BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.363 of 2021

Date of Decision: 18.01.2023

Ireo Private Limited, Registered Office at: Ireo Compaus, Archview Drive, Ireo City, Gold Curse Extension Road, Gurugram-122101.

Appellant

Versus

Mr. Ashok Jaipuria son of late Shri Sita Ram Jaipauaria, House No.1/27, Shanti Niketan, New Delhi-110021.

Respondent

CORAM:

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

Argued by: Shri Shekhar Verma, Advocate, ld. Counsel for the appellant.

Ms. Remya Ranold, Advocate, ld. Counsel for the respondent.

O R D E R:

INDERJEET MEHTA, MEMBER (JUDICIAL):

Feeling aggrieved by the order dated 27.11.2018, handed down by the learned Haryana Real Estate Regulatory Authority, Gurugram, (hereinafter called 'the Authority'), in Complaint No.326 of 2018, titled "Mr. Ashok Jaipuria Vs. M/s Ireo Private Limited", vide which, the complaint preferred by

the respondent-allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act') for refund of the deposited amount was not allowed and the learned Authority granted the relief of interest on delayed possession, the appellant/promoter has chosen to prefer the present appeal under Section 44(2) of the Act.

2. The respondent/allottee in a project namely "Ireo Gurugram Hills" launched by the appellant/promoter, moved an application dated 12.07.2012, for booking of 4 BHK apartment having super area of 6388 sq. ft. bearing no.B 18-41, 17th floor, Tower no.B, Sector-2, Gwal Pahari, Gurugram, and paid a cheque of Rs.45,00,000/- towards booking amount. The receipt of the said amount of Rs.45,00,000/- was acknowledged by the appellant/promoter, vide letter dated 14.08.2012. Thereafter, an allotment letter dated 22.08.2012 was issued in favour of the respondent/allottee. Subsequently, an 'Apartment Buyer's Agreement' (for brevity 'the agreement') was entered into between the parties on 26.10.2012. During the period 2012-2017, as per the payment schedule, the respondent/allottee deposited an amount of Rs.5,16,34,616/- through various cheques and the receipt of the said amount was also acknowledged by the appellant/promoter.

3. The respondent/allottee also alleged that since the construction was not being carried out and the possession had not been handed over in May, 2017, within the stipulated time of 60 months (with grace period) from the date of approval of the building plan in May, 2012, so, the respondent/allottee terminated the agreement vide letter dated 08.01.2018 and requested the appellant/promoter to refund the entire amount along with compensation and interest. Thereafter, the respondent/allottee also sent a legal notice dated 08.02.2018 to the appellant/promoter seeking refund of the entire amount along with interest and compensation. The said legal notice dated 08.02.2018, was responded to by the appellant/promoter by sending a reply dated 19.02.2018 denying its liability and alleged that period of 60 months (with grace period) was to be computed from 26.12.2013 and not from May,2012. A rejoinder to said reply was sent by the respondent/allottee on 28.02.2018. Since, the appellant/promoter could not carry out the construction activities within the stipulated period and a period of six years had elapsed after the apartment had been booked, so, having no other option, the respondent/allottee preferred a complaint seeking relief of refund of deposited amount as well as compensation to the tune of Rs.25,00,000/- for loss suffered

by him due to deficiency in service, and another compensation to the tune of Rs.10,00,000/- for indulging in unfair trade practice.

4. Upon notice, the appellant/promoter filed the reply before the learned Authority. However, as the said reply was not available on the record, so, vide order dated 09.01.2023, the appellant/promoter was directed to place the reply on the file, which was placed by the appellant on 10.01.2023 and is taken on record.

5. While filing reply, the appellant/promoter has resisted the complaint on the ground of estoppel, locus standi, cause of action and suppression of material facts. On merits, the appellant/promoter has taken the stand that according to the booking application form and the agreement, the time period for offering the possession of the unit to the respondent/allottee has not yet elapsed and the complaint preferred by the respondent/allottee is premature. Even otherwise, as per Clause 23 of the agreement, the respondent/allottee has a limited right to cancel the allotment i.e. only in case of clear and unambiguous failure of the appellant/promoter. In fact, the appellant/promoter has already completed the construction of the unit allotted to the

respondent/allottee prior to the date of offering possession and had applied for the grant of Occupation Certificate on 24.09.2018. Further, it has been alleged that the learned Authority is not vested with the jurisdiction to decide the compensation and interest, as claimed by the respondent/allottee and in fact, the respondent/allottee should have approached the learned Adjudicating Officer of the learned Authority to claim such compensation. While denying all other allegations of the complaint, the appellant/promoter has alleged that the respondent/allottee is neither entitled to the refund of the deposited amount nor any compensation and also prayed for the dismissal of the complaint.

6. The respondent/allottee also filed rejoinder denying the stand taken by the appellant/promoter in its reply and reiterated the allegations of the complaint preferred by him.

7. After hearing the learned counsel for the parties and appreciating the material on the record, the learned Authority disposed of the complaint filed by the respondent/allottee vide impugned order dated 27.11.2018, issuing directions as follows:-

"i. The respondent shall pay interest @ 10.75% p.a. on the paid amount of Rs.5,16,34,616/- to the complainant as delayed possession charges as per the provision of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 from due date of delivery of possession i.e. 21.08.2017 till actual handing over of possession, failing which the complainant is entitled to withdraw from the project.

ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of issuance of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10th of subsequent month. Amount, if any, due from the complainant may be adjusted mutually."

8. Hence, the present appeal.

9. Along with the present appeal, an application under Section 5 of the Limitation Act, 1963 read with Section 44 of the Act, for condonation of delay of 682 days has been preferred by the appellant, which is duly supported with an affidavit of Shri Vinod Kumar, an authorised representative of the appellant.

10. As per the contents of the said application, the impugned order was passed on 27.11.2018, which was corrected vide order dated 05.07.2019, and it was uploaded on

08.07.2019. Thereafter, the appellant made efforts to arrange the pre-deposit amount as awarded by the learned Authority, so as to comply with the proviso to Section 43(5) of the Act. Further, it is alleged that in the meantime due to pandemic situation caused by COVID-19, on 24.03.2020, a nationwide lockdown was imposed by the Government of India and accordingly the functioning of the appellant company was also crippled and thus it could not take steps to file the present appeal. Further, it has been alleged that since the appellant has a very good case and is sanguine of acceptance of appeal, so, the present application maybe accepted.

11. Though, complete copy of the paper book as well as copy of the application for condonation of delay preferred by the appellant was supplied to the learned counsel for the respondent, but, in spite of availing two opportunities for filing the reply, no response was filed on behalf of the respondent/allottee.

12. Vide impugned order, the learned Authority has directed the appellant to pay interest @ 10.75% per annum on the amount deposited by the respondent/allottee w.e.f. 21.08.2017 till actual handing over of the possession. So, the appellant was required to pay huge sum on account of delayed

possession charges. In order to get its appeal entertained, the appellant/promoter has deposited a sum of Rs.2,18,00,000/- with this Tribunal. The said amount has been deposited by the appellant to get its appeal entertained. The deposit of such a substantial amount itself shows the bona fide on the part of the appellant. As the appellant was directed to pay the huge sum on account of interest on delayed possession, it was not going to gain anything by filing the belated appeal. The amount payable to the respondent/allottee, as per the impugned order, has already been deposited with this Tribunal by the appellant. So, the respondent/allottee is not going to suffer any prejudice if the delay is condoned and the appeal is heard on merits, specifically when no response to the application for condonation of delay, which is duly supported with an affidavit of the authorised representative of the appellant, has been filed by the respondent/allottee.

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

14. Initiating the arguments, learned counsel for the appellant while referring to clauses 14.3., 14.4 and 14.5 of the agreement, has submitted that the appellant was obligated to deliver the possession of the apartment within 42 months from the date of building plan and/or fulfillment of pre-conditions

imposed thereunder subject to the performance on his part by the allottee, including completion of internal/interior work as per the terms of the agreement. The parties had also agreed under clause 14.3 that a grace period of six months would be provided to the appellant for any unforeseen delay, and as per clause 14.5 of the agreement, a period of 12 months at the end of grace period in the event of delay by the appellant in offering possession of the apartment would also be provided. Further, it has been contended that since no construction could have been commenced, on mere approval of the building plan, the period in the instant case is to be computed from the date of fire NOC i.e. 26.12.2013 and not from the date of either approval of site plan i.e. 17.05.2012 or the date of the consent to establish i.e. 26.07.2013. Reliance has been placed upon citation ***Ireo Grace Realtech Pvt. Ltd. Versus Abhishek Khanna & Others, (2021) 3 SCC 241***.

15. Further, while drawing attention of this Tribunal towards recital 'E' and 'H' as well as clause 13.1 and 13.3 of the agreement, it has been submitted that the project "Ireo Gurugram Hills" launched by the appellant is a distinct project as the apartments were to be handed over to the allottees in a bare-shell condition and thereafter it was incumbent on the part of the allottees to finish the interior work within a span of

nine months from the date of grant of permission for interior works, failing which the allottees were obligated to pay compensation on account of default and delay in finishing the interior work. Further, it has been submitted that the respondent/allottee failed to submit a single drawing from amongst various requirements for this purpose despite multiple opportunities given to him to come forward and complete the internal/interior work. Since, the respondent/allottee as per the contractual obligations failed to carry out the internal/interior work, so, he is not entitled to any relief.

16. Per contra, learned counsel for the respondent/allottee has submitted that the appellant/promoter had got approval of the building plan from Directorate Town and Country Planning (DTCP) on 17.05.2012, and within the stipulated period of 60 months (including grace period) from the date of approval of the building plan, the possession was to be handed over to the respondent/allottee in May, 2017. Further, it has been submitted that since on or before May, 2017, the possession of the unit was not handed over, so, the respondent/allottee rightly terminated the agreement vide letter dated 08.01.2018. Further, it has been submitted that even otherwise the

appellant/promoter did not inform the respondent/allottee regarding fulfillment of pre-conditions under the building plan, when it raised the demand under the 'Construction Linked Payment Plan' and accepted the payment thereunder. Further, it has been submitted that no "Occupation Certificate" was obtained and project was delayed, and thus, the respondent/allottee is entitled to the refund of the deposited amount along with interest at the prescribed rate.

17. For the proper appreciation of the rival submissions made by learned counsel for the parties, first of all, let us have a thorough look at clauses 14.3, 14.4 and 14.5 of the agreement, which are as follows:-

> *"14.3 Subject to Force Majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer*

the possession of the said Apartment to the Allottee within a period of 42 months from the date of approval of the Building Plans and/or fulfillment of the preconditions imposed thereunder ("Commitment Period"). The Allottee further agrees and understands that the Company shall additionally be entitled to a period of 180 days ("Grace Period"), after the expiry of the said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company.

14.4 Subject to Clause 14.3, if the Company fails to offer possession of the said Apartment to the Allottee by the end of the Grace Period, it shall be liable to pay to the Allottee compensation calculated at the rate of Rs.10 (Rupees Ten only) per sq. ft. of the Super Area ("Delay Compensation") for every month of delay until the actual date fixed by the Company for handing over of possession of the said Apartment to the Allottee. The Allottee shall be entitled to payment/adjustment against such 'Delay Compensation' only at the time of 'Notice of Possession' or at the time of payment of the final installment, whichever is earlier.

14.5 Subject to Clause 14.3, in the event of delay by the Company in offering the possession of the said Apartment beyond a period of 12 months from the end of the Grace Period (such 12-month period hereinafter referred to as the "Extended Delay Period") then the Allottee shall become entitled to opt for termination of the Allotment/Agreement and refund of the actual paid up installment(s) paid by it against the said Apartment after adjusting the interest on delayed payments along with Delay Compensation for 12 months. Such refund shall be made by the Company within 90 days of receipt of intimation to this effect from the Allottee, without any interest thereon. For the removal of doubt, it is clarified that the Delay Compensation payable to the Allottee who is validly opting for termination, shall be limited to and calculated for the fixed period of 12 months only irrespective of the date on which the Allottee actually exercised the option for termination. This option may be exercised by the Allottee only up till dispatch of the Notice of Possession by the Company to the Allottee whereupon the said option shall be deemed to have irrevocably lapsed. No other claim, whatsoever, monetary or otherwise shall

lie against the Company and/or the Confirming Party nor be raised otherwise or in any other manner by the Allottee."

18. Undisputedly, as per the citation ***Abhishek Khanna & Others'*** case (Supra), the date for handing over the possession of the apartment/unit ought to have been calculated from the date of grant of fire NOC and not from the date of consent to establish. The fire NOC in the present case was granted on 26.12.2013, as has been placed by the appellant/promoter along with its reply before the learned Authority. Thus, the due date of possession of the apartment on a cumulative reading of aforesaid clauses 14.3, 14.4 and 14.5 shall be 26.12.2018 subject to due performance/obligations to timely completion of internal/interior work by the allottees as per the agreement. There is no dispute regarding this stipulated time of 60 months (with grace period), because in para no.8 of the complaint, the respondent/allottee himself has pleaded that the possession was to be handed over in May, 2017, i.e. within the stipulated period of 60 months from the date of approval of the building plan in May,2012. Since, the due date of possession is established to be 26.12.2018, so, termination of the agreement by the respondent/allottee vide letter dated

08.01.2018 as well as filing of the complaint before the learned Authority on 22.05.2018, are proved to be premature.

19. Regarding the submission of the learned counsel for the respondent/allottee that the appellant/promoter should have made the respondent/allottee aware about such conditions of the building plan, it is suffice to say that as per recital 'F' and Clause 29 of the agreement, the respondent/allottee had inspected all the relevant documents and had undertaken due diligence before signing the agreement. The fact that the respondent/allottee had access to such documents, because of which he could conduct his requisite due diligence, shows that the appellant/promoter was transparent with the respondent/allottee and did not misrepresent any information, coupled with the fact that the respondent/allottee did not raise any objection in this regard at any given time. In fact, before entering into the agreement, the respondent/allottee had every opportunity to raise the issue of precondition under the building plan which was approved on 17.05.2012 and the respondent/allottee at this belated stage cannot raise issue about the pre-condition under the building plan approved by the competent authority.

20. As per the submissions of learned counsel for the appellant, the respondent/allottee was well aware that he was obligated to undertake and complete internal/interior works and the appellant/promoter's obligation was to hand over the unit in a "bare-shell condition". Since, despite reminders and updates, the respondent/allottee failed to undertake much less complete the internal/interior works and aggrieved by said failure, the appellant/promoter was constrained to complete the minimum requirement so as to move an application on 24.09.2018 for grant of 'Occupation Certificate', after fulfilling the minimum requirements as prescribed.

21. At this stage, first of all, let us have a look at recital 'E' and 'H' as well as clauses 13.1 and 13.3 of the agreement, which are as follows:-

> *"E. The Confirming Party has separately vested the Company with the complete authority and appropriate powers inter alia to undertake on its behalf marketing, sale and administration of all the constructed units comprising Ireo Gurgaon Hills project including the interest agreed to be transferred hereunder and also to act under and enforce this Agreement on its behalf and in its name as and whenever required. The Company is also fully authorised by the Confirming Party to receive applications*

for allotment of the residential apartments in bare shell condition and to impose conditions, make allotments and otherwise to deal with, negotiate, finalize, sign and execute the sale agreements, conveyance deeds and all such incidental documents, as may be reasonably necessary to give effect to this Agreement, and also to receive the sale consideration and other charges or dues as stated in this Agreement from the purchasers/allottees and to give valid receipts thereof in its own name, and otherwise to do all such acts, deeds or things, as may be deemed necessary by the Company in its sole discretion, to give effect to this Agreement."

"H. The Allottee, after fully satisfying itself with respect to the right, title and interest of the Confirming Party in the said Land, the approvals and sanctions for Ireo Gurgaon Hills project in favour of the Confirming Party as well as the designs, specifications and suitability of the proposed construction, has applied to the Company vide application dated 16-Aug-23 ("Application") for allotment of unfinished residential apartment no. B18-41 on 17 floor B tower having a Super Area of 6388.05 sq. ft., or thereabouts approximately in bare shell condition, together with the exclusive right to use 3 nos. Parking Spaces, which shall form an indivisible part thereof (hereinafter collectively referred to as the "Apartment"). The Apartment

shall be in accordance with the specifications enumerated in Annexure-I hereto."

"13.1 Subject to the Allottee having fulfilled all its obligations under this Agreement, the Company shall permit the Allottee to carry out interior works in the said Apartment prior to handing over the possession of the said Apartment. However, such permission shall not be construed as, and in no way entitle the Allottee to have any right, interest or title whatsoever, in respect of the said Apartment."

"13.3 The Allottee shall complete the interior works in the said Apartment within a period of 9 months from the date of grant of permission for interior works, failing which the Allottee shall pay to the Company as penalty Rs.25/- per sq. ft. per month for 0-3 Month, Rs.40/- per sq. ft. per month for 3-6 Month & Rs.50/- per sq. ft. per month more than 6 month, for the period of delay. In the event of delay in completion of interior works beyond a period of 12 months from the date of expiry of the aforesaid period, the Company shall be entitled to cancel the allotment and terminate this Agreement. The Allottee further agrees that in the event of such termination of this Agreement, the Company shall not be responsible or liable to reimburse or refund any cost and expenses incurred by the Allottee in carrying out the interior works in the

said Apartment and the Allottee shall not raise any dispute or claim in this regard."

22. A bare perusal of the aforesaid clauses shows that the appellant had to provide the apartment to the respondent/allottee in "bare-shell condition" and the respondent was obligated to carry out the interior works in the said apartment prior to handing over of the possession of the apartment. Clause 13.3 of the agreement lays down that the respondent/allottee was required to complete the interior works within nine months from the date of grant of permission to carry out the said works, failing which, the respondent/allottee would be liable to pay certain costs to the appellant on a monthly basis for the delayed period.

23. Learned counsel for the appellant has drawn the attention of this Tribunal towards an order dated14.10.2022 handed down by the Hon'ble National Company Law Tribunal, New Delhi (for brevity 'NCLT') in ***Company Petition No.IB-239/ND/2021, titled 'Amrit Kumar Sinha and others vs. IREO Private Limited"***, whereby the Hon'ble NCLT, during the pendency of the present appeal, on 14.10.2022, had dismissed the petition filed by various allottees (including the respondent/allottee) of the same project of the appellant under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for

brevity 'the Code'). Similar stand, as has been taken by the respondent/allottee in the present case, had been taken before the Hon'ble NCLT. However, the said petition preferred by the respondent/allottee and other allottees under Section 7 of the Code, was dismissed with the following relevant observations:-

> *"30. From the bare perusal of the above said order, it is apparent that vide order dated 27.09.2017 which was passed by the DTCP in compliance to the order passed in CWP No.4475 of 2017, it was clearly laid down that, Applicants were allotted bare-shell apartment in the project as per the brochure, whereas the detailed plans have been approved. Accordingly, DTCP held the issues as bilateral between two parties as per the contract agreement in between. Further, it is also specifically stated in the said order that there is no challenge on the technical ground, hence issue raised is not considered maintainable as far as he Department of Town & Country Planning is concerned. It is also laid down that the complainant agreed and insisted that bare-shell apartment be given and accordingly, accepted to that extent. It is the matter of consent. Thus, it is established on the record that the applicant herein voluntarily*

agreed to have a bare-shell apartment. Further, the DTCP in the same order also noted that at the time of hearing that matter the construction of concrete walls columns was not in violation of building by-laws and if there is any deviation from the approved building plan, if covered under composition clause that can be compounded for grant of occupation certificate. Hence, the said objection was also not held to be technically tenable on the technical grounds. In the same order, it is also specifically mentioned that the revised building plans were approved on 26.10.2017 and the same was valid up to 25.10.2022, whereas the building plan of EWS block and convenient shopping was up to 25.10.2019, as the height of the same was less than 15 mtrs. It is further laid down that the Respondent/Corporate Debtor had applied for Occupation Certificate on 24.09.2018 with respect to Towers A,B,C & D, EWS Block, Convenient Shopping and Basement under the tower falling on GH Scheme measuring 15.5 acres approximately."

"32. Further, even in the month of August 2019, repeatedly, the reminders have been sent on behalf of the Respondent/Corporate Debtor to the

allottees to complete the internal finishing. Despite repeated reminders on the part of the Respondent/Corporate Debtor to the allotees to perform their part of agreement i.e., to complete the interior work of the apartments. Even, DTCP, vide order dated 22.08.2021 have also mentioned in the order that the same has not been undertaken by the applicants and the OC can be granted subject to only 3 conditions i.e., (i) renewal of licenses, (ii) revalidation of building plan and (iii) submission of report from HVPNL and also to complete the internal work by the allottees as per the contract. It is matter of common parlance that "completion certificate" cannot be given unless all these internal work and other requisite condition are not being fulfilled. "In-principle" OC issued by DTCP Haryana, certifies that the most of the work by the Respondent/Corporate Debtor has been completed and the situation goes back to 22.02.2017, which stands authenticated by the report of the Architect (HQ), "Occupancy Certificate" means that the building is complete in all respect and the Occupancy Certificate can be given only when the entire building including the entire work is completed and the apartment has become habitable. Unless the internal work has not been

done in the bare-shell units as per the building plan approved by the DTCP, OC cannot be issued. From the website, it is also revealed that most of the apartments in the Gurgaon are being occupied by the residents without obtaining in the occupancy certificate and approximately, notice to 17 builders have been given, where the residents are residing in the apartments, although the occupancy certificate has not been issued by the DTCP, Haryana. If there is a default qua obtaining occupancy certificate, the penalty can be imposed as per rules but the resident cannot be thrown out. Thus, it is established that the bare-shell apartments were already completed by February 2017 and the requests were continuously made on behalf of the Respondent/Corporate Debtor to the allottees to complete their part by finishing their interior work. Therefore, the applicant/allottees, who failed to complete their part of obligations of the ABA since 2017, cannot shift the responsibility upon the shoulders of the respondent and are accordingly, stopped to take benefits of their own wrong doings. Once the applicants have not performed their part of agreement, then they cannot allege that the respondent had not completed its job.

In this context, certain photographs are placed on record, not only on behalf of the Respondent, but also six applicants (who were later-on impleaded as Applicants No.31 to 36, which are as under:- "

"38. Ld. Counsel for the applicant relied upon citation Amit Katyal Vs. Meera Ahuja, 2020 SCC Online NCLT 748 and contended that even if, OC has been granted during the pendency of the application under Section 7 of the Code, the CIR proceedings can be initiated against the developer. In this context, it is to be mentioned that the said mater of Amit Katyal (Supra) has gone up to the Hon'ble Supreme Court of India, where the same was settled between the parties. Moreover, the facts and circumstances of the said matter are totally different from the matter in hand, as the applicants herein have to perform their part of obligation of doing interior work in the flats, which was not accordingly, performed by them, hence the applicant themselves are at fault, whereas the same was not so in the above said case. Apparently, there is a hidden motive of the applicants to get their money back by creating undue pressure upon the Respondent/Corporate Debtor to put it

under insolvency. The applicants herein are ***"Speculative investors"*** *because of the reason that this project meant for "**high class gentry**", who intend to invest huge amount of Rs.5 Crore (approx.), on a mere bare-shell apartment and further intended to do the interior work at their own cost. Actually, this project "Ireo Gurgaon Hills" is having premium apartments and is situated at Gurgaon-Faridabad Expressway "Gwal-Pharie", having a Spectacular classic view of the hilly & lush green area. These applicants actually purchased those apartments not to have a shelter on their head, but these flats were actually booked as '**Holiday Homez**', therefore such like allottees could not be classified as '**genuine home-buyers**'. Thus, the applicants herein are speculative investors, who just invested their amounts in the project to earn profits later-on or to enjoy the posh locality. Now, the applicants want to get their money back which further shows their conduct that they are least interested in getting the apartments and that is why they have not completed their own part of obligations as per the agreement and kept on sleeping over the same since February-2017 with ulterior motive. Accordingly, the*

applicants herein are stopped to allege that occupancy certificate/completion certificate has not been obtained by the Corporate Debtor. In fact, the Respondent/Corporate Debtor has been continuously making efforts to obtain the occupancy certificate since 2018. Even, this fact also stands corroborated from the "In-Principle OC" dated 20.08.2021. Thus, all sincere efforts were being made by the Respondent/Corporate Debtor since 2017 and DTCP, Haryana only submitted the report on 04.12.2019, which was also confirmed vide memo dated 27.11.2020. Apparently, this petition has been filed on 20.04.2021, whereas all the requisite formalities for obtaining the occupancy certificate were already completed by the Respondent/Corporate Debtor. In fact, the applicants themselves failed to perform their part of agreement despite repeated communications. Hence, the applicants/ allottees herein cannot take the benefit of their own wrong doings."

"40. In sequel of the above said discussion, this Tribunal is of affirm view that the applicants/allottees themselves are in default as they failed to complete their part of obligation of the Apartment-Buyer-Agreement, whereas the respondent/

corporate debtor had completed its part of obligations, therefore, the applicant/ allottees herein failed to make out the case under Section 7 of the Code for initiation of Corporate Insolvency Resolution Process proceedings against the Corporate Debtor."

24. From these aforesaid observations of the Hon'ble NCLT, this fact is clearly established that the respondent/allottee has not complied with his obligation under clause 13.1 and 13.3 of the agreement and consequently, he cannot be allowed to take advantage of his own wrong and cannot shift the burden of responsibility to the appellant. As per the communication dated 20.03.2017 (at page 261of the paper book), the appellant/promoter had asked the respondent/allottee to start the interior work in unit no.GH-B-18-41) allotted to him. In the said communication, it was specifically mentioned that a detailed letter, explaining the execution procedure and compliances, Do's and Don't and the drawings for apartment shall be provided, and the respondent/allottee was required to give an 'Undertaking' and 'Leave & License Agreement' to be duly executed and then the respondent/allottee would be allowed to take physical measurement for the apartment and start the interior works.

It was also communicated that all the dues have to be cleared before undertaking the physical measurement of the apartment to start the interior work. No response to this aforesaid communication was made by the respondent/allottee and ultimately vide letter dated 24.09.2018 (at page 262 of the paper book), the appellant/promoter applied to the Town and Country Planning Department, Chandigarh, for grant of Part Occupation Certificate for Towers A, B, C, D and other parts. Here, it is pertinent to mention that the allotted unit to the respondent/allottee is situated in Tower 'B'. Thus, it is explicit that in spite of the fact that no interior work was carried out by the respondent/allottee in his apartment, the appellant/promoter after doing the required work in the apartment, applied for grant of part occupation certificate by undertaking required construction in tower 'B' in which the apartment of the respondent/allottee is situated.

25. From the observations of the Hon'ble NCLT also in para no.32, this fact is clearly established that "In-principle" OC issued by DTCP Haryana, certifies that the most of the work by the appellant/promoter had been completed and the situation goes back to 22.02.2017, which stands authenticated by the report of the Architect (HQ). Further, in

the same paragraph no.32, it has been observed that it is established that the bare-shell apartments were already completed by February, 2017 and the requests were continuously made on behalf of the appellant/promoter to the allottees to complete their part by finishing their interior work. It was also specifically observed that the allottees who failed to complete their part of obligations of the agreement since 2017, cannot shift the responsibility upon the shoulders of the appellant and are accordingly, estopped to take benefits of their own wrongs. Thus, this fact is clearly established that the respondent/allottee has not complied with his obligations under Clause 13.1 and 13.3 of the agreement and cannot be allowed to take advantage of his own wrongs.

26. Further, as per clause 23 of the agreement, the respondent/allottee has been only conferred a limited right to cancel the allotment only in a case of clear and unambiguous failure of the appellant/promoter. Since there is absolutely nothing on record to suggest even remotely that the appellant/promoter has breached any clause of the agreement which obligated the appellant/promoter to perform its part of the agreement, so, the respondent/allottee, in the given facts and circumstances of the case, is not at all justified to terminate the agreement vide letter dated 08.01.2018.

Accordingly, we are of the view that the respondent/allottee is not entitled either to refund of the deposited amount or interest thereon, as the respondent/allottee himself is in breach of his obligation under the agreement.

27. Thus, as a consequence to the aforesaid discussion, we are of the considered view that the impugned order that the appellant/promoter is liable to pay interest @ 10.75% per annum on the paid amount of Rs.5,16,34,616/- to the respondent/allottee as delayed possession charges from the due date of delivery of possession i.e. 21.08.2017, till actual handing over the possession, is hereby set aside. However, we are alive to the situation that the respondent/allottee has paid an amount of Rs.5,16,34,616/- to the appellant/promoter regarding the allotted unit, and thus, we direct the respondent/allottee to take possession of the apartment on paying the balance sale consideration as per the terms and conditions of the agreement. It is well settled that the appellant is not entitled to the holding charges. Though, the appellant/promoter is entitled to maintenance charges as per stipulation 17 of the agreement, but, keeping in view the peculiar facts and circumstances of the present case, the appellant/promoter would not raise demand regarding this

aspect from the respondent/allottee. The appeal stands disposed of accordingly. No order as to costs.

28. The amount deposited by the appellant/promoter i.e. Rs.2,18,00,000/- with this Tribunal to comply with the proviso to Section 43(5) of the Real Estate (Regulation and Development) Act, 2016, along with interest accrued thereon, be sent to the learned Authority for disbursement to the appellant/promoter subject to tax liability, if any, as per law and rules.

29. The copy of this order be communicated to the parties/learned counsel for the parties and the learned Authority for compliance.

30. File be consigned to the record.

Announced:
January 18, 2023

CL

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

Anil Kumar Gupta
Member (Technical)