BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.609 of 2019
Date of Decision: 19.12.2022

Emaar MGF Land Ltd. registered office at #2564, Sector 21, Panchkula. 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. Varuna Ahuja, daughter of Late Shri Ved Prakash Ahuja.
3. 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. Tanika Goel, 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 16.10.2018 passed by the Haryana Real Estate Regulatory Authority, Gurugram (for short, 'the Ld. Authority') whereby the Complaint No.106 of 2018 filed by the respondents-allottees was disposed of with the following directions:

i. *"The respondent is duty bound to pay the interest at the prescribed rate i.e. 10.45% for every month of delay of from the due date of possession i.e. 01.03.2011 till the actual date of handing over of the possession.*

ii. *The respondent is directed to pay interest accrued from 01.03.2011 to 16.10.2018 on account of delay in handing over of possession which shall be paid to the complainant within 90 days from the date of decision and subsequent interest to be paid by the 10th every succeeding month.*

iii. The respondent is further directed to apply for registration of the project within fifteen days from 16.10.2018 otherwise penal consequences will follow."

2. As per averments of the respondents-allottees in the complaint, it was pleaded that the unit was booked by original allottee Mr. Sashi Sagar bearing unit no. TDP-F-F010F101 on first floor in the project of the appellant "Premier Project in Palm Drive", Sector 66, Golf course Ext., Gurugram measuring 2625 sq. ft, in the month of January 2008 by payment of booking amount of Rs. 10 lakhs. It was further pleaded that the unit was further sold to first transferee Mr. Harminder Singh Chimni in the year January 2012, for which he further paid Rs. 11,00,000/- and early payment rebate of Rs. 8,59,999/- was credited in his account/ledger. The property was then bought by the second transferee i.e. the respondents/allottees in resale from the first transferee in the month of April 2017 for Rs. 1,88,50,000/- the total money with the appellant as on date 23.03.2018 is Rs. 1,50,83,163/-. The Buyer's Agreement was executed on 05.03.2008. The basic sale price of the unit was 1,44,34,275/- against which the respondents-allottees till the date of filing of the complaint had paid of Rs. 1,57,76,655/-.

3. It was further pleaded that the appellant had allotted the unit in 2008 and has offered the possession on 09.03.2018 vide their letter dated 09.03.2018, after 10 years and the appellant is asking for Rs. 19,40,201/-.

4. It was further pleaded that the buyer's agreement of the said property is just one sided and does not protect the respondents/allottee's rights on the money invested with the appellant for the last ten years where they had paid appellant as and when demanded by them almost 95-99 percent approx. consideration money in the period between 2008-2012.

5. It was further pleaded that first and second transferee paid all demands as per stage of construction and the demands raised by the appellant. There was no demand from 29.02.2012 to 28.09.2017 as during this period the construction was abandoned. The appellant on 09.03.2018 offered possession with the increased area 2666.14 sq. ft from 2625 sq. ft to the respondents-allottees. The appellant requested the respondents-allottees to calculate area of flat, but appellant did not provide the calculation to respondents-allottees which depicts clear indication that the appellant is doing unfair trade practice and breach of the contract which attracts heavy fine and penalty.

6. It was further pleaded that the project of the appellant comes under the definition of "ongoing project" as the RERA Act came to force in 01.05.2016 and the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter called the 'rules') came into force in 28.07.2017 and by that time the construction was not completed and therefore, the project needed to be registered before the Ld. Authority but the appellant failed to register its project under the Act. Therefore, the appellant is liable under the Section 3 and 4 of the Act and attract the penalty under Section 59 and 60 of the Act.

7. It was further pleaded that the appellant asked for payment on 28.09.2017 as per construction linked plan i.e. on completion of flooring and wall paint. It is clear from this fact that occupancy certificate filed by the appellant was for incomplete project, as the occupancy certificate cannot be granted if a building is under construction. On account of this reason, occupancy certificate was granted after completion of the building i.e. on 09.03.2018.

8. With the above said pleadings, the respondents-allottees sought the following reliefs in its complaint:

> "i. *The complainant is seeking compensation in the form of compound interest + penalty on the amount invested with the builder on account of delay in hand over of the possession of the*

property for over many years as per the law of Haryana Real Estate Regulatory Authority. The total money with the respondent as on date 23.03.2018 is Rs. 1,50,83,163.00 statement of account attached in Annexures.

ii. *The complainant is seeking a stay on the demand letter and on the penalties as outlined in the intimation of possession letter dated 09.03.2018 if the complainant does not take the possession.*

Till 06.04.2018 till the case is decided by HRERA."

9. The complaint was contested by the appellant on the ground that the complaint is not maintainable as the authority has no jurisdiction to entertain the present complaint. The appellant further pleaded that the project is not an "ongoing project" nor is the project registered with the ld. Authority. As per rule 2(1)(o) of the said rules, any project for which an application for occupation certificate was made to the competent authority prior to the date of publication of the Rules i.e. 28.07.2017, the project is not an "ongoing project". The application in the present case for occupation certificate was made to the competent authority on 25.04.2017. Therefore, the

Authority does not hold any jurisdiction whatsoever to entertain the present complaint and therefore the complaint is liable to be rejected.

10. It was further pleaded that if a project is covered under the definition of "ongoing project" and registered with the Authority, the complaints pertaining to compensation and interest under Section 12,14,18 and 19 of the Act are required to be filed before the Ld. Adjudicating Officer under Rule 29 read with section 31 and Section 71 of the Act. It was further pleaded that while making the request for transfer of allotment in their name, the respondents-allottees also executed and undertaking-cum- indemnity bond dated 28.03.2017, in favour of the appellant, wherein the respondents-allottees undertook not only to make the balance payment of all the charges but also to abide by the terms and conditions of the Buyers Agreement and indemnify the appellant in case of any legal action. The appellant also stated that the filing of the complaint cannot be a ground and does not entitle the respondents-allottees not to pay the charges and hence the respondents-allottees are liable to pay those charges.

11. It was further pleaded that it was only on

13.04.2017 that the allotment of the said apartment was transferred in favour of the respondents-allottees and immediately thereafter the appellant had applied the occupation certificate vide its letter dated 25.07.2017 and it was granted on 25.01.2018. Soon after obtaining this the appellant issued the letter of offer of possession dated 09.03.2018 and hence there is no question of the respondents-allottees waiting for the possession for the last 10 years. The respondents-allottees are caught in a web of their own lies as the proposed estimated time of handing over of the possession of the said apartment was by December 2010 plus 90 day, also without prejudice to the above, the said proposed time is applicable only subject to force majeure and the respondents-allottees or the predecessor not being in default of any terms and conditions of the agreement, including but not limited to the payment of installments. This was also provided in clause 14 of the Act. However, the respondents-allottees and their predecessors have been defaulters, having deliberately failed to make various installments as mentioned in the statement of accounts. It is also pertinent to mention here that even after receiving the notice of possession dated 09.03.2018 and various reminders the respondents-allottees having deliberately

failed to make the payment of last installment and current outstanding amount as on 08.05.2018 is Rs. 1,51,147/- towards various installments, delay payments interest etc.

12. It was further pleaded that the project such as the one in question is a huge project and involves putting in place huge infrastructure and is dependent on timely payment by all the allottees. Such huge projects do take some reasonable time for completion and timelines are not absolute. This position is fortified from the fact that the parties, having envisaged that there could be some delay after December 2010+90days, agreed to specify condition that in case the appellant fails to offer possession of the apartment within the time, it shall be liable to pay delay compensation @ Rs. 5 per. Sq. ft. per month of the super area of the said apartment. This was also provided in clause 16 of the agreement which respondents-allottees had signed and executed.

13. After controverting all the pleas raised by the respondents-allottees, the appellant-promoter pleaded for dismissal of the complaint being without any merit.

14. The Ld. authority after considering the pleadings of the parties passed the impugned order, the relevant part of which has already been reproduced in the upper part of this appeal.

15. We have heard, Ld. counsel for the parties and have carefully examined the record. The appellant has placed on file written submission on 07.12.2022.

16. In the written arguments, it is contended that the Buyers Agreement between the first purchaser and the appellant was executed on 05.03.2008. The present respondents-allottees are subsequent purchaser and has stepped into the shoes of the first allottee on 13.04.2017 i.e. much after the due date of handing over of the possession. The Occupation Certificate was applied on 25.07.2017 and was received on 25.01.2018. The offer of possession was issued on 09.03.2018 and the respondents-allottees filed the complaint on 26.03.2018. The respondents-allottees had actually taken over the possession on 29.12.2018. The conveyance deed has been executed on 21.02.2019.

17. It was contended that the present respondents-allottees purchased the property from the previous allottee in resale and nomination letter was issued by the appellant on 13.04.2017, which means that the respondents-allottees at the time of purchase of the unit were aware of the fact that the due date of delivery of possession has already elapsed and the project is running behind schedule. However, despite the knowledge of the said fact that the project is delayed the respondents allottees still chose to buy the unit in the said

project. Thus, interest can only be awarded from 13.04.2017 i.e. the day when the subsequent allottee i.e. the present respondents-allottees stepped into the shoes of the original allottee and relied upon the judgment of the Hon'ble Supreme Court (Full Bench) in Civil Appeal No. 7042 of 2019 tilted as M/s Laureate Buildwell Private Ltd. v. Charanjeet Singh" decided on 22.07.2021.

18. The appellant has made further reliance on the judgment of Hon'ble Supreme Court in Civil Appeal No. 4910-4941 of 2019 titled as DLF v. D.S. Dhanda decided on 10.05.2019, and contended that as per the ratio of the law, the transferee shall be entitled to interest from the due date or from the date of transfer whichever is later.

19. It was further contended that in any case, the delayed possession interest on the payments made after due date of possession shall be from the date such payments have been made by the allottee to the appellant.

20. With these contentions, it was contended that the present appeal may be allowed and the impugned order dated 16.10.2018 be set aside.

21. Per contra, Ld. counsel for the respondents- allottees contended that this Tribunal has passed orders in various

appeals deciding similar issues and, therefore, this appeal may be decided in accordance with orders passed in those appeals.

22. It was further contended that the impugned order dated 16.10.2018 passed by the Ld. Authority is perfectly in order, is as per the Act, Rules and Regulations and contended for dismissal of the appeal being without any merits.

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

24. The undisputed facts of the case are that unit was booked by original allottee Mr. Sashi Sagar bearing unit no. TDP-F-F010F101 on first floor in the project of the appellant "Premier Project in Palm Drive", Sector 66, Golf course Ext., Gurugram measuring 2625 sq. ft, in the month of January 2008 by payment of booking amount of Rs. 10 lakhs. The Builder Buyers Agreement was executed on 05.03.2008. The due date of handing over the possession as per Builder Buyers Agreement is 01.03.2011. The basic sale price of the unit was Rs. 1,44,34,215/-. The unit was further sold to Mr. Harminder Singh Chimni, in the year January 2012 for which he further paid an amount of Rs. 11,00,000/-. The said unit was then purchased by the respondents-allottees in resale from the first transferee in the month of April 2017. The Occupation Certificate was obtained by the appellant-promoter on

25.01.2018. The possession was offered on 09.03.2018. The possession was taken over by the respondents-allottees on 29.12.2018. The complaint was filed by the respondents-allottees with the ld. Authority on 26.03.2018. The total amount paid by the allottees to the appellant till the date of filing of the complaint Rs. 1,57,76,655/-.

25. It is argument of the appellant that the respondents-allottees are subsequent allottees, who have purchased the property from the first transferee in resale and the appellant issued nomination letter in favour of the respondents-allottees on 13.04.2017, after the due date of possession i.e. 01.03.2011. This means that the respondents-allottees at the time of purchase of the unit were aware of the fact that the due date of delivery of possession has already elapsed and the project is running behind schedule. However, despite the knowledge of the said fact that the project is delayed the respondents allottees still chose to buy the unit in the said project. It is further argument that the interest can only be awarded from the day when the respondents- allottees stepped into the shoes of the original allottee as per the judgment of the Hon'ble Supreme Court in case of M/s Laureate Buildwell Private Ltd (Supra).

26. The relevant part of the above said judgment of the Hon'ble Supreme Court of India is reproduced as below:-

"31. In view of these considerations, this court is of the opinion that the per se bar to the relief of interest on refund, enunciated by the decision in Raje Ram (supra) which was applied in Wg. Commander Arifur Rehman (supra) cannot be considered good law. The nature and extent of relief, to which a subsequent purchaser can be entitled to, would be fact dependent. However, it cannot be said that a subsequent purchaser who steps into the shoes of an original allottee of a housing project in which the builder has not honoured its commitment to deliver the flat within a stipulated time, cannot expect any – even reasonable time, for the performance of the builder's obligation. Such a conclusion would be arbitrary, given that there may be a large number- possibly thousands of flat buyers, waiting for their promised flats or residences; they surely would be entitled to all reliefs under the Act. In such case, a purchaser who no doubt enters the picture later surely belongs to the same class. Further, the purchaser agrees to buy the flat with a reasonable expectation that delivery of possession would be in accordance within the bounds of the delayed timeline that he has knowledge of, at the time of purchase of the flat. Therefore, in the event the purchaser claims refund, on an assessment that he too can (like the original allottee) no longer wait, and face intolerable burdens, the equities would have to be moulded. It would no doubt be fair to assume that the purchaser had knowledge of the delay.

> *However, to attribute knowledge that such delay would continue indefinitely, based on an a priori assumption, would not be justified. The equities, in the opinion of this court, can properly be moulded by directing refund of the principal amounts, with interest @ 9% per annum from the date the builder acquired knowledge of the transfer, or acknowledged it."*

27. In the present case, the respondents-allottees had purchased the unit after the due date of handing over of the possession i.e. 01.03.2011, therefore, from the ratio of the above said law laid down in M/s Laureate Buildwell Private Ltd (Supra), it is held that since the respondents-allottees had stepped into shoes of the original allottee after the expiry of due date of handing over of the possession, therefore, respondents-allottees are entitled for delayed possession charges w.e.f the date of entering into the shoes of the original allottee vide nomination letter dated 13.04.2017 issued by the appellant.

28. The further arguments of the appellant is that the interest at the prescribed rate on the payments which has been made by the respondents-allottees after they have stepped into shoes of the original allottee i.e. 13.04.2017, shall be payable from the date on which the respective payments have been made. It is clarified that the payments made by the respondents-allottees after 13.04.2017 when they stepped into the shoes of the original allottee shall be from the date, the

respective payments have been made by the respondents-allottes to the appellant-promoter.

29. The further argument of the appellant is that the respondents-allottees had not made the payments on time and therefore, shall also be liable to pay interest, on the due payments which have been delayed by the respondents-allottees, at the same rate as is being granted to the respondents-allottees in case of delayed possession charges. This argument of the appellant is as per the definition of interest given in the act and therefore is correct. The appellant promoter is entitled to charge the interest at the same rate on the delayed payments as has been awarded to the respondents allottees as delayed possession charges.

30. The appellant has raised the issue of the jurisdiction of the learned authority and some other technical grounds in the grounds of appeal. However, the appellant has not pressed these pleas on account of the Judgment of Hon'ble Apex Court in the case M/s New Tech Promoters and Developers Pvt. Ltd. v. State of UP & others 2021 SCC online SC 1044. So, those issues are not being discussed here.

31. No other issue was pressed before us.

32. Thus, keeping in view of our above discussion, the present appeal is partly allowed as per the aforesaid observations.

33. The amount of Rs.1,01,61,126/- 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.

34. No order as to costs.

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

36. File be consigned to the record.

Announced:
December 19, 2022

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

Anil Kumar Gupta
Member (Technical)

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