Date of Decision: 23.12.2019

Appeal No. 347 of 2019

1. Major General Bhaskar Kalita son of Sh. Hari Kalita
2. Mrs. Bobita Kalita wife of Major General Bhaskar Kalita both residents of 90, Pratap Chowk, Delhi Cantt. New Delhi

.....Appellant

Versus

1. The Haryana Real Estate Regulatory Authority, Gurugram Haryana, New PWD Rest House, Civil Lines, Gurugram.
2. M/s. Selene Construction Limited F-60, Malhotra Building, 2nd Floor, Cannaught Place, New Delhi through its authorized signatory.
   Also at
   448-451, Indiabulls House, Udyog Vihar – Phase V, Gurugram 122001

..... Respondent

Coram: Justice Darshan Singh (Retd), Chairman
Sh Inderjeet Mehta, Member (Judicial)
Sh Anil Kumar Gupta, Member (Technical)

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Argued by:

Amit Jain, Advocate, Ld counsel for the appellant.

Respondent No.1 Service dispensed with.

Respondent No.2 Ajiteshwar Singh, Advocate, Ld counsel for the respondent.

ORDER:

1. Feeling aggrieved by the order dated 26.03.2019 handed down by Ld Haryana Real Estate Regulatory Authority, Gurugram, (hereinafter referred as Authority) in complaint No.2253 of 2018 titled Major General Bhaskar Kalita & anr. Vs. M/s Selene Construction Ltd., vide which a complaint preferred by the appellants/complainants for refund of the amount deposited by them with the respondent No.2 was partly allowed, they have chosen to prefer the present appeal.

2. As back as in the year 2014, after it has been assured by respondent No.2 that possession of complete residential apartment shall be delivered within a maximum period of 3 years and a grace period of 6 months, the appellants/complainants had booked a unit No. L031 in project "Centrum Park" situated in Sector-103, Gurugram. After making initial 25% payment as per booking, the respondent No.2 had issued a provisional allotment letter dated 25.06.2014 and the aforesaid unit bearing No.L-031 was allotted to the appellants. In furtherance to provisional allotment letter, parties entered into a Flat Buyer Agreement on 10.07.2014. Since, thereafter in terms of Clause No.21 of Flat Buyer's Agreement, the respondent No.2 had failed to complete

the construction of the said residential unit within a period of 3 years with a 6 months grace period, so the appellants preferred the complaint before the Authority for refund of the total amount deposited by them.

3. Though the Haryana Real Estate Regulatory Authority, Gurugram, was arrayed as respondent No.1, but as no relief has been claimed against it, so service of respondent No.1 was ordered to be dispensed with vide order dated 29.08.2019.

4. Upon notice the respondent No.2 had resisted the complaint preferred by the appellants on the grounds of maintainability and suppression of material facts. On merit it had taken a stand that since as per the agreement duly executed between the parties, it was agreed that in the eventuality of any dispute, matter shall be adjudicated through arbitration, so the appellants should have resorted to the said remedy. However, instead of opting aforesaid mode, the complainants had approached the Authority for redressal of the grievances. Further, it has been alleged that it was in the knowledge of the appellants that there is a mechanism detailed in buyer's agreement which covers the exigencies of the inordinate delay caused in completion and handing over of the booked unit as enumerated in Clause 22 of the said

Agreement. In case of any delay the respondent No.2 developer was only liable to pay penalty of Rs.5 per Sq.ft of super area per month for the period of delay. Further, it has been alleged that there is only delay of 9 months 15 days in delivering the possession of the flat to the complainants and for the said delay there is no fault of the respondent No.2 because there were problems relating to the labour/raw material and Government restrictions including a ban imposed by National Green Tribunal on carrying out constructions in Delhi-NCR area for several months. The respondent No.2 also prayed for the dismissal of the complaint.

5. After taking into consideration all the material facts as adduced and produced by both the parties, the Ld Authority while exercising power vested in it under Section 37 of the Real Estate (Regulation & Development) Act, 2016 (hereinafter called 'the Act') disposed of the complaint, preferred by the appellants, with following directions to the respondent No.2 in the interest of justice and fair play:

(i) The respondent is directed to refund the amount deposited by the complainants by deducting 10% of total sale consideration.

(ii) In addition to this, respondent is at liberty to charge service tax and other taxes received from the complainants and deposited with the concerned authorities.

(iii) Order should be complied within 90 days of issuance.

6. Hence the present appeal.

7. Opening his side of arguments, the Ld counsel for the appellants, while drawing the attention of this Tribunal towards Section 18 of the Act has submitted that since as per the stipulated period mentioned in Clause 21 of Flat Buyer's Agreement, there is delay of 9 months 15 days in offering the possession to the appellants so they have justifiably and legally requested for refund of the entire amount deposited by them with the respondent No.2 and the Ld Authority has illegally ordered for deduction of 10% of the total sale consideration out of the said deposited amount and the appellants are entitled to refund of the total amount. Reliance has been placed upon Citation (2019) 5 Supreme Court Cases 725 titled **Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan and Ors**. Further, it has been submitted that the findings of Ld Authority to the extent that the appellants are also liable to pay service tax and

other taxes deposited with Government by respondent No.2 are legally unsustainable as neither the respondent No.2 has produced anything on record with regard to any alleged payment of any taxes whatsoever nor it is anywhere provided under the Act that allottees/appellants shall be liable to pay service tax and other taxes, in case amount is ordered to be refunded.

8. Countering this vehemently, the Ld counsel for the respondent No.2 has submitted that there is no illegality and infirmity in the impugned order handed down by the Ld Authority because first of all, after the offer of possession has been given to the appellants on 25.10.2018, there was no justification whatsoever on the part of the complainants to prefer the complaint before the Ld Authority on 21.12.2018 and secondly, by no stretch of imagination, the delay of 9 months and 15 days in offering the possession of the unit to the appellants, can be construed to be unreasonable and inordinate delay, coupled with the fact that the Ld Authority has held that complainants/appellants are entitled for delayed possession charges at the prescribed rate of interest i.e. 10.75% per annum with effect from 10.01.2018 as per the provision of Section 18(1) of the Act till offer of possession.

9. After thoroughly going through, the imp ugned order and the material available on the record we are of the considered opinion that the arguments advanced by the Ld counsel for the appellants are not only misconceived but are also devoid of merit for the reasons as stated hereinafter.

10. First of all, let the admitted facts be taken note of. Admittedly as per Clause 21 of Flat Buyer Agreement dated 10.07.2014 for unit No.L031, in project "Centrum Park" Sector-103, Gurugram, possession was to be handed over to the appellants/complainants by respondent No.2 within a period of 3 years from the date of execution of flat Buyer's agreement +6 months grace period which comes out to be upto 10.01.2018. Admittedly, complainants have already paid Rs.21,00,940/- to the respondents No.2 against a total sale consideration of Rs.92,36,982/- (including taxes). This is also an admitted fact that Occupation Certificate was granted by the concerned Authorities on 23.07.2018 and possession of the unit was offered to the complainants by respondent No.2 on 25.10.2018. Thus, admittedly there is delay of 9 months 15 days in offering the possession of the unit to the complainants. Admittedly, the complainants had knocked the door of the

Ld Authority for refund of the deposited amount by way of filing the complaint on 21.12.2018.

11. Though there is delay of 9 months and 15 days in offering the possession of the unit to the complainants but by no stretch of imagination it can be construed to be inordinate or unjustifiable delay. Such delay of about 9 months in such like big project is likely to occur on account of some unforeseen and unavoidable circumstances. Even otherwise as per Clause 22 of the Flat Buyer Agreement upto 10.07.2014 in the eventuality of delay in offering the possession, the developer was bound to pay penalty @ Rs.5/- per sq.ft. per month to the buyer. For this delay of 9 months and 15 days, the complainants/appellants have been held entitled for delayed possession charges at the prescribed rate i.e.10.75% per annum with effect from 10.01.2018 till offer of the possession, as mentioned in Para No.38 of the impugned order.

12. After the possession of the unit had been offered to complainants on 25.10.2018, it doesn't seem proper on behalf of the complainants to knock the door of the Ld Authority on 21.12.2018 for refund of the amount, specifically when only an amount Rs.21,00,946/- had

been deposited by them against the total sale consideration of Rs.92,36,982/-.

13. Learned counsel for the appellants has vehemently relied upon the email dated 20.10.2018 vide which the respondent/allottee has sought cancellation of the booking. We have perused the said email at page 96 (Annexure-11) of the paper-book which shows that the cancellation had been sought by the allottee due to some personal reasons and not on account of delay in the completion of the project. Said personal reasons are also not explained. Moreover, in this email the allottee had sought information as to what amount they have to pay for the cancellation of the booking. So, this email is of no help to the appellants.

14. The deduction of 10% of the total sale consideration of the unit, out of the amount deposited by the complainants, is also in conformity with the Regulations 2018, as notified by the Authority, wherein, it has been stipulated that forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the Real Estate i.e. Apartment/Plot/Building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project

and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer.

15. In Citation 2015(16)RCR(Civil)72 titled **DLF Ltd Vs. Bhagwanti Narula**, the Hon'ble National Consumer Disputes Redressal Commission has laid down that an amount exceeding 10% of the total price cannot be forfeited by the seller, since, forfeiture beyond 10% of the sale price would be unreasonable.

16. Section 18(1)(a) of the Act reads as:

> *"If the promoter fails to complete or is unable to give possession of an apartment, plot or building, - (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein;*
>
> *he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act; Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

17. A bare perusal of the aforesaid Section reveals that simple present tense used in the starting line of Section 18 clearly indicates that the provision shall apply only till the project is incomplete or the promoter is unable to give possession. Once the project construction is complete or possession is offered, as the case may be, the said provision ceases to operate. Since, the offer of the possession has been admittedly given to the appellants on 25.10.2018 so the aforesaid provision of Section 18 of the Act is of no help to the appellants/complainants and as admittedly the appellants had knocked the door of the Authority on 21.12.2018 for refund of the amount, so the Ld Authority has justifiably ordered for deduction of 10% of the total sale consideration out of the said deposit amount by the appellants.

18. The Citation **Pioneer Urban Land and Infrastructure Ltd. case (supra)** is of no help to the case of the appellants and is distinguishable because as per the facts of said Citation, appellant/builder failed to fulfil his contractual obligation of obtaining the occupancy certificate and offering the possession of the flat to the respondent/purchaser within stipulated period in the agreement or within a reasonable time thereafter. Since, the possession was offered by the appellant/builder

almost 2 years after the grace period under agreement had expired, so that period of 2 years was not held to be reasonable time. Contrary to it in the present case though the possession was to be handed over to the appellant/complainants upto 10.01.2018 but as the occupation certificate was granted by the concerned Authorities to the respondent No.2 builder on 23.07.2018, so the possession of Unit was offered to the complainants on 25.10.2018 i.e. almost 2 months prior to the filing of the complaint on 21.12.2018 by the appellant before the Authority for refund. Accordingly, this delay of 9 months 15 days as referred to above falls within the preview of reasonable time.

19. Regarding the second submission of the Ld counsel for the appellants that the appellants are not liable to pay service tax and other taxes deposited with the Govt. by respondent No.2, it is suffice to say that as per Clause 23 of the Flat Buyer Agreement dated 10.07.2014 the appellants/buyer are liable to pay on demand Govt. rates, cesses, charges, wealth tax or taxes of all and any kind by whatever name called. Clause 23 of the flat buyer agreement dated 10.07.2014 is as follows:

> *"The Buyer shall reimburse to the Developer and shall be liable to pay on demand Govt. rates, cesses, charges, wealth tax or taxes of all and*

ny kind by whatever name called, whether levied, or leviable now or in future, on land and/or the building, as the case may be from the date of its due and in proportion to the super area of the Unit prior to the execution of the sale deed in respect of the said Unit irrespective of the fact that the Buyer has not taken over possession or has not been enjoying the benefit of the Unit. Till the Unit is individually assessed to property tax or any other charges as aforesaid by the authorities, the Buyer shall be liable to pay to the Developer on demand, such taxes/charges whether levied now or in future on the land/buildings of the Complex, proportionate to the area of the Unit. If such charges are increased (including with retrospective effect) after the sale deed has been executed then these charges shall be treated as unpaid Total Sale Price of the Unit and the Developer shall have lien on the Unit of the Buyer for the recovery of such charges. Apportionment of such taxes, charges, levied by the Developer or their nominees shall be conclusive and binding upon the Buyer."

20. A thorough perusal of the aforesaid Clause shows that the appellants/buyers are liable to pay on demand Govt. rates, cesses, charges, wealth tax or taxes of all and any kind prior to the execution of the sale deed in respect of the Unit irrespective of the fact that the buyer has not

taken possession or has not been enjoying the benefit of the Unit. Further, till the Unit is individually assessed to property tax or any other charges, the buyer shall be liable to pay to the Developer on demand such taxes/charges. Admittedly in the present case though the possession had been offered to the appellants/buyer but they have not taken possession of the same and admittedly, the said Unit has not been individually assessed to property tax. Thus, in view of these facts and circumstances the appellants are also liable to pay service tax and other taxes actually deposited with the Govt. by respondent No.2 in proportion to the super area of the unit allotted to the appellants. Thus, there appears to be no illegality in the findings arrived at by the Ld Authority that the appellants are liable to pay service tax and other taxes deposited with the Govt. by respondent No.2.

21. Resultantly, as a consequence of the aforesaid discussion we are of the considered opinion that there is no illegality and infirmity in the impugned order handed down by the Ld Authority and the present appeal containing no merit deserves dismissal and is accordingly ordered to be dismissed.

22. File be consigned to record.

Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh
23.12.2019

Inderjeet Mehta
Member (Judicial)
23.12.2019

Anil Kumar Gupta
Member (Technical)
23.12.2019

Major Gen. Bhaskar kality & anr.
V/s
HRERA, Gurugram and others.
Appeal No. 347/2019

Present: None

The present appeal filed by the appellant M/s Major Gen. Bhaskar Kality & anr. stand dismissed vide our detailed judgment of even dated.

Copy of the detailed judgment be communicated to the parties and the ld. Real Estate Regulatory Authority, Gurugram.

File be consigned to the records.

Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh
23.12.2019

Inderjeet Mehta
Member (Judicial)
23.12.2019

Anil Kumar Gupta
Member (Technical)
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