BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No. 709 of 2022
Date of Decision: 28.07.2023

Mr. Parbhat Kumar, R/o H. No. 39-AB, Tagore Garden, Ambala Cantt, Haryana-133001.

Appellant

Versus

1. M/s Mascot Buildcon Private Limited, Regd. Office at 294/1, Vishwakarma Colony, Opposite ICD, MB Road, Lal Muan, New Delhi-110044.
2. V Square Development Company Private Limited, Regd. Office at 35/6, Basement, Jhandewalan Extension, New Delhi-110055.
3. Home Town Properties Private Limited, Regd. Office at 294/1, Vishwakarma Colony, Opposite ICD, MB Road, Lal Muan, New Delhi-110044.

Respondents

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

Present: Mr. Nitin Kant Setia, Advocate
for the appellant.

Mr. Gulshan Sharma, Advocate,
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-allottee against impugned order dated 02.08.2022 passed by the Haryana Real Estate Regulatory Authority, Gurugram (for short 'the Authority') whereby Complaint No. 3898 of 2019 filed by the appellant-allottee was disposed of with the following directions:

> *"i. The respodnents are directed to refund an amount of Rs. 54,50,000/- along with interest at the prescribed rate i.e. 9.80% from the date of re-deposit i.e. 26.03.2020 up to the date of actual re-payment within a period of 30 days.*
>
> *ii. The respondent is directed not to create any third-party rights over the allotted unit till 60 days i.e. the period prescribed for filing appeal against the order."*

2. As per averments in the complaint, the appellant-allottee had booked a shop measure 432.50 sq. ft. in the project named "Oodles Skywalk", Sector 83, Village Sihi, Gurugram on 03.01.2013. Since the possession of the shop as agreed was not being offered, the appellant-allottee filed a complaint dated 19.04.2018 before the Authority against the respondent-promoter. The said complaint was disposed of by the Authority by an order dated 30.10.2018. Operative part of the order reads as under:-

"(i) The respondent is duty bound to hand over the possession of the said unit by 08.07.2018 as committed by the respondent.

(ii) As per provisions of Section 19 (a) of the real Estate (Regulation and Development) Act, 2016 the complainant is also duty bound to pay the due instalment in time.

(iii) The complainant is eligible for delayed possession charges at the prescribed rate of interest i.e. 10.45% per annum from the committed date of delivery of possession i.e. 08.07.2018 as per agreement dated 08.04.2015. Issue w.r.t. PLC charges shall be decided finally at the time of delivery of possession.

(iv) If the possession is not given on the date committed by the respondent then the complainant shall be at liberty to further approach the Authority for the remedy as provided under the provisions i.e. Section 19(4) of the Act ibid."

3 The appellant-allottee against the above said order dated 30.10.2018, filed an appeal no. 162 of 2019 before this Tribunal. The Tribunal on 22.05.2019, directed to the director of the respondent-promoter to file the affidavit as to what is the exact measurement of shop no. G-124. The directions of the order dated 22.05.2019 of the Appellate Tribunal is reproduced as under:

> *"The appellant/ complainant has contended that he has allotted shop no. G-124 measuring 432.5 sq. ft. he contended that in fact, now he is being offered the shop having an area of around 180 sq. ft.*
>
> *Let, the affidavit of the director of the respondent/ promoter be filed stating therein as to what is the exact measurement of shop no. G-124, the possession of which is being offered/ will be offered to the appellant. Now the case to come up on 14.06.2019 for filing the said affidavit and consideration."*

4. It was pleaded that the respondent-promoter without intimation to the appellant-allottee or this Tribunal transferred an amount of Rs. 31,77,823/- into appellant-allottee's father account in HDFC Bank on dated 11.06.2019 after deducting 10% of the basic sale price i.e. 4,48,719/- and also adding delayed interest of Rs. 3,19,113/-. An application was moved by the appellant-allottee on the very next date of hearing on 14.06.2019 to bring the knowledge of this Tribunal. Thereafter, respondent-promoter sent a cancellation letter dated 11.06.2019 which was received on 15.06.2019. This act of cancellation of the shop during the pendency of the appeal by the respondent-promoter is not only disrespect to the

Tribunal but has also caused irreparable loss to the appellant-allottee.

5. It was pleaded that on 29.07.2019 the appellant-allottee filed an application before the Tribunal and placed on record his statement along with cheque no. 000007 of Rs. 31,77,823/- and cheque no. 000006 of Rs. 24,74,421/- of HDFC bank for the remaining balance amount against the unit in question to show his bonafide intention to take possession.

6. It was further pleaded that when the matter of possession of the unit after settlement of the dispute regarding actual size, PLC charges etc. was pending, the respondent-promoter cancelled the unit unilaterally without seeking permission from the Appellate Tribunal and without intimating the appellant-allottee.

7. It was further submitted that the cancellation occurred while the respondent-promoter itself was in default. In the order dated 30.10.2018, the Authority noted that 70% of the construction was complete, which led to the denial of a refund to the appellant-allottee. The appellant-allottee was also restricted from withdrawing from the project. However, the situation changed as the appellant-allottee has diligently made 8 out of 11 required

instalments on time, amounting to over 60% of the total payment for unit G-124. This hard-earned money has been with the respondent- promoter for more than 7 years. Additionally, delayed interest is given to the appellant-allottee at a rate of 10.45% during the respondents' default. In the interest of fairness and justice, the respondent- promoter should not have been allowed to cancel the unit. Nonetheless, they deliberately and maliciously cancelled shop no. G-124, and to make matters worse, they refunded only Rs. 31,77,823/- based on their own calculations. Instead of unilaterally cancelling shop no. G-124, the respondent had the option to carry execution of the Authority's order dated 30.10.2019.

8. With these pleadings, appellant-allottee sought following reliefs in the complaint, which reads as under:-

> " *(a) Direct the respondent to restore the unit in question G-124 by setting aside the wrongful cancellation and accepting the refunded amount with pending outstanding decided by this Hon'ble Authority.*
>
> *(b) Direct the respondent to pay an amount of Rs. 1,00,000/- to the complainant towards the cost of litigation.*

(c) Direct the respondent not to interfere in the rights of the complainant by any means whatsoever in future.

(d) Direct the respondent to disclose the actual carpet area, covered area and common area of the unit no. G-124 to avoid unwanted further litigation."

9. The complaint was resisted by the respondent-promoter on the grounds of jurisdiction of the Authority. It was further pleaded by the respondent- promoter that the appellant vide an application form applied to the respondent-promoter for provisional allotment of a unit in its project. The appellant-allottee in pursuant of the aforesaid application form, was allotted an independent unit bearing no. G-124, located on the ground floor, in the project vide an allotment letter dated 12.03.2014. the appellant-allottee consciously and wilfully opted for a construction linked payment plan for remittance of the sale consideration for the unit in question and further represented to the respondent-promoter that he shall remit every instalment on time as per the payment schedule. The respondent-promoter had no reason to suspect the bona fide of the appellant-allottee and proceeded to allot the unit in question in their favour.

10. It was further pleaded that the allotment letter being the preliminary and the initial draft contained basic and primary understanding between both the parties, to be followed by the space buyer agreement to be executed between the parties. After fulfilling certain documentation and procedures the allotment letter dated 12.03.2014 was issued in favour of the appellant-allottee allotting a commercial unit bearing no. G-124 on ground floor. Thereafter, on 08.04.2015, the space buyer agreement was executed between the parties stipulating all the rights and obligations.

11. It was further pleaded that the appellant-allottee filed a complaint bearing no. 171 of 2018 before the Authority for refund on account of delay of possession in the delivery of the unit. The appellant-allottee in the said complaint made several false and misleading allegations against the respondent amounting to fraud and cheating while also including a prayer of refund of the entire amount deposited by the appellant-allottee with the respondent. The said complaint was decided by the Authority's order dated 30.10.2018 granting delay payment charges to the respondent stating that the appellant is duty bound to make timely payments as well as delay possession charges to the appellant-allottee.

However, the Authority also directed the appellant-allottee that such relief is granted subject to the clearing of the outstanding dues towards the total sale consideration of the unit.

12. It was further pleaded that the Authority vide its order dared 30.10.2018 granted a relief to the appellant-allottee by directing the respondent to pay the delay possession charges subject to the condition that the appellant-allottee would clear all the pending dues immediately. The Authority also noted that the appellant-allottee at the time of filing the complaint bearing no. 171 of 2018, had only deposited 52% of the total consideration despite acknowledging the fact that the project in 2018 was on time and was already completed more than 70%. The Authority vide its order dated 30.10.2018 in the said complaint noted that the appellant-allottee was bound by the terms and conditions of the space buyer's agreement as at the time of signing the agreement the appellant-allottee consciously chose to pay the consideration in terms of construction linked payment plan. Therefore, the appellant-allottee was bound to deposit balance due consideration of the unit with the respondent, whereas the appellant-allottee only deposited 52% of the amount.

13. It was further pleaded that the Authority directed the appellant-allottee to clear the outstanding dues with the respondent-promoter, to which the appellant-allottee has failed miserably to deposit any amount. The appellant-allottee not only has breached the terms and conditions of the space buyer agreement entered with the respondent- promoter but also has failed to comply the directions of the Authority and since then has only acted in the derogation of the space buyer agreement as well as the final order of the Authority thereby committing an act of contempt.

14. It was further pleaded that the respondent-promoter from time to time raised numerous demand letters to the appellant-allottee requesting him to clear the dues as well as complying with the orders of the Authority, but the appellant-allottee turned his deaf ear to the requests and demands raised by the respondent-promoter. The respondent-promoter kept raising the demand/reminder letters. The appellant-allottee was very well aware of the continuous delays and was reminded on continuous basis through the demand letters and despite numerous requests the appellant-allottee never paid any amount.

15. It was further pleaded that the due to the ongoing continuous defaults by the appellant-allottee, the respondent- promoter was constrained to send a letter of non-payment of dues final notice dated 26.12.2018 in terms of the space buyer agreement executed between the parties. The appellant-allottee even after receiving the letter of cancellation did not pay any heed by clearing the outstanding dues towards the total sale consideration. Eventually, on 11.06.2019 the respondent-promoter as per the space buyer agreement cancelled the said unit of the appellant-allottee without committing any breach of the terms and conditions of the agreement entered with each other and refunded the said amount to the appellant-allottee.

16. It was further pleaded that the appellant during the pendency of the appeal before the Appellate Tribunal a filed complaint bearing no. 3898 of 2019 before the Authority. The appellant-allottee went against the law by filing two cases at the same time with similar issues and falsely concealed the said fact with this Tribunal. Moreover, in fear of losing the case with the Appellate Tribunal, he withdrew his case thereafter as he was a defaulter.

17. It was further pleaded that the Authority in complaint no. 3898 of 2019, vide its order dated 05.03.2020, directed the appellant-allottee in affirmative to pay his remaining outstanding dues to the respondent-promoter, failing which the allotted unit to the allottee would stand cancelled. Even after being categorically directed by the Authority, the appellant-allottee failed to comply with the order and again miserably failed to pay the remaining amount to the respondent-promoter. The appellant-allottee chose to ignore all these aspects and wilfully defaulted in making timely payments.

18. It was also pleaded that as per clause 23 of the space buyer agreement, the respondent- promoter is entitled to forfeit the earnest money as well as the brokerage along with the taxes and interest. Similarly, as per clause 24 of the space buyer agreement "time being the essence", the allottee is duty bound to pay the charges on or before the due date or as and when demanded by the respondent-promoter as the case may be.

19. It was also pleaded that the respondent-promoter is squarely covered under section 11(5) of the Act, which states that:

> *"11(5) the promoter may cancel the allotment only in terms of the agreement for sale: Provided*

that the allotee may approach the Authority for relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause."

20. It was further pleaded that on the request of the appellant-allottee, the Authority had given a last chance to the appellant-allottee to get his unit by depositing the entire due amount by 31.03.2020 and not later. Appellant-allottee purposely did not deposit the same and breached the order issued. He even agreed to the same by sending an email whereby he stated that he has not paid his entire due amount.

21. It was further pleaded that the appellant-allottee misrepresented the Authority that he has deposited the entire due, on which a CA was appointed by the Authority to calculate the same to which the CA appointed by the Authority issued a letter dated 08.10.2021 stating that amount of Rs. 18 lacs were due against the appellant-allottee as on 31.03.2023.

22. It was further pleaded that due to the ongoing continuous defaults by the appellant-allottee, the respondent- promoter was constrained to send a letter of non-payment of dues final notice dated 26.12.2018 in terms of the space buyer agreement executed between the

parties. The appellant-allottee even after receiving the letter of cancellation did not pay any heed by clearing the outstanding dues towards the total sale consideration.

23. With these pleading the respondent prayed for dismissal of the complaint being without any merits.

24. 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.

25. Aggrieved with the aforesaid order of the Authority, the appellant has preferred the present appeal.

26. We have heard the Learned counsels of both the parties and have carefully gone through the record of the case.

27. Learned counsel for the appellant while reiterating the pleadings in the complaint, submitted that the respondent-promoter has hastily created the third party rights by selling the shop in question during the pendency of this appeal. The appellant is ready to deposit the refunded amount to the respondent–promoter along with any amount as decided by this Tribunal. He contended that the appeal may be allowed and the possession of the shop be handed over to the appellant.

28. On the other hand, learned counsel for the respondent-promoter reiterated the pleadings put forward by the respondent in reply to the complaint and submitted that the respondent- promter has refunded the amount of Rs.54,50,000/- along with the interest @ 9.8% per annum to the appellant and the respondent has sold the shop to Mr. Sanjay Verma & Mrs. Pooja Verma vide agreement to sell dated 25th November, 2022 for a sale consideration of Rs. 60,76,750/- as per the orders of the Authority dated 02.08.2022 for which the appellant has already furnished its affidavit dated 10.07.2023 with this Tribunal. He contended that there is no merit in the appeal and the same deserves to be dismissed.

29. We have duly considered the aforesaid contentions of the parties.

30. The brief facts of the case are that the appellant booked a shop measuring 432.50 sq. ft. in the project of the respondent namely “Oodles Skywalk” situated at Sector 83, Gurugram. An agreement was executed between the parties on 08.04.2015 for shop No. G-124, Ground floor in the project of the respondent-promter for total sale consideration of Rs. 60,74,462.0. As per clause 38 of the agreement, the delivery of possession of shop was to given within (36+3) months of from the date of start of

construction or signing of the agreement whichever is later. The date of start of excavation is 26.03.2014. therefore, due date of delivery of possession is 08.07.2018. The possession of the unit was not being given by the due date and that the size of the shop was also not as per the agreed size, therefore, the appellant filed the complaint no. 171 of 2018 on 19.04.2018 before the Authority. the appellant had paid an amount of Rs. 33,07,429.0 at the time of filing of this complaint. The relief sought by the appellant in the complaint reads as under:

> *"i. Refund the entire amount paid to the respondent i.e. Rs. 33,07,429 along with the interest from the date of deposit till the date of refund.*
>
> *ii. Compensation of Rs. 5,00,000 should be awarded as part of damages to the complainant on account of mental agony, torture and harassment.*
>
> *iii. Payment of Rs. 5,00,000 as compensation to the complainant as part of deficiency on the respondent part.*
>
> *iv. Refund all illegal costs incurred by the complainant.*
>
> *v. Any other relief as this Hon'ble Authority deem fit to meet the ends of justice."*

31. However, the Authority vide its order dated 30.10.2018 instead of granting the relief as sought by the appellant granted the relief of possession with delayed

possession interest. The operative part of the above said order dated 30.10.2018 reads as under:

> *"(i) The respondent is duty bound to hand over the possession of the said unit by 08.07.2018 as committed by the respondent.*
>
> *(ii) As per provisions of Section 19 (a) of the real Estate (Regulation and Development) Act, 2016 the complainant is also duty bound to pay the due instalment in time.*
>
> *(iii) The complainant is eligible for delayed possession charges at the prescribed rate of interest i.e. 10.45% per annum from the committed date of delivery of possession i.e. 08.07.2018 as per agreement dated 08.04.2015. Issue w.r.t. PLC charges shall be decided finally at the time of delivery of possession.*
>
> *(iv) If the possession is not given on the date committed by the respondent then the complainant shall be at liberty to further approach the authority for the remedy as provided under the provisions i.e. Section 19(4) of the Act ibid.*
>
> *The order is pronounced.*
>
> *The case is consigned."*

32. The appellant was not satisfied with the above order of the Authority, so he preferred an appeal no. 162 of 2019 before this Appellate Tribunal. The Tribunal

passed an order dated 22.05.2019 directing the director of the respondent- promoter to file an affidavit, on the next date of hearing on 14.08.2019, stating the exact measurement of the shop no. G-124. The order dated 22.05.2019 of this Tribunal is reproduced as under:-

> "*The appellant/complainant has contended that he has allotted shop no. G-124 measuring 432.5 sq. ft. he contended that in fact, now he is being offered the shop having an area of around 180 sq. ft.*
>
> *Let, the affidavit of the director of the respondent/promoter be filed stating therein as to what is the exact measurement of shop no. G-124, the possession of which is being offered/ will be offered to the appellant. Now the case to come up on 14.06.2019 for filing the said affidavit and consideration."*

33. In the meantime, during the pendency of the appeal, the respondent- promoter cancelled the unit allotted to the appellant on 11.06.2019 and transferred an amount of Rs. 31,7783/- into the appellant's father's Bank account on 11.06.2019. The appellant during the pendency of the appeal filed another complaint bearing no. 3898 of 2019 on 02.09.2019 before the Authority, for restoration of the shop by setting aside its cancellation.

The appellant thereafter, withdrew the appeal no. 162 of 2019 filed before this Tribunal.

34. The relief sought by the appellant in the complaint no. 3898 of 2019 are as follows:-

> " *(a) Direct the respondent to restore the unit in question G-124 by setting aside the wrongful cancellation and accepting the refunded amount with pending outstanding decided by this Hon'ble Authority.*
>
> *(b) Direct the respondent to pay an amount of Rs. 1,00,000/- to the complainant towards the cost of litigation.*
>
> *(c) Direct the respondent not to interfere in the rights of the complainant by any means whatsoever in future.*
>
> *(d) Direct the respondent to disclose the actual carpet area, covered area and common area of the unit no. G-124 to avoid unwanted further litigation."*

35. The Authority vide its orders dated 06.09.2019 restrained the promoter from creating third party rights or alienating the allotted unit in any manner till further orders. Similarly vide orders dated 05.03.2020, the Authority directed the complainant to make payment of the outstanding amount along with prescribed rate of interests to the respondent by 01.04.2020 otherwise, the

unit would stand cancelled. The order dated 05.03.2020 is reproduced as under:

> *"Part arguments heard.*
>
> *The unit of the complainant was cancelled by the respondent vide cancellation letter dated 11.06.2019 for non-payment of amount due towards him. Complainant has filed complaint for restoration of the unit. Complainant is directed to make the outstanding payment along with the prescribed rate of interest to the respondent by 01.04.2020 otherwise the unit stands cancelled."*

36. In pursuance to above mentioned order of the Authority the appellant transferred the sums of Rs. 35,00,000/-, Rs. 16,00,000/- and Rs. 3,50,000/- through different RTGS in the account of Mascot Buildcon Private Limited (respondent) on 21.03.2020, 23.03.2020 and 26.03.2020 respectively totalling to Rs. 54,50000/-.

37. Since both the parties were disputing the amount to be deposited by the appellant, the Authority in order to determine the amount to be deposited by the appellant sought report from its Chartered Accountant (CA). The Chartered Accountant submitted its report on 05.10.2021, according to which the appellant was to deposit an amount of Rs. 59,22,996.88. The appellant had deposited an amount of Rs. 54,50,000/- and disputed the

amount of Rs. 4,77,996.88/-. Therefore, after considering the factual position and hearing the parties, the Authority passed the order dated 02.08.2022, which reads as under:-

> *" Hence, the Authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligation case upon the promoter as per the function entrusted to the Authority under section 34(f) of the Act of 2016:*
>
> *(i) The respondent is directed to refund an amount of Rs. 54,50,000/- along with interest at the prescribed rate i.e. 9.80% from the date of re-deposit i.e. 26.03.2020 up to the date of actual re-payment within a period of 30 days.*
>
> *(ii) The respondent is directed not to cause any third party rights over the allotted unit till 60 days i.e. the period prescribed for filing appeal against the order."*

38. The appellant lodged the current appeal before this Tribunal on October 20, 2022. The respondent-promoter was issued a notice of the appeal on October 31, 2022, and was supposed to appear on December 2, 2022. However, prior to the notice and appearance, the respondent refunded the appellant Rs. 54,50,000 with 9.8% interest within the specified 30-day period as

directed by the Authority in the impugned order dated August 2, 2022.

39. Subsequently, on April 13, 2023, this Tribunal issued an order directing the respondent- promoter to furnish an affidavit from its director containing details of allotment of unit, if any, to another person on the next date of hearing. On July 10, 2023, the respondent- promoter submitted an affidavit certifying that they had already sold unit G-124 to Mr. Sanjay Verma S/o Shri Hari Chand Verma and Mrs. Pooja Verma W/o Sh. Sanjay Verma via a sale agreement dated November 25, 2022, for a consideration of Rs. 60,76,750/-.

40. It seems the appellant was hasty in creating third-party rights. Although the appellant had paid a substantial amount of Rs. 54,50,000, there remained a dispute of only Rs. 4,77,996.88. While the Authority allowed a 60-day period for not creating third-party rights, the respondent- promoter should have taken into account that notice takes time to be served after the appeal is filed. The appellant filed the appeal within the 60-day limitation period, but before notice and appearance before this Tribunal, the respondent- promoter had already sold the shop to someone else. Earlier, the respondent- promoter issued a cancellation letter for the shop allotted to the

appellant on June 11, 2019, during the pendency of appeal no. 162 of 2019 before this Tribunal. By the time of the cancellation, the appellant had paid a considerable amount. It is evident that the respondent's actions can indeed be perceived as impulsive and lacking reasonable consideration for the appellant's rights and interests.

41. The appellant's conduct is also questionable. In complaint no. 171 of 2018, the appellant sought a refund of the amount paid, citing discrepancies in the shop's size and delay in possession. The Authority, however, ordered possession with delay possession interest in its order dated October 30, 2018. The appellant appealed this decision in appeal no. 162 of 2019 before this Tribunal, requesting a refund with interest. Later, during the appeal's pendency, when the respondent cancelled the shop on June 11, 2019, the appellant filed complaint no. 3898 of 2019 seeking possession of the unit and subsequently withdrew appeal no. 162 of 2019.

42. No other issue was raised before us.

43. Understandably, the respondent-promoter cannot be expected to wait indefinitely with their shop unsold, while the appellant decides whether to seek possession or a refund. Therefore, given the conduct of the parties, and considering that the third-party interest was

created by the respondent-promoter in accordance with the orders of the Authority, a duly constituted body under the Act, albeit hastily by the respondent-promoter, and appellant allottee having paid a substantial amount, but was not clear as to whether he wants possession or refund, we have no choice but to dismiss the appeal with liberty to the appellant to seek compensation for the losses, if any, suffered by him by filing a separate complaint under Section 71 and 72 of the Act with the Adjudication Officer appointed by Authority.

44. No order to costs.

45. Copy of this order be sent to the parties/Leaned counsel for the parties and Haryana Real Estate Regulatory Authority, Gurugram.

46. File be consigned to the record.

Announced:
July 28, 2023

Justice Rajan Gupta
Chairman
Haryana Real Estate Appellate Tribunal,

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

Rajni