BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.1392 of 2019

Date of Decision: 04.01.2023

1. Abhishek Agarwal

2. Monal Agarwal

Both Residents of D-39, Gate No.4, Freedom Fighter Enclave, Saket, Delhi-110068.

Appellants

Versus

M/s Cosmos Infra Engineering India Private Limited, 5A, C,D, 5th Floor, Vandhna Building, 11 Tolstoy Marg, New Delhi-110001.

Respondent

CORAM:

Shri Inderjeet Mehta, Member (Judicial)
Shri Anil Kumar Gupta, Member (Technical)

Argued by: Shri Vineet Sehgal, Advocate, learned Counsel for the appellants.

Shri Gaurav Chopra, Learned Senior Advocate, assisted by Shri Rishab Bajaj, Advocate and Shri Vardhan Seth, Advocate, learned counsel for the respondent.

O R D E R:

INDERJEET MEHTA, MEMBER (JUDICIAL):

Feeling aggrieved by the order dated 10.04.2019, handed down by the learned Haryana Real Estate Regulatory

Authority, Gurugram, (hereinafter called 'the Authority'), in Complaint No.1834 of 2018, titled "Abhishek Agarwal and Anr. Vs. M/s Cosmos Infra Engineering India Private Limited", vide which, the complaint preferred by the appellants seeking refund of the deposited amount was not allowed, and instead they were granted the relief of possession along with interest on delayed possession, they have chosen to prefer the present appeal under Section 44(2) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act').

2. As back as in the year, 2011, in response to the advertisement by the respondent/promoter regarding its upcoming project "COSMOS EXPRESS 99" in Sector-99, Gurugram, the appellants had booked a flat in the same by paying an amount of Rs.2,00,000/- as registration of booking and the same was acknowledged by the respondent/promoter. Thereafter, the appellants further deposited an amount of Rs.1,70,000/- to the promoter in April, 2011. A 'Flat Buyer's Agreement' was executed between the parties on 07.02.2012 (for brevity 'FBA'). Out of the total sale consideration or Rs.50,10,000/-, the appellants had deposited an amount of Rs.40,24,441/-. As per Clause 1(B) of the FBA, the license of the promoter was valid up to 21.07.2015, so, completion/possession was to be made on or before

21.07.2015. Since, without any justifiable cause, the respondent/promoter did not hand over the possession to the appellants/allottees on the due date of possession i.e. 21.07.2015, so, having no other option, the appellants/allottees knocked the door of the learned Authority by way of filing a complaint on 04.12.2018, claiming the relief of refund of the deposited amount.

3. Upon notice, the respondent/promoter in its reply has resisted the complaint on the ground of suppression of material facts. Further, it has been alleged that the appellants did not make the payment of the allotted flat as per the schedule despite numerous notices and reminders. It has been denied that the respondent/promoter was to hand over the possession of the unit on or before 21.07.2015, as alleged in the complaint. In fact, as per Clause 3.1 of the FBA, the possession of the flat was to be handed over to the appellants/allottees within a period of four years from the date of execution of the FBA plus six months grace period. The respondent/promoter while denying all other allegations made in the complaint, prayed for dismissal of the same.

4. After hearing the appellants and learned counsel for the respondents and appreciating the material on the record, the learned Authority disposed of the complaint filed by the

appellants/allottees vide impugned order dated 10.04.2019 and the relevant observations are as follows:-

> *"44. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issued the following direction to the buyer in the interest of justice and fair play:*
>
> *i. The respondent is directed to pay interest at the prescribed rate of 10.70% per annum on the amount deposited by the complainants with the promoter on the due date of possession i.e. 07.08.2016 up to the date of offer of possession.*
>
> *ii. The arrears of interest so accrued @ 10.70% p.a. so far shall be paid to the complainants within 90 days from the date of this order. Thereafter, the monthly payment of interest till handing over of the possession so accrued shall be paid before 10th of every subsequent month.*
>
> *iii. Complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.*
>
> *iv. The respondent is directed not charge anything from the complainants which is not part of the BBA.*
>
> *v. The respondent is directed that interest on the due payments from the complainants*

shall be charged at the prescribed rate of interest i.e. 10.70% by the promoter which is the same as is being granted to the complainant in case of delayed possession.

45. *Since the project is not registered, notice under section 59 of the Real Estate (Regulation and Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to issue show cause notice to the builder-respondent under the Act to show cause as to why a penalty of 10% of the cost of the project may not be imposed. A copy of this order be endorsed to registration branch for further action in the matter.*

46. *The order is pronounced.*

47. *Case file be consigned to the registry. Copy of this order be endorsed to the registration branch."*

5. Hence, the present appeal.

6. Learned counsel for the appellants has contended that the flat in question was allotted to the allottees on 15.02.2011. The FBA was executed on 07.02.2012. Out of the total sale consideration of Rs.50,10,000/-, the allottees had already paid an amount of Rs.40,24,441/-. The due date of delivery of possession by adding six months grace period was

07.08.2016, but the promoter failed to deliver the possession of the unit as per terms and conditions of the FBA. So, the allottees have become entitled for refund of the entire amount deposited by them along with interest at the prescribed rate. In support of his contention, he relied upon case ***M/s Newtech Promoters & Developers Pvt. Ltd. vs. State of UP & Ors. Etc. 2022(1) R.C.R. (Civil) 357.***

7. On the other hand, learned Senior Counsel for the promoter, while drawing the attention of this Tribunal towards the last sentence of para no.54 of ***M/s Newtech Promoters'*** case (Supra), which is as follows:-

> *"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."*

has contended that the Act would apply to on-going projects, and future projects, after they are registered under Section 3 of the Act and that projects which are currently not registered with the Authority, would not be within the purview of the Act till they are registered. Further, it has been submitted that since the project COSMOS EXPRESS 99, in which the allotted unit of the appellants is situated was registered on 14.10.2019, so, the said project was not within the ambit of the Act at the time of institution of the complaint on

04.12.2018 before the learned Authority. Thus, the present appeal deserves to be dismissed and consequently the complaint preferred by the appellants/allottees before the learned Authority also deserves to be dismissed.

8. We have duly considered the aforesaid contentions.

9. First of all, let the admitted facts be taken note of. Admittedly, the appellants/allottees by way of filing a complaint have claimed the refund of the entire amount deposited by them along with interest. However, the learned Authority by way of impugned order has declined the relief of refund and ordered for taking possession along with interest on delayed possession. The allottees had booked a flat with the promoter on 15.02.2011. Clause 3.1 of the FBA dated 07.02.2012, provides that the possession is to be delivered within a period of four years of the start of construction or execution of this agreement, whichever is later, plus six months grace period. So, the due date of delivery of possession was 07.08.2016 and as per the terms and conditions of the 'Flat Buyer's Agreement', the respondent/promoter was required to deliver the possession by 07.08.2016. The appellants/allottees had approached the learned Authority by way of filing a complaint on 04.12.2018 i.e. after 2 years 4 months of due date of possession. Even on

10.04.2019, when the impugned order was handed down, as mentioned in para no.39 of the impugned order as per the report dated 09.04.2019 of the Local Commissioner, the physical progress of the tower 'D', in which the unit of the allottees is located, was approximately 60% and the possession of the unit could not have been delivered.

10. It is settled proposition of law that the ordinary rule of civil law is that the rights of the parties stand crystallised on the date of institution of the suit and, therefore decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. So, we are to see the status of the parties as on the date of registration of the complaint filed by the allottees i.e. on 04.12.2018. By that time, as referred above, the project was not complete. The deemed date for delivery of possession was 07.08.2016 and there was delay of more than two years and four months. So the rights of the allottees to claim refund had already crystallised on the date of filing of the complaint.

11. In the latest judgment ***M/s Newtech Promoters & Developers Pvt. Ltd. vs. State of UP & Ors. Etc.*** (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 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."*

12. 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 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 07.08.2016 the stipulated date as per the buyer's agreement dated 07.02.2012.

13. The submission of the learned Senior Counsel for the respondent that the Act would apply to on-going projects, and future projects, after they are registered under Section 3 of the Act and that projects which are currently not registered with the Authority, would not be within the purview of the Act till they are registered, is not only without any substance but is also misconceived. The Hon'ble Supreme Court in ***M/s Newtech Promoters & Developers Pvt. Ltd. vs. State of UP & Ors. Etc.*** (Supra), while dealing with the issue concerning the retroactive application of the provisions of the Act, 2016, particularly, with reference to the on-going projects, has dealt with the same elaborately and the said ratio can be condensed as follows:-

> *"The Act is intended to comply even to the ongoing real estate projects. All "ongoing projects" that commenced prior to the Act and in respect to which completion certificate had not been issued are covered under the Act. It*

manifests that the legislative intent is to make the Act applicable not only to the projects which were yet to commence after the Act became operational but also to bring under its fold the ongoing projects. If the Act is held prospective, then the adjudicatory mechanism under Section 31 would not be available to any of the allottee for an ongoing project. At the given time, there was no law regulating the real estate sector, development works/obligations of promoter and allottee, it was badly felt that such of the ongoing projects to which completion certificate had not been issued, must be brought within the fold of the Act, 2016 in securing the interests of allottees, promoters, real estate agents in its best possible way obviously, within the parameters of law. Merely because enactment as prayed is made retroactive in its operation, it cannot be said to be either violative of Articles 14 or 19(1)(g) of the Constitution of India."

14. From these aforesaid observations of the Hon'ble Supreme Court, by no stretch of imagination it can be construed that the Act is not applicable to the unregistered projects. In fact, without any distinction between the registered and un-registered projects, the Hon'ble Supreme Court has explicitly laid down that all "ongoing projects" that commenced prior to the Act and in respect of which

completion certificate has not been issued, fall within the purview of the Act. Thus, the aforesaid submission of learned Senior Counsel for the respondent cannot be attached any legal credence. Rather, the acceptance of aforesaid submissions of learned Senior Advocate would provide immunity not only to the promoters of ongoing unregistered projects, from the applicability of the Act, but also to unscrupulous promoters of future projects, who may be enticed by such interpretation not to get their upcoming projects registered as per provisions under Section 3 of the Act.

15. Admittedly, at the time of institution of the complaint on 04.12.2018, and at the time of handing down of the impugned order dated 10.04.2019, the project 'COSMOS EXPRESS 99', in which the unit of the appellants is situated, was an ongoing project regarding which completion certificate had not been issued and thus it was within the purview of the Act, and for the decision of the present appeal, it is of no relevance that the said project was got registered by the respondent/promoter on 14.10.2019.

16. Thus, keeping in view our aforesaid discussion, the impugned order dated 10.04.2019 passed by the learned Authority is not sustainable. Consequently, the present

appeal filed by the allottees is hereby allowed, the impugned order dated 10.04.2019 is set aside. The appellants/allottees are entitled for refund of the entire amount paid by them i.e. Rs.40,24,441/- along with interest at the prescribed rate prevailing as on today, i.e. @ 10.6% per annum (SBI highest+MCLR+2%), 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 made by the allottees to the respondent/promoter, till the date of realization.

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

18. File be consigned to the record.

Announced:
January 04, 2023

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

Anil Kumar Gupta
Member (Technical)

CL