**RESERVED JUDGEMENT**

**BENCH NO.2**

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

**Appeal No. 74 of 2023**

Naveen Nishchal ....**……Appellant**

**Versus**

S. J. P. HOTELS & RESORTS PVT LTD **…….Respondent**

************

**Hon'ble Mr. Sanjai Khare, Judicial Member**
**Hon'ble Mr. Devindar Singh Chaudhry, Technical Member**

1. The present appeal is filed by the appellant allottee on being aggrieved by the order dated 02.09.2021, passed by the Learned Regulatory Authority in Complaint bearing no. **NCR144/08/58702/2020 (Naveen Nischal Vs. S.J.P HOTELS & RESORTS PVT LTD)** to refund the amount at Rs. 7, 37, 254/- along with interest @ MCLR+1%.

2. The brief facts, as culled out from the memo of appeal, are that: -

   2.1 The Respondent, S. J. P. HOTELS & RESORTS PRIVATE LIMITED, launched a residential project titled "MIGSUN ULTIMO" situated at plot No. GH-3, Sector Omicron 3, Greater Noida, Gautambuddh Nagar Uttar Pradesh.

   2.2 The Appellant were introduced into the Project by the real estate agent "Investor Aura" Mr Hansraj Singh to booked the unit in Migsun Ultimo and finally Unit No 0506 in Sun 3 Tower was finalized herein to be referred as "Flat 1" and have made the total payment of Rs.11,48,000 in Flat 1.

   2.3 Respondent Residential project titled "MIGSUN ULTIMO" was not in a position for offer of possession of the Apartment, they relocated the Appellant in a new project Migsun Wynn.

2.4 Appellant was forced to swap the Unit in their new project titled as "Migsun Wynn" due to delayed possession in "Flat 1" and was allotted new unit as 1407 tower SUN 3 located at Plot No GH-01B, Sector ETA 2 Greater Noida, Gautam Buddh Nagar Uttar Pradesh, herein to be referred as "Flat 2" on 40- 30-30 percent payment plan.

2.5 The amount of Rs.11,48,000 was adjusted to Rs.10,77,000/- as the swapping amount of "Flat 1" and "Flat 2" was allotted in aforesaid project leading to deduction of Rs. 71,000 towards administration & service tax charges.

2.6 Appellant further paid Rs.1,02,655/- vide Receipt dated 01.07.2017 towards Flat 2 in Migsun Wynn. Total amount remitted (without deducting service tax & administration charges) comes out to be Rs.12,50,655/- which comes out to be 42% of total cost of Rs.29,49,340/-.

2.7 Appellant stopped payment due to delayed & unconfirmed possession and finally "surrendered/withdrawal from project" on 21.08.2018 from "Flat 2" of respondent.

2.8 The respondent gave "Final Reminder Letter" dated 04.09.2018 followed by "Termination Letter" dated 17.11.2018 misusing the provisions of 7.1 of the Uttar Pradesh Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules ,2018.

2.9 As per the provisions of 7.5 of the Agreement, Cancellation by Allottee, "allottee have the right to cancel/withdraw his allotment in the Project without any fault of Promoter, they are entitled to forfeit the booking amount paid for the allotment. The promoter shall return 50% of the balance amount of money paid within 45 days of such cancellation/ withdrawal and the remaining 50% of the balance amount on re-allotment of the apartment/plot or at the end of one year from date of cancellation / withdrawal by the allottee, whichever is earlier."

2.10 The appellant has also taken No Objection Certificate from the "Investor Aura – Real Estate Agent" for cancellation of Flat 2 The respondent, although agreed to refund the amount as per "Final Settlement Account" of Rs.10,84,555/-, but respondents had not taken any positive steps to refund money nor honor their commitment.

2.11 In the impugned order following observations had been made:

*"In case of cancellation/rejection of flat, cancellation charges is to be deducted at the rate of 15% of the total cost of flat which was given in Builder Buyer Agreement. Total cost of Unit is Rs.29,49,340/- of which the complainant has paid Rs.11,79,655/- to Respondent. Amount of Rs 11,79,655- 4,42,401= Rs.7,37,254/-is to be refunded along with interest at rate equal to MCLR on home loan of SBI +1% within 45 days of receiving termination notice."*

2.12 Imposition of one-sided condition of Builder Buyer Agreement (Allotment Letter) are not good in the interest of Justice and for saving consumer from lots of mental torture done by Respondents and their appointed agents.

2.13 The Impugned order provides refund for the Appellant but also provides the way for deduction of 15% Earnest Money by the developer which is in violation of the provisions of the Act as since the project was delayed which is an admitted fact and the shifting of the appellant to the new project was also done without the consent of the Appellant.

2.14 Appellants has applied for Recovery Certificate for confirmation of interest amount to U.P. Real Estate Regulatory Authority Gautambuddh Nagar and RC No 2777/ UPRERA/ RO/ Recovery/ 2021-22 was issued on 15.01.2022. RC has ordered respondent to pay Principle Amount Rs.7,37,254 along with Interest Rs.2,87,618.59 from date of termination of notice, instead of date of first payment to respondent, total amounting Rs.10,24,872.69 calculated @8.3% annual simple interest from 22.05.2017 to 15.01.2022 of which only partial amount of Rs.7,37,254/- was deposited in RERA Central Account, which has been credited to the Account of the Appellant.

2.15 The order has been passed in a premediated manner, contrary to the provisions of The Real Estate (Regulation & Development) Act, 2016 (herein after referred to as 'Act of 2016').

2.16 The appellant has also taken No Objection Certificate from the "Investor Aura –Real Estate Agent" for cancellation of Flat 2 The respondent, although agreed to refund the amount as per "Final Settlement Account" of Rs 10,84,555/- as but respondents had not taken any positive steps to refund money nor honor their commitment.

2.17 The deduction of the 15% of the earnest money is illegal.

3. **Relief (s) sought**:

(i) Hon'ble tribunal may be pleased to set aside the present Impugned Order dated 02.09.2021 passed by the learned Real Estate Regulatory Authority at Lucknow (herein after referred to as the Ld. Authority) in complaint No. NCR144/08/58702/2020 and direct the opposite party to refund the 15% deducted amount along with interest to the appellant.

(ii) Such other orders as this Hon'ble tribunal may deem fit and proper under the circumstances of the case so as to protect and safeguard the interest of the appellant may also be passed in the interest of justice.

4. The respondent promoter has averred in objections that: -

4.1 The appellant has already filed an application dated 06.12-2021 before the Ld. Authority for compliance the order dated 02-09-2021 and in pursuance of compliance the order Ld. Authority has already issued Recovery certificate dated 15.01.2022, which has been fully complied by the respondent.

4.2 The order dated 02.09.2021 and recovery certificate dated I5.01.2022 has been fully complied by the respondent and thus the above noted appeal is already infructuous, which has been filed to just harass the respondent in unnecessary litigation.

4.3 The appellant had been allotted by unit No. 0506 in SUN 3 Tower which was rescheduled in new project title as "MIGSUN WYNN" Unit

No. 1407, Sun 3 located at plot No. GH-018. sector-ETA 2 Greater Noida, Gautam Budh Nagar, U.P., under the construction link plan.

4.4 The appellants paid amount of Rs. 11,48,000/- out of total value Rs. 29,49,340/-. Thereafter the unit was rescheduled and therefore Rs. 10,77,000/- has been adjusted in the deposited amount (due to deduction of administration & service tax changes).

4.5 The unit was booked by fie appellant through application dated 17.12.2016 under the construction link plan. It is further submitted that the agreed term of clause a(d) of allotment letter it was agreed by the appellant that the possession will be offered within 40 months with grace period of 6 months from the date of allotment letter i.e. 04.09.2017 on subject of receiving entire sale consideration of unit.

4.6 As per clause 4(d) of the Allotment Letter the timeline to offer possession i.e. 46 months has to completed on 03.03.2021 but without completing the said timeline the appellant has applied for cancellation through its broker on 22.04.2019 which was accepted by the respondent through letter dated 17.11.2018 in which it was clearly mentioned that the deposited amount will be refunded after forfeiting the earnest money.

4.7 It is clear that the complaint filed by the appellant before Ld. Authority was premature as filed by the appellant without completing the stipulated time period of 46 months and thus the complaint was itself not maintainable on the ground of premature complaint.

4.8 The appellant is a defaulter who has failed to make timely payment to get the timely possession and that delay in payment made by the allottee(s) is also a compensatory in nature under section 19(6) and 19(7) of the Act of 2016.

4.9 The allotment of the appellant was cancelled after several reminders and after providing sufficient opportunity to clear dues and i.e. according to the agreed terms of allotment letter.

4.10 The complainant has breached the terms and conditions of the Buyers Agreement and thus is not entitled for any interest or compensation. since the complainant has violated the essence of agreement by not making timely payments is also a defaulter and thus is not entitled for any interest or compensation.

4.11 The respondent had informed appellant to come at office and meet with the officer concern to complete the refund process according to the terms and conditions of the Allotment Letter but the appellant never communicated with the respondent to complete the refund process and filed complaint for refund.

4.12 The order dated 02.09.2021 and issued recovery certificate dated 15.01.2022 has been fully complied by the respondent and thus the above noted appeal is already infructuous and not maintainable before this Hon'ble Appellate Tribunal.

5. The appellant, in rejoinder denies the averment contained in the objection to the appeal and reiterates, and adopts the content of the appeal.

6. Heard Sri Amit Yadav, learned counsel for the appellant and Sri Harish Pandey, learned counsel for the respondent.

7. In the light of above facts and averments of the parties, we deem it proper to frame the following questions to analyze and decide the issue involved in this appeal.

(i) Whether the respondent promoter is entitled to deduct 15% of the total cost of the allotted unit on cancellation vide cancellation letter dated 17.11.2018.

(ii) Whether appellant allottee is entitled for interest on the amount to be refunded on cancellation either from the date of deposit or from the date of cancellation of unit.

(iii) Whether impugned order suffers from any illegality or perversity.

**Answer to Issue No. (i)**

8. It is admitted fact that the appellant allottee initially applied for a flat/Apartment in respondent promoter's project 'Misgun Ultima' and paid Rs. 3,80,000/- on 07.10.2015, Rs. 1,92,000/- on 07.11.2015 and Rs. 1,92,000/- on 06.04.2016. Later on appellant allottee opted for change/swapping of allotment of flat/apartment in respondent promoter's another project 'ULTIMA WYNN'. Appellant allottee filed fresh application on 17.12.2016

for allotment of flat No. 14.7, Tower SUN-3, 14th floor, super area 1060 sq. ft. for Basic Sale Price Rs. 28,22,140/- (Total price Rs. 29,49,340/-). Flexi Payment Plan was 40:30:30. Amount deposited in project MISGUN ULTIMA was adjusted in this present allotment after deduction of administration & service charges. Allotment letter/BBA was executed between the parties on 04.09.2017 for MISGUN WYNN Project, flat No. SUN-3/1407 (14th Floor). Clause 4 (a) of the BBA dated 04.09.2017 specifically mentions the period of completion/assured date of possession 46 months (40 months plus 06 months grace period) from the date of Agreement. Therefore, the respondent had to deliver the possession of the allotted unit on or before 04.07.2021. It is also admitted fact that appellant allottee paid instalment of Rs. 1,92,000/- on 01.07.2017. Thereafter appellant allottee did not pay any further instalment or amount. Appellant allottee has submitted that he stopped payment due to the delayed and unconfirmed possession.

8.1 It has also been submitted by the appellant allottee that Real Estate Agent and promoter had assured of arranging loan from the bank, loan could not be sanctioned from the bank, therefore, he could not pay the rest amount. That is why the appellant allottee sent an e-mail dated 26.12.2018 to respondent promoter for the cancellation of unit and refund of amount because bank has rejected the loan application having no service in my home town – Nupur, District Bijnor (U.P.). NOC dated 22.04.2019, to cancel the unit, has been issued by the real estate agent, 'Investor Aura' to respondent promoter.

8.2 Respondent promoter has submitted that appellant allottee deposited total Rs. 11,79,655/- till 01.07.2017. Several letters were sent for payment of the rest consideration but appellant allottee did not pay any amount after 01.07.2017. Respondent promoter issued last reminder letter on 04.09.2018. When appellant allottee made no further payment, respondent promoter cancelled allotment of unit vide cancellation letter dated 17.11.2018. Validity of cancellation has not been challenged.

8.3 Appellant allottee has submitted that real estate agent and respondent promoter had assured for arranging the loan from bank while respondent promoter has denied for any such assurance. Perusal of

BBA dated 04.09.2017 reveals that clause 2(h) (i) specifically mentions that the responsibility of getting the loan sanctioned and disbursed will rest exclusively on the allottee. Allotment letter/BBA does not show any transaction regarding allotment through any Real Estate Agent.

8.4 Above discussion and analysis reveals that appellant allottee defaulted in payment of consideration as per agreed flexi plan. Project was well within assured date of possession/completion i.e. 04.07.2021. Clause 1 of page 3 of BBA makes provision of 15% Earnest Money of the total price of the Apartment/unit including the booking amount.

8.5 Section 13 (1) of 'Real Estate (Regulation and Development) Act, 2016' (for short – Act 2016) is extracted below:-

*"13. (1) A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.*

8.6 Rules 9.1 (i), 9.2 & 9.3 of RERA Rules 2018 are extracted below:-

" *Rule 9.1 Subject to the Force Majeure clause, the Promoter shall be considered under a condition of Default, in the following events:*

*(i) Promoter fails to provide ready to move in possession of the [Apartment/Plot] to the Allottee within the time period specified in Para 7.1 or fails to complete the Project within the stipulated time disclosed at the time of registration of the Project with the Authority. For the purpose of this Para, 'ready to move in possession' shall mean that the apartment shall be in a habitable condition which is complete in all respects including the provision of all specifications, amenities and facilities, as agreed to between the parties, and for which occupation certificate and completion certificate, as the case may be, has been issued by the competent authority;*

*Rule 9.2* *In case of Default by Promoter under the conditions listed above a non-defaulting Allottee is entitled to the following:*

*(i)* *Stop making further payments to Promoter as demanded by the Promoter. If the Allottee stops making payments, the Promoter shall correct the situation by completing the construction milestones and only thereafter the Allottee be required to make the next payment without any interest; or*

*(ii)* *The Allottee shall have the option of terminating the Agreement in which case the Promoter shall be liable to refund the entire money paid by the Allottee under any head whatsoever towards the purchase of the apartment, along with interest at the rate equal to MCLR (Marginal Cost of Lending Rate) on home loan of State Bank of India +1% unless provided otherwise under the Rules. within forty-five days of receiving the termination notice: Provided that where an Allottee does not intend to withdraw from the Project or terminate the Agreement, he shall be paid, by the Promoter, interest at the rate prescribed in the Rules, for every month of delay till the handing over of the possession of the [Apartment/Plot], which shall be paid by the Promoter to the Allottee within forty-five days of it becoming due.*

*Rule 9.3* *The Allottee shall be considered under a condition of Default, on the occurrence of the following events:*

*(i)* *In case the Allottee fails to make payments for 2 (two) - consecutive demands made by the Promoter as per the Payment Plan annexed hereto, despite having been issued notice in that regard the Allottee shall be liable to pay interest to the promoter on the unpaid amount at the rate equal to MCLR (Marginal Cost of Lending Rate) on home loan of State Bank of India +1% unless provided otherwise under the Rules. The Promoter must not be in default to take this benefit;*

*(ii) In case of Default by Allottee under the condition listed above continues for a period beyond 3 (three) consecutive months after notice from the Promoter in this regard, the Promoter may cancel the allotment of the [Apartment/Plot] in favour of the Allottee and refund the money paid to him by the Allottee by deducting the booking amount and the interest liabilities and this Agreement shall thereupon stand terminated. The Promoter must not be in default to take this benefit; Provided that the Promoter shall intimate the Allottee about such termination at least thirty days prior to such termination.*

8.7 In the event, the cancellation by the allottee, rule 7.5 of RERA Rules 2018 will apply which is extracted as below: -

*" 7.5* ***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 proposes to cancel/withdraw from the Project without any fault of the Promoter, the Promoter herein is entitled to forfeit the booking amount paid for the allotment. The promoter shall return 50% (fifty percent) of the balance amount of money paid by the allottee within 45 (forty five) days of such cancellation / withdrawal and the remaining 50% (fifty percent) of the balance amount on reallotment of the apartment / plot or at the end of one year from the date of cancellation / withdrawal by the allottee, whichever is earlier. The promoter shall inform the previous allottee the date of re-allotment of the said apartment / plot and also display this information on the official website of UP RERA on the date of reallotment"*

9. Perusal and analysis of above rules reveal that promoter cannot accept more than 10% amount before the execution of BBA. This 10% amount is called booking amount. Either promoter has cancelled the unit on allottee's default or on the cancellation request of allottee, promoter is entitled to deduct 10% of price of the unit.

9.1 Hon'ble Supreme Court in Godrej Projects Development Ltd Vs. Anil Karlkar & Ors. (2025 SCC OnLine SC 222) decided on 03.02.2025 has held that forfeiture of 20% of BSP was excessive and unreasonable. Only 10% of BSP can be forfeited by the promoter. The agreement imposing unreasonable terms and conditions, is one sided favouring the developer/promoter, therefore falls under the ambit of 'Unfair Trade Practices'.

9.2 Having decision rendered in Godrej Projects (Supra), the respondent promoter is not entitled to deduct/forfeit more than 10% of the BSP and any forfeiture of earnest money beyond this limit would be unjust, arbitrary and unreasonable.

9.3 In the circumstances, discussed above, in our opinion, clause of deduction of 15% as earnest money in case of cancellation of allotment either due to the default of the allottee or cancellation at the request of allottee without any fault of promoter is unjust, arbitrary and unreasonable. Appellant allottee has defaulted in payment as well as appellant allottee has requested for cancellation without any fault of the promoter, consequently unit came to be cancelled due to the default of allottee, therefore, liable for forfeiture of earnest money at 10% of BSP and no more.

9.4 The issue No. (i) is accordingly answered.

**Answer to Issue No. (ii)**

10. This requires us to examine whether appellant allottee is entitled for any interest on the amount of refund on cancellation of unit. If allottee is entitled for any interest, then either from the date of deposit or from the date of cancellation.

10.1 As per rule 9.3 (ii) of RERA Rules 2018, if promoter cancels the unit due to the default of allottee, promoter is entitled to deduct the booking amount and refund the rest amount to allottee. The agreement shall thereupon stand terminated. This rule does not make any provision for refund with interest but it is essential for promoter to refund the rest amount to allottee after cancellation of unit and deduction of booking

amount. As per Section 13(1) of the RERA Act 2016, promoter cannot accept any sum more than 10% of the cost of the apartment/unit before the execution of registered agreement to sale. This amount of 10% of Basic Sale Price is earnest money which is called booking amount. if promoter cancels this allotment on the default of allottee, promoter is under obligation to refund the rest amount, to allottee after deduction of 10% of the Basic Sale Price as earnest money. If allottee immediately gets refund of the rest amount after cancellation, then promoter is not required to pay any interest on the such amount.

10.2 In the present case, it is admitted fact that only Rs. 7,37,254/- has been recovered from the promoter during the execution proceedings, pending before Regulatory Authority. BSP of the allotted unit has been mentioned at Rs. 28,22,140/- in application form dated 17.12.2016 (total cost Rs. 29,49,340/- in application form as well as in Agreement). 10% of BSP is Rs. 282214/-. Admittedly, appellant allottee has deposited Rs. 11,79,655/-. Respondent promoter was under obligation to refund Rs. 1179655-282214=Rs. 897741/- after the cancellation of the unit on 17.11.2018. But promoter did not refund the amount after cancellation of the unit. Promoter is said to be in default for not refunding Rs. 897441/- to allottee after cancellation. Therefore, equity requires that promoter should refund this amount of Rs. 897441/- with interest @MCLR+1% from the date of cancellation till the date of refund to the allottee after deducting the amount of Rs. 7,37,254/-, paid by the promoter during execution proceedings, pending before Regulatory Authority.

10.3 Issue no. (ii) is accordingly answered.

**Answer to Issue No. (iii)**

11. Answers to Issues (i) & (ii) clarify that unit has been cancelled due to the default of appellant allottee. Respondent promoter is entitled for deduction of 10% of the Basic Sale Price as earnest money. Appellant allottee is entitled for interest on the amount of refund from the date of cancellation till the date of actual refund @MCLR+1 because respondent promoter has not refunded amount till now.

11.1 Learned Regulatory Authority has failed to interpret the law relating to the deduction/forfeiture of the earnest money in case of default of allottee and entitlement of allottee regarding interest on refund if respondent promoter does not refund this amount after cancellation. Therefore, impugned order dated 02.09.2021 of Regulatory Authority suffers from illegality and perversity.

11.2 Issue No. (iii) is answered accordingly.

12. On the basis of above discussion and analysis, we **partly allow** the present appeal by passing the following orders :-

(i) Respondent promoter is directed to refund the amount at Rs. 8,97,441/- along with interest thereon @MCLR+1% from the date of cancellation till the date of payment to the allottee within 45 days from the date of uploading this order on web portal of this Tribunal.

(ii) The amount of Rs. 7,37,254/-, recovered by Regulatory Authority during execution proceedings, shall be adjusted in final calculations, accordingly.

(iii) The impugned order dated 02.09.2021 of learned Regulatory Authority shall stand modified to the extent hereinabove.

(iv) No order as to cost.

**Dated** : **12.05.2026** **(Devindar Singh Chaudhry)** **(Sanjai Khare)**
*Bhavesh/M. Singh*