

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Civil Writ Petition No.22113 of 2022 (O&M)
Date of decision : September 23, 2022

M/s Angle Infrastructure Private Limited ... Petitioner

Versus

**Haryana Real Estate Regulatory Authority
and others** ... Respondents

**CORAM: HON'BLE MR. JUSTICE HARINDER SINGH SIDHU
HON'BLE MR. JUSTICE LALIT BATRA**

Present: Mr. Amit Jhanji, Senior Advocate with
Mr. Himanshu Arora, Advocate for the petitioner.

Mr. Jugam Arora, Advocate for
Mr. Ankur Mittal, Advocate
for respondents No.1 and 2.

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HARINDER SINGH SIDHU, J.

This petition has been filed praying for direction to respondent No.2 - Haryana Real Estate Appellate Tribunal to entertain the appeal of petitioner-Company against the order dated 04.11.2020 (Annexure P-12) passed by Haryana Real Estate Regulatory Authority, Gurugram, by calculating the pre-deposit amount after excluding the period during which the project could not be implemented on account of stay orders of the Court.

M/s Capital Builders which was the owner of land measuring about 115 Kanals 15 Marlas situated in village Fazilpur Jharsa, District Gurgaon, executed a Development Rights Agreement in favour of the petitioner-Company whereby it granted, conveyed and

transferred all development, construction, marketing, sales and other rights and entitlements to develop, construct, market and sell Group Housing Project on the project land to the petitioner. The petitioner-Company proposed to develop a Group Housing Project namely Florence Estate on that land. Licence dated 22.09.2008 was issued to M/s Capital Builders for development of the project which was subsequently transferred in the name of the petitioner-Company on 07.06.2014.

In November, 2012, the complainants/ respondents No.3 and 4 approached the petitioner-Company to buy an apartment in the project. They booked a flat in the said project which was purchased by them under the Construction Linked Payment Plan. Allotment letter dated 04.12.2013 was issued to them. An Apartment Buyer's Agreement was entered into between the petitioner-Company and respondents No.3 and 4 on 20.04.2013. They were allotted Unit No.D0502 (measuring 1865 sq. ft.) on the 5th floor for a total consideration of Rs.1,01,42,426/-. As per Clause 3.1 of the Apartment Buyer's Agreement, the petitioner-Company was to hand over actual vacant physical possession of the apartment to the complainants within a period of 4 years from the date of commencement of construction or execution of the agreement or date of obtaining all licences, permissions or approvals for commencement of construction whichever is later subject to *force majeure*. There was also a grace period of nine months. In terms thereof, the possession was to be handed over on or before 01.03.2018 subject to *force majeure* as the date of

commencement of construction was 01.06.2013.

As the possession was not handed over within the stipulated time, respondents No.3 and 4 filed a complaint before the Haryana Real Estate Regulatory Authority (in short 'HRERA') seeking possession of the flat and interest from the due date of possession till the offer of actual physical possession.

The petitioner-Company filed a reply to the complaint contending that the project could not be executed within time on account of interim stay orders passed in CWP No.17737 of 2013 and EFA-15-2015. It was contended that the delay could not be attributed to the petitioner-Company. The HRERA disposed of the complaint vide order dated 04.11.2020.

The contention of the petitioner-Company that the period of delay on account of interim stay orders passed by the Court should be excluded was negated by observing as under:

“12. On consideration of the circumstances, the documents, other record and submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2)(a), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 3.1 of the apartment buyer agreement executed between the parties on 20.4.2013, possession of the booked unit was to be delivered within a period of 4 years plus 9 months grace period from the execution of apartment buyer agreement or start of construction, whichever is later. Hence, the due date has been calculated from the date of start of construction (i.e. 1.6.2013) subsequent to the date of execution of the agreement. Therefore, the due date of possession comes out to be 1.3.2018. The grace period of 9 months which has been allowed to the respondent subsequently covers all the exigencies which would have been beyond the control of the respondent. Further, it was alleged by the counsel of the respondent during the hearing that there

was a stay by Punjab and Haryana High Court that got vacated on 17.11.2014 and this period should be exempted and the interregnum period should not be counted for the purpose of DPC. However, it was stated by the counsel for the complainant that there is no reason that on account of the title dispute inter-se the partners (licensee) he should not be made to suffer on account of DPC. In this regard the authority is of the view that a matter of the fact any title dispute is a sort of fraud perpetrated on the innocent home buyers and as such home buyers should not be crushed such type of irregularities on the part of the licensee/promoter/builder. Hence, this period shall be counted for the purpose of grant of DPC.

13. Accordingly, it is the failure of the promoter to fulfil his obligations as well as responsibilities as per the apartment buyer's agreement dated 20.4.2013 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act are the part of the respondent is established. In this case, the respondent has not offered the possession of the unit to the complainants. As such the complainants are entitled to delayed possession charges at rate of the prescribed interest @ 9.30% p.a. w.e.f. 1.3.2018 till the offer of physical possession as per provisions of section 18(1) of the Act read with rule 15 of the Rules.”

Mr. Jhanji, learned senior counsel for petitioner-Company has contended that the HRERA has erred in not excluding the period during which the project could not be implemented on account of interim stay orders passed by the Court. He argued that the petitioner cannot be faulted for the delay in execution of the project for the period when the stay was operating. He states that vide order dated 16.8.2013 passed in CWP-17737-2013 titled as *Ballu Ram @ Bal Kishan Versus State of Haryana and others*, status quo with regard to transfer/construction was ordered to be maintained. This order came to be vacated by Hon'ble Supreme Court vide order dated 25.11.2013

passed in Civil Appeal No.10588-10590 of 2013 titled as *Angle Infrastructue Pvt. Ltd Versus Ballu Ram @ Bal Krishan and others*. The writ petition (CWP-17737-2013) was eventually dismissed on 17.11.2014.

Further in execution, EFA-15-2015 titled as *Capital Builders Vs. Angle Infrastructure Pvt. Ltd.*, an order restraining the petitioner-Company from creating 3rd party interest over the unsold flats was passed on 10.9.2015. This order continued till 8.5.2019. He further refers to Clauses 11.1 and 11.2 of the Apartment Buyer's Agreement (P-2) as per which the seller shall not be held responsible or liable for not performing any of its obligations or undertakings if such performance is prevented due to *force majeure*. The issue of any injunction, order or direction from any authority that prevents or restricts the seller from complying with any terms and conditions as agreed in the agreement is amongst the events which are included under the *force majeure* clause.

Accordingly, Mr. Jhanji, learned senior counsel for petitioner contends that as per the plain terms of Apartment Buyer's Agreement, the period during which the project could not be executed on account of stay orders passed by the Court is liable to be excluded for the purpose of calculating the interest for delayed payment compensation. He argued that the HRERA has acted arbitrarily including this period in computing the period of delay in offering possession. Accordingly, he has contended that the petitioner-Company be permitted to file an appeal before the Tribunal by making

pre-deposit after excluding the interest for the aforesaid period.

It is not possible to accept the contention of learned senior counsel for petitioner. It has been held by the Court in a number of cases that the requirement of pre-deposit as envisaged under Section 43(5) of the Act is mandatory.

In CWP No.17657 of 2020 titled “**Sana Realtors Private Limited vs. The Haryana Real Estate Regularoty Authority and others**” and other petitions decided on 25.05.2022 it was observed as under:

“Mr. Bhandari, learned counsel for the petitioner company (hereinafter referred to as the 'developer'), submits that the orders impugned in these petitions need to be treated to be void ab initio as they are against the basic principles of natural justice, inasmuch as the petitioner company was never heard in the matter, as would be obvious from the impugned orders themselves, with him further submitting that the complaints filed by the home buyers came up for hearing on different dates during the course of the ongoing pandemic; and consequently were adjourned from time to time without any actual hearing taking place, but on the date of passing of the impugned orders (i.e. 30.10.2020), the matters were taken up and decided in the absence of any representative or counsel for the petitioner company, with no advance intimation given to the effect that the matters would actually be taken up for hearing and would not be adjourned as they were being earlier due to the pandemic.

Whereas that argument is most definitely a tenable argument otherwise and on the principle audi alteram partem alone, we may otherwise have interfered in the matter, but Mr. Mittal learned counsel for the respondent

RERA, firstly submits that the issue of waiving a pre-deposit to be made prior to an appeal being heard by the Tribunal, has been conclusively decided by the Supreme Court not just in the case of 'M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P. and others', 2022(1) R.C.R. (Civil) 357, but in the case of the petitioner company itself also, i.e. in 'Sana Realtors Private Limited Vs. Union of India and others', SLP(C) No.13005 of 2020, the SLP has been dismissed in terms of the ratio of the judgment in Newtechs' case (supra); and consequently, with an alternative remedy of challenging the impugned orders on the merits/demerits thereof, available with the petitioner before the learned Real Estate Appellate Tribunal, this court would not exercise jurisdiction under Article 226 of the Constitution of India, to entertain these petitions. He specifically refers to paragraphs 78, 136 and 137 of the judgment in Newtechs' case (supra), which reads as follows:-

“78. This Court while interpreting Section 18 of the Act, in Imperia Structures Ltd. v. Anil Patni and Another, 2020(10) SCC 783 held that Section 18 confers an unqualified right upon an allottee to get refund of the amount deposited with the promoter and interest at the prescribed rate, if the promoter fails to complete or is unable to give possession of an apartment as per the date specified in the home buyer’s agreement in para 25 held as under:-

“25. In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the Project. Such right of an allottee is specifically made “without prejudice to any other remedy available to him”. The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be

prescribed. The proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the Project. In that case he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is up to the allottee to proceed either under Section 18(1) or under proviso to Section 18(1). The case of Himanshu Giri came under the latter category. The RERA Act thus definitely provides a remedy to an allottee who wishes to withdraw from the Project or claim return on his investment.”

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136. It is indeed the right of appeal which is a creature of the statute, without a statutory provision, creating such a right the person aggrieved is not entitled to file the appeal. It is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasi judicial litigations and it is always be circumscribed with the conditions of grant. At the given time, it is open for the legislature in its wisdom to enact a law that no appeal shall lie or it may lie on fulfilment of precondition, if any, against the order passed by the Authority in question.

137. In our considered view, the obligation cast upon the promoter of pre-deposit under Section 43(5) of the Act, being a class in itself, and the promoters who are in receipt of money which is being claimed by the home buyers/allottees for refund and determined in the first place by the competent authority, if legislature in its wisdom intended to ensure that money once determined by the authority be saved if appeal is to be preferred at the instance of the promoter after due compliance of pre-deposit as envisaged under Section 43(5) of the Act, in no circumstance can be said to be onerous as prayed for or in violation of Articles 14 or 19(1)(g) of the Constitution of India.” (Emphasis applied in the present order only).

Learned counsel appearing for the complainant (in CWP No.4236-2021), submits that the agreement between the home buyer and the developer was entered into in the year 2010, with the date of delivery of possession of the dwelling units being in the year 2013, but with the home

buyer suffering even thereafter for nine years now; and consequently, the petitioner cannot take a “technical plea” of not having been heard by the respondent authority.

*Mr. Bhandari however wishes to rebut even that argument on the strength of the judgment of the Supreme Court in **Harbanslal Sahnia and another Vs. Indian Oil Corpn. Ltd. And others, 2003 AIR (SC) 2120 and Union of India & Ors. Vs. Tania Construction Pvt. Ltd., 2011(3) R.C.R. (Civil) 821.***

He submits that this court while exercising jurisdiction under Article 226 of the Constitution of India, in such a situation, would interfere in the matter and set aside the impugned orders, while directing the respondent authority to pass fresh orders after duly hearing the petitioner.

It is also to be noticed that learned counsel for the petitioner has submitted that possession was actually offered in the year 2017, but was not taken by the home buyer, which counsel for the home buyer in CWP No.4236 of 2021 strongly refutes.

That issue obviously is not to be gone into by this court and would be looked at by the Tribunal after taking into consideration the pleadings and arguments raised before it on both sides.

Though Mr. Bhandari wishes to make submissions on the merits of other arguments sought to be raised by the home buyer, we are not at all going into that issue, which would be naturally considered by the learned Tribunal, in all aspects thereof.

Thus, having considered the matter, as already said, though otherwise we would be in agreement with learned counsel for the petitioner on the principles of audi alteram partem as a basic principle of natural justice, yet, looking

at the fact that the Real Estate (Regulation and Development) Act, 2016, has been specifically enacted by Parliament to protect the interests of home buyers and the Supreme Court (in paragraph 78 of the judgment) in Newtech' (supra) has held as has been reproduced hereinabove and has further specifically held to the effect that the right of home buyer under the Act is an unqualified right and (in paragraph-137) has held that in no circumstance can the condition of a pre-deposit as envisaged under Section 43(5) of the Act, said to be onerous or in violation of Articles 14 or 19(1)(g) of the Constitution of India, these petitions would not be entertained by this court, specially with Mr. Mittal having specifically pointed to the fact that the Supreme Court (in the case of Newtech), had also specifically dealt with the issue as decided in the case of 'Tecnimont Pvt. Ltd. (Formerly Known As Tecnimont ICB Private Limited) Vs. State of Punjab and Others', and after having duly considered the matter in the light of the jurisdiction of a High Court to waive the condition of a pre-deposit under Article 226 of the Constitution of India, has still gone onto hold as has been held specifically (in paragraph-137) of Newtechs' case (supra). Consequently, these petitions are dismissed.

However, naturally, the petitioner would be at liberty to file appropriate appeals before the learned Real Estate Appellate Tribunal after making a pre-deposit as required in terms of Section 43(5) of the Act of 2016, in each case.”

Accordingly, we find no merit in the present petition and the same is dismissed.

We clarify that we have not opined in any manner on the

merits of the contention of the petitioner which would be considered by the Tribunal. The petitioner has already registered an appeal before the Tribunal bearing No.H-REAT 537 of 2022. The Tribunal may proceed to hear the same after the required pre-deposit in terms of Section 43(5) of the Act is made by the petitioner.

(HARINDER SINGH SIDHU)
JUDGE

September 23, 2022

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(LALIT BATRA)
JUDGE

Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No