BENCH NO. 1

THE U.P. REAL ESTATE APPELLATE TRIBUNAL
AT
LUCKNOW

1. Appeal No : 185/2022

Ritu Sharma……..….....Appellant

Versus

Elegant Infracon Pvt. Ltd.…….Respondent

with

2. Appeal No : 906/2021

Jatin Sharma ……..……..….....Appellant

Versus

Elegant Infracon Pvt. Ltd.…….Respondent

with

3. Appeal No : D 907/2021

Lakshman Singh Bhandari……..….....Appellant

Versus

Elegant Infracon Pvt. Ltd.…….Respondent

with

4. Appeal No : 908/2021

Sanjay Chibba……..….....Appellant

Versus

Elegant Infracon Pvt. Ltd.…….Respondent

with

5. Appeal No : D 909/2021

Anita Chibba……..….....Appellant

Versus

Elegant Infracon Pvt. Ltd.……Respondent

with

6. Appeal No : D 910/2021

Janak Dulari Sharma ……..….....Appellant

Versus

Elegant Infracon Pvt. Ltd.……Respondent

and

7. Appeal No : 67/2022

Rama Sharma……..….....Appellant

Versus

Elegant Infracon Pvt. Ltd.……Respondent

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

1. Heard Sri Dron Mishra, learned counsel for the appellant and Sri Prashant Kumar, learned counsel for the respondent.

2. Learned counsel for the parties submitted that though all the above mentioned appeals arise out of different impugned orders on complaints of the appellants but issues involved and directions of the Regulatory Authority in all the orders are same hence all these appeals be heard and decided together.

3. Appreciating the request of the learned counsels for the parties, all the seven appeals are being examined together and Appeal No. **185/2022 (Ritu Sharma**

Vs. Elegant Infracon Pvt. Ltd.) is taken as leading case for the sake of convenience.

4. The appellant allottee in the instant appeal has raised challenge to the order dated 31.01.2022, passed by learned Regulatory Authority, Regional Office, Gautam Budh Nagar, arising from complaint No. NCR144/03/52671/2020, whereby, the complaint of the allottee came to be rejected on the ground that the consideration amount of the unit was periodically returned to the appellant by the respondent in installments.

5. The facts, briefly stated that gives rise to the appeal are that the appellant booked Flat No. D-505, (for short unit) situated at Elegant Ville project, on 5th floor, Tower-D, GH-04, Tech Zone-IV, Noida Extension, Greater Noida (West), Gautam Budh Nagar, for an agreed consideration at Rs 10,98,572/-. The appellant opted for an assured return plan duly agreed between the parties through a Memorandum of Understanding (MoU) dated 23.12.2010. As per the MoU, the respondent, herein, agreed that in the event, the appellant allottee makes upfront payment, the appellant would be entitled to assured return at Rs 26.31/- per sq.ft per month from 26.10.2010 till the time of possession of the flat. The appellant deposited upfront amount vide two cheques at Rs 1,00,000/- and 9,00,000/- on 23.09.2010 and 22.10.2010, respectively.

5.1. It has been submitted that the amount of assured return agreed was reportedly stopped by the respondent in 2014 and third party rights were created by allotting the unit at Rs 40,14,326/- i.e. almost three times the initial consideration.

5.2. The project was to be completed in 36, plus/minus, six months i.e. in 2013. However, the project was not completed. Aggrieved, appellant approached learned Regulatory Authority by filing complaint on 16.03.2021, inter alia, praying for possession of the unit, delayed interest and assured return in terms of MoU.

5.3. The Regulatory Authority dismissed the complaint recording the statement of the respondent that since appellant has received his invested amount towards the unit, therefore, he is not entitled to possession and delayed interest.

5.4. Learned counsel for the appellant submits that the appellant has not invested money by making upfront payment but had booked a unit which was duly allotted to him.

5.5. Since the respondent was in need of money, for the project, therefore, the respondent proposed that allottees who were interested in making upfront payment would be entitled to an assured return on the amount as indicated in the MoU. The proposal was duly agreed upon between the parties. MoU on record shows that appellant was interested in purchase of unit in the project in terms of Builder Buyer Agreement (for short 'BBA') dated 26.03.2012. It clearly shows that he was allotted a unit and the description of the unit was also mentioned therein.

5.6. Further, MoU nowhere says that after reversal of upfront payment made by the allottee, appellant had no right to the booked unit, rather, MoU clearly records that in the event, final installment confirmation of area on completion of the building, if consideration amount increases or decreases, the same shall be paid by or refunded back, as the case may be, at the booking rate within 15 days of demand by the first party.

5.7. MoU clearly specifies the payment of accrued interest upon the upfront payment which the respondent agreed to pay to the appellant so as to avoid raising funds from the open market/banks at such lower rates to fund the project.

5.8. It has been further submitted that in the objections, filed by the respondent, before the learned Regulatory Authority, it was not categorically stated that the unit of the appellant was cancelled in 2014, rather, a categorical stand was taken stating that since the consideration amount, deposited by the appellant has been returned, therefore, the appellant is not entitled to possession and interest thereon.

5.9. It has been further submitted that it is for the first time, before this Tribunal, in supplementary affidavit, the respondent has taken a stand that unit stood cancelled on 04.02.2014, further, stated that third party right in respect of the unit has already been created by allotting the unit to some other person.

5.10. On specific query, learned counsel for the respondent does not dispute that, till date, OC/CC in respect of the project in question has not been received by the respondent from the relevant Competent Authority.

5.11. It has been further submitted that the respondent has played fraud and misrepresented in the proceedings for the reason that the postal docket number of the alleged cancellation letter, posted to the appellant is 10 months after the date of cancellation. It has been submitted that the cancellation letter was never communicated and served to the appellant. The cancellation letter is merely a manipulation, otherwise, objections to that effect would have been taken by the respondent in the first instance before learned Regulatory Authority.

5.12. The learned counsel for the appellant submits that the cancellation letter is a manufactured document for the reason that vide communication dated 23.08.2015, the respondent had communicated to the appellant that the area of the unit has increased to 1025 sq. ft as per the final sanctioned plan. In other words, it has been submitted that had the unit been cancelled, there was no occasion for the respondent to issue the communication. The cancellation is alleged to have been made in 2014.

5.13. Our attention has also been drawn to FIR being Criminal Case No. 219/2021 under Section 420, 406 of IPC lodged at Thana Bisrakh, District Gautam Budh Nagar, wherein, it has been alleged by the complainant, therein, that the unit has been transferred fraudulently to several persons at enhanced sale proceeds to subsequent allottees by the respondent by cheating the complainant/informant. The first informant is also before this Tribunal in the batch of appeals listed.

6. In rebuttal, learned counsel for the respondent submits that BBA filed by the appellant is a manufactured document and the respondent does not rely upon it. It has been further submitted that the appellant was not an allottee, but an investor in the project and appellant's principal amount was returned as per the MoU. The appellant had no right to the unit being an investor in the respondent company as reflected from the MoU.

7. On specific query, learned counsel for the respondent does not dispute that the unit, description of which is indicated in the MoU came to be allotted to the

appellant. It has been further submitted that the unit allotted to the appellant has since been allotted to third party at more than three times the price agreed upon with the appellant. It has been further submitted that BBA was duly entered upon with the third party at Rs 40,14,326/- for the same unit but the document is un-registered. It is finally urged that the appeal lacks merit and is liable to be dismissed.

8. In the above facts and circumstances, the following questions arise for examination/determination:-

(i) Whether the appellant is an allottee of the unit or an investor in the company;

(ii) Whether the respondent has played fraud and indulged in 'Unfair Trade Practice' by allegedly cancelling the unit and allotting the same to a third party, and/or, whether entitled to possession of unit and delayed interest.

Question : (i)

9. The facts and circumstances, *inter-se,* parties are not disputed. Our attention has been drawn to the receipt dated 19.12.2010, indicating deposit at Rs 9,00,000/- by the appellant, wherein, it has been noted that the amount is towards booking/part payment of installment for flat/unit No. D-505, 970 Sqft, 5th Floor, whereas, cancellation letter dated 04.02.2014, placed on record by the respondent through supplementary affidavit dated 08.04.2023, reads as under:-

> *"This is to inform you that your investment in the company has been refunded to you. So any claim on the flat which was given to you as security against your payment through MOU stands cancelled. We request you to return the original MOU.*
> *Thanks and regards*
>
> *Elegant Infracon Pvt. Ltd"*

10. Perusal of the so called cancellation letter is with regard to investment in the company, alleged to have been made by the appellant that has been refunded, therefore, any claim on the flat which was given by way of security for payment through MoU stands cancelled. In this backdrop, it has been submitted by the learned counsel for the respondent that the appellant is not an

allottee, but merely an investor, therefore, he has no right to claim possession and interest on the deposits.

11. In the rebuttal, learned counsel for the appellant submits that appellant has not made any investment in the company, rather, upfront amount was paid towards booking/consideration of the unit as recorded on receipt and MoU. MoU nowhere records that the appellant is making an investment in the company and not in the project, (flat), floated by the respondent. Rather, an assured return by way of interest, on the upfront payment, which the respondent promoter was willing to pay to such allottees who made cash down payment. The upfront payment was demanded at a promised rate of return to enable the respondent to generate funds for the project. Had allottee been an investor, he would not have been interested in possession of the flat and delayed interest. Further, had the appellant not been an allottee, there was no occasion for the respondent to issue cancellation letter, cancelling the allotment of the unit, made in favour of the appellant. Further, as reflected, from the BBA, entered into by the respondent with the third party, immediately after issuance of the cancellation letter in 2014, unit price had appreciated more than three times, subsequently, allotment came to be made at an enhanced price at more than Rs 40 lakh, three times the initial cost/price. BBA entered with the third party is not being disputed.

12. In this backdrop, it is evident that the respondent indulged in 'Unfair Trade Practice' for undue windfall gain by playing fraud upon the appellant, Regulatory Authority and the subsequent allottee. FIR has been lodged against the respondent company for allotting the unit to successive allottees at enhanced price. It is writ large from the booking receipt, MoU and the alleged BBA that appellant was an allottee of a specific unit noted therein. There is no document to show that appellant was an investor in the respondent company. Investor in a company and an allottee of a unit in the project are different and distinct act and the expressions i.e. investor/allottee have different connotation and consequences. We have no hesitation in holding that the appellant was an allottee of the unit in the housing project floated by the respondent. **Question No. (i)** is accordingly answered.

Question No : (ii)

13. The stand taken by the respondent promoter before the Regulatory Authority was not bonafide. In the objections filed by the respondent to the complaint, it was not categorically stated that the unit allotted to the appellant allottee has been cancelled. Rather, a categorical assertion was made that the appellant was an investor in the company and upon refund of his investment, appellant would have no right as he was not an allottee to the unit. Even before this Tribunal, in the objections to the memo of appeal, it was nowhere stated that the unit was cancelled way back in 2014. It is only after filing supplementary affidavit, a stand was taken that unit allotted to the appellant was cancelled and subsequent allotment of the unit was made to third party. It is also not in dispute that the respondent promoter taking advantage of price escalation of the unit has allotted/transferred the unit at three times of the consideration to a third party during the lien on the unit being in favour of the appellant.

13.1. It appears that this has been a regular practice, adopted by the respondent promoter in respect of other allottees. The aggrieved persons were compelled to lodge FIR being Criminal Case No. 219/2021 under Section 420, 406 of IPC lodged at Thana Bisrakh, District Gautam Budh Nagar, wherein, it has been alleged by the complainant allottee, therein, that the unit has been transferred fraudulently to several persons at enhanced sale proceeds to subsequent allottees.

13.2. Further, the respondent promoter willfully and deliberately setup a case that the appellant was not an allottee but an investor in the company, whereas, on examining the documents placed on record, it is evident that at the time of booking, the appellant was allotted a unit, description of which was clearly indicated in the receipts of payments as well as in MoU. No document has been brought on record by the respondent to show that the appellant was an investor in the company and had no bearing with the housing project, floated by the appellant. The lien on the unit could have been terminated of an allottee and not of an investor.

13.3. It is evident from the facts noted hereinabove that the respondent promoter, by playing fraud and misrepresentation, has been successful in deceiving the appellant in order to gain by causing loss to the appellant. Admittedly, the unit upon cancellation came be to be allotted to third party at three times rate. There was no occasion to cancel the

unit had the appellant not been an allottee, but only an investor. The respondent has been blowing hot and cold at the same time which exposes his malafide intention.

13.4. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage **[S.P.Chengalvaraya Naidu Vs. Jagannath**, 1994 SCC (1) 1].

"Fraud" means an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. In short, the benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived **[Indian Bank Vs. Satyam Febres (India) Pvt.Ltd., 1996 (5) SCC 550]**.

Fraud is anathema to all equitable principles and any unfair tainted with fraud cannot be perpetuated or saved by the application of any equitable 9 doctrine including res judicata. **(Ram Chandra Singh Vs. Savitri Devi and Ors** (2003 (8) SCC 319).

Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence.

Fraud arises out of deliberate active role of representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. **Central Bank of India Vs. Madhulika Guru Prasad Dahir and Ors**, 2008 (13) SCC 170; **Ramesh Kumar & Anr vs Furu Ram & Anr**, 2011 (8) SCC 613.

13.5. In the scheme of Real Estate (Regulation & Development) Act, 2016 (for short 'Act 2016'), allottee has been defined to mean a person to whom the unit has been allotted. In other words, Act 2016 creates a lien on the unit in favour of the allottee; it follows, that without cancellation of the allotment and the agreement, no further allotment could have been made of the unit to a third party by the promoter. It is not the case of the

respondent that the cancellation of the unit was occasioned for default in payment.

Section 11 (4) (h) of Act 2016 is extracted:

" after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be."

13.6. In the given and admitted facts, the cancellation was not due to any default of the appellant but it was done with an ulterior motive to sell the unit to a third party at highly escalated price, fraudulently by the respondent by misrepresenting & cheating that appellant was an investor. Criminal proceedings have been initiated against the respondent by allottees of the project. It is a settled principle of law that the gains obtained by committing fraud/misrepresentation cannot be perpetuated, therefore, cancellation of the unit is merely an eyewash to deceive the appellant and would be bad under Section 114 (h) of Act 2016, being outcome of a fraudulent act. There was no occasion to cancel the allotment of unit. The alleged cancellation order and belated postal docket was setup by the respondent to perpetuate their fraud to enable them to transfer the unit to a third party at exorbitant price. The appellant is entitled to possession of the unit.

13.7. In the given facts and having regard to the overall circumstances, the respondent promoter has deceived not only to the appellant allottee but also to the Regulatory Authority, this Tribunal and the subsequent allottee which is willful and deliberate for undue windfall gain. The **question No. (ii)** is accordingly answered.

14. In view of the above discussion, the appeal along with other connected appeal Nos 906/2021, D 907/2021, 908/2021, D 909/2021, D 910/2021 & 67/2022 is **allowed** by passing the following orders:

14.1. Impugned order dated 31.01.2022 and other impugned orders passed in various complaints corresponding to the connected appeals of this composite judgement/order are **set aside** and **quashed**;

14.2. The respondent is directed to handover possession of the unit in question to the respective appellants after obtaining OC/CC and execute the conveyance deed;

14.3. Learned Regulatory Authority to proceed against respondent in accordance with the Chapter VIII of Act 2016, read with Section 38 for imposing penalty for playing fraud, indulging in Unfair Trade Practice and for breach of the provision of the Act 2016, Rules and regulations framed thereunder.

14.4. Cost of litigation assessed at Rs 15,000/- to be paid by the respondent promoter to the appellant.

Dated: 14.11.2024
M. Singh/-

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