IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

CWP-16153-2014
Date of decision : 21.07.2015

Rajiv Arora

... Petitioner

Versus

State of Punjab and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Ms.Ruchi Shekari, Advocate
for the petitioner.

Mr. Harit Sharma, Advocate
for respondents No.2 to 4 - GMADA.

REKHA MITTAL, J.

The petitioner has filed the instant petition under Articles 226/227 of the Constitution of India seeking quashing of orders dated 19.05.2014 (Annexure P7) and dated 09.06.2014 (Annexure P8) vide which refund of amount paid by the petitioner was made under Clause 2.3(II) of Letter of Intent (for brevity 'LOI') in place of Clause 3(II) thereof. Further prayer has been made for issuance of direction to the respondents to return the entire deposited amount along with interest @ 8% as per clause 3(II) of LOI.

Counsel for the petitioner contends that Greater Mohali Area Development Authority (in short “the GMADA”) floated a scheme namely Purab Premium Apartments, Sector 88, S.A. S. Nagar (in short “the scheme”) in regard to 4500 residential apartments. The petitioner applied for Type III flat and paid 10% of tentative price of flat as earnest money i.e. ₹ 6,90,000/- with the application. He was declared successful in the draw of lots and LOI No.1879 dated 22.05.2012 (Annexure P2) was issued. As per Clause 2.1 of LOI, the petitioner deposited another amount of ₹ 13.80 lacs to complete 30% of total price of flat. It is argued that the scheme ran into dispute with farmers from whom the land was acquired for the said purpose. Though respondent No.2 offered 4500 residential flats but only 1320 applicants were left in the scheme as others withdrew from it. As a result, respondent No.2 (GMADA) decided to construct only 1620 flats. It is further argued that on 01.07.2013, respondent No.2 uploaded a notice (Anneuxre P4) on its official website i.e. www.gamada.gov.in informing that construction of 1620 flats is proposed to be completed by September 2015. As per clause 3(II) of LOI, possession of the apartment was to be handed over to the petitioner within a period of 36 months from the date of issue of LOI i.e. upto 23.05.2015. As per notice Annexure P4, respondent No.2 could not be able to deliver possession of the flat by the said stipulated date. Feeling aggrieved, the petitioner lodged his complaint (Annexure P5) online by referring to Clause 3(II) of LOI with a request to refund the money deposited by him. Thereafter, the petitioner approached the officials of respondent No.2 and asked for refund of ₹20,70,000/- deposited by him. The officials of the GMADA told the petitioner that his money would not be refunded as per Clause 3(II) of LOI and the petitioner was forced to ask for refund under Clause 2.3(II) as he was in need of money for marriage of his daughter. The petitioner was asked to surrender the original LOI dated 26.05.2012 and he surrendered the same on 03.02.2014. As per office order dated 19.05.2014, 10% of total amount along with penal interest was sought to be forfeited which is contrary to the terms and conditions of LOI. The respondent vide order dated 09.06.2014 wrongly and illegally made deduction of ₹8,64,231/- while making refund of balance amount of more than ₹12 lacs.

The main argument advanced by counsel for the petitioner is that as respondent No.2 could not be able to deliver possession of flat within stipulated period of 36 months from the date of issuance of LOI dated 20.05.2012 in the light of notice uploaded on its official website on 01.07.2013, the respondent was not entitled to make any deduction and was liable to refund the entire amount with interest @ 8% per annum in compliance with what has been envisaged in Clause 3(II) of LOI. In the alternative, counsel has submitted that in case the petitioner is found liable for forfeiture of 10% of the amount, the said 10% should be of ₹6,90,000/- initially deposited as earnest money and not 10% of total price of the flat i.e. ₹69,00,000/-.

Counsel for the contesting respondent, on the other hand, would urge that as per condition No.2 of the brochure on page 44, in case LOI is surrendered within 30 days of issuance, earnest money shall be refunded with 2% deduction but deduction would be 10% in case it is surrendered after 30 days of issuance of LOI. The allottee surrendered the flat on 03.02.2014 in respect of LOI issued on 21.05.2012. The deduction of ₹8,00,268/- has been made as per terms and conditions of LOI. ₹63,963/- was deducted towards service tax instead of ₹21,321/- and accordingly another amount of ₹42,642/- would be refunded to the petitioner. It is argued that the petitioner failed to pay installments which fell due on 22.11.2012, 22.05.2013 and 22.11.2013 before he offered to surrender the flat in December 2013/ February 2014. According to learned counsel, as the petitioner did not pay the six half yearly installments due on 22.11.2012 to 22.05.2014 nor waited till May 2015 for delivery of possession of the flat, he cannot be allowed to take advantage of Clause 3(II) of the LOI. Further argued that the petitioner could seek resort to Clause 3(II) only if he had performed his part of the contract by making payment of six half yearly installments on the scheduled dates and the respondent had failed to deliver possession of the flat within the stipulated period of 36 months from the date of issuance of LOI. The petitioner surrendered the LOI on 03.02.2014 and filed the petition in August 2014 long before the date upto which the respondent was obligated to deliver possession of the flat. It is further argued that as the petitioner failed to pay the installments, he enured liability of forfeiture of 10% of the tentative price of flat i.e. ₹69 lacs, interest due on installments uptil February 2014 and interest under the scheme, making a total sum of ₹8,00,268/-. The petitioner was paid the balance amount of ₹12,05,769/- and another amount of ₹42,642/- as the service tax was wrongly calculated to the tune of ₹63,963/- instead of ₹21,321/-.

We have heard counsel for the parties and perused the paper book and original records produced by counsel for respondents No.2 to 4.

The petitioner, admittedly, deposited an amount of ₹6,90,000/-, 10% of the tentative price of the apartment of ₹69 lacs along with the application. He deposited another amount of ₹13,80,000/- being 20% price of the apartment to complete 30% of the price by 22.06.2012 in compliance with Clause 2.1 of the payment schedule. Clause 2.2 (PLAN-A) of LOI provided for schedule of payment of balance amount of ₹42,60,750/- i.e. 65% of the tentative price in case the balance payment is made within 60 days of issue of LOI and thus entitling the allottee to get rebate of 5% on the balance amount. Plan B of Clause 2.2 fixed the schedule for payment of balance amount of ₹44,85,000/- along with interest @ 12% in six half yearly installments. Concedely, the petitioner did not pay any of the installments which became due in November 2012, May 2013 and November 2013 prior to surrender of LOI on 03.02.2014.

Much stress has been laid by counsel for the petitioner that the petitioner is entitled to refund of entire deposited amount along with interest @ 8% compounded annually by invoking Clause 3(II) of LOI. To adjudicate this claim, a reference to relevant extract from Clause 3 is imperative and the same reads thus:-

> ***"3. OWNERSHIP AND POSSESSION***
>
> *(I) XXX XXX XXX*
>
> *(II) Possession of apartment shall be handed over after completion of development works at site in a period of 36 months from the date of issuance of LOI. In case for any reason, the authority is unable to deliver the possession of apartments within stipulated period, allottee shall have the right to withdraw from the scheme by moving an application to the Estate Officer, in which case, the Authority shall refund the entire amount deposited by the applicant along with 8% interest compounded annually. Apart from this, there shall be no other liability of the authority."*

No doubt, the allottee was given the right to withdraw from the scheme by making a request in writing in case the authority is unable to deliver possession of apartment within the stipulated period of 36 months from the date of issuance of LOI but such a right could be availed of by that allottee only who had fulfilled his part of the contract by making payment of the balance amount in compliance with clause 2 dealing with payment schedule. In the case at hand, as the petitioner failed to deposit balance outstanding amount in compliance with terms and conditions laid down in Clause 2, he cannot be heard to say that he is entitled to invoke Clause 3(II) by relying upon the notice uploaded on the official website of respondent No.2 on 01.07.2013 informing that construction of 1620 flats is proposed to be completed by September 2015. The allottee, in no circumstance, can take advantage of Clause 3(II) unless he has complied with schedule of payment and waited for a period of 36 months from the date of issuance of LOI for delivery of possession of the flat. In this view of the matter, we do not find any merit in contention of the petitioner that he is entitled to refund of the entire deposited amount along with interest @ 8% compounded annually.

Another aspect of the matter is whether the respondent is entitled to forfeiture of 10% of the tentative price i.e. ₹69,00,000/- or of the earnest money i.e. ₹6,90,000/-. For this purpose, it is necessary to refer to Clause 2.1 and 2.3 of LOI, quoted thus:-

> "***2 Payment Schedule***
>
> ***2.1 For initial 30%***
>
> *(I) Payment of Rs.1380000/- (Thirteen Lakh Eighty Thousand only) being 20% price of the apartment is to be made by 22.6.2012 to complete 30% of the apartment.*
>
> *(II) In case of failure of (to) make the payment within*

stipulated period, the amount paid shall be refunded with 10% deduction and the allotment cancelled. However, this period can be further extended up to 30 days with 2% penalty upto 60 days with 3% penalty and upto 90 days with 5% penalty on prior written request.

2.2 XXX XXX

2.3 For Balance Payment of 5%

(I) XXX XXX

(II) Delays in payment of installments shall result in cancellation of the allotment. However, on request establishing genuine grounds, delays up to 12 months can be condoned by the Estate Officer, by charging 18% interest for the period of delay. Delay beyond 12 months shall not be condoned under any circumstances and shall result in cancellation of allotment and refund of the amount paid, after forfeiture of 10% of the amount. Possession shall not be handed over till all dues are cleared."

A conjoint reading of afore-extracted Clauses of LOI would evident that there is a clear distinction in the language used in Clause 2.1(II) and that of 2.3(II) in respect of refund. In Clause 2.1(II), in case the allottee failed to pay ₹13.80 lacs being 20% price of the apartment by 26.06.2012, the amount paid shall be refunded with 10% deduction and allotment cancelled. Indisputably, before making payment of 20% price i.e. ₹13,18,000/-, the allottee had paid initial amount of 10% of the tentative price i.e. ₹6,90,000/-. On the contrary, as per Clause 2.3(II) there shall be forfeiture of 10% of the amount in case the allottee failed to deposit the installment on schedule dates or during extended period, if any, allowed by the Estate Officer. The use of word "amount" in Clause 2.3(II), in our considered opinion, refer to the price of the apartment which in the present case is ₹69 lacs. As the petitioner failed to pay the installments which became due before he surrendered the flat, he also incurred the liability to pay interest to the respondent and therefore, we are unable to find any error much less illegality in the impugned order whereby the respondents forfeited an amount of ₹8,00,683/- towards 10% of the amount while making refund of an amount of ₹12,05,769/-. The respondent has also corrected the mistake in calculating liability of the petitioner to pay service tax and as a consequence, another amount of ₹42,642/- has been refunded. Counsel for the petitioner is not in a position to substantiate claim of the petitioner either for seeking refund of entire amount along with interest or point out any factual or legal error in the impugned orders as would call for intervention.

In view of what has been discussed hereinabove, finding no merit, the petition is dismissed leaving the parties to bear their own costs.

(REKHA MITTAL)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

July 21, 2015.
Davinder Kumar