BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.657 of 2021

Date of Decision: 24.03.2023

M/s Pivotal Infrastructure Private Limited, 2nd floor Om Shubham Tower Neelam Bata Road, N.I.T. Faridabad, Haryana.

Appellant

Versus

Mr. Ajay Pal, H.No.6/36, Kalyan Nagar, Malabar Hotel, Sonipat-131001, Haryana.

Respondent

CORAM:

Justice Rajan Gupta	Chairman
Shri Inderjeet Mehta,	Member (Judicial)
Shri Anil Kumar Gupta,	Member (Technical)

Argued by: Shri Vaibhav Grover, Advocate for appellant.

Shri Kamaljeet Dahiya, Advocate for respondent.

O R D E R:

ANIL KUMAR GUPTA, MEMBER (TECHNICAL):

The present appeal has been preferred under Section 44(2) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act'), by the appellant/promoter, against the orders dated 18.11.2020, 04.08.2020, 04.03.2020, 22.11.2018 and 30.10.2018 passed

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by learned Haryana Real Estate Regulatory Authority, Panchkula (hereinafter called 'the Authority'), whereby complaint No.330/2018, filed by respondent/allottee was disposed of. The operative part of the orders dated 18.11.2020 and 30.10.2018 relevant to this appeal are reproduced as below: -

Order dated 18.11.2020:

"3. Learned counsel for the respondent has today argued on the strength of the judgment of the Hon'ble Supreme Court passed in Civil Appeal No.6303 of 2019 – titled as "Wg.Cdr.Arifur Rahman Khan and others Versus M/s DLF Southern Homes Pvt. Ltd." that open car parking charges are payable by the complainant. The Authority does not find the cited ruling to be helpful to the respondent because the precise question involved therein was not in respect of the parking charges levied for a space located on such area of the project which is meant for use by all the allottees of the project. The issue involved in the citing ruling was concerning parking charges which were being levied in terms of the Builder Buyer Agreement entered between the parties. The crucial question in the present case is as to whether or not the respondent can levy the charges from the complainant in the guise of parking charges by earmarking a space in the open area of the project. It needs no emphasis that a promoter after development and completion of the project is duty

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bound to handover the common areas to the Residential Welfare Association and he thus has no right to assign any part common areas to any individual allottee. Any act on his part to sell a part of common areas will result in depriving the use of such sold part by other allottees of the project. So, the promoter neither has a right to allocate any space of the common area to a particular allottee nor can levy charges from anyallottee on the pretext of allocating a specific space to him in the common area for parking of vehicle.

4. As a matter of fact, the Hon'ble Supreme Court in the case titled as Nahal Chand Laloo Chand Private Limited Versus Panchali Cooperative Housing Society Limited: AIR-2010-SCC-3607 had an occasion to decide on similar issue and has therein ruled that the promoter cannot be allowed to sell any space for open parking out of the land which forms the part of common areas of the project. So the Authority, has no hesitation in concluding that the respondent for the reason that he has no provided any earmarked space to the complainant out of the saleable area of the project and is demanding charges for car parking in respect of a space which is part of the common area, has no right to levy parking charging. Theamount of Rs.75,000/- demanded from the complainant on account of open car parking charges thus cannot be allowed and is hereby quashed.

5. The present complaint is hereby disposed of with a direction to the respondent to revise the

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impugned demands in consonance with the findings recorded by this Authority."

Order dated 30.10.2018:

"c) This Authority has taken a view with regard to the compensation to be paid to each of the allottee on account of delay in handing over possession by the developers in complaint Case No.113 of 2018- Madhu Sareen Versus M/s BPTP Ltd. In the said complaint, two Members had taken a view for the delay compensation shall be payable as prescribed in Rule 15 of the HRERA Rules whereas 3rd member had taken a different view for the reasons recorded in detail in complaint Case No.49 of 2018- Parkash Chand Arohi Versus M/s Pivotal Infrastructure Pvt. Ltd. As per law, majority view will be implemented, however, the views of the respective members shall remain as expressed in above mentioned cases."

2. It was pleaded by the respondent/allottee in the complaint that he was allotted apartment no.T-7/0403 measuring 950 sq. ft. in Residential Group Housing Project named "Royal Heritage", Faridabad, with basic sale price of Rs.18,03,200/-, vide letter dated 23.09.2010. The appellant vide letter dated 07.03.2012, requested the respondent/allottee to accept the increased carpet area from 950 sq. ft. to 1045 sq. ft. without giving any specific details.

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The appellant offered the possession of the apartment in the month of December, 2017 i.e. after 42 months of the date of commitment. The respondent/allottee took the possession of the apartment in January, 2018. The respondent/allottee made the total payment of Rs.20,80,475/- till the filing of the complaint including additional cost of Rs.1,55,895/- towards the increased area of the apartment. It was pleaded by the respondent/allottee in the complaint that an 'Apartment Buyer's Agreement' (for brevity 'the agreement') was executed between the parties on 18.12.2010. As per clause 18 of the agreement, the possession of the unit was to be delivered within 42 months from the date of the execution of the agreement, which had elapsed on 18.06.2014.

3. The respondent/allottee filed the complaint for refund of the amount paid by him along with 18% interest from the date of issuance of the allotment letter and imposition of penalty on appellant/promoter for delay in delivery of possession, and compensation for his mental agony, pain and harassment. However, during the pendency of the complaint, the respondent/allottee confined his claim for grant of compensation on account of delay in delivery of possession of the apartment.

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4. The complaint was contested by the appellant/promoter by filing reply stating that a sum of Rs.3,72,224.69 was demanded as final payment vide its letter dated 08.12.2017, for handing over physical possession of the unit to the respondent/allottee. The respondent/allottee approached the appellant for settlement and both the parties amicably settled the matter wherein the appellant waived off the interest payable by the allottee on delayed payments amounting to Rs.93,157/- and further credited penalty on account of delay in delivery of physical possession amounting to Rs.73,150/-. Accordingly, as full and final settlement of the matter, the respondent/allottee has made the payment of Rs.2,05,918/- to the appellant on 02.01.2018 and the appellant issued revised demand letter on the same date waiving off the interest of Rs.93,157/-. It was further pleaded that the matter stands settled and the appellant cannot give any further compensation on account of delay in handing over the possession of the unit. It was also pleaded that the respondent/allottee is liable to pay penalty for delay of two months in taking possession in January, 2018, while the possession was offered on 30.11.2017

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5. While controverting all other pleas of the respondent/allottee, the appellant/promoter sought dismissal of the complaint.

6. The learned Authority, after hearing arguments of learned counsel for the parties and taking into consideration the material facts and documents adduced on the record, passed various orders which have been impugned by the appellant in this appeal.

7. We have heard Shri Vaibhav Grover, Advocate, for the appellant; Shri Kamaljeet Dahiya, Advocate, for the respondent and have carefully examined the record. The appellant has also submitted written submissions on 20.02.2023.

8. It was contended by learned counsel for the appellant that the appellant had waived an amount of Rs.93,157/- (interest on delay in payments by the respondent allottee) and Rs.73,150/- (delay possession penalty on 24.01.2018) from the final demand of Rs.3,72,224/-. The respondent/allottee deposited the balance amount of Rs.2,05,918/- i.e. (Rs.3,72,224/- minus Rs.93,157/- minus Rs.73,150/-) vide cheque no.00033 dated 02.01.2018 with the appellant as full and final settlement entered into between the

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appellant and the respondent. It was contended that there was no occasion for the appellant to waive of an amount of Rs.1,66,307/- (Rs.93,157/- plus Rs.73,150/-) if no full and final settlement had been arrived at between the appellant and the respondent. He contended that the matter was settled in full and final settlement, and therefore, interest for delay in delivery of possession should not have been awarded to the respondent/allottee.

9. He contended that in none of the impugned orders, the learned Authority had adjudicated the rate of interest and also the period of the interest payable to the respondent/allottee. The rate of interest and the period of interest has been determined by the learned Authority in its order dated 07.07.2022 in the execution petition no.1120 of 2021 filed by the respondent/allottee. The learned Authority had exercised its powers in the execution proceedings beyond the ambit, scope and jurisdiction as the learned Authority cannot go behind the order which is being sought to be executed.

10. He contended that the agreement between the appellant and the respondent/allottee was never executed. It was the respondent/allottee who did not execute the

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agreement and now he cannot take the benefit of his own negligence and intentional non-execution of the agreement. Therefore, the respondent/allottee cannot claim any delay in offer of possession in the absence of the agreement between the parties.

11. It was also contended by the learned counsel for the appellant that provision in Section 18 of the Act for grant of interest on return of amount and interest in case of delay in delivery of possession are different. The Proviso to section 18(1) of the Act does not mention the words "in the manner as provided under the act". Therefore, he contended that the rate of interest as per rule 15 of the Haryana real Estate (Regulation and Development) Rules, 2017, (hereinafter called 'the Rules') will not be applicable.

12. It was further contended that the learned authority has not considered the contents of deed of declaration. As per the approved Zoning Plan approved by the Directorate of Town and Country Planning, Haryana, the appellant is obligated to provide 1.5 Car Parks for each dwelling unit out of which 75% of the car parks ought to be provided in the form of covered parking. Therefore, the appellant had made the provision of the open car parking spaces as per the approved drawings and

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layouts, which do not form the part of the common areas of the project. It was further contended that the appellant had filed the deed of declaration in accordance with the provisions of the Haryana Apartment Ownership Act,1983 and in terms thereof, 'Open Car Parking Spaces' were not part and parcel of the 'Common Areas' of the project.

13. It was further contended that as per the allotment letter dated 23.09.2010, the respondent is to pay Rs.75,000/- for the open car parking spaces. The respondent/allottee had paid for the car parking spaces on 25.07.2012 and a period of more than six years had elapsed after which the respondent allottee disputed the payment for the open car parking spaces and therefore the dispute regarding payment of car parking has become time barred. He contended that the car parking charges were duly upheld in the judgment of Hon'ble Supreme Court in civil appeal number 6239 and 6303 of 2019 titled as "Wing Commander Arifur Rahman Khan and others versus DLF Southern Homes Pvt. Ltd." (MANU/SC/0607/2020).

14. With these contentions, it was submitted that the appeal may be allowed and the impugned order dated 18.11.2020 and all other previous orders culminating to the final impugned order dated 18.11.2020 may be set aside.

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15. Per contra, learned counsel for the respondent/allottee contended that the learned Authority has rightly held that the open car parking space is a common area and the appellant cannot charge for the common area and has rightly ordered for refund of Rs.75,000/- charged by the appellant for open car parking space. It was further contended by learned counsel for the respondent/allottee that there was no settlement between the parties and the respondent is wrongly alleging that there has been full and final settlement. The respondent/allottee is entitled for delayed possession interest for the period of delay in delivery of possession from the deemed date of delivery of possession, as per the provisions of the Act and rules, which has been rightly awarded vide impugned order passed by the learned Authority.

16. He contended that there is no merit in the appeal filed by the appellant and the impugned orders passed by the learned Authority are as per the Act and rules and therefore the appeal may be dismissed being without any merit.

17. We have duly considered the aforesaid contentions of both the parties.

18. Undisputedly, the respondent/allottee was allotted an apartment bearing no.T-7/0403 measuring 950 sq. ft. vide

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allotment letter dated 23.09.2010 with basic sale price of Rs 18,03,200/-in Residential Group Housing Project named "Royal Heritage", Faridabad, being developed by the appellant.

19. The appellant is contending that the alleged agreement dated 18.12.2010 was not signed by the respondent allottee and therefore there is no agreement. In the absence of the agreement, the due date of delivery of possession cannot be determined and therefore, the respondent/allottee cannot be given any delayed possession interest.

20. The appellant prepared the agreement as per its own terms and conditions and sent it to the respondent/allottee for his signatures, but the respondent/ allottee did not sign it and returned it to the appellant. The appellant has demanded and received the payments from the respondent/allottee and in consideration thereof has offered possession to him in December, 2017. The terms for delivery of the possession were mentioned in the agreement by the appellant with its own free will. Thus, at this stage it does not lie in the mouth of the appellant that there is no agreement between the parties and the period of delivery of possession cannot be determined. Since, both the parties have acted upon the said agreement dated 18.12.2010, so, it is held that

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the rights of the parties are to be governed by the agreement dated 18.12.2010.

21. As per Clause 18 of the agreement dated 18.12.2010, the possession was to be delivered within 42 months from the date of the execution of the agreement. Therefore, the due date of possession of the unit comes out to be 18.06.2014. Admittedly, the possession of the unit was offered by the appellant to the respondent/allottee on 08.12.2017. The contention of the appellant is correct to the extent that in any of the impugned orders the rate of interest and the period of interest is not mentioned. In the order dated 30.10.2018, it is mentioned that the compensation to the allottee on account of delay in handing over possession by the appellant shall be in accordance with the majority view taken in the complaint no.113 of 2018 – Madhu Sareen Versus BPTP ltd. In the said case the majority view was to pay the prescribed rate of interest for the period of delay in handing over the possession to the allottee. We are of the view that the respondent allottee should not be deprived of its rights for delay in possession on the ground that the learned authority has not determined the rate of interest and period of interest. In the larger interest of justice and to impart substantial justice to the parties, the rate of interest and the period of

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interest, are derived here in this appeal. Thus, the respondent/allottee is held entitled for delay in possession interest from the due date of possession i.e. 18.06.2014 till the date of offer of possession in 08.12.2017 at the prescribed rate of interest as per rule 15 Rules i.e (SBI highest MCLR plus 2%) i.e. 10.6% per annum on the amounts paid by the allottee as per law.

22. The appellant is contending that there is an oral settlement between the parties, wherein the respondent/allottee has waived off his right to seek delayed possession interest. He contended that the appellant waived off interest payable by the respondent/allottee on delay in payment amounting to Rs.93,157/-, and further the appellant credited an amount Rs.73,150/- on 04.01.2018 on account of delay in delivery of possession. He has relied upon the 'statement of accounts' placed at page 123/124 and 147 of the paper book respectively, indicating the settlement between the parties.

23. On the perusal of the statement of accounts prepared by the appellant placed at page 123/124 and 147 of the paper book, we could not find anything which contains any material evidence which indicates there has been any

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settlement between the parties. The valuable rights of any party in the settlement can only be waived off with some consideration and just the 'statement of accounts' prepared by the same party claiming benefits of settlement cannot be considered as evidence good enough for such settlement. Therefore, it is held that the respondent allottee is entitled for delayed possession interest for the period of delay in offer of possession, as arrived at above.

24. The appellant is contending that provision in Section 18 of the Act for grant of interest on return of amount and interest in case of delay in delivery of possession are different. In case of return of the amount, it is mentioned in section 18 that the interest shall be "as prescribed in the Act". Whereas, in case of delay in delivery of possession, it is interest "as may be prescribed". Therefore, it is submitted by the learned counsel for the appellant that the rate of interest as per rule 15 of the Rules will not be applicable.

Section 18 of the Act reads as under:

"18. Return of amount and compensation:—

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building:—

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(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

The bare reading of the Section 18 of the Act clarifies that, in case of return of amount, the 'interest at such rate as may be prescribed' is mentioned. Similarly, in the case of delay in handing over of the possession 'interest at such rate as may be prescribed' is mentioned. We find no difference in the provision for award of interest in case of return of an amount or in case of delay in handing over the possessions. It is felt that the learned council is confusing with the provision of

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compensation associated with the return of amount, wherein, it is mentioned "compensation in the manner as provided under this Act". There is no merit in the plea of the appellant that the interest mentioned with the return of the amount and interest on delay in delivery of possession are different and the rate of interest as per rule 15 of the Rules shall not be applicable in case where interest is awarded to the allottee in case of delay in delivery of handing over of the possession.

25. The other dispute is regarding the charging of Rs.75,000/- by the appellant on account of open car parking space. It has been held by the learned Authority that the space of open car parking is a part of the common area which is required to be handed over to the association of the allottees after seeking Occupation Certificate/part Completion Certificate from the competent authority and execution of deeds of declaration by the promoter as required under the statute.

26. We have gone through the deed of declaration placed at page from 224 to 235 of the paper book. We are unable find anywhere in the said deed of declaration where any of open areas of the project the space for car parking is mentioned. The appellant has not been able to convince us on

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any ground that amount of Rs 75000/- being claimed from the respondent allottee, though as per agreement, by earmarking a space as 'Open Car Parking Space' in the open areas of the project is not a common area. Therefore, any part of the common area cannot be allowed to be sold by the appellant, even if there is any provision in the bilateral agreement executed between the appellant- promoter and the respondent/allottee. The reliance placed by the appellant on the judgment of Hon'ble Supreme Court in case of ***"Wing Commander Arifur Rahman Khan and others versus DLF Southern Homes Pvt. Ltd."*** (Supra) is of no help to the appellant as the fact of the instant case are different from the facts of the case considered in the said judgement of Hon'ble Supreme Court of India. In the case in hand the question is whether the appellant- promoter can charge from the allottee by earmarking a space in common area in the guise of car parking charges. Whereas in the above said judgement of Hon'ble Supreme Court the case was about the charging of open car parking as per the agreement.

27. No other point was urged before us.

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28. In view of our aforesaid findings, the present appeal filed by the appellant/promoter is dismissed with the aforesaid observations. However, no order as to costs.

29. The amount deposited by the appellant/promoter i.e. Rs.7,47,689/- with this Tribunal to comply with the proviso to Section 43(5) of the Real Estate (Regulation and Development) Act, 2016, along with interest accrued thereon, be sent to the learned Authority for disbursement to the respondent/allottee subject to tax liability, if any, as per law and rules.

30. The copy of this order be communicated to the parties/learned counsel for the parties and the learned Authority for compliance.

31. File be consigned to the record.

Announced:
March 24, 2023

Justice Rajan Gupta
Chairman
Haryana Real Estate Appellate Tribunal
Chandigarh

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

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