

**BEFORE THE HARYANA REAL ESTATE APPELLATE
TRIBUNAL**

Date of Decision: 29.08.2023
Appeal No. 713 of 2022

Aaliyah Real Estates Pvt. Ltd., registered office at Corporate One, Ground Floor, Plot No.5, District Center, Jasola, New Delhi 110025; Second Address at Plot no.271, Phase II, Udyog Vihar, Gurugram Haryana 122016

Appellant/Promoter

Versus

1. Raj Kumar Mehta;
2. Anu Mehta both resident of House no.59, PLA, Sector 15, Hisar Haryana 125001

Respondent/Allottees

CORAM:

Justice Rajan Gupta

Shri Anil Kumar Gupta

Chairman

Member (Technical)

Present: Mr. Somesh Arora, Advocate,
for the appellant.

Mr. Shobhit Phutela, Advocate,
for the respondent.

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 the order dated 15.07.2022

Appeal No.713 of 2022

passed by the Haryana Real Estate Regulatory Authority, Gurugram (for short, the Authority) whereby the Complaint No.4724 of 2020 filed by the respondent/allottees was disposed of with the following directions:

- i) *The respondent-promoter is directed to refund the amount after deducting 10 % of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority, Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 within 90 days from the date of this order along with interest @9.80% p.a. on the refundable amount, from the date of cancellation till the date of realization of payment as the cancellation of the allotted unit was made on 13.02.2019 after the Act of 2016.*
 - ii) *A period of 90 days is given to the respondent to comply with the directions given in this order and failing which the legal consequences would follow.*
33. *Complaint stands disposed of.
File be consigned to the registry.”*

2. As per averments of the respondent/allottees (appellant therein) in the complaint, the respondent/allottees booked a service apartment on

Appeal No.713 of 2022

16.10.2012 and paid an amount of Rs.7,00,000/- as booking amount. The appellant/ promoter allotted a unit bearing No.410 having a super area of 1224 square feet @ 9400 per square feet in its project. The appellant/ promoter on 01.01.2013 issued a Unit Allotment Letter of service apartment No.410 having approx. super area of 1224 square feet in its project. The respondent/allottees paid an amount of Rs.4,30,820/-, Rs.10,10,520/- and Rs.2,30,844/- on 12.01.2013, 28.01.2013 and 31.05.2013 respectively to the appellant/ promoter. Further on 27.01.2014, on request of the respondent/allottees, the appellant/promoter changed the original booked and allotted unit with a new Unit bearing No.304 with a super area of 796 square feet. The respondent/allottees issued cheques of Rs.1,70,000/-, Rs.1,30,000/- and Rs.4,18,879/- on 03.03.2014 and 20.03.2014 respectively to the appellant/promoter. After a long follow-up, on 01.12.2014, a pre-printed, unilateral, one-sided, arbitrary ex-facie commercial Space Buyer's Agreement (for short, 'the agreement') was executed between the parties. According to clause No.2.1, the appellant/promoter proposed to offer the possession of the unit within a period of 42 months from the date of

Appeal No.713 of 2022

approval of the building plan of the commercial complex or the date of execution of this agreement, whichever is later, with a grace period of 180 days. Therefore, due date of possession is to be computed from the date of approval of building plans. The building plans were approved on 05.01.2012 so the due date of possession comes out to be 05.01.2016 with 180 days of grace period. The respondent/allottees paid an amount of Rs.30,91,103/- till the date of execution of the agreement dated 16.10.2012. The appellant/promoter received an Occupation Certificate (OC) on 16.01.2018 and issued a final notice for possession on 30.03.2018 and asked for a payment of Rs.93,13,843/-. The appellant/promoter has revised the area of the unit and asked for unjustified demands and an interest of Rs.27,53,580/-. On receipt of above said notice of possession, the respondent/ allottees visited the office of the appellant/ promoter and asked for cancellation of allotment (surrender of the unit) and refund of money as per law. The appellant/promoter sent a cancellation notice to the respondent/allottees on 13.02.2019 mentioning that "an amount of 15 % of the total sale consideration, being the 'earnest money', received from them against the above mentioned allotment

is hereby forfeited”. As per clause 1.9 of the Agreement, the consideration means basic sale price and PLC. There is no PLC against the said unit. It was further pleaded that one of the respondent/allottees, Mr. Raj Kumar Mehta has retired from his job on 21.05.2020, the project of the appellant/promoter was not approved by leading banks till 2016. The banks refused to grant the loan due to age factor and a short period of balance service. The respondent/allottees visited the office of the appellant/promoter and asked for balance money as per regulation of the Authority, but the appellant/promoter did not consider the pleas of the respondent/allottees.

3. Aggrieved with the non-payment of refund of the amount payable, the respondent/allottees preferred to file a complaint before the authority seeking the following reliefs:

- i) *Direct the respondent to refund the paid money along with prescribed interest from the date of payment till date of refund.*
- ii. *Direct the respondent not to give effect to unfair clauses unilaterally incorporated in the BBA.*

Appeal No.713 of 2022

4. The complaint was resisted by the appellant/promoter (respondent therein) on the ground that the occupation certificate was applied on 22.05.2017 before the enactment of the Act on 28.07.2017 and, therefore, the Authority does not have the jurisdiction to deal with such a complaint. It was pleaded that there is no delay on the part of the appellant/promoter in offering the possession of the unit in terms of the agreement, the respondent/allottees have failed to clear their outstanding dues for the reasons best known to them and are levelling false allegations by stating that the appellant/promoter has failed to get project approved from leading banks. The Occupation Certificate has been received by the appellant/promoter on 16.01.2018 and, thus, there is no merit in the complaint.

5. The appellant/promoter after controverting all the pleas raised by the respondent/allottees, sought dismissal of the complaint being without any merits.

6. The learned Authority after considering the pleadings of the parties and appreciating the material on record, passed the impugned order dated 15.07.2022, the relevant part of which is already reproduced in the opening paragraph of this order.

Appeal No.713 of 2022

7. We have heard learned counsel for both the parties and have carefully examined the record of the case.

8. At the very outset, learned counsel for the appellant contended that the appellant/promoter has constructed the project well within the scheduled period. As per the agreement, the due date of offer of possession is 01.12.2018. The occupation certificate of the project in which the unit of the respondent/ allottees is situated was issued on 16.01.2018. The appellant issued offer of possession on 30.03.2018. The respondent/allottees after paying an amount of Rs.30,91,103/- did not pay the demand raised by the appellant/promoter for the balance sale consideration. The appellant/promoter issued several notices and made repeated requests, the respondent/allottees did not make the payments and took possession of the said unit. Therefore, finally on 30.03.2018 a final notice of possession was issued to the respondent/allottees along with a request for payment of Rs.93,13,843/-. However, the respondent/allottees did not make the payments and took possession and later on asked for cancelation of their allotment and refund of the amount paid by them by visiting the office of the

Appeal No.713 of 2022

appellant. The appellant, in these circumstances, was constrained to cancel the said unit vide cancellation notice dated 13.09.2019. The cancellation of the said unit is as per the provisions of the agreement. The amount is refundable only after sale of the unit to third party and out of the receipts of the amount from the third party, the respondent/allottees are entitled to be refunded the amount after deduction of 10 % of the earnest money. It was asserted that the refunded amount should not carry any interest till the unit is sold to a third party. The appellant is not benefited by holding the said unit, rather it is incurring loss by holding and maintaining the said unit.

9. Based on these arguments, the appellant asserts that the respondent/ allottees are not entitled for any interest on the refundable amount and sought for allowing the appeal to that extent.

10. Per contra, learned counsel for the respondent/allottees argued that the order of the authority is just and fair and is as per law of the land. Since the appellant/promoter has cancelled the unit on 13.02.2019, the respondent/allottees are entitled for the

Appeal No.713 of 2022

interest from the date of cancelation till its realization as per law of the land.

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

12. Undisputedly, the allotment letter of Unit No.410, 4th Floor in the project of “Baani City Centre”, Sector 52, Village Maidawas, Gurugram with the area of 1224 square feet was issued by the appellant/promoter on 01.01.2013. Thereafter, on request of respondent/allottees the said unit was changed to a new Unit bearing No.304, 3rd floor with the area of 796 square feet on 01.12.2014 in the same project. As per statement of account dated 05.02.2021, the respondent/allottees paid an amount of Rs.30,91,173/- against the basic sale price of the unit was Rs.76,23,400/- with total sale consideration of Rs.94,26,541.33. As per clause 2.1 of the Agreement, the possession of the unit is to be handed over within a period of 42 months from the date of approval of building plans or the date of execution of the agreement whichever is later with grace period of 180 days. As the date of Agreement is 01.12.2014 which is later, the due date of possession comes out to be 01.12.2018 with a grace period of 180 days as arrived by the Authority and

Appeal No.713 of 2022

there is no dispute about it in the present appeal. The appellant/promoter had obtained the part Occupation Certificate of the project in which unit of the Respondent/allottees is situated on 16.01.2018. The appellant/promoter issued notice of possession to the respondent/allottees on 30.03.2018. The respondent/allottees did not make the requisite payment, therefore, the appellant/promoter issued a cancellation notice on 13.02.2019.

13. The plea advanced by the appellant/promoter is that it completed the construction of project in time, obtained an Occupation Certificate on January 16, 2018 and issued offer of possession on 30.03.2018 well in advance of the stipulated date December 1, 2018 as specified in the agreement. Furthermore, the appellant/promoter contends that holding the aforementioned unit does not yield any benefits; rather, it incurs losses due to maintenance costs. The compliant builder (appellant/promoter) is faced with the dual obligation of refunding the sum, incurring losses from holding and maintenance of said unit and accruing interest on the refund amount. Therefore, it is argued that the refundable amount should remain interest-free until the unit is successfully resold.

Appeal No.713 of 2022

14. We find substance in the above argument of the appellant/ promoter. Considering the circumstances and facts of the case, it becomes evident that the appellant/ promoter indeed completed the construction of the unit well within the timeframe stipulated in the Agreement. Furthermore, the respondent/allottees did not meet the demand raised by the appellant/promoter for a considerable period following the unit's cancellation. The unit, thus, remained unsold for a long duration. Consequently, it is deemed appropriate, in peculiar facts and circumstances of this case, to grant interest on the refundable amount to the respondent/allottees starting from the date of the Authority's order i.e. 15.07.2022, rather than from the date of the unit's cancellation i.e. 13.02.2019.

15. No other point was argued before us.

16. In view of our aforesaid findings, the present appeal filed by the appellant/promoter is, accordingly, partly allowed as per aforesaid observations.

17. No order as to costs.

18. The amount deposited by the appellant/ promoter i.e. Rs.28,68,350/- with this Tribunal to comply with the proviso to Section 43(5) of the Act, along with

Appeal No.713 of 2022

interest accrued thereon, be sent to the learned Authority for disbursement to the respondent/allottee subject to tax liability, if any, as per the aforesaid observations, the excess amount be refunded to the appellant/promoter, subject to tax liability, if any, in accordance with law.

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

20. File be consigned to the record.

Announced:
August 29, 2023

Justice Rajan Gupta
Chairman
Haryana Real Estate Appellate Tribunal

Anil Kumar Gupta
Member (Technical)

Manoj Rana