

**BEFORE THE HARYANA REAL ESTATE APPELLATE
TRIBUNAL**

**Appeal No.39 & 683 of 2021
Date of Decision: 05.05.2022**

Appeal No.39 of 2021

Emaar India Limited

Registered Office: 306-308 Square One, C-2 District Centre,
Saket, New Delhi-110017.

Corporate Office Emaar Business Park, MG Road,
Sikanderpur, Sector 28, Gurugram-122002, Haryana.

Appellant

Versus

Brig. Atul Kumar Singh, House No.78, Sector 17-A, Gurugram,
Haryana-122001.

Respondent

Appeal No.683 of 2021

Brig. Atul Kumar Singh, House No.784, Sector 17-A,
Gurugram, Haryana-122001.

Appellant

Versus

Emaar India Limited, 306-308, 3rd Floor, Square One, C-2,
Saket District Centre, New Delhi-110017.

Respondent

CORAM:

Justice Darshan Singh (Retd),
Shri Inderjeet Mehta,
Shri Anil Kumar Gupta,

Chairman
Member (Judicial)
Member (Technical)

Present: Ms. Rupali Shekhar Verma, Advocate, learned counsel for appellant-promoter in appeal no.39/2021.

Shri Akshat Mittal, Advocate, learned counsel for respondent-allottee, in appeal no.39/2021 and appellant in appeal no.683/2021.

Shri Sanjeev Sharma, Advocate, learned counsel for respondent-promoter, in appeal no.683/2021.

ORDER:

JUSTICE DARSHAN SINGH (RETD.) CHAIRMAN:

This order of ours shall dispose of both the appeals mentioned above which have arisen out of the same order dated 22.01.2019 passed by the learned Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called the 'Authority') whereby complaint No.543 of 2018, filed by complainant Brig. Atul Kumar Singh (respondent in appeal no.39/2021 and appellant in appeal no.683/2021) was disposed of with the following directions:-

- “(i) Counsel for the respondent has stated at bar that they have applied for grant of occupation certificate, copy of application is placed on record.*
- “(ii) The case of the complainant is that he had booked a unit no.GGN-09/0502, 5th floor, building no.9, “Gurgaon Greens” in Sector 102 Gurugram and buyer’s agreement to this effect*

was executed inter-se the parties on 10.5.2013. By virtue of clause 14(a) of the buyer's agreement, the possession of the booked unit was to be handed over the complainant within a period of 36 months from the date of start of construction i.e. 14.6.2013 + 5 months grace period which comes out to be 14.11.2016. However, the respondent has given the revised date of possession as 31.12.2018 as per RERA registration.

- (iii) Since the respondent has miserably failed to hand over the possession of the booked unit to the complainant in time, complainant, by virtue of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 is entitled for delayed possession charges at the prescribed rate of interest i.e. @ 10.75% per annum.*
- (iv) Accordingly, the respondent is directed to pay delayed possession charges @ 10.75% per annum to the complainant till the actual offer of possession.*
- (v) The interest accrued so far shall be paid to the complainant within a period of 90 days from the date of this order and thereafter on or before the 10th of subsequent month.”*

2. As both the parties have filed the cross appeals, so in order to avoid confusion with respect to the identity of the parties Emaar India Limited (appellant in appeal no.39/2021 and respondent in appeal no.683/2021) shall be referred as

Appeal No.39 & 683 of 2021

'promoter' and Brig. Atul Kumar Singh (respondent in appeal no.39/2021 and appellant in appeal no.683/2021) shall be referred as 'allottee'.

3. Before proceeding further it is pertinent to mention that there is delay of 502 days in filing appeal no.39/2021 for which the promoter has moved an application for condonation of delay.

4. Learned counsel for the allottee has stated at bar that he has no objection in condonation of delay in filing the appeal. Thus, in view of his statement at bar, the application filed by the promoter for condonation of delay is hereby allowed. The delay of 502 days in filing appeal no.39 of 2021 stands condoned. Learned counsel for the allottee has accepted the notice of the appeal.

5. The allottee had filed complaint before the learned Authority seeking the following relief:-

"a) PASS an order for refund of Rs.11427,043/- (Rupees One Crore Fourteen Lakhs Twenty Seven Thousand and Forty Three Only) along with pendente lite and future interest thereon @ 24% from the due date of payment till the date of actual payment, in favour of the Complainant and against the Respondents, his legal representatives, heirs and assigns being the

amount due and payable to the representatives heirs and assigns being the amount due and payable to the Complainant from the Respondent on account of amount paid under the receipt nos. provided in the Statement of Ledger; and

- b) Pass an order for payment of penalty for delay as per the Allotment Agreement at the rate of Rs.7.50/ Sq. feet of the super area per month for the period of delay amounting to Rs.12,375/- (Twelve Thousand Three Hundred and Seventy Five Only) per month in favour of the Complainant and against the Respondent.*
- c) Award Rs.1,00,000/- (Rupees One Lakh Only) as the cost of the complaint in favour of the Complainant and against the Respondent; or*
- d) Pass such other order(s), direction(s) relief(s) as this Hon'ble Authority may deem fit and appropriate in the facts and circumstances of the present case and in the interest of justice."*

6. Thus, the basic relief sought by the allottee was for refund of the amount deposited by him along with interest on the ground that the promoter had failed to deliver the possession of the unit within the stipulated period mentioned in the 'Buyer's Agreement' dated 10.05.2013.

7. The complaint filed by the allottee was contested by the promoter by raising various preliminary objections in the

reply filed by it. The pleas raised in the complaint were controverted. It was pleaded that there was no delay in delivery of possession on the part of the promoter. The allottee had defaulted in timely payment of several instalments. The allottee was bound by the contractual covenants set out in the Buyer's Agreement which is valid, binding and subsisting contract between the parties. The allottee is not entitled to any compensation or to the refund of the amount paid by him. Section 18 of the Act is not applicable to the facts and circumstances of the case. The allottee cannot assert any claim which is contrary to the provisions of the buyer's agreement.

8. With these pleas, the promoter has pleaded for dismissal of the complaint filed by the allottee.

9. On hearing learned counsel for the parties and appreciating the material on record, the learned Authority disposed of the complaint with the directions mentioned in the upper part of this order.

10. Aggrieved with the aforesaid order, both the parties have filed these appeals.

11. We have heard Shri Akshat Mittal, Advocate, learned counsel for the allottee in both the appeals, Ms. Rupali

Shekhar Verma, Advocate, learned counsel for the promoter in appeal No.39/2021 and Shri Sanjeev Sharma, Advocate learned counsel for promoter in appeal No.683/2021 and have meticulously examined the record of the case.

12. Shri Akshat Mittal, learned counsel for the allottee has contended that the unit in question was allotted to the allottee on 03.09.2012. The buyer's agreement was executed on 10.05.2013. The allottee had paid almost the entire sale consideration. The due date for delivery of possession by adding five months grace period was 14.11.2016, but the promoter failed to deliver the possession of the unit as per the terms and conditions of the buyer's agreement. So, the allottee has become entitled for refund of the entire amount deposited by him along with interest at the prescribed rate. In support of his contentions, he relied upon case ***M/s Newtech Promoters & Developers Pvt. Ltd. vs. State of UP & Ors. Etc. 2022(1) R.C.R. (Civil) 357.***

13. On the other hand, Shri Sanjeev Sharma, learned counsel for the promoter has contended that there was no delay on the part of the promoter in delivery of possession. After completion of the project, the promoter had applied for issuance of the Occupation Certificate on 31.12.2018. The Occupation Certificate was issued on 30.05.2019 and

possession was offered to the allottee on 31.05.2019 i.e. on the next date of receiving the Occupation Certificate. He contended that once the project is complete, the Occupation Certificate has been received and possession has been offered, then the allottee is not entitled for the refund of the amount. To support his contentions, he relied upon case ***Ireo Grace Realtech Pvt. Ltd. Versus Abhishek Khanna & Others, 2021(1) R.C.R. (Civil) 574.***

14. Ms. Rupali Shekhar Verma, learned counsel for promoter has also supported the contentions raised by Shri Sanjeev Sharma, Advocate. She further contended that the allottee was not even entitled to the delayed possession charges as granted by the learned Authority. The allottee was not entitled to interest at the prescribed rate for the alleged delay in delivery of possession. The allottee was bound by the terms and conditions of the agreement.

15. We have duly considered the aforesaid contentions.

16. As already mentioned, the basic relief sought by the allottee in the complaint filed by him is the refund of the entire amount deposited by him along with interest. In the impugned order the learned Authority has declined the relief of refund on the ground that the promoter had already applied for grant of Occupation Certificate and copy of the said

application was placed on record. The allottee had booked the unit with the promoter on 03.09.2012. The buyer's agreement was executed on 10.05.2013. Clause 14(a) of the agreement dated 10.05.2013 provides that the possession is to be delivered within 36 months from the date of start of construction plus five months as a grace period. It is not disputed that the date of start of construction is 14.06.2013. So, the due date for delivery of possession was 14.11.2016. As per the terms and conditions of the buyer's agreement, the promoter was required to deliver the possession to the allottee by 14.11.2016. The revised date of completion of the project as per RERA Registration will not alter the terms and conditions of the agreement with respect to the deemed date of delivery of possession. The Hon'ble Apex Court in case ***M/s Imperia Structures Ltd. And others versus Anil Patni and others, Law Finder Doc Id # 1758728*** has laid down as under:-

“33. We may now consider the effect of the registration of the Project under the RERA Act. In the present case the apartments were booked by the Complainants in 2011-2012 and the Builder Buyer Agreements were entered into in November, 2013. As promised, the construction should have been completed in 42 months. The period had expired well before the Project was registered under the

provisions of the RERA Act. Merely because the registration under the RERA Act is valid till 31.12.2020 does not mean that the entitlement of the concerned allottees to maintain an action stands deferred. It is relevant to note that even for the purposes of Section 18, the period has to be reckoned in terms of the agreement and not the registration. Condition no. (x) of the letter dated CIVIL APPEAL NO. 3581-3590 OF 2020 @ CIVIL APPEAL DIARY NO.9796/2019 M/s Imperia Structures Ltd. vs. Anil Patni 43 17.11.2017 also entitles an allottee in same fashion. Therefore, the entitlement of the Complainants must be considered in the light of the terms of the Builder Buyer Agreements and was rightly dealt with by the Commission.”

17. In view of the aforesaid ratio of law laid down by the Hon'ble Apex Court that for the purpose of Section 18 of the Act, the period has to be reckoned in terms of the agreement and not the RERA registration. So, the promoter was required to deliver the possession of the unit to the allottee by 14.11.2016. It is an admitted fact that on the date of filing the complaint by the allottee, the promoter had not even applied for issuance of the Occupation Certificate.

18. Learned counsel for the promoter has contended that the promoter had applied for the Occupation Certificate on 31.12.2018, the same was granted on 30.05.2019 and the possession was offered to the allottee on 31.05.2019. So, the

Appeal No.39 & 683 of 2021

right of the allottee to seek refund stands extinguished. But, we do not find any substance in this plea raised by learned counsel for the promoter. The copy of the impugned order shows that the complaint filed by the allottee was put up before the learned Authority for first hearing on 13.09.2018. Enclosure- 'B' (in appeal no.39/2021) is the copy of the complaint filed by the allottee which shows that the same was registered with the learned Authority on 06.07.2018 with Complaint Registration No.CIN/HARERA/GGM/0872/2018. So, the allottee filed the complaint with the learned Authority much before the application for issuance of Occupation Certificate was moved by the promoter. The complaint filed by the allottee was registered on 06.07.2018, whereas the promoter has moved the application for issuance of the Occupation Certificate on 31.12.2018.

19. It is settled proposition of law that the ordinary rule of civil law is that the rights of the parties stand crystallised on the date of institution of the suit and, therefore decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. So, we are to see the status of the parties as on the date of registration of the complaint filed by the allottee i.e. on 06.07.2018. By that time, the project was not complete and even the application for issuance of the

Occupation Certificate was not moved. The deemed date for delivery of possession was 14.11.2016 and there was delay of more than one year and seven months. So the right of the allottee to claim refund had already crystallised on the date of filing the complaint which cannot be taken away by the subsequent event of issuance of the Occupation Certificate and offer of possession.

20. In the latest judgment ***M/s Newtech Promoters & Developers Pvt. Ltd. vs. State of UP & Ors. Etc.*** (Supra), which is the authoritative landmark judgment of the Hon'ble Apex Court with respect to the interpretation of the provisions of the Act, the Hon'ble Apex Court has dealt with the rights of the allottees to seek refund as referred under Section 18(1)(a) of the Act. The Hon'ble Apex Court has laid down as under:-

“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.”

21. As per the aforesaid ratio of law, the allottee has unqualified right to seek refund referred under Section 18(1)(a) and Section 19(4) of the Act, which is not dependent on any contingencies. The right of refund of payment has been held to be 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. Thus, the present allottee has unqualified and unconditional absolute right to seek the refund as the promoter has failed to deliver the possession of the unit by 14.11.2016 the stipulated date as per the buyer's agreement dated 10.05.2016. In view of this latest judgment of the Hon'ble Apex Court and the fact that the rights of the parties have crystallised on 06.07.2018 with the registration of the complaint, case **Ireo Grace Realtech Pvt. Ltd. Versus Abhishek Khanna & Others** (Supra) relied upon by learned counsel for the promoter will be

Appeal No.39 & 683 of 2021

of no help to it. Once the allottee has become entitled for the refund of the amount the contentions raised by Ms. Rupali Shekhar Verma, to assail the findings of the learned Authority with respect to the grant of delayed possession charges has no relevancy and becomes inconsequential.

22. Thus, keeping in view our aforesaid discussion, the impugned order dated 22.01.2019 passed by the learned Authority is not sustainable. Consequently, appeal no.683 of 2021 filed by the allottee is hereby allowed, the impugned order dated 22.01.2019 is hereby set aside. Allottee Brig. Atul Kumar Singh is entitled for the refund of the entire amount paid by him i.e. Rs.1,14,27,043/- along with interest at the prescribed rate i.e. 9.3% per annum prevailing as on today, as per Rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017. The interest shall be calculated from the dates of respective deposits by the allottee, till the date of realization.

23. Resultantly, appeal No.39 of 2021 filed by the promoter stands dismissed.

24. The amount of Rs.31,26,549/- deposited by the appellant-promoter in appeal No.39/2021 with this Tribunal to comply with the provisions of Section 43(5) of the Act be remitted to the learned Haryana Real Estate Regulatory

Appeal No.39 & 683 of 2021

Authority, Gurugram, along with interest accrued thereon for disbursement to the allottee in accordance with law/rules and of course subject to tax liability, if any.

25. The original order be attached with appeal no.39/2021 and certified copy be attached with appeal no.683/2021.

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

27. Files be consigned to the record.

Announced:
May 05, 2022

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

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)