THE U.P. REAL ESTATE APPELLATE TRIBUNAL

AT

LUCKNOW

Bench 1

Reserved Judgment

APPEAL NO. 59/2020

Hari Mohan Srivastava

Vs.

Lucknow Development Authority

(Complaint No. LKO162/08/0425/2019)

WITH

APPEAL NO. 60/2020

Nand Kumar Pathak & Anr.

Vs.

Lucknow Development Authority

(Complaint No. LKO162/07/0694/2019)

WITH

APPEAL NO. 61/2020

Dinesh Chandra Sharma & Anr.

Vs.

Lucknow Development Authority

(Complaint No. LKO162/08/0577/2019)

WITH

APPEAL NO. 62/2020

Kanchan Prabha & Anr.

Vs.

Lucknow Development Authority

(Complaint No. LKO162/07/1478/2019)

WITH

APPEAL NO. 63/2020

Vinod Kumar Upadhdhaya & Anr.

Vs.

Lucknow Development Authority

(Complaint No. LKO162/07/1242/2019)

WITH

APPEAL NO. 64/2020

Namita Verma

Vs.

Lucknow Development Authority

(Complaint No. LKO162/08/0606/2019)

Hon'ble Mr. Justice (Dr.) D. K. Arora, Chairman.
Hon'ble Mr. Rajiv Misra, Administrative Member.

1. The instant 6 appeals have been preferred under Section 44(1) of the Real Estate (Regulation and Development) Act 2016 ("the Act") by the appellants on 03.02.2020, aggrieved by the order dated 09.12.2019 passed by the Regulatory Authority ("the Regulatory Authority"), through which 7 complaints were disposed off by a common order. As the respondent, Lucknow Development Authority (the "LDA") in all the appeals is the same and the complaints have been disposed off through a common order by the Regulatory Authority as well as the issues involved are also same, therefore all the 6 appeals are clubbed and are being disposing off through a common Judgment.

   1.1 For the sake of convenience, Appeal No. 59/2020 (Hari Mohan Srivastava Vs. LDA) is taken up as the lead case.

2. A perusal of the order passed by the Regulatory Authority on 09.12.2019 indicates that the Regulatory Authority has rejected the complaints made by the complainants and has observed that the possession of the allotted flats was given to the complainants after some delay at the old cost of the

land to the allottees, and therefore, the allottees are not entitled to get interest for the delay in handing over of the possession.

3. The brief facts of the cases are as follows:-

   i. All the complainants had booked flats in **Sargam Apartment**, a project of the respondent, and the complainants (allottees) had made full payment for the apartments in question. However, the respondent/promoter increased the price of the units and included GST due to the delay in handing over of the possession of the units. The complainants/appellants have already been given possession after execution of the conveyance deed in their favour. However, the complainants complained that the flats still have some incomplete works.

   ii. The respondent/promoter submitted that there was a land dispute with the farmers with respect to land of the project, therefore, the project got delayed and possession could not be given to the allottees within the prescribed time limit. Further, since the dispute of land was between the farmers and the State Government, therefore, the respondent/promoter had no control over it. It was further submitted that the construction agency of the project delayed construction work regarding which the construction agency was also issued a letter.

4. The appellants have challenged the order of the Regulatory Authority dated 09.12.2019 on the following grounds:-

   A. The Regulatory Authority has passed the impugned order dated 09.12.2019 without application of judicial mind and without appreciating the facts placed before it through documents and written submissions and the order is against the basic objectives and spirit of the Act of 2016.

   B. The Regulatory Authority has failed to give the justice to the appellants, who have suffered heavy financial loss due to delay of over 6 years in getting possession of the flats and has wrongly dismissed the complaints on the ground that since the registry has been done and possession of the flats were taken, therefore, the complainants are not entitled to get interest for delayed possession in terms of Section 18 of the Act.

C. There is no limitation clause provided in the Act of 2016 to file the complaint by the allottees/home buyers against the promoter/real estate agents under Section 18 of the Act.

D. The Regulatory Authority has relied upon the judgment of Hon'ble Supreme Court in *Civil Appeal No. 6051/2002 (Ghaziabad Development Authority Vs. Shakuntala Rohatgi*), but the guidelines laid down by the Hon'ble Apex Court cannot be the basis for rejecting the complaints as the order of the Apex Court was given in 2009, i.e. prior to the enactment of the Act. The Hon'ble Supreme Court in the case of *Bangalore Development Authority Vs. Syndicate Bank,* reported in 2007 has clearly laid down that if some statute steps in and creates any statutory obligations on the part of the development authority in the contractual field then the matter will be governed by the provisions of that statute. The guidelines laid down by Hon'ble Supreme Court should be the basis for deciding the present appeals rather than on the basis of the judgment of Hon. Apex Court in Ghaziabad Development Authority Vs. Shakuntala Rohatgi. The Regulatory Authority did not give the reason or the provisions under the Act on the basis of which farmer's agitation is taken as force majeure, whereas it is not covered under the provisions of force majeure as given in Section 6 of the Act.

E. The Regulatory Authority did not follow the doctrine of judicial precedence while passing the impugned order dated 09.12.2019 and completely overlooked its own orders passed in complaint no. 120186327 (Smt. Upasana Duggal Vs. LDA), complaint no. 7201814312 (Shri Ashok Kumar Vs. LDA), complaint no. 2201930654 (Shri Anupam Mehrotra Vs. LDA) and complaint no. LKO162/06/0693/2019 (Smt. Usha Srivastava Vs. LDA), wherein the Regulatory Authority had directed the LDA to pay the interest for delay in handing over of the possession of flats in question to the complainants, rejecting the grounds of delay due to farmer's agitation and dispute with Sub-Contractor advanced by the LDA.

F. In the leading case (Appeal No. 59/2020 Hari Mohan Srivastava Vs. LDA), the submission of the learned counsel for the appellant is that the flat in question was booked on 14.05.2011 and as per clause no. 4.3 of the prospectus/brochure of the project launched by the respondent, the date of handing over of the possession of the flat to the appellant was 24 months from the date of application for allotment of the flat i.e. by 13.05.2013; but the possession of the flat was given to the appellant on 18.07.2019 with a delay of 6 years and two months, which is a clear violation of the provisions of Section 18 of the Act, therefore, the respondent is liable to compensate the appellant. In all these cases, the possession of the respective flats was given with considerable delay.

G. Further, according to the learned counsel for the appellant in leading appeal no. 59/2020, the appellant has been asked to pay additional amount of Rs. 7,63,190/- over and above the cost of the flat at the time of booking. The respondent has also charged Rs. 14,643/- as penal interest at the rate of 12% for delay in payment by the appellant and hence the respondent/promoter is liable to pay the interest for delay in possession of the flat at the same rate in terms of proviso to Section 2 (za) of the Act, and also as per law of equity. The stand taken by the appellants in all the appeals is similar in nature.

5. The appellants have sought the following reliefs broadly:-

i. To set aside the impugned order dated 09.12.2019 passed by the Regulatory Authority.

ii. The respondent be directed to pay the interest at the rate of 12% p.a. on the total amount deposited for the period of delay in handing over of the possession of the allotted flats to the appellants from the promised date of possession till the actual date of possession.

iii. To direct the respondent to compensate for the harassment, mental agony and financial loss due to delay in possession.

iv. Issue direction to the respondent for paying cost of appeal to the appellant.

6. Learned counsel for the respondent filed objections to the grounds of appeal as follows:-

   i. Learned counsel for the respondent vehemently denied that the impugned order dated 09.12.2019 is bad in the eyes of law and submitted that the order is not against the spirit of the Act.

   ii. The Regulatory Authority has rightly observed the fact that the complainants have filed the complaints after registry and taking possession of the flat, hence, they are not entitled for interest due to delay in possession under Section 18 of the Act and in the current situation the appellants must approach the competent court under Section 71 of the Act.

   iii. The authority has rightly considered the grounds of farmer's agitation while passing the instant order.

   iv. The final amount charged from the complainants/allottees includes charges such as cost of getting the sale deed executed, GST, parking charges, corpus fund charges, etc. Further, the initial costing is an approximate value of the flat which can be increased or decreased up to 5%.

7. Shri Harish Pandey, Advocate, who had put in appearance on 26.02.2020 and had been representing the case on behalf of the respondent, was not present. Heard Shri Hridesh Srivastava, learned counsel for the appellant and perused the pleadings of the parties available on record.

8. Based on the contentions raised by the appellant, we deem it proper to frame the following questions in order to examine the issues involved:-

   (i) Whether the appellants/allottees can claim interest and/or compensation for delayed possession of the unit by the respondent/promoter after execution of the conveyance deed and taking over possession of the units?

   (ii) If the respondent is entitled for interest and/or compensation on account of delayed possession under the scheme of the Act 2016 then what should be the rate of interest as per the provisions of the Act of 2016, Rules 2016?

9. Question no. (i) is regarding whether a home buyer, who got the deed of conveyance executed and taken possession of the unit is entitled for claiming interest and/or compensation for the delayed possession?

9.1 As per record, the conveyance deeds have been executed in favour of the appellants and the possession of the units/apartments/ flats have also been given to the appellants. It is also an accepted fact that as per the Registration Booklet of the respondent, the possession of the unit/apartment/flat was to be given to the appellants within 24 months from the date of allotment. There has been considerable delay in handing over of the possession from the specified dates in terms of the Registration Booklet.

9.2 The Regulatory Authority in its order passed on 09.12.2019 has relied upon the judgment passed by Hon'ble Supreme Court in the case of ***Ghaziabad Development Authority Vs. Shakuntala Rohatgi*** (***Civil Appeal No. 6051/2002),*** whereas the appellants have submitted that the said judgment of the Hon'ble Apex Court was given prior to the enactment of the Real Estate (Regulation and Development) Act 2016 and the complaints could have been decided by the Regulatory Authority under the provisions of the Act of 2016 on the basis of Hon'ble Supreme Court's judgment in **Bangalore Development Authority Vs. Syndicate Bank**, reported in **07 CTJ 689 (SC) (CP)** case. We therefore examine both these judgments of Hon'ble Supreme Court. The relevant portion of para 10 of the judgment/order passed in Bangalore Development Authority Vs. Syndicate Bank, reported in 07 CTJ 689 (SC) (CP) is being extracted hereinbelow:-

> *"10. Where a Development Authority forms layouts and allots plots/flats (or houses) by inviting applications, the following general principles regulate the granting of relief to a consumer (applicant for allotment) who complains of delay in delivery or non-delivery and seeks redressal under the Consumer Protection Act, 1986 ('Act' for short) - [vide : Lucknow Development Authority vs. M. K. Gupta - 1994 (1) SCC 243, Ghaziabad Development Authority vs. Balbir Singh - 2004 (5) SCC 65, and Haryana Development*

Authority vs. Darsh Kumar - 2005 (9) SCC 449, as also Ghaziabad Development Authority vs. Union of India - 2000 (6) SCC 113]:

(a) Where the development authority having received the full price, does not deliver possession of the allotted plot/flat/house within the time stipulated or within a reasonable time, or where the allotment is cancelled or possession is refused without any justifiable cause, the allottee is entitled for refund of the amount paid, with reasonable interest thereon from the date of payment to date of refund. In addition, the allottee may also be entitled to compensation, as may be decided with reference to the facts of each case.

(b) Where no time is stipulated for performance of the contract (that is for delivery), or where time is not the essence of the contract and the buyer does not issue a notice making time the essence by fixing a reasonable time for performance, if the buyer, instead of rescinding the contract on the ground of non-performance, accepts the belated performance in terms of the contract, there is no question of any breach or payment of damages under the general law governing contracts. However, if some statute steps in and creates any statutory obligations on the part of the development authority in the contractual field, the matter will be governed by the provisions of that statute.

…………………………………………….”

9.3 On examination, we find that in Civil Appeal No. 6051/2002 (Ghaziabad Development Authority Vs. Shakuntala Rohatgi) judgment dated 04.03.2009 passed by Hon'ble Supreme Court, the Hon'ble Supreme Court while making observations, regarding inadmissibility of the interest on account of some delay, if the allotted units are given at the original price, without charging revised higher rate, which were prevailing at a later date and if the allotment is at a tentative rate, subject to calculation of final cost, which is higher than the tentative cost, the same will not be considered as charging a revised higher rates, placed reliance on the principles laid down for award of interest in ***Ghaziabad Development Authority Vs. Balbir Singh (2004)5 SCC 65,***

Municipal Corporation Chandigarh and others Vs. Shanti Nikunj, (2006)4 SCC 109 and Bangalore Development Authority Vs. Syndicate Bank (2007) 6 SCC 711. The relevant portion of Para 10 of **Bangalore Development Authority Vs. Syndicate Bank** has been extracted in the preceding para:-

9.4 With utmost humility at our command, we observe that the ratio of ***Ghaziabad Development Authority Vs. Shakuntala Rohatgi*** does not apply to the present case, further in the case of ***Bangalore Development Authority Vs. Syndicate Bank,*** it has been laid down by the Hon'ble Supreme Court that if some statute steps in and creates any statutory obligations on the part of the development authority in the contractual field, the matter will be governed by the provisions of that statute. Now the field is occupied by the Act of 2016 and the Rules and Regulations made thereunder.

9.5 It is pertinent to mention here that the issue regarding claim for compensation of an allottee for delay in handing over of the possession of unit/apartment/flat against the promoter/builder after having taken possession is no more res-integra. The Hon’ble Supreme Court in the case of ***Wg. Cdr. Arifur Rahman Khan and Aleya Sultan and others Versus DLF Southern Homes Pvt. Ltd. (now known as BEGUR OMR Homes Pvt. Ltd. and others*****, (**reported **in SCC online SC 667)** while examining the issue whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title, was pleased to observe that it would be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. Paras 34, 35 and 36 of the aforesaid judgment read as under:-

> *“34. The developer has not disputed these communications. Though these are four communications*

issued by the developer, the appellants submitted that they are not isolated aberrations but fit into a pattern. The developer does not state that it was willing to offer the flat purchasers possession of their flats and the right to execute conveyance of the flats while reserving their claim for compensation for delay. On the contrary, the tenor of the communications indicates that while executing the Deeds of Conveyance, the flat buyers were informed that no form of protest or reservation would be acceptable. The flat buyers were essentially presented with an unfair choice of either retaining their right to pursue their claims (in which event they would not get possession or title in the meantime) or to forsake the claims in order to perfect their title to the flats for which they had paid valuable consideration. In this backdrop, the simple question which we need to address is whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title. It would, in our view, be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position which the NCDRC has espoused. We cannot countenance that view.

35 The flat purchasers invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation.

36. It has been urged by the learned counsel of the developer that a consequence of the execution of the Deed of Conveyance in the present case is that the same ceases to be a transaction in the nature of "supply of services" covered under the CP Act 1986 and becomes a mere sale of immovable property which is not amenable to the jurisdiction of Consumer Fora. In Narne Construction (P) Ltd. v. Union of India21, this Court distinguished between a simple transfer of a piece of immovable property and housing construction or *building activity carried out by a private or statutory body falling in the category of "service" within the meaning of Section 2 (1) (o) of the CP Act 1986. This Court held that:*

"8. Having regard to the nature of transaction between the appellant Company and its customers involved much more than a simple transfer of a piece of immovable property it is clear the same constitutes "service" within the meaning of the Act. It was not the case that the appellant Company was selling the given property with all its advantages and/or disadvantages on "as is where is" basis, as was the position in UT Chandigarh Admn v. Amarjeet Singh. It is a case where a clear-cut assurance was made to the purchasers as to the nature and extent of development that would be carried out by the appellant Company as a part of package under which a sale of fully developed plots with assured facilities was made in favour of the purchasers for valuable consideration. To the extent the transfer of site with developments in the manner and to the extent indicated earlier was a part of the transaction, the appellant Company has indeed undertaken to provide a service. Any deficiency or defect in such service would make it accountable before the competent Consumer Forum at the instance of consumers like the respondents."

The developer in the present case has undertaken to provide a service in the nature of developing residential flats with certain amenities and remains amenable to the jurisdiction of the Consumer Fora. Consequently, we are unable to subscribe to the view of the NCDRC that flat purchasers who obtained possession or executed Deeds of Conveyance have lost their right to make a claim for compensation for the delayed handing over of the flats."

9.6 In view of the aforesaid judgment it can safely be said that a home buyer does not lose his right to claim compensation and/or interest for the delay in possession even after execution of the conveyance deed and taking possession of the Unit/Apartment/Flat booked by him, during the pendency of the complaint case or even thereafter.

9.7 When we examine Section 18(1) of the Act of 2016, we find that if the promoter fails to complete or is unable to give possession of an apartment/flat or building in accordance with the terms of the agreement for sale, or as the case may be and 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.

9.8 Since the Real Estate (Regulation and Development) Act, 2016 has come into force w.e.f. 01.05.2017 and provides for payment of interest for the delay in handing over of the possession, therefore, all these issues are required to be examined in pursuance to the provisions of the Act of 2016, readwith Judgment of Hon'ble Supreme Court in ***Wg. Cdr. Arifur Rahman Khan and Aleya Sultan and others Versus DLF Southern Homes Pvt. Ltd. (now known as BEGUR OMR Homes Pvt. Ltd. and others*, (**reported in **SCC online SC 667)** (supra). Admittedly, there is a delay in handing over of the possession, therefore even after execution of conveyance deed and taking over possession of the respective units, allottees are entitled to claim interest for delay in handing over of possession. Question no. (i) is accordingly answered in favour of the appellants.

10. Question no. (ii) is regarding as to what rate of interest should be awarded to the appellants for delayed possession.

10.1 Section 18(1) of the Act clearly specifies that if an allottee doesn’t intend to withdraw from the project, then he shall be paid interest for every month of delay till handing over of the possession “at such rate as may be prescribed”.

10.2 We have come across various orders of the Regulatory Authority, wherein, it had granted interest at the rate of MCLR+ 1 percent p.a. in case of delayed projects. This Tribunal had an occasion to examine the issue of rate of interest at MCLR+ 1 percent awarded by the Regulatory Authority in **Appeal No. 295 of 2019 (U.P. Avas Vikas Parishad Vs. Devesh Kumar Tiwari) decided on 20.02.2020**, in which the Tribunal had held as follows:-

> *“We feel that this imbalance is on account of the fact that the buyer/allottee has much less bargaining power as compared to the seller in the real estate market and therefore the buyers/allottees have no choice but to sign on such "dotted line", "one sided, unfair and unreasonable" terms and conditions/Agreements. We are therefore of the view that the rate of MCLR +1% ,*

> *as prescribed by the Government and as being ordered by the Regulatory Authority, be payable from the date of deposit of money in case the allottee wishes to withdraw from the project; and from the specified/expected date of possession in case the allottee wishes to stay in the project, would balance the equities and are just and fair and will fall within the term "interest at such rate as may be prescribed" as used in Sections 12, 18 & 19………"*

10.3 Thus, we are of the view that the appellants (allottees) are entitled for interest at the rate of MCLR+ 1 percent on account of delay in handing over of the possession.

10.4 As far as claim of the appellants with respect to compensation is concerned, the same cannot be examined in the present proceedings, the appellants are required to approach the Adjudicating Officer of the Regulatory Authority under Section 71 of the Act of 2016 and Rule 34 of the Rules 2016.

11. On the basis of analysis of the provisions of Section 18(1) of the Act of 2016 and the judgment of Hon'ble Supreme Court in ***Wg. Cdr. Arifur Rahman Khan and Aleya Sultan and others Versus DLF Southern Homes Pvt. Ltd. (now known as BEGUR OMR Homes Pvt. Ltd. and others*, (**reported **in SCC online SC 667)** (supra), we are of the considered view that the impugned judgment/order dated 09.12.2019 passed by the Regulatory Authority is not sustainable in the eyes of law. Accordingly, the order of the Regulatory Authority dated 09.12.2019, challenged in the instant bunch of appeals in Complaint No.–LKO162/08 /0425/2019, Complaint No.–LKO162/07/0694/2019, Complaint No.–LKO162/08/0577/2019, Complaint No.–LKO162/07/1478/2019, Complaint No.–LKO162/07/1242/2019 & Complaint No.–LKO162/ 08/0606/2019 is set aside. The appeals are partly allowed with the following orders:-

i. The respondent/promoter is directed to pay interest at the rate of MCLR+ 1 percent on the deposited amount to the appellants on account of delay in handing over of the possession for the delayed period from the promised date of possession to the date of receipt of OC/CC from the competent authority or the actual date of possession whichever is earlier.

ii. The respondent is directed to comply with these orders within 45 days.

iii. The appellants are at liberty to approach the U.P. Real Estate Regulatory Authority (UPRERA) for execution of these orders if the same are not complied within the time frame fixed by this Tribunal.

iv. No order as to costs.

Dated*:* 17.09.2021

Gaurav (Rajiv Misra) (D. K. Arora)