. After hearing learned counsel for the parties and going through the material on the record, the learned Authority disposed of the complaint vide impugned order dated 18.12.2018 with the following observations:-

“26. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the authority is of the view that Project is registered with the authority and the revised date of delivery of possession is 30.11.2019 as per registration certificate.

27. Complainant has booked unit no.1504, Tower-G, in project “Mapsko Mount Ville, Sector 78-79, Gurugram but no builder buyer agreement was

executed inter-se the parties. He has already deposited Rs.29,52,196/- with the respondent against total consideration of Rs.89,82,180/-. In this way, complainant has deposited about 25% of the total sale consideration upto 15.11.2012. However, the BBA sent by the respondent to the complainant for attestation was not signed by the complainant. As per their agreed terms and conditions as mentioned in the BBA executed with other allottees, respondent was duty bound to hand over the booked unit to the complainant within 48 + 6 months grace period on account of force majeure factors.

28. Counsel for the respondent has raised an issue w.r.t order/judgment dated 31.7.2018 pronounced by ADJ-7 (West) Tis Hazari Courts, West District, Delhi where the learned Judge dismissed the plaint of the complainant and directed the parties to settle the matter arbitrarily.

29. The parties are also obligated to pay prescribed rate of interest 10.75% equitable for late delivery charges. Project is registered one. Once it is registered, the revised date of delivery is 30.11.2019, so both the parties are equally liable to pay interest @ 10.75% per annum.

30. As per provisions of Section 19 (6) of the Real Estate (Regulation & Development) Act, 2016 complainant is also duty bound to abide by the terms and conditions of contract and make timely payment. As such, complainant is directed to make payment at

the prescribed rate of interest i.e. 10.75% per annum till the handing over the possession of the unit by the respondent. However, complainant is entitled to late delivery charges at par. Builder as well as complainant are directed to sort out their matter at their own level.

31. As such, complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum w.e.f 15.11.2012 to the date of order i.e. 18.12.2018 on the paid up amount Rs.29,52,196/-. As per above order the interest amount has been calculated to amounting Rs. 19,33,728.75/- , as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016. Further Page 13 of 13 Complaint No. 748 of 2018 the respondent will pay monthly interest till the handing over the offer of possession which shall be Rs. 26,446/- per month. This monthly interest shall be paid by 10th of every subsequent month.

32. Hence the authority exercising its under section 37 of the act hereby directs the respondent to act in accordance with the provisions of section 18 (1) of the Act ibid i.e. to adjust the amount @ 10.75% per annum i.e. delayed possession charges. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order.

33. The complaint is disposed of accordingly.”

8. Both the parties to the present lis felt aggrieved, hence, these appeals.

9. We have heard learned counsel for the parties and have meticulously examined the record of the case.

10. Learned counsel for the promoter has submitted that the allottee had opted for 'Construction Linked Plan'. Though, initially, up to the year 2013, the allottee made the payments qua the allotted apartment, but later on, in spite of continuous reminders sent to the allottee, it failed to make payment towards the purchase of unit, and this fact has been clearly mentioned in the demand notice dated 08.06.2017, that an amount of Rs.64,77,637/- was due and not paid by the allottee as demanded. Further, it has been submitted that though two original copies of the draft of 'Flat Buyer's Agreement' were sent to the allottee, but the allottee being an investor did not execute the same. Further, it has been submitted that since the timely payment of due installments is essence of agreement and the allottee failed to make the payment of due installment in time, so, the allottee has not adhered to making the payments of due installments as per the construction linked plan, which it had opted. Lastly, it has been submitted that that the promoter has always been ready

and willing to hand over the allotted unit to the allottee after receipt of the amount due.

11. Per contra, learned counsel for the allottee has submitted that as per the construction linked plan, the allottee had made regular payments up to 16.05.2013. After making the payments till May, 2013, the officials of the allottee tried to contact the promoter to enquire about the status as well as tentative date of possession, but in vain. Further, it has been submitted that after receipt of demand notice dated 08.06.2017, the officials of the allottee visited the project site, but, to their utter shock and surprise, the construction of the project was moving at a very slow pace and the demand of the amount raised by the promoter in the demand notice dated 08.06.2017 was not in accordance with the construction linked plan. Lastly, it has been submitted that since within the stipulated period, the possession of the apartment was not handed over to the allottee, so, it had no option but to knock the door of the learned Authority to claim the relief of the refund of the amount deposited by it.

12. We have duly considered the aforesaid submissions.

13. First of all, let the admitted facts be taken note of. Admittedly, M/s T.S. Enterprises, the predecessor-in-interest

of the allottee, had applied for allotment of the unit by paying the booking amount of Rs.15,18,677/- vide MoU dated 27.09.2012 in a project namely 'Mapsko Mount Ville' launched by the promoter. The factum of allotment of unit no.1504 in tower 'G' admeasuring 1510 sq. ft. as well as sale consideration of the unit to be Rs.89,82,180/- has been admitted. It has been also admitted that the allottee had opted for construction linked plan and had paid Rs.7,59,339/- on 15.11.2012 and had also paid third and fourth installments on 16.05.2013 by paying Rs.3,79,650/- and Rs.2,94,450/-, and in this way, the allottee had paid the amount to the tune of Rs.29,52,196/- to the promoter qua the allotted unit.

14. Though, the allottee in its complaint before the learned Authority has specifically alleged that as per the terms of the allotment of the said unit, the promoter was bound to hand over the possession within a period of 48 months and six months extension, in case of force majeure, from the date of 'Flat Buyer's Agreement', but, a thorough perusal of the MoU/allotment dated 27.09.2012 (Annexure A-2) executed between the promoter and predecessor-in-interest of the allottee shows that there is no stipulation to this effect that the promoter was bound to hand over the possession within a

period of 48 months and six months extension in case of force majeure. Admittedly, 'Flat Buyer's Agreement' has not been executed between the parties and as per the respective case set up by both the parties to the present lis, they have blamed each other for non-execution of 'Flat Buyer's Agreement'. However, by taking this stand in the pleadings that the promoter obligated to hand over the possession within a period of 48 months plus six months extension in case of force majeure, the allottee in a way has admitted this to be a period to arrive at the date of handing over of the possession of the unit. During the course of arguments, both the learned counsel for the parties have referred to 'Flat Buyer's Agreement' (Annexure A-5) dated 09.11.2012, executed between the promoter and one another allottee 'Jyoti Arora'. As per the terms and conditions mentioned in this 'Flat Buyer's Agreement' (Annexure A-5), the promoter was duty bound to hand over the booked unit to the allottee within 48 months plus six months grace period on account of force majeure factors. It is pertinent to mention that this 'Flat Buyer's Agreement' dated 09.11.2012 (Annexure A-5) is relating to the same project in which the allottee has been allotted the apartment. Since, both the parties to the present lis have placed reliance upon this 'Flat Buyer's Agreement'

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dated 09.11.2012, so, due date of possession would be after completion of 48 months i.e. four years and the said date would be 08.11.2016. Since, neither there are pleadings nor evidence regarding the plea of force majeure, so, the promoter is not entitled for six months grace period.

15. To claim the relief of refund, the allottee had knocked the door of the learned Authority by way of filing the complaint on 28.07.2018 and reply to this complaint was filed by the promoter towards the ends of October, 2018. In para no.11 of the said reply, towards the end, the promoter had specifically pleaded that it would be able to hand over the possession of the flat within next few months. Thus, it is established that even towards the end of October, 2018, the project was not complete and as the due date of possession is established to be 08.11.2016, so, a period of two years had elapsed when the promoter had filed the reply to the complaint filed by the allottee for refund.

16. In the latest judgment ***M/s Newtech Promoters & Developers Pvt. Ltd. vs. State of UP & Ors. Etc. 2022(1) R.C.R. (Civil) 357*** (Supra), which is the authoritative landmark judgment of the Hon'ble Apex Court with respect to the interpretation of the provisions of the Act, the Hon'ble

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Apex Court has dealt with the rights of the allottees to seek refund as referred under Section 18(1)(a) of the Act. The Hon'ble Apex Court has laid down as under:-

“25. The unqualified right of the allottee to seek refund referred under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.”

17. As per the aforesaid ratio of law, the allottee has unqualified right to seek refund referred under Section 18(1)(a) and Section 19(4) of the Act, which is not dependent on any contingencies. The right of refund of payment has

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been held to be as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events. Thus, the present allottee has unqualified and unconditional absolute right to seek the refund as the promoter has failed to deliver the possession of the unit by 08.11.2016 the stipulated date for delivery of possession.

18. Thus, keeping in view our aforesaid discussion, the impugned order dated 18.12.2018 passed by the learned Authority is not sustainable. Consequently, appeal no.354/2019 filed by the allottee is hereby allowed and the impugned order dated 18.12.2018 is hereby set aside. The allottee is entitled for the refund of the entire amount paid by it i.e. Rs.29,52,196/- along with interest @ SBI highest marginal cost of lending rate (MCLR) +2% i.e. 10.35% per annum prevailing as on today, as per Rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017. The interest shall be calculated from the dates of respective payments by the allottee to the promoter, till the date of realization.

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19. Resultantly, appeal No.180/2019 filed by the promoter stands dismissed.

20. The amount of Rs.6,04,000/- deposited by the appellant-promoter in appeal No.180/2019 with this Tribunal to comply with the provisions of Section 43(5) of the Act be remitted to the learned Haryana Real Estate Regulatory Authority, Gurugram, along with interest accrued thereon for disbursement to the allottee in accordance with law/rules and of course subject to tax liability, if any.

21. The original order be tagged with appeal no.180/2019 and certified copy be placed on the file of appeal no.354/2019.

22. Copy of this order be communicated to the parties/learned counsel for the parties and the learned Authority for compliance.

23. Files be consigned to the record.

Announced:
December 13, 2022

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

Anil Kumar Gupta
Member (Technical)