AFR
BENCH NO. 1
SR. NO. 45

U.P. REAL ESTATE APPELLATE TRIBUNAL
AT
LUCKNOW

Appeal No. D 361 of 2024

Anuradha Kumari

Vs.

Aastha Infracity Limited

****

Hon'ble Mr. Justice Suneet Kumar, Chairman
Hon'ble Sanjai Khare, Judicial Member
Hon'ble Mr. Rameshwar Singh, Administrative Member.

1. Heard learned counsel for the parties and perused the record with their assistance.

2. Learned counsel for appellant allottee by the present appeal is raising challenge to the judgment and order dated 18.06.2024, passed by the UP Real Estate Regulatory Authority at Gautam Budh Nagar, (for short, 'Regulatory Authority'), in Complaint No. NCR144/01/103987/2023, whereby, the complaint filed for possession of the unit and interest for the delayed period came to be rejected on the ground that one of the co-allottee had requested for termination/sale of the allotted unit. In other words, it was observed, therein, that appellant, upon sale of the unit to a third party, ceases to be an allottee.

3. Facts ***inter-se*** parties are not in dispute.

4. The respondent, promoter company, floated a residential project, in the name and style, "AASTHA GREENS," Plot No-3, Township at GH-4, Sector-4, Greater Noida West, U.P. Appellant and her late husband jointly, booked a residential unit, admeasuring 1116 Sq. Ft. on 15.01.2013. The total consideration of the unit was at Rs.27,34,200/-, flat bearing no. 408, fourth floor, Tower-1 came to be allotted.

5. The allottees, pursuant to the allotment letter deposited at Rs.11,00,000/- on 15.01.2013, thereafter, until 05.04.2018 deposited ninety five percent of the sale consideration at Rs. 26,39,490/-. The formal agreement came to be executed on 28.07.2016, after over three years, wherein, it was provided that the unit would be handed over to the appellant (allottees) on or before 28.01.2020 (36 months, plus 6 months grace period). It is evident, in the aforenoted facts that respondent had solicited investment into the project without having permission/permit from the competent authority to construct the flat. It is only, thereafter, in 2016, agreement came to be signed. The project being an ongoing project was duly registered with UP RERA.

6. The co-allottee (husband) of the appellant, unfortunately expired on 30.04.2021. The appellant, thereafter, had sent a mail to the respondent on 29.09.2021, wherein, she requested for transfer of the unit/agreement in her sole name being a co-allottee. It appears that respondent did not respond to the mail, consequently, multiple mails were dispatched by the appellant on 21.11.2021, 06.12.2021, 22.02.2021 and 19.02.2021 respectively, to the respondent reiterating the request, however, there was no response. In any case, upon death of the co-allottee, appellant became sole allottee of the unit.

7. The appellant, on being subjected to harassment by the respondent promoter, was constrained to institute a complaint on 31.01.2023, under Section 31 of Real Estate (Regulatory Authority) Act 2016, (for short, 'Act 2016'), seeking possession of the unit and interest for the delayed period. The respondent promoter put in appearance before the Regulatory Authority and filed objections. It was stated that the co-allottee (husband) vide e-mail dated 06.10.2020, had requested the respondent that, 'I am interested to sell my unit no. 408 on fourth floor, Tower-1, Astha Green' thereby, sought termination of the unit/agreement and refund of his deposit. It was, further submitted that appellant approbated and reprobated by first consenting to sell the unit, thereafter, seeking possession of the unit.

8. It is submitted by the learned counsel for the appellant that without terminating the agreement, and informing the appellant (co-allottee) with regard to the status of the unit/termination of the agreement, the respondent transferred the unit to third party (Mausami Rani) upon allotment on 30.09.2022 and thereafter executed the sub-lease deed on 15.10.2022. It is

submitted by the learned counsel for appellant that the respondent promoter violated the terms and conditions of the agreement, in particular, Clause 6 and 6(a), wherein, it has been provided that in case the allottee at any time desires to cancel the allotment for any reason ,whatsoever, then, in such case ten percent of total cost price of the flat shall be forfeited towards cancellation charges.

9. Further, the refundable amount after deduction shall be paid to the allottee, on or before expiry of three months and not later than six months from the date on which, the company received the cancellation application/affidavit and proper documents from the allottee for such cancellation. In this backdrop, it is submitted that the respondent, neither, cancelled the agreement/allotment of the unit on the request of the co-allottee, nor, the deposited amount was refunded.

10. In the circumstances, it is urged that the allotment/agreement dated 28.07.2016, was never terminated, by the respondent, rather, subsists till date. It is further submitted that on the death of the co-allottee, appellant had immediately requested through several correspondence that appellant desires to take the unit in terms of the agreement. In any case, appellant, being a co-allottee of the unit, continued to be the allottee of the unit after death of the husband (co-allottee). The unit, however, came to be transferred without terminating the unit/agreement in terms of Clause (6)/6(a) of the agreement.

11. The respondent has filed objections/written statement to the memo of appeal, inter alia, stating that appellant ceases to be an allottee within the meaning of Section 2 (d) of Act 2016. The allotment of the appellant came to be cancelled on the request made by the co-allottee. It is further submitted that since appellant had opted out of the project as one of the allottee had given his consent for revocation of the agreement, the unit subsequently came to be transferred to the third party. It is however, submitted by the learned counsel for the respondent that upon cancellation/transfer of the unit to the third-party, the deposited amount has not yet been refunded, as appellant had not demanded refund of the amount. It is submitted that respondent is willing to refund the deposited amount, along with, interest to the appellant.

12. The learned counsel for the respondent has placed reliance on e-mail dated 06.10.2020, dispatched by co-allottee (husband), wherein, he had requested

for cancellation of the agreement/unit, seeking refund of the deposit. It is, therefore, submitted that after receiving the request, respondent started looking out for a new purchaser. The unit came to be transferred by executing conveyance deed dated 15.10.2022, thereafter, possession of the unit was also handed over to the subsequent allottee.

13. It is further submitted that after one year from the date of transfer of the unit, appellant sent intimation to the respondent, seeking possession of the unit. In the circumstances, it is urged that after conveyance /possession being handed over to the third party, it was not possible to restore possession of the unit to the appellant.

14. In the aforenoted factual matrix **the following questions arise for consideration:**

(i) whether the unit/agreement allotment came to be cancelled in terms of the agreement, read with, Rules 2018.

(ii) whether complaint at behest of the appellant was maintainable, and/or, whether respondent has indulged in unfair fraudulent practice.

(iii) whether appellant is entitled to possession of the unit and interest for the delayed period.

(iv) whether the respondent-promoter has exposed itself for penal consequences under Chapter VIII of Act 2016, for violating the provisions of the Act, Rules and Regulations made thereunder.

<u>Question No. 1.</u>

15. It is not being disputed by the respondent, as noted earlier, the respondent has not issued that cancellation/termination order/letter of the unit, pursuant to the request of the co-allottee, nor, the deposit came to be refunded upon cancellation of the unit/agreement. The promoter requesting cancellation died before the proposal was accepted by the respondent. The unit devolved upon the sole co-allottee.

16. In the given facts, it is urged on behalf of the respondent that the allottee had sought termination of the agreement/allotment of the unit. In this backdrop, it is relevant to examine, as to whether the unit/agreement came to be cancelled

or terminated in terms of the agreement, read with, Rule 7.5 of U.P. Real Estate (Regulation and Development), Agreement and Sale Rules 2018, (for short, 'Rules 2018').

17. **Clause 6 and 6 (a) of the agreement is extracted:**

6. That in case the Allottee/s, at any time desires for cancellation of the provisional allotment for any reason whatsoever, then in such case 10% of the total cost price of the flat shall be forfeited as cancellation charges to partially make good the loss to the company on account of such cancellation affecting future commitments, holding cost of unit, manpower cost, reduced cash flow, project re-schedulement, increase in cost of project etc. and the balance, if any, shall be refunded without any interest in the following manner:-

6(a). The refundable amount, after deduction as explained above shall be paid to the Allottee/s not before expiry of a period of three months and not later than six months from the date on which the Company received the cancellation application/affidavit and proper documents from the Allottee/s for such cancellation.

18. The agreement mandates that in case the allottee/s, desires cancellation of the allotment, in such case 10 percent of the total price of the flat shall be forfeited towards cancellation charges and the balance, if any, shall be refunded without any interest. The balance amount, if any, shall be paid to the allottee/s not before expiry of a period of three months and not more than six months from the date, on which the company received the cancellation application/affidavit and proper documents from the allottee/s for such cancellation. The respondent-promoter though on having received the request for cancellation of the unit from one of the allottees on 16.10.2020, thereafter, never proceeded to cancel the unit upon taking any affidavit or the documents of the unit from the allottee/s. Further, request of the co-allottee was never acted upon by the respondent, admittedly, the money/deposit was not returned.

19. It is not in dispute that appellant had not made any request, along with, her husband for cancellation of the unit. The co-allottee, thereafter, died on 13.04.2021. In other words, request for cancellation of the unit before it could be acted upon by the respondent, the co-allotee had died. It is relevant to take

notice of Rule 7.5 of Rules 2018, pertaining to cancellation by allottee of his allotment.

<u>Rule 7.5 is extracted: -</u>

Cancellation by Allottee. — The Allottee shall have the right to cancel/withdraw his allotment in the Project as provided in the Act:

> *Provided that where the Allottee/s proposes to cancel/withdraw/terminate from the Project without any fault of the Promoter, the Promoter herein is entitled to forfeit the Booking Amount paid for the allotment of the Said Unit. Upon such termination, the Allottee/s shall execute and register a Deed of Cancellation recording such termination and cancellation of this Agreement, however the date of the Allottee/s aforesaid notice of termination shall be and be deemed to be the date on which this Agreement has stood terminated and cancelled. The Promoter shall return 50% (fifty percent) of the balance amount of money paid by the Allottee/s within 45 (forty-five) days of such cancellation / withdrawal and the remaining 50% (fifty percent) of the balance amount on re-allotment of the Said Unit to a new Allottee or at the end of one year from the date of cancellation / withdrawal by the Allottee/s, whichever is earlier. The Promoter shall inform the previous Allottee/s the date of re-allotment of the Said Unit and also display this information on the official website of the Authority on the date of re-allotment.*

20. Rule 7.5 mandates that allottee shall have the right to cancel/withdraw his allotment in the project without any fault of the promoter. The promoter is entitled to forfeit the booking amount paid for the allotment (10 percent). The rule further mandates that promoter shall refund 50 percent of the balance amount of money paid by the allottee within 45 days from the said cancellation and the remaining 50 percent of the balance amount on re-allotment of the unit or at the end of one year from the date of cancellation, whichever, is earlier. Further, promoter shall inform the previous allottee, the date of re-allotment of the said unit and also display this information on the official website of U.P. RERA of the date of re-allotment.

21. On conjoint reading of the terms of the agreement Clause 6/6(a) and Rule 7.5, the request by the allottee for cancellation of the unit would be incomplete

without cancelling the unit/agreement of allotment and returning the deposit after forfeiting of 10 percent towards earnest/booking money.

22. The respondent, admittedly, failed to comply the mandate of Clause 6/6(a), read with, a Rule 7.5, of Rules 2018. It, therefore, follows that the unit never came to be cancelled and the agreement/allotment of the unit continued to subsist upon the death of the co-allottee (husband). Further, the unit/agreement could not have been cancelled solely on the request of the one of the allottees without taking the consent of the other allottee (appellant). The appellant, on death of the co-allottee, sought possession of the unit as is evident from the multiple communications.

23. We have no hesitation to hold that the allotment of the unit/agreement dated 28.07.2016 never came to be cancelled by the respondent, therefore, appellant had lien on the unit (refer Section 11(h), read with, Section 11(5)) on the date of subsequent allotment and conveyance of the unit to third party. **Question no. 1 is accordingly answered.**

Question No. 2.

24. As noted hereinabove, while answering the question no. 1, respondent submitted that on the request made by the one of the co- allottee (husband) vide communication dated 06.10.2020 for sale of the allotted unit and refund of the money. The respondent, thereafter, went forward with the request, therefore, the unit came to be transferred to a third party on 15.10.2022.

25. In this backdrop, it is submitted by the respondent that since the unit came to be cancelled, even without having issued any formal communication to that effect by the respondent, and not having refunded the deposit to the allottee, in terms of Clause 6/6(a) of the agreement, read with, Rule 7.5 of the Rules 2018. It is, therefore, urged that appellant ceases to be an allottee within the meaning of Section 2(d) of the Act 2016.

26. It is, therefore, submitted that the complaint under Section 31, for possession and interest for the delayed period was not maintainable. It is urged that impugned judgment and order is as per law and calls for no interference.

27. We do not find any merit in the submissions of the learned counsel for the respondent.

28. The expressions 'allottee' is defined under Section 2(d), which reads thus:

<u>Allottee 2(d):</u>

> *"allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;*

29. The definition mandates that an allottee would mean a person to whom the unit has been allotted, sold or otherwise transferred by the promoter and includes the person who subsequently acquires the said allotment, *inter alia,* through sale transfer or otherwise. In other words, in the case of death of an allottee the legal heirs/representative would acquire the said allotment upon devolution falling within the expression 'otherwise'.

30. In the given facts, admittedly, appellant was co-allottee along with her husband, upon death of the co-allottee, appellant became the sole allottee of the unit. It is not in dispute that the respondent before having accepted and proceeded on the request/proposal made by one of the allottee (husband) for cancellation of the allotted unit, the co- allottee had died. In the circumstances, the proposal for sale/termination of allotment could not have been acted upon without having the consent of the appellant, who upon death of her husband became the sole allottee of the unit. The appellant has taken a categorical stand that after the death of her husband, she through multiple communication, addressed to the respondent, requested that she would continue with the allotted unit and sought possession of the unit. The learned counsel for the respondent on query, admits that the appellant at no point of time had given her consent to terminate the allotment, within, the deposit was returned to the appellant. The Indian Contract Act 1872, mandates devolution of joint rights upon death of any one of them. Section 45 is extracted:

<u>Section-45 of Indian Contract Act, 1872</u>

> ***Devolution of joints rights. —****When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with*

the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

31. Further, Section 11(5) of Act, 2016 mandates that the promoter may cancel the allotment only in terms of agreement for sale provided the cancellation is not unilateral and without any sufficient cause.

Section 11(5) of Act, 2016 is extracted:

(5) *The promoter may cancel the allotment only in terms of the agreement for sale:*

Provided that the allottee 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.

32. In the given facts, promoter had not cancelled the allotment in terms of the agreement (Clause 6/6(a)). The cancellation, of the unit was requested by a co-allottee, to the agreement, which was not acted upon, neither, the co-allottee (appellant) had ever requested for cancellation of the unit, either, independently or along with the other co-allottee (husband). Further, it is not in dispute that respondent promoter till date has not refunded the deposit, after deducting 10 percent towards cancellation charges. In other words, the request of the co-allottee was never acted upon by the respondent or given effect to by cancelling the allotment, followed by refund of the money. In other words, the allotment agreement subsists till date and appellant has lien on the unit. Subsequent sale of the unit by the respondent without cancelling the contract/lien is illegal and nullity. [Section 11(4)].

33. In the given facts, respondent promoter has subjected the appellant (widow) to harassment while creating third party interest on the unit without cancelling the allotment and refunding the money. Appellant has been running from post to pillar and till date the respondent has shown no concern to hand over possession of the unit, and/or, refund her money along with interest thereon. The deposited money is being utilised by the respondent even after sale of the unit. The conduct of the respondent tantamounts of unfair fraudulent practice. The relevant portion of Section 7 of Act 2016, is extracted:

7. (1) The Authority may, on receipt of a complaint or suo motu in this behalf or on the recommendation of the competent authority, revoke the registration granted under section 5, after being satisfied that—

(a) the promoter makes default in doing anything required by or under this Act or the rules or the regulations made thereunder;

(b) xxxxx

(c) the promoter is involved in any kind of unfair practice or irregularities.

Explanation. —For the purposes of this clause, the term "unfair practice means" a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely: —

(A) xxxx

(B) xxxx

(d) the promoter indulges in any fraudulent practices.

34. Having regard to the facts and the reasons assigned hereinabove, respondent-promoter has wilfully and deliberately indulged in unfair fraudulent practice. The complaint at behest of the appellant/allottee for the reliefs was maintainable for possession of the unit and interest on the deposit. **Question no. 2 is accordingly answered.**

<u>Question No. 3.</u>

35. In the aforenoted facts (Question no. 1 and 2), it is evident, that the request made by the co-allottee, during his life time, seeking cancellation of the unit was not acted upon by the respondent. The agreement/termination of the unit was not executed in terms of Clause 6 and 6 (a), of the agreement. The respondent had not completed the formalities for cancellation i.e. obtaining affidavit/papers from the appellant and issuing cancellation/termination letter of the unit, followed by refund of the deposit.

36. Learned counsel for the respondent on query submits that, there is no such termination letter/communication issued by the respondent acting upon the request of the co-allottee. It is admitted that till date the amount deposited by the appellant, towards the unit, has been retained by the respondent-promoter and was not refunded to the appellant after the alleged cancellation. In the circumstance, respondent without terminating the agreement, transferred the allotted unit to a third party, over which, the appellant had lien and right to possession.

37. In the circumstance, respondent had no right or authority to transfer the unit without terminating the agreement of the unit, consequently, transfer of the unit is illegal, nullity and *void ab initio*. The respondent lacked authority to

transfer the unit without terminating the lien thereupon. We had earlier requested the respondent-promoter to settle the matter amicably with the appellant, either by offering an alternate unit or refund money, at current market price (circle rate) equivalent to area of the unit. It appears that the respondent failed to make any genuine effort in settling the dispute. The appellant, a widow, from Patna, Bihar, has been subjected to immense harassment by the respondent promoter taking advantage of her present social status. The appellant in terms of Section 18(1) of Act 2016, would be entitled to interest till the handing over possession of the unit. The respondent being in default withheld possession of the unit illegally and fraudulently. **Question no. 3 is accordingly answered.**

<u>Question No. 4.</u>

38. Having regard to the records, finding return hereinabove, while answering Question no. 1,2 and 3 respectively, respondent-promoter cancelled the unit without compliance of mandate of Section 11(5) of Act 2016. Admittedly, in terms of Rules 7.5 of Rule 2018, upon cancellation the amount deposited was to be returned i.e. 50 percent within 45 days and the remaining amount not later than one year. The deposited amount till date has not been returned, a rather, fraudulently being utilised by the promoter. In view thereof, the respondent-promoter has violated the provisions of the Act 2016, and Rules 2018 made thereunder, therefore, is liable to penal consequence under Section 61 of Chapter VIII of Rules 2018. **Question no. 4 is accordingly answered.**

39. In view thereof, the **appeal succeeds and is allowed** by passing the following orders:

(i) the impugned order dated 18.06.2024 passed by the Regulatory Authority in Complaint No. NCR144/01/103987/2023 is set aside and quashed.

(ii) the respondent is directed to hand over possession of the unit bearing No. 408 on fourth floor, in Tower-1 at Aastha Green, situated at Greater Noida West, U.P. to the appellant within 45 days from the date of order.

(iii) The appellant shall be entitled to interest on her deposit at the prescribed rate at MCLR+1 percent, in terms of Section 18 (1) of the

Act 2016, w.e.f. 29.01.2020 till the date of handing over of physical possession of the unit.

(iv) The Regulatory Authority is directed to proceed against the respondent under Chapter VIII for violation of Act 2016/ Rules 2018, in accordance with law after due notice.

(v) The Registry is directed to forward this order to be Regulatory Authority for compliance.

(vi) The cost of litigation is assessed at Rs. 25,000/- to be paid by the respondent to the appellant-allottee within 45 days from the date the order is uploaded.

40. It is clarified that no other point or ground was pressed by either of the parties.

(Rameshwar Singh) **(Sanjai Khare)** **(Suneet Kumar)**

Dated: 08.04.2026
Nikita/Ranjeet.