

**BEFORE THE HARYANA REAL ESTATE APPELLATE
TRIBUNAL**

**Appeal No.425 of 2019
Date of Decision:01.09.2020**

1. Sudhakar Chawla son of late Shri J.L. Chawla, Resident of E-179, 2nd Floor, Greater Kailash-II, New Delhi-110048.
2. Samarth Chawla son of Shri Sudhakar Chawla, Resident of E-179, 2nd Floor, Greater Kailash-II, New Delhi-110048.

Appellants

Versus

M/s IREO Grace Realtech Private Limited 304, Kanchan House, Karampura Commercial Complex, New Delhi-110015.

Respondent

CORAM:

Justice Darshan Singh (Retd.)	Chairman
Shri Inderjeet Mehta	Member (Judicial)
Shri Anil Kumar Gupta	Member (Technical)

Argued by: Shri Sanjiv Pabbi, Advocate, Learned Counsel for appellants.
Shri Vinod S. Bhardwaj, Advocate with Ms. Mehak Sawhney, Advocate, Learned Counsel for respondent.

[The aforesaid presence is being recorded through WhatsApp Video Conferencing since the proceedings are being conducted in virtual court.]

ORDER:

JUSTICE DARSHAN SINGH (Retd.) CHAIRMAN:

Appellants/allottees have preferred this appeal under Section 44 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act') read with Rule 22 of The Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter called 'the

Rules) against the order dated 09.04.2019 passed by the learned Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called 'the Authority'), in Complaint No.2381 of 2018 filed by the appellants/allottees was disposed of by the learned Authority with the following directions:-

- “i. Complainant shall pay the outstanding dues, if any, after adjustment of interest for the delayed period.*
- ii. The promoter shall not charge anything from the complainant which is not a part of the builder buyer agreement.*
- iii. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.75% by the promoter which is the same as being granted to the complainant in case of delayed possession.*
- iv. The respondent is directed to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainant with the promoter from the due date of possession i.e. 27.11.2018 up to the date of offer of possession.*
- v. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.”*

2. As per the averments in the complaint, Unit No.CD-C3-04-402 was allotted by the respondent/promoter to the appellant, having super area of 1295.78 sq. ft in their project “The Corridors” situated in Sector 67-A, Gurgaon, Haryana, for

the basic sale price of Rs.1,19,21,176/-.The appellants/allottees have paid a total sum of Rs.1,41,48,452.32 but the respondent/promoter failed to complete the construction as per the terms and conditions of the "Apartment Buyer's Agreement" (hereinafter called the 'Buyer's Agreement') dated 24.04.2014. The building plans were approved on 23.07.2013. As per the Buyer's Agreement, the possession of the unit was to be delivered within 42 months thereafter, which comes to 23.01.2017. The appellants have also assailed some of the clauses of the Buyer's Agreement being unilateral, arbitrary and in contravention of the Act. Thus, the appellants/allottees sought refund of the money paid by them to the respondent/promoter i.e. Rs.1,41,48,452.32 alongwith the prescribed rate of interest. Hence the complaint.

3. The respondent/promoter contested the complaint by raising the preliminary objections with respect to the maintainability of the complaint as the Buyer's Agreement was executed prior to the enforcement of the Act; that there was no cause of action and locus standi to file the complaint; that the period of offering possession of the unit has not yet elapsed; that the learned Authority had no jurisdiction to entertain the complaint; that there was an arbitration clause in the Buyer's Agreement; that the appellants have not approached the

learned Authority with clean hands and had intentionally suppressed the material facts.

4. On merits, it was pleaded that the time period for offering the possession has not yet elapsed and the complaint is pre-mature. The building plan was approved vide memo dated 23.07.2013. Before starting the construction, the clearance issued by the Ministry of Environment and Forest, Government of India had to be obtained, which was granted on 12.12.2013 and Fire Safety Plan was approved on 27.11.2014. According to the terms of the Buyer's Agreement, the time for calculating the due date for delivery of possession will commence w.e.f. 27.11.2014. As per Clause 13.3 and 13.5 of the Buyer's Agreement, sixty months' period was permissible which will expire on 27.11.2019. Hence, it is pleaded that the complaint is pre-mature. It is further pleaded that the appellants/allottees have committed default in payment of the instalments as per the payment schedule. The terms and conditions of the Buyer's Agreement are legal and binding upon the appellants/allottees. All other pleas raised in the complaint were controverted. With these pleas, the respondent/promoter pleaded for dismissal of the complaint.

5. On appreciating the material on record and contentions raised by learned counsel for the parties, the learned Authority disposed of the complaint vide impugned

order dated 09.04.2014 issuing directions reproduced in the upper part of this judgment.

6. Aggrieved with the aforesaid order, the appellants/allottees have preferred the present appeal.

7. We have heard Shri Sanjiv Pabbi, Advocate, learned counsel for the appellants, Shri Vinod S. Bhardwaj, Advocate assisted by Ms. Mehak Sawhney, learned counsel for the respondent and have meticulously examined the record of the case.

8. It is pertinent to mention that during the pendency of this appeal, the appellant Sudhakar Chawla has filed his affidavit dated 16.08.2019 before this Tribunal on 26.08.2019 whereby the appellants have restricted their claim only to the extent of the interest which became payable to them for delay in the delivery of possession as per the terms and conditions of the Buyer's Agreement dated 24.04.2014.

9. Initiating the arguments, Shri Sanjiv Pabbi, Advocate, learned counsel for the appellants contended that in fact the construction was started in the year 2014, which is evident from the demands of the instalments raised by the respondent/promoter. The third instalment was demanded on 09.04.2014 which had become due only on the starting of the construction and excavation. Thus, he contended that the period of 42 months should be reckoned from 09.04.2014. He contended that the learned Authority had wrongly taken that

the period for completion of construction is to be computed w.e.f. 27.11.2014. Thus, he contended that the appellants shall be entitled to interest for delay in delivery of possession with effect from October, 2017 till the date of offer of possession. To support his contentions, learned counsel for the appellants has relied upon the cases **Gunish Chawla &Anr Vs. IREO Grace Realtech Pvt. Ltd., Consumer Case No.1181 of 2017** decided on 28.03.2019 by the Hon'ble National Consumer Disputes Redressal Commission, New Delhi and **Subodh Pawar Vs. M/s IREO Grace Realtech Pvt. Ltd. & 4 ors., Consumer Case No.1998 of 2016** decided on 24.09.2018 by the Hon'ble National Consumer Disputes Redressal Commission, New Delhi.

10. Per contra, learned counsel for the respondent/promoter contended that as per Clause 13.3 of the Buyer's Agreement, even prior to the booking of the flat, the appellants were aware that completion of the project may take 42 months + 180 days as a grace period. This aspect has been rightly acknowledged by the learned Authority and the delay has been counted after completion of 48 months from the date of issuance of fire NOC.

11. He further contended that the building plan was approved on 27.03.2013. As per condition No.17(iv) of the building plan, the respondent was required to obtain the clearance/NOC from the Ministry of Environment and Forest,

Government of India, before starting the construction. As per the notification dated 14.09.2006 issued by the Ministry of Environment and Forest, Government of India, the environmental clearance was mandatory before raising the construction of the project. The environmental clearance in this case was issued on 12.12.2013 by the State Environmental Impact Assessment Authority, Haryana. He further contended that the learned Authority has correctly read the clauses of the Buyer's Agreement and other statutory provisions, and calculated the date of construction from the date when the fire NOC was issued i.e. 27.11.2014.

12. He further contended that for excavation of soil, the approval of the Mines and Geology Department is required. The excavation of soil does not form the part of construction which is supposed to be raised after obtaining the fire NOC. The construction of the project and excavation of the soil are two different aspects, which require the approval from different authorities. The demand for third instalment was made at the time when excavation of the soil had commenced after obtaining the approval from the Mines and Geology Department, which was obtained in February, 2014.

13. Learned counsel for the respondent further contended that the cases relied upon by learned counsel for the appellants are not applicable to the facts of the present case as in those cases the construction had already started

before obtaining the fire NOC. Whereas, in the case in hand, the respondent has complied with all the statutory provisions carefully and started the construction only after obtaining the requisite approvals. He further contended that all these aspects were correctly dealt with by the learned Authority. Thus, he contended that the present appeal is devoid of merits.

14. We have duly considered the aforesaid contentions.

15. Clause 13.3 of the Buyer's Agreement dated 24.04.2014 reads as under: -

“13.3 Subject to Force Majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of the Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges, and also subject to the allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said apartment to the allottee within a period of 42 months from the date of approval of the Building Plans and/or fulfilment of the preconditions imposed thereunder (Commitment Period). The allottee further agrees and understands that the company shall be additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company.”

16. As per the aforesaid provisions of the contract, the respondent/promoter was to offer the possession of the apartment to the appellants within a period of 42 months from the date of approval of the building plans and/or fulfilment of the conditions imposed thereunder with additional grace period of 180 days. So, the possession was to be offered within 48 months from the date of the approval of the building plans and/or fulfilment of the pre-conditions imposed thereunder. As per the averments in the reply filed by the respondent, the building plans were approved on 23.07.2013. The approval of the building plans was subject to the conditions provided thereunder. The condition No.17 (iv) of the building plan reads as under: -

“That the Colonizer shall obtain the clearance/NOC as per the provision of the notification No.S.O.1533 dated 14.09.2006 issued by the Ministry of environment and forest, Government of India before starting the construction/ execution of development works at the site.”

17. It is further the admitted case of the respondent/promoter that the environmental clearance for construction of the project was granted by the competent authority on 12.12.2013. The relevant portion of the environmental clearance reads as under: -

“PART A-

SPECIFIC CONDITION

Construction phase: -

xxxx

[19] The project proponent shall provide for adequate fire safety measures and equipments as required by the Haryana Fire Service Act, 2009 and instructions issued by the local authority/Directorate of the fire from time to time. Further the project proponent shall take necessary permission regarding fire safety scheme/NOC from competent authority as required.”

18. As per the above condition, the respondent/promoter was required to provide adequate safety measures and equipments as required by the Haryana Fire Service Act, 2009 (herein after called the 'Fire Act') and the instructions issued by the local authority/Directorate of the fire from time to time and the promoter was required to take necessary permission regarding fire safety scheme/NOC from the competent authority **as required**. The fire safety scheme approval was granted on 27.11.2014.

19. As per the contentions raised by learned counsel for the respondent, the period of four years for offer of possession is to be reckoned from 27.11.2014 i.e. the date on which the fire safety scheme was approved. The learned Authority in the impugned order has accepted this plea of the respondent and has calculated the delay period by taking the date of commencement of the construction to be 27.11.2014 and due the for delivery of possession has been determined to be

27.11.2018. The point for consideration arises as to whether there was any hindrance for the respondent to start the construction prior to the approval of the fire safety scheme, and secondly, as to whether the respondent/promoter had actually started the construction before that date.

20. The fire safety approval is required to be obtained under section 15 of the Fire Act, which reads as under: -

15. Approval of Fire Fighting Scheme and issue of no objection certificate. –

(1) Any person proposing to construct a building to be used for any purpose other than residential purpose or a building proposed to be used for residential purpose of more than 15 metres in height, such as group housing, multi-storeyed flats, walk-up apartments, etc., before the commencement of the construction, shall apply for the approval of Fire Fighting Scheme conforming to National Building Code of India, the Disaster Management Act, 2005 (53 of 2005), the Factories Act, 1948 (Act 63 of 1948) and the Punjab Factory Rules, 1952, and issue of no objection certificate on such form, alongwith such fee, as may be prescribed.

(2) The Director or any officer duly authorized by him in this behalf, may take cognizance of any application and issue such instructions and orders regarding the building plan and for construction by issuing a provisional no

objection certificate before the construction is taken up.

Explanation. - *In case any person proposes to increase the number of floors on any building already constructed in such a manner that it shall qualify for being termed as a high rise building, shall before construction, apply for no objection certificate.*

(3) The provisional no objection certificate shall be issued within 60 days of submission of application along with such fee, as may be prescribed, giving all the details of the construction being undertaken as well as the rescue, fire prevention and fire safety details required to be incorporated during the period of construction.

(4) During the process of construction, the inspection of the construction may be conducted and the advice about any additions, deviations, modifications that are required to be carried out from the precaution and prevention point of view, may be tendered. Such advice shall be made on prescribed performa and handed over to the party concerned.

(5) On completion of construction of the high-rise building, a no objection certificate shall be obtained, which shall be valid for a period of five years. In the absence of such certificate, the owner shall not occupy, lease or sell the building.”

21. As Section 15(1) of the Fire Act provides that where a person proposes to raise the construction of the building for residential purposes of more than 15 meters in height, such as Group Housing, multi-storeyed flats, walk-up apartments, etc., before the commencement of the construction shall apply for approval of the Fire Fighting Scheme. Thereafter, as per Section 15(2) of the Fire Act, the Directorate or any officer duly authorised on its behalf shall take the cognizance of the application and issue such instructions and orders regarding the building plan and for construction by issuing a provisional 'No Objection Certificate' before the construction is taken up.

22. Section 15(3) of the Fire Act provides for issuance of the provisional 'No Objection Certificate' within 60 days of the submission of the application. Thus, as per Section 15(1) of the Fire Act, it was required to file application for approval of the Fire Fighting Scheme. Further, as per Section 15(2) of the Fire Act, only provisional 'No Objection Certificate' is required before the construction is taken up. Section 15(3) of the Fire Act, provides that the provisional 'No Objection Certificate' is to be issued within 60 days from the submission of the application. The respondent/promoter has withheld the fact from the Tribunal as to when the application for approval of Fire Fighting Scheme was submitted to the competent authority. Thus, an adverse inference has to be drawn against

the respondent and it will be presumed that the provisional 'No Objection Certificate' might have already been issued prior to the final approval of the Fire Safety Scheme, which was granted on 27.11.2014. Thus, there is no substance in the plea raised by learned counsel for the respondent that start of the construction was not possible before 27.11.2014, the date on which the fire safety scheme was finally approved.

23. Moreover, it is evident from the record of the case that in fact, the construction was already started by the respondent/promoter. It is a construction linked plan. The payment plan annexed with the agreement is available at page 149 of the paper book, which shows that the third instalment was due on excavation. The respondent/promoter has issued the letter dated 13.04.2014 to the appellants/allottees demanding the payment of the remaining amount of the third instalment which had become due on 09.04.2014 (page 218 of the paper book). It means, the excavation work had already started before 09.04.2014.

24. It is an admitted case of the respondent that they have received the permission of Mines and Geology Department for excavation of soil in February, 2014. We do not find any substance in the plea raised by the learned counsel for the respondent that the construction of the project and excavation of the soil, are two different aspects. In fact,

the excavation is a preliminary activity of the construction of project. Excavation is the process of moving earth, rock or other materials with tools, equipment or explosives. The scope of excavation includes the setting out of corner benchmarks, survey for ground levels, survey for top levels, excavation to approve depth, dressing of loose soil, making up to cut off level, constructing dewatering wells and interconnecting trenches, marking boundaries of the building and constructing the protection bunds and drains. The first and preliminary step involved in the excavation is to find out the extent of soil and clearing of the construction site of unwanted bushes, weeds and plants. Thereafter, the excavation lines and centre lines are drawn on the ground with requisite bench marks. The tracing is marked by lime powder with the reference of drawing and benchmarks the depth of the excavation is fixed. The process of excavation is carried out manually or by machines as per requirement. The process of excavation also includes the proper shoring to hold the loose soil if the site is located in loose soil area. All the sides of the building are required to be sealed for the purpose of safety. So, the excavation is not just the digging of soil/earth, rather, number of activities, reproduced above, forms the process of excavation and it is certainly the preliminary activity of constructing a project.

25. As per the admitted case of the respondent, the excavation had started by 09.04.2014. So, in our view 09.04.2014 shall be the date of starting the construction after obtaining the requisite approvals, permissions and fulfilment of the conditions provided thereunder. So, the period of 48 months is to be reckoned w.e.f. 09.04.2014. The learned Authority has fallen into an error by reckoning the aforesaid period from 27.11.2014. Thus, as per our opinion, the due date for delivery/offer of possession comes to 09.04.2018 instead of 27.11.2018, as determined by the learned Authority in the impugned order. Consequently, the appellants/allottees shall be entitled to interest for the delay in delivery/offer of possession on the amount deposited by the appellants/allottees, with the respondent/promoter at the prescribed rate w.e.f. the due date of possession i.e. 09.04.2018 up to date of offer of possession of the unit to the appellants/allottees.

26. No other point was argued before us.

27. Thus, keeping in view our aforesaid discussions, the present appeal is hereby allowed. The impugned order dated 09.04.2019 passed by the learned Authority is hereby modified to the extent that the appellants/allottees shall be entitled to interest at the prescribed rate i.e. 10.75% per annum on the amount deposited by them with the promoter from the due

date of possession i.e. 09.04.2018 till the date of offer of possession. No order as to costs.

28. Copy of this order be communicated to learned counsel for the parties/parties and the learned Authority for compliance.

29. File be consigned to the records.

Announced:
September 01st, 2020

Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

CL

Sudhakar Chawla & Anr.
Vs.
M/s IREO Grace Realtech Pvt. Ltd.

Appeal No.425 of 2019

Present: None.

Vide our separate detailed judgment of the even date, the appeal is allowed and the impugned order dated 09.04.2019 passed by the learned Authority is modified.

Copy of the detailed judgment be communicated to both the parties and the learned Authority.

File be consigned to the records.

Announced:
September 01st, 2020

Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

CL