BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No. 621 of 2022
Date of Decision: 28.04.2023

SS Group Private Limited registered office at Plot No.77, Sector 44, Gurugram-122003 (Haryana).

Appellant/Promoter

Versus

1. Neeraj Gupta;
2. Kajal Gupta

   Both residents of House No.1634, Sector 10-A, Opp. Meenakshi Public School, Gurugram-122001 (Haryana).

Respondents/Allottees

CORAM:
Justice Rajan Gupta **Chairman**
Shri Anil Kumar Gupta **Member (Technical)**

Present: Shri Yashpal Sharma, Advocate,
for the appellant/promoter.

Shri Rishabh Jain, Advocate,
for the respondents/allottees.

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 10.05.2022 passed by the Haryana Real Estate Regulatory Authority, Gurugram (for short, 'the Authority') whereby the Complaint No.1414 of 2018 filed by the respondents/allottees was disposed of with the following directions:

> *i) The respondents/promoters are directed to refund the amount i.e. Rs.34,92,148/- received by them from the complainants along with interest at the rate of 9.40% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.*
>
> *ii) A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow."*

2. As per averments in the complaint, the respondents/allottees were allotted a flat bearing No.11D, 11th floor, T-3 measuring 1575 sq. ft., in the project being developed by the appellant/promoter, namely, "The Leaf" at Sector 63, Gurugram vide allotment letter dated

10.09.2012. The Builder Buyer's Agreement (for short, 'the Agreement') between the parties was executed on 04.10.2013. As per the said agreement the sale price of the unit is Rs.89,39,250/-. As per ledger account as being maintained by the appellant/promoter, the respondents/ allottees had paid an amount of Rs.34,92,148/- as on 18.09.2019. As per clause 8.1(a) of the agreement, the appellant/promoter was to handover the possession of the unit within a period of 36 months from the date of signing of the agreement. A further grace period of 90 days, after expiry of 36 months for applying and obtaining the Occupation Certificate is provided in the agreement.

3. The respondents-allottees have pleaded in the complaint that they started depositing various payments with the appellant/promoter and paid a total sum of Rs.34,92,148/- vide different payments upto February, 2015. It was further pleaded that the appellant/promoter started raising demand against the allotted unit without following the schedule of payment plan. The respondents/allottees requested number of times to deliver the possession of the allotted unit, but, no response was received by them from the appellant-promoter. The due date of delivery of possession of the

allotted unit had already expired and the respondents/allottees did not wish to remain in the project and, therefore, sought withdrawal of the deposited amount along with interest and compensation in terms of Section 18 (1) of the Act.

4. With these pleadings, respondents/allottees filed a complaint before the Authority seeking the following reliefs:

> *"i. Direct the respondents to refund full amount deposited by the complainants amounting Rs.34,92,148/- along with interest at the rate prescribed by the act of 2016.*
>
> *ii. Direct the respondents to pay legal expenses of Rs.1 lakh incurred by the complainants"*

5. The complaint was resisted by the appellant/promoter on the grounds that the respondents/allottees were not paying the instalments regularly. It was pleaded that though there is delay in completion of the said project but that is due to delay in payment of due instalments by the various allottees including the respondents/allottees. A number of reminders in this regard were issued requesting the

respondents/allottees to make the payment of amount due, but with no positive results.

6. It was submitted that the respondents/allottees are investors, who booked the said unit in order to earn profit and not to continue with the same. Further with the slow-down in the Real Estate market the prices have come down and which resulted in the respondents/allottees not coming forward for depositing of amount due. With these pleadings the appellant/promoter pleaded for dismissal of the complaint being without any merit.

7. The Authority after hearing the pleadings of both the parties passed the impugned order, the operative part of which has already been reproduced in paragraph No.1 of this order.

8. We have heard, learned counsel for the parties and have carefully examined the record.

9. At the outset, it was contended by learned counsel for the appellant/promoter that as per clause 6 of the agreement it has been categorically agreed between the parties that the time was essence to pay the Sale Price along with other payments stipulated under the agreement to be paid on or before the due date or as and when demanded. It had been clearly agreed between the

parties that it was not obligatory on part of the appellant to send any reminders regarding the payments to be made by the respondents/allottees. It was also agreed that in case of delay of 60 days in making payment as per schedule of payments, the appellant/promoter had the right to terminate the Agreement and forfeit the earnest money. However, the appellant/promoter could, in its sole discretion, waive the right to terminate the Agreement and enforce all the payments. Further, as per Clause 8.1 (b)(iii) of the Agreement, in case of any default/delay in payment as per the schedule of payments as provided in Annexure-I to the Agreement, the date of handing over of the possession shall be extended accordingly. However, the respondents/allottees were making payments, albeit irregularly, as per demands raised up till 11.02.2015. Even after the payment dated 11.02.2015, an amount of Rs.8489/- remained pending towards the last demand raised by the appellant/promoter. However, when the next demand for payment was raised by the appellant/promoter on 19.09.2015, as per the schedule of payments and much before the alleged due date of possession i.e. 03.08.2016, not only did the respondents/allottees defaulted in making the said

payment but failed to make the payment even after repeated reminders through e-mails dated 18.04.2015, 16.01.2018, 07.04.2018, 07.06.2018, 31.07.2018 and vide demand letters dated 07.09.2015, 18.02.2016, 03.06.2016 and 21.03.2018. Pertinently, in its e-mails and demand letters, the appellant/promoter categorically informed the respondents/allottees that timely payment is the essence of the agreement and the failure to pay timely instalments is affecting the work at the construction site. However, the respondents/allottees, being investors sensing a slowdown in the real estate market, chose to turn a blind eye to the appellant's requests/demands and thus not only acquiesced to but were even complicit in the delay in handing over possession.

10. It was further stated that in spite of the failure of the respondents/allottees to make the payments as per schedule, the appellant/promoter, in a show of its bona fides, preferred to give another opportunity to the respondents/allottees to make the payment and clear their dues vide reminder letter dated 19.11.2018 and informed that as on that date, an amount of Rs.48,70,545/- was due towards the unit booked by the respondents/allottees, failure in payment whereof has

been causing delay in construction and completion activities of the Project. However, even after the reminder letter dated 19.11.2018, no payment, much less to the tune as due was forthcoming from the respondents/allottees. Concededly, the respondents/ allottees up till date, have only paid a total amount of Rs.34,92,148/- to the appellant/promoter. It is a matter of record that though the respondents/allottees were required to make payments as per the schedule/payment plan provided and agreed, the respondents/allottees have defaulted on various occasions and have not even made the requisite payments, leave apart making the same in a timely manner, despite various reminders. Evidently and rather concededly, the respondents/allottees failed to deposit the payments towards the sale consideration/price of the Unit and thus, had violated the terms and conditions of the agreement executed between the parties.

11. It was further stated that the appellant/promoter had applied for grant of Occupation Certificate and the same was granted on 09.05.2022.

12. It was further submitted that the Authority has carried out a selective reading of the judgement of the

Hon'ble Supreme Court in the case of *Newtech Promoters and Developers Pvt. Ltd. versus State of U.P. and Others* 2021 SCC Online SC 1044. He contended that perusal of the above said judgment of Hon'ble Supreme Court, it would become discernible that while the Hon'ble Supreme Court has upheld the unqualified right of the respondents/allottees to seek refund, an exception appears to have been carved out to the said rule in cases where the delay in handing over possession is attributable to the respondents/ allottees. The Hon'ble Supreme Court is apparently cognizant of the grave injustice that would entail in case respondents/allottees is allowed to take advantage of their own wrongs leading to delay in handing over possession and has thus specifically mentioned that refund would entail when the unforeseen events which are not attributable to the respondents/allottees lead to the delay. A conclusion to the contrary would not only be unjust but also opposed to the principles of equity and fair play.

13. He has further contended that the Occupation Certificate has been issued on 09.05.2022. The Unit is ready for possession, subject to the allottees clearing the dues. He contended that the reliance placed by the

Authority on the judgment of Hon'ble Supreme Court of India in case of IREO Grace Realtech Pvt. Ltd. vs. Abhishek Khanna & Ors., Civil Appeal No.5785 of 2019 is misconceived and non-maintainable. In the case of IREO Grace Realtech *supra*, the developer had not obtained Occupation Certificate even on the date of the decision and, hence, the Hon'ble Supreme Court considered it fit to grant refund. However, in the instant case, not only was the project has been completed before the date of decision by the Authority but also Occupation Certificate had been obtained. He contended that the facts of the present case are significantly different from the case of IREO Grace Realtech *supra.*

14. He contended that the Authority has erred in concluding that the respondents-allottees were absolved of their defaults in payment as per schedule merely on account of the Appellant not having invoked the provisions of Clause 15 and cancelling the allotment of unit by issuing of 15 days' notice. He contended that the Authority has misread the said Clause as the option given to the Developer under Clause 15(a) to cancel the Agreement in the event of a default is completely discretionary and it is in no way obligatory upon the

Developer to cancel the Agreement in every event of default. Clause 15 unequivocally provides that the Developer can 'elect' to cancel the Agreement.

15. It was further submitted that even if the appellant/promoter was to be held liable to refund any amount to the respondents/allottees, exigencies of equality and also the constitution require that same be done keeping in view the principles that this Tribunal and the Authority itself have followed in matters related to refund. In the matter of *Shakti Singh versus M/s Bestech India Ltd.* Appeal No.279 of 2019, wherein the complainant had failed to fulfil their contractual obligation to make payments as per schedule and was then seeking refund alleging that there had been a delay in completion of the project, this Tribunal allowed the promoter to forfeit 10% of total sale consideration and return the balance amount with interest as per Rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (for short, the Rules) from the date of passing of the order till realization. The facts of the present case too are similar to the case of Shakti Singh *supra* and thus, if at all the appellant/promoter is to be held liable to refund any amount, the same must be on similar lines as

those of Shakti Singh (*supra*) case. It was, therefore, submitted that the respondents/allottees would only be eligible for refund of the balance amount after deducting 10% of the total sale consideration.

16. With these contentions, it was contended by the learned counsel of the appellant that the present appeal may be allowed and the impugned order dated 10.05.2020 may be set aside.

17. Per contra, learned counsel for the respondents/allottees contended that the construction of the project was not as per schedule of payment, so the respondents-allottees stopped making remaining amount, which ultimately led to their withdrawal from the project on 03.08.2016 followed by reminders dated 16.08.2016, 17.10.2016, 09.11,2016, 13.05.2017, 17.08.2017, 31.08.2017, 05.09.2017, 06.10.2017, 23.11.2017, 24.11.2017, 29.11.2017, 15.11.2018, 24.03.2018, 26.03.2018 and 02.05.2018. He further contended that it is admitted by the appellant-promoter that the appellant-promoter has received a letter of surrender of the subject unit from the respondents/allottees on 17.11.2016. The appellant/promoter had delayed the possession of the

unit and the respondents/allottees have sought refund and filed complaint much prior to issue of the occupation certificate. He contended that all these above said references/ e-mails find mention in Para No.9 and 10 of the impugned order and the same have not been disputed by the appellant. He contended that the judgment in case of M/s Newtech Promoters' *supra* passed by Hon'ble Supreme Court of India is fully applicable in this case and respondents/allottees are entitled for refund of the amount as per the aforesaid judgment.

18. With these contentions, it was prayed that the impugned order passed by the Authority is in order and as per the Act, Rules and Regulations and sought dismissal of the appeal.

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

20. The undisputed facts of case are that the respondents/allottees were allotted a flat bearing No.11D, 11th floor, T-3 measuring 1575 sq. ft., in the project being developed by the appellant/promoter, namely, "The Leaf" at Sector 63, Gurugram vide allotment letter dated 10.09.2012. The Agreement between the parties was executed on 04.10.2013. As per the agreement, the sale

price of the unit is Rs.89,39,250/-. As per ledger account as being maintained by the appellant/promoter, the respondents/allottees had paid an amount of Rs.34,92,148/- as on 18.09.2019. As per clause 8.1(a) of the agreement, the appellant/promoter was to handover the possession of the unit within a period of 36 months from the date of signing of the agreement. A further grace period of 90 days, after the expiry for applying and obtaining the Occupation Certificate is provided in the agreement. The due date of possession has been arrived at to be 04.10.2016 which has not been disputed in this appeal.

21. The respondents/allottees have paid an amount of Rs.34,92,148/- (39.6 %) upto February, 2015 against the total sale consideration of Rs.89,39,250/-. The respondents/allottees have withdrawn from the project on 03.08.2016 by sending e-mails. It is admitted by the appellant/promoter itself that it had received a letter of surrender of the unit from the respondents/allottees on 17.11.2016. The letter of surrender of the unit through email followed by reminders dated 16.08.2016, 17.10.2016, 09.11,2016, 13.05.2017, 17.08.2017, 31.08.2017, 05.09.2017, 06.10.2017, 23.11.2017,

24.11.2017, 29.11.2017, 15.11.2018, 24.03.2018, 26.03.2018 and 02.05.2018. The above said emails stands mentioned in paras 9 and 10 of the impugned order and has not been disputed by any of the parties.

22. The appellant/promoter has received the Occupation Certificate of the tower in which the unit of the respondents/allottees is situated on 09.05.2022 after a delay of five years and five months from the due date of possession i.e. 04.10.2016. The respondents/allottees cannot be expected to wait endlessly for taking possession of the allotted unit for which they have paid a considerable amount towards the sale consideration. The case of the respondents/allottees is well covered under Section 18(1) of the Act which states that if the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give the possession of the unit, the allottee is entitled for refund of the amount along with interest. The said case of the respondents/allottees is very well covered by the judgment of Hon'ble Supreme Court of India in M/s Newtech Promoters' case supra. The relevant part of the of which is reproduced as below:

"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."

23. The above said judgment in case of M/s Newtech Promoters' supra is fully applicable in the present facts of the case as the appellant/promoter has failed to complete the unit by the due date of possession as per the terms of the agreement. The appellant/promoter has obtained the Occupation Certificate on 09.05.2022 after a delay of five years and five months from the due date of possession i.e.

04.10.2016 and the respondents/allottees have sought refund of the amount on 03.08.2016/ 17.11.2016 from the appellant and filed the complaint for refund on 23.10.2018 i.e. much before the issue of Occupation Certificate on 09.05.2022. The appellant has tried to distinguish its case from the facts of the case of IREO Grace Realtech Pvt. Ltd. supra on the grounds of having received the Occupation Certificate on 09.05.2022 before the passing of the decision of the Learned Authority on 10.05.2022. However, no benefit can be granted to it in view of our aforesaid findings that the respondents/ allottees have sought refund of the amount and filed complaint for refund much prior to the grant of Occupation Certificate on 09.05.2022 and is entitled for refund of the in terms of section 18 of the Act and as per the judgment of Hon'ble Supreme Court in M/s Newtech Promoters' case supra.

24. We also find no merits in the contention of the appellant that the present case is similar to the case of Shakti Singh *supra* wherein this Tribunal had allowed the promoter to forfeit 10% of the total sale consideration and return the balance amount with interest from the date of passing of the order till realization. The facts of the

present case are entirely different from the case of Shakti Singh *supra*. In the case of Shakti Singh *supra*, the promoter has cancelled the unit on 01.07.2016 due to non-payment of the instalment demanded by it much prior to the allottee having filed a complaint for refund of the amount on 03.05.2018. Also, in the present case, on having stopped the payments by the respondents/ allottees, the appellant/promoter had the option to cancel the unit. However, the appellant for its own reasons deemed it fit not to cancel the unit. Also, as per Clause 15 of the agreement, the appellant/promoter had the option to cancel the allotment of the unit on failure on the part of the respondents/ allottees to deposit the amount as demanded by it. However, the appellant/promoter did not cancel the allotment of the unit and continued to raise the demands which the allottee did not pay on account of the slow progress. Therefore, on account of the aforesaid reasons no benefit can be granted to the appellant on the reliance of Shakti Singh's case Supra.

25. No other point was argued before us by learned counsel for the parties.

26. Consequently, we find no merit in the present appeal filed by the appellant/promoter and is, therefore,

the same is hereby dismissed as per the above said observations.

27. The amount of Rs.63,64,169/- 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 Authority for disbursement to the respondents/ allottees as per the aforesaid observations, subject to tax liability, if any, accordance to law.

28. No order as to costs.

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

30. File be consigned to the record.

Announced:
April 28, 2023

Justice Rajan Gupta
Chairman
Haryana Real Estate Appellate Tribunal

Anil Kumar Gupta
Member (Technical)

Manoj Rana