BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.666 OF 2022
Date of Decision: 02.05.2023

TDI Infrastructure Ltd. registered office at 02nd Floor, Mahindra Towers, Bhikaji Cama Place, New Delhi 110022

Appellant

Versus

Faqir Chand Gupta, resident of Flat no.141, Atulya Apartments, Block-A, Sector 18-B, Dwarka, New Delhi

Respondent

CORAM:

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

Present: Mr. Shubhnit Hans, Advocate
for the appellant.

Ms. Nidhi Jain, Advocate,
for the respondent.

O R D E R:

Rajan Gupta, Chairman (Oral):

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 18.05.2022 passed by the Haryana Real Estate

Regulatory Authority, Panchkula (for short, 'the Authority') whereby the Complaint No.1108 of 2019 filed by the respondent/allottee was disposed of with the following directions:

> *"3. This case is being disposed on merits on the basis of arguments of parties and available record. Authority observes that admitted unilateral reduction in super area of the shop of complainant from 400 sq. ft. to 239.52 sq. ft. which is not acceptable to complainant, amounts to reduction by almost 40% of area of shop which could rendered the place non-viable for business activates of complainant as may have been envisaged by complainant. Such unilateral reduction in area of the shop amounts to material alteration of terms of the booking and frustrates letter and spirit to purpose of the booking. Further, respondent had offered fit out possession of the shop to the complainant on 23.03.2019. Said offer has been made after delay of thirteen years from the date of booking which is highly unreasonable. Therefore, even purpose of buying commercial shop may have got totally frustrated after such extraordinary delay. Respondent has been using the amount deposited by complainants for the last sixteen years without any reasonable justification. Therefore, on account of multiple defaults by respondent. Authority finds it to be a fit case for allowing refund of the amount paid by the*

complainant and directs the respondent to refund Rs. 12,16,000/- paid by the complainant from along with interest at the rate stipulated under Rule of the HRERA Rules, 2017 from the date of making payments up to the date passing of this order.

4. As per calculations made by Accounts Branch, amount payable by the respondent to the complainant along with interest has been worked out to Rs. 28,53,139/- (Rs 12,16,000/- + Rs. 16,37,139/-). Therefore, Authority directs the respondent to refund Rs. 28,53,139/- to complainant.

5. Respondent shall pay the entire amount to the complainant within 90 days of uploading this order on the web portal of the Authority, Disposed of in these terms. File be consigned to the record room and order be uploaded on website of Authority."

2. As per averments in the complaint, the respondent/allottee had booked a commercial shop in the project named "Radeo Drive-TDI City" of the appellant-promoter situated at Sonipat on 22nd November, 2006. Commercial Shop no.SF-127 measuring 400 sq. ft. was allotted to the respondent/allottee. No Builder Buyer's Agreement (for short, agreement) was executed between the parties. The

respondent/allottee has paid Rs.12,16,000/- against basis sale consideration of Rs.15,20,000/-. It was pleaded that in certain similar cases respondent had assured allottees to deliver possession of the shops within three years from the date of booking. It was also submitted that the appellant after taking entire consideration amount, should have been given the possession within reasonable period of time. The appellant after inordinate delay of about 13 years from the date of booking had issued offer of possession letter dated 23.03.2019. As per the said offer of possession letter, the appellant/promoter has unilaterally reduced super area of the shop from 400 Sq.feet to 239.52 Sq. feet which is not acceptable. It was further pleaded that on ground of the huge reduction of the area of shop i.e. about 40 % it will not be feasible for respondent/allottee to carry on business activities from such a small place. Therefore, on account of multiple defaults by appellant/promoter, respondent/allottee had filed complaint before the Authority seeking refund of Rs.12,16,000/- along with interest as per Rule 15 of the Real Estate (Regulation and Development) Rules, 2017 (hereinafter called, 'the Rules').

3 No reply on merits of the case was filed by the appellant/promoter, however, during the arguments, it was pleaded by ld. counsel for the appellant that the project has already been developed for which part completion certificate was granted on 23.01.2008, 18.11.2013 and 22.09.2017. It was stated that the appellant/promoter has already received occupation certificate in respect of such commercial site vide letter dated 12.06.2019 issued by the Director, Town and Country Planning (DTCP), Haryana. The appellant/promoter had offered possession of the said commercial shop to the respondent/allottee on 23.03.2019. However, it was admitted by learned counsel for the appellant that there is reduction in super area of the shop and pleaded that same has been done as per approved plan by DTCP. With these pleadings, learned counsel for the appellant pleaded for dismissal of the complaint being without any merits.

4. 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.

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

6. At the outset, it was contended by learned counsel for the appellant/promoter that the offer of possession of the unit was issued on 23.03.2019 which is placed at page No.40 of the paper book. He further submitted that the occupation certificate with respect to the part ground-floor and part first-floor of the project has been issued by DTCP on 12.06.2019 which is placed at page No.38 of the paper book. The unit of the respondent/allottee is situated at second floor for which the occupation certificate has been applied for and is yet to be issued by DTCP. He further contended that a part completion certificate of the project has also been issued by DTCP and is placed at page No.23 of the paper book. He further contended that since the project of the appellant/promoter is complete, therefore, the refund of the amount paid allowed by the Authority to the respondent/allottee is not correct.

7. With these contentions, it was contended by the learned counsel of the appellant/promoter that the present appeal may be allowed and the impugned order dated 18.05.2022 may be set aside.

8. Per contra, learned counsel for the respondent/allottee contended that the unit of the respondent/allottee is situated at second floor for which the occupation certificate even up to now has not been issued by the competent authority. The respondent/allottee filed the complaint on 03.05.2019 and, therefore, the offer of possession issued on 23.03.2019 is not a valid offer of possession as the occupation certificate has yet not been received by the appellant/promoter. She contended that in addition to above, the super area of the unit as per the letter for offer of possession is 239.52 Sq. feet against agreed super area of 400 Sq. feet. It was stated that it is not feasible for the respondent/allottee to carry on his business activities on such a small unit. She stated that the order of the Authority for grant of refund of the amount along with interest is just and fair and is as per law.

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

10. The undisputed facts of case are that the respondent/allottee had booked and was allotted a commercial Shop no.SF-127 measuring 400 sq. ft. in the project named “Radeo Drive-TDI City” of the appellant-

promoter situated at Sonipat on 22nd November, 2006. No Agreement was executed between the parties. The respondent/allottee has paid Rs.12,16,000/- against basis sale consideration of Rs.15,20,000/-. It is also admitted that the super area of the shop offered vide offer of possession letter dated 23.03.2019 is 239.52 Sq. feet against the agreed super area of 400 Sq. feet.

11. In the absence of the agreement, the Authority has taken a period of three years as a reasonable period for handing over the possession. The respondent/allottee had booked the unit on 22.11.2006. Therefore as per the above said period of three years as considered by the Authority, the appellant/promoter was to deliver the unit by 22.11.2009. We are aware of the fact that when there is no delivery period stipulated in the allotment or there is no agreement, a reasonable time has to be taken into consideration for delivery of possession. In the instant case, a time period of three years is a reasonable time for handing over of the unit to the respondent/allottee i.e. 22.11.2009. A similar view has been taken by the Hon'ble Supreme Court in Fortune Infrastructure Vs. Trevor D' Lima, (2018) 5 SCC 442 wherein it has been held as under:-

> *"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of the present case, a time period of three years would have been reasonable for completion of the contract i..e the possession was required to be given by last quarter of 2014. Further, there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion which draws us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly, the issue is answered. When once this Court comes to the conclusion that there is deficiency of services, then the question is what compensation the respondent complainants are entitled to?"*

12. It is also admitted by the counsel for the appellant that the occupation certificate in respect of the unit of the respondent/allottee which is at second floor of the project of the appellant/promoter has yet not been issued. The respondent/allottee 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 respondent/allottee 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 respondent/allottee is very well covered by the judgment of Hon'ble Supreme Court of India in *Newtech Promoters and Developers Pvt. Ltd. versus State of U.P. and Others* 2021 SCC Online SC 1044. 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."

13. 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. The appellant has issued the letter dated 23.03.2019 offering possession of the shop measuring 239.52 sq. ft. against the allotted area of 400 sq. ft. The offer of possession letter issued by the appellant is without obtaining the occupation certificate. Such an offer of possession is not a valid offer of possession in the eyes of law. The area of the shop being offered is also considerably less than the area originally agreed to. Therefore, in our opinion, the respondent-allottee is entitled for the refund of the amount along with interest

as per Rule 15 of the Rules and, thus, there is no infirmity in the impugned order passed by the Authority.

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

15. Consequently, we find no merit in the present appeal filed by the appellant/promoter and is, therefore, the same is hereby dismissed.

16. The amount of Rs.28,53,139/- 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 respondent/allottee as per the aforesaid observations, subject to tax liability, if any, accordance to law.

17. No order as to costs.

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

19. File be consigned to the record.

Justice Rajan Gupta
Chairman
Haryana Real Estate Appellate Tribunal

Anil Kumar Gupta
Member (Technical)

02.05.2023/Manoj Rana