

**THE UTTAR PRADESH REAL ESTATE APPELLATE TRIBUNAL,
AT
LUCKNOW.**

**RESERVED JUDGMENT
BENCH-1**

Appeal No. 4/2021

Narendra VermaAppellant.

Versus

M/s Panchsheel Buildtech Pvt. Ltd.Respondent.

(Complaint No.NCR144/02/0072/2020)

Hon'ble Mr. Justice (Dr.) D. K. Arora, Chairman.
Hon'ble Mr. Kamal Kant Jain, Technical Member.

1. This appeal was filed under Section 44(1) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'the Act 2016') by Mr. Narendra Verma (hereinafter referred to as the 'appellant/complainant') against the order dated 06.10.2020 passed by the U. P. Real Estate Regulatory Authority, Gautam Budh Nagar (hereinafter referred to as 'Regulatory Authority') in Complaint No. NCR144/02/0072/2020, whereby the following directions were made:-
 - a) The respondent is directed to provide possession of the original allotted unit to the complainant by March 2021 or to provide physical possession of a unit equivalent to the original allotted unit with the consent of the complainant by December 2020 alongwith the occupancy certificate.
 - b) The respondent shall pay interest at the rate of MCLR+1% to the complainant from 24.06.2018 till the date of receipt of OC/CC. This amount of interest will be adjusted towards last payment at the time of handing over the possession, and the rest of the amount will be paid to the complainant.
 - c) Keeping in view the lockdown in the country for the prevention and control of Covid-19, delay interest will not be calculated from

24.03.2020 to 30.09.2020, for default in payment by the complainant and for default by the respondent in completion of the project.

d) If any amount is to be paid by the complainant then the complainant shall make payment of the balance amount. As per Section 2(z)(i) of the Act 2016 the respondent is entitled to interest, but the interest will not be payable more than the rate of MCLR+1%.

2. The facts of the case, in brief, as culled out from the memo of appeal, are that the appellant applied for a flat in the respondent's project named as "Panchsheel Greens-II" situated at Plot No. GH-01A, Sector-16, Greater Noida (West), through application no. 2399 dated 12.05.2015.
- 2.1 The appellant vide allotment letter dated 23.06.2015, was allotted Apartment No.903, Type 3B/R (Super HIG), Floor 9, Block C-4, leasable area 1820 sq. ft., built up area 1436.66 sq. ft. by the respondent in the said project. The total cost of the unit was Rs.73,18,080/- (inclusive Preferential Location Charges, basic cost, taxes etc.).
- 2.2 The appellant entered into a Tripartite Agreement dated 23.06.2015 executed among the appellant, respondent and the Indian Infoline Housing Finance Limited (IIHFL) for taking the loan of Rs.50,00,000/- for the booked flat.
- 2.3 The total amount deposited by the appellant against the booked flat is Rs.60,83,264/-, which includes the loan amount of Rs.42,08,400/-.
- 2.4 As per the allotment letter the possession of the unit was to be given within 36 months from the date of allotment (23.06.2015) i.e. by 23.06.2018.
- 2.5 In para 8 of the terms and conditions of the allotment letter it is clearly mentioned that if the respondent fails to handover the possession within the stipulated time then the promoter/respondent is liable to compensate for the delay in handing over the possession.
- 2.6 The appellant opted for the subvention plan of the respondent. The respondent, through a letter dated 02.07.2015, gave consent to the IIHFL that it has no objection to giving loan to the appellant and mortgaging the said flat by the appellant to IIHFL by way of security for repayment.

- 2.7 As per the price list of subvention scheme of the said project of the respondent under the heading 'note' it was mentioned that 'no pre-EMI till offer of possession'. No EMI is to be paid by the appellant against the loan till the respondent handovers the possession of the unit. The respondent paid EMIs to IIHFL for three years and from July 2018 stopped making payment of EMIs.
- 2.8 Despite making payment on time as per the demand raised by the respondent, the appellant has not received the offer of possession. In spite of several reminders and requests made by the appellant to the respondent for completing the project as per the agreement, handing over the physical possession along with delay penalty as well as payment of pre-EMIs till possession, the respondent has failed to perform the same. Feeling aggrieved the appellant filed a complaint case before the Regulatory Authority, which was registered as Complaint No.NCR144/02/0072/2020. The said complaint was decided by the Regulatory Authority in the manner mentioned in para 1 above.
3. The appellant has challenged the impugned order dated 06.10.2020 passed by the Regulatory Authority on the following grounds:--
- I. Because the Regulatory Authority has passed the impugned order dated 06.10.2020 without application of mind, without appreciating the facts placed before the authority and without going through record.
 - II. Because the Regulatory Authority has failed to consider the fact that the appellant has mentioned in its complaint that the appellant sought for immediate possession or any alternative unit along with delay interest and refund the amount paid at the interest rate which was being paid by the appellant to the bank loan with interest.
 - III. Because the Regulatory Authority failed to consider the fact that the respondent is liable to pay the upcoming EMIs of the flat as per subvention plan.
 - IV. Because the Regulatory erred in travelling beyond the scope of complaint preferred by the appellant.

- V. Because the Regulatory Authority failed to appreciate that the appellant was entitled for interest for the period for which the appellant has paid the EMIs, as the delay was caused because of the respondent in handing over the possession.
- VI. Because the Regulatory authority has passed the impugned order for possession without mentioning about the refund of the amount paid at the interest rate which was being paid by the appellant to the Bank loan with interest and directing the respondent for paying the upcoming EMIs of the flat against the bank loan as per the subvention scheme of the respondent opted by the appellant.
- VII. Because the Regulatory Authority has done injustice with the appellant which is illegal in the eyes of law by overlooking the allotment letter, customer ledger, Tripartite Agreement and payment plan according to which the respondent should handover the possession on or before 23.06.2018, and the Appellant has opted the for the subvention scheme accordingly.
- VIII. Because the Regulatory Authority has failed to consider that the appellant has purchased the Flat on the basis of the subvention scheme where the EMIs should be deposited by the respondent to IIHFL till the actual handing of the possession of the apartment, which the respondent has failed to comply.
- IX. Because the impugned judgment and order passed by Learned Authority is cryptic, illegal and manifestly erroneous and is liable to be set aside.
- X. Because the Regulatory Authority has committed manifest error of law in not granting the reliefs as sought by the appellant.
- XI. Because the Regulatory Authority has failed to consider the fact that the appellant has asked for physical possession and delay interest along with the refund of the amount paid to the bank as EMI after the post July 2018 along with the financial loss suffered because of the respondent.
- XII. Because the Regulatory Authority has failed to consider the fact that as per Section 18 of Real Estate (Regulation and Development)

Act, 2016, the promoter is liable to pay for the delay made in handing over the possession as per the agreement.

- XIII. Because the Regulatory Authority has failed to consider the fact that as per Section 12 of the Real Estate (Regulation and Development) Act, 2016 the promoter is liable to compensate the person who makes a deposit on the basis of the information contained in the advertisement or prospectus or sustains any loss or damage by reason of any incorrect, false statement included therein, in that case person should be compensated for the same.
- XIV. Because it was submitted by the appellant that the respondent had approached the Regulatory Authority not with clean hands by not disclosing true and correct facts and by misrepresenting material facts.
- XV. Because it was submitted by the appellant that the respondent has not paid the EMIs after the post July 2018 even after several reminders and requests made to the respondent.
- XVI. Because it was submitted by the appellant that the respondent after many reminders and requests did not provide the possession on time and thus liable for losses which the appellant has suffered.
- XVII. Because the Regulatory Authority has failed to consider the fact that there is legitimate grievance that the appellant can have against the respondent which comes under ambit of the Real Estate (Regulation and Development) Act, 2016 and prevailing UPRERA Rules viz. 'The Uttar Pradesh Real Estate (Regulation and Development) Rules 2016.

4. The appellant has prayed for the following reliefs:-

- a. To set aside the impugned Order passed by the Regulatory Authority dated 06.10.2020 to the extent it doesn't deal with prayer clause 5.2 & 5.3 prayed before the Authority in the complaint of the appellant.
- b. Either order or direct the respondent to handover the immediate possession or to provide any alternative flat with the delay interest.

- c. Either order or direct the respondent to refund the total amount paid by the appellant as Pre-EMIs to the bank after the post July 2018 along with the interest.
 - d. To direct the Respondent to pay the upcoming Pre-EMI of the Flat as per the subvention scheme/plan.
5. The respondent has filed objection/counter to the memo of appeal and submitted that offer of possession regarding the unit in question was given on 30.06.2021. The respondent further submitted that it has made an application regarding part completion for plot no.GH-01A, Sector-16, Greater Noida on 28.03.2019.
6. The appellant has not filed any reply to the objection of the respondent.
7. Head Shri Abhishek Khare, learned counsel for appellant and Shri Amit Yadav, learned counsel for respondent.
- 7.1 Shri Abhishek Khare, learned counsel for the appellant submitted that the only grievance of the appellant is regarding non-grant of relief by the Regulatory Authority with respect to payment of pre EMI as per agreement of the respondent.
- 7.2 Shri Amit Yadav, learned counsel for the respondent while opposing the appeal submitted that the issue of pre-EMI and assured return has already been considered by this Tribunal in various judgments and placed a judgment passed in Appeal No. 211/2022 (Meena Gupta Vs. One Place Infrastructures Pvt. Ltd.). The learned counsel for the respondent submitted that the instant appeal is misconceived and deserves to be dismissed.
8. On the basis of the submissions of learned counsel for the parties and taking into consideration the prayer of the learned counsel for the appellant, whereby he has restricted the grievance of the appellant with respect to non-grant of relief by the Regulatory Authority with respect to payment of pre EMI as per agreement of the respondent, we deem it proper to frame the following question:-
 - i. Whether under the Scheme of Act 2016 there is a provision for examining and deciding the issues relating to the provisions of assured return/committed charges or payment of Pre-EMI by

promoter for a fixed period or till possession etc. or commercial effect in an allotment letter/builder buyer agreement for purchase of flat/apartment/plot?

9. In order to examine **issue no. (i)**, we proceed to examine the aims and objects and the obligations and compliances required to be made by the promoters/developers.
- 9.1 The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardization and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardization has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasized in various forums.
- 9.2 The Real Estate (Regulation and Development) Act, 2016 aims to create a real estate regulatory authority and an appellate tribunal that will act as a watchdog for the housing sector, primarily towards protecting consumer interests while creating an alternative redress mechanism for an disputes that may arise. This Act also aims to provide a uniform regulatory environment in the real estate sector which is laced with black money, red-tapism, land mafias and corruption. The core objective of this Act is twofold: firstly, to ensure sales of immovable properties in an efficient and transparent manner and secondly, to protect the interest of consumers in the real estate sector.
- 9.3 The Act is further intended to achieve:-
 - (a) To ensure accountability towards allottees and protect their interest;
 - (b) To infuse transparency, ensure fair-lay and deduce frauds & delays;
 - (c) To introduce professionalism and pan India standardization;
 - (d) To establish symmetry of information between the promoter and allottee’
 - (e) To impose certain responsibilities on both promoter and allottees;

- (f) To establish regulatory oversight mechanism to enforce contracts;
- (g) To establish fast-track dispute resolution mechanism;
- (h) To promote good governance in the sector which in turn would create investor confidence;
- (i) Regulation of the planned development in the real estate sector;
- (j) To ensure sale of immovable properties in an efficient and transparent manner;
- (k) To protect the interest of consumers in the real estate sector;

9.4 The promoter/developers are also required to make various compliances:-

- i. No launch or advertisement before registration with RERA;
- ii. Sharing information project plan, layout government approvals, land title status, sub-contractors;
- iii. Increased assertion on the timely completion of projects and delivery to the consumer;
- iv. An increase in the quality of construction due to a defect liability period of five years;
- v. Informing allottees about any minor addition or alteration;
- vi. Consent of 2/3rd allottees about any other addition or alteration;
- vii. Consent of 2/3rd allottees for transferring majority rights to 3rd party;
- viii. Formation of RWA within specified time or three months after majority of units have been sold.

9.5 The promoter of a real estate development firm has also to maintain a separate account for each of their projects. A minimum 70 per cent of the money from investors and buyers will have to be deposited. This money can only be used for the construction of the project and the cost borne towards the land. The developers will have to keep informed the buyers of their other ongoing projects.

9.6 RERA requires builders to submit the original approved plans for their ongoing projects and the alterations that they made later. Builders also have to furnish details of revenue collected from allottees, how the funds were utilized, timeline for construction, completion, and delivery that will need to be certified by an engineer/architect/practicing chartered accountant.

- 9.7 It is responsibility of each state regulator to register real estate projects and real estate agents operating in their state under RERA. The details of all registered projects will be put up on a website for public access.
- 9.8 Further the regulator will have to ensure protection to buyers in this matter for five years from the date of possession. If any issue is highlighted by buyers in front of the regulator in this period including in quality of construction and the provision of services, the developer will have to rectify the same within 30 days.
- 9.9 Developers can't invite, advertise, sell, offer, market or book any plot, apartment, house, building, investment in projects, without first registering it with the regulatory authority. Furthermore, after registration, all the advertisement inviting investment will have to bear the unique RERA registration number. The registration number will be provided project-wise. After registering the project, developers will have to furnish details of their financial statements, legal title deed and supporting documents.
- 9.10 If the promoter defaults on delivery within the agreed deadline, they will be required to return the entire money invested by the buyers along with the pre-agreed interest rate mentioned in the contract based on the model contract agreement given by RERA.
- 9.11 If the buyer chooses not to take the money back, the builder will have to pay monthly interest on each month delay to the buyer till they get delivery. After developers register with the regulator, a page will be created for the builder on the regulatory authority's website. The developer will be given login credentials using which it will upload all the information regarding the registered projects on the regulator's website. The number, type of apartments, plots and projects and their completion status will be updated at a maximum quarterly basis.
- 9.12 To add further security to buyers, RERA mandates that developers can't ask more than 10 per cent of the property's cost as an advanced payment or booking amount before actually signing a registered sale agreement.

- 9.13 The regulator will have the power to impose penalty and courts can fine and imprison errant builders. The imprisonment can go up to a period of three years in case of certain matter.
- 9.14 Section 2(c) of the Act 2016 defines “agreement to sale” means an agreement entered into between the promoter and the allottee and Section 13 refrains the promoter from accepting a sum more than 10% of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale specifically providing therein the particulars of the development of project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot, or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.
- 9.15 Section 18 of the Act 2016 gives right to the allottee to seek refund of the amount and compensation if the promoter fails to complete or is unable to give possession of the apartment, plot or building in accordance with the terms of agreement for sale duly completed by the date specified therein.
- 9.16 Section 19(4) of the Act 2016 provides for entitlement of an allottee to claim refund of amount along with interest at such rate as may be prescribed and compensation in the manner as provided under the Act 2016 from the promoter, if promoter fails to comply or unable to give possession of the apartment, plot or building, as the case may be in accordance with the terms of agreement for sale. Sub Section (6) of Section 19 further provides that every allottee to make necessary payment in the manner within the time as specified in the agreement for sale.
- 9.17 Section 31 of the Act empowers any aggrieved person to file a complaint with the Authority for the Adjudicating Officer, as the case may be, for violation or contravention of the provisions of the Act 2016 and Rules and Regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

9.18 The State Government in exercise of powers conferred by sub section (1) of Section 84 read with clause (h) of sub section (2) of the said Section and sub-section (2) of Section 13 of the Act 2016 framed The Uttar Pradesh Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018 (hereinafter referred to as 'Rules 2018'). Chapter-II of Rules 2018 provides for 'agreement for sale/lease' to be executed between the promoter and an allottee in the form as per Annexure and under the heading of 'Terms' as per clause 1.5, a promoter has been given sole discretion to give a rebate for early payments of instalments payable by the allottee by discounting such early payments @ % per annum for the period by which the respective installment has been preponed and the provision for allowing rebate and such rate of rebate shall not be subject to revision/withdrawal, once granted to an allottee by the Promoter.

Rules further provide the mode of payment, compliance of law relating to remittance, adjustment or appropriation of payments.

Under the heading 'Time is the Essence' it has been specifically provided that the promoter shall abide by the time schedule for completing the Project as disclosed at the time of registration of the Project with the Authority and towards handing over the (Apartment/Plot) to the Allottee. Similarly, Allottee was also required to make payment of the installment and other dues and to meet the other obligations under the Agreement subject to the simultaneous completion of construction by the Promoter as provided in the payment plan.

Rules also provide for construction of the Project/Apartment, possession of the Apartment/Plot, Representations and Warranties of the promoter, conveyance of the apartment, maintenance of the building/apartment/project, defect liability, right to enter the apartment for repairs, usage, general compliance with respect to the apartment, compliance of laws, notifications etc by parties, additional constructions, promoter shall not mortgage or create a charge etc.

9.19 Clause 25 of the 'Terms' provides severability to the effect that *"If any provision of this Agreement shall be determined to be void or unenforceable under the Act or the Rules and Regulations made there*

under or under other Applicable Laws, such provisions of the Agreement shall be deemed amended or deleted in so far as reasonably inconsistent with the purpose of this Agreement and to the extent necessary to conform to Act or the Rules and Regulations made there under or the Applicable Laws, as the case may be, and the remaining provisions of this Agreement shall remain valid and enforceable as applicable at the time of execution of this agreement.”

- 9.20 From the examination of the provisions of entire scheme of Act 2016 and the Rules 2018, it is evident that the agreement for sale is required to be entered into between the promoter and allottee and they are under obligation to perform their duties/obligations as per the provisions of the Act 2016 and Rules 2018. The entire Act does not talk about securing loan by an allottee through any financial institution and/or for facilitating the loan, execution of tripartite agreement by allottee, promoter as well as financial institution and entering into memorandum of understanding with respect to no pre-EMIs till possession etc. or any assured return or committed charges.
- 9.21 In our considered view, the assured return or committed charges, payment of EMIs by promoter on behalf of buyer etc. are independent commercial arrangements between the parties which sometime a promoter/developer offer, in order to attract buyers/investors or users who may invest either in under construction or pre-launched/new launched projects. Out of these independent commercial arrangements between promoter and buyer, the commercial effect would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is ‘raised’ under a real estate agreement, which is done with profit as the main aim, such agreement between the developer and home buyer would have the “commercial effect” as both the parties have “commercial” interest in the same- The real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Whereas the object of promulgation of the Real Estate (Regulation and Development) Act 2016 aims to create and ensure sale of immovable property in efficient and transparent manner and to protect the interest of the

consumers in the real estate sector and not to use the forum for profit purposes/unjust enrichment.

- 9.22 On the basis of the above, we are of the considered view that there is no provision under the Scheme of Act 2016 for examining and deciding the issues relating to the provisions of assured return/committed charges or payment of Pre-EMI by promoter for a fixed period or till possession etc. or commercial effect in an allotment letter/builder buyer agreement for purchase of flat/apartment/plot. The **issue no. (i)** is answered accordingly.
10. Shri Abhishek Khare, learned counsel for the appellant restricted his submissions and prayer during the course of argument advanced only with respect to non-grant of relief by the Regulatory Authority with respect to payment of pre EMI as per agreement by the respondent. Appreciating the submission of learned counsel for the parties, we framed the question and after analyzing the same, we are of the considered view that the claim of the appellant is not sustainable in the eyes of law in pursuance to the provisions of Act and Rules, 2016. Accordingly, the appeal is **dismissed**.

Dated: 17.07.2023
GauravSri/-

(K.K. Jain)

(D.K. Arora)