

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint No. : 1776 of 2018
Date of first hearing : 12.02.2019
Date of Decision : 15.03.2019

Sh. Arvind Kumar Jain and Sh. Arpit Jain
R/o. House no. 722 B, Katra Hardayal,
Nai Sarak, Delhi- 110006.

Complainant

Versus

M/s SS Group Pvt. Ltd.
(through its A.R.)
Regd. office : SS House, Plot no 77, Sector
44, Gurugram, Haryana-122001.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Shri Sanjeev Sharma
Shri Sunil Shekhawat

Advocate of the complainant
Authorized representative of respondent

ORDER



1. A complaint dated 29.11.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants Sh. Arvind Kumar and Sh. Arpit Jain, against the promoter M/s SS Group Pvt. Ltd, on account of violation of clause 8.1 of the flat buyer's

agreement dated 12.09.2013 for not handing over possession of the subject flat as described below on due date, as per the terms of agreement dated 12.09.2013 which is in violation of section 11(4)(a) of the Act *ibid*.

2. Since the flat buyer's agreement dated 12.09.2013 was executed prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, penal proceedings cannot be initiated retrospectively, so the authority has decided to treat this complaint as an application for non-compliance of obligation on behalf of the respondent as per section 34 (f) of the Act *ibid*.
3. The particulars of the complaint are as under: -

| | | |
|-----|--|---------------------------------------|
| 1. | Name and location of the project | "The leaf", Sector 85, Gurugram. |
| 2. | Date of booking | 12.07.2012 |
| 3. | Date of allotment letter | 10.09.2012 (Annex I) |
| 4. | Flat/unit no. | 3B, 3 rd floor in tower -2 |
| 5. | Unit area | 1620 sq. ft. |
| 6. | Nature of project | Group housing complex |
| 7. | Total area of the project | 11.093 acres |
| 8. | RERA registered/ unregistered. | Unregistered |
| 9. | DTCP license no. | 81 of 2011 |
| 10. | Nature of payment plan | Construction linked payment plan |
| 11. | Total consideration amount as per payment plan | Rs. 90,19,800/- (Annex 4) |



| | | |
|-----|---|---|
| 12. | Total amount paid by the Complainant till date as per SOA | Rs 68,61,823/- (Annx 3) |
| 13. | Date of flat buyer's agreement | 12.09.2013 (Annx 2) |
| 14. | Date of delivery of possession. (As per clause 8.1 of FBA: 36 months + 90 days' grace period from date of execution of agreement) | 12.12.2016 |
| 15. | Penalty clause as per the agreement dated 12.09.2013 | Clause 8.3: - Rs. 5/- per sq. ft. per month of the super area. |

4. The details provided above have been checked as per record of the case file. A flat buyer agreement dated 12.09.2013 is available on record for unit no. 3B, 3rd floor in tower 2, of the project, namely 'the leaf' located at sector 85, Gurugram according to which the possession of the aforesaid unit was to be delivered by 12.12.2016. The respondent has failed to fulfil its contractual liability till date.
5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. Accordingly, the respondents appeared on 12.02.2019. The case came up for hearing on 12.02.2019, 15.03.2019. The reply has been filed by the respondent on 17.12.2018 which has been perused by the authority.



Facts of the complaint: -

6. Briefly put facts relevant for the disposal of the present complaint are that the on 12.07.2012, the complainants jointly booked a flat/unit in the respondent's project namely 'the leaf' located at sector 85, Gurugram by paying Rs. 7,50,000/- as booking amount. Pursuant to aforesaid booking of the complainants, respondent vide allotment letter dated 10.09.2012 allotted unit no. 3B, 3rd floor in tower 2 of the project in favour of the complainant.
7. On 12.09.2013, flat buyer's agreement for the allotted unit number was executed between the parties. The total consideration of the unit was agreed at Rs. 90,19,800/- as against which the complainants have made a total payment of Rs. 68,61,823/- on various dates as per the construction linked payment plan.
8. As per clause 8.1 of the agreement dated 12.09.2013, possession of the unit was to be delivered within a period of 36 months plus 90 days' grace period from the date of execution of agreement i.e. by 12.12.2016. It was alleged by the complainants that the respondent has failed to deliver the possession till date.
9. It was further alleged by the complainants that the respondent has illegally charges PLC of Rs. 2,43,000/- @ Rs.



150/- per sq. ft. and additional PLC of Rs. 1,62,000/- @ Rs. 100/- per sq. ft. even though there is nothing unique about the location. In addition to it, the complainants alleged that the respondent have claimed reserved car parking slot charges exorbitantly to Rs. 3,50,000/- ignoring the fact the reserve car parking charge is part of common area for which the builder cannot seek any cost from the complainant.

10. Being aggrieved by the aforesaid acts of the respondent the complainants are constrained to file the instant complaint.

Issues raised by the complainant: -

- i. **Whether the respondent has caused exorbitant delay in handing over the possession of the units to the complainants and for which the respondent is liable to pay interest @ 18% p.a. on the amounts received from the complainant?**
- ii. **Whether the open parking space and parking in common basement be sold to the allottees as separate unit by the promoter, which the respondent has sold as separate unit at a cost of Rs. 3,00,000/-?**
- iii. **Whether the respondent is liable to refund the monies so collected by it from the complainant towards GST which came into effect from 01.07.2017 as the said tax became**



payable only due to delay in handing over the possession by the respondent?

- iv. Whether payment of VAT at higher rate than the lump sum tax @ 1% as per the scheme of government of Haryana should have been paid?
- v. Whether the complainant is liable to pay PLC with the same being unjustified for majority of the flat owners are being charged PLC making the imposition worthless and there being nothing unique about the location vis-à-vis other flats?
- vi. Whether the respondent can coerce the complainant to pay club membership charges when the same should be optional being a luxury?
- vii. Whether insurance as required under section 16 of the RERA, 2016 be obtained by the respondent before handing over the possession of common area to the association of allottees?



Reliefs sought:-

1. Direct the respondent to refund of the excess amount collected on account of any area in excess of carpet area as the common areas and which sale of common area is in total contradiction of the Act.

- 2. Direct the respondent to pay delayed interest @ 18% p.a. on the amounts collected from the complainants.**
- 3. Direct the respondent to obtain insurance, if not obtained, as per section 16 of the Act ibid before handing over the possession of common area to the association of allottees.**
- 4. Direct the respondent to refund the amount of GST service tax, VAT charges, car parking charges, PLC, club membership charges, etc.**
- 5. Pass an order against the respondent under section 59 of the Act for the failure of respondent to register itself with this hon'ble authority.**

Respondent's reply:-

11. The preliminary objection raised on behalf of the respondent is that the authority does not have the jurisdiction to decide the complaint as the said flat buyer agreement dated 12.07.2012 was executed between the parties much prior to the coming into force of the Act. Moreover, the jurisdiction of this authority cannot be invoked as the said agreement contains an arbitration clause whereby the parties resolve to settle the dispute amicably failing which the same is to be settled way of arbitration.



12. The respondent submitted that the complainant is claiming for the refund of the amount along with interest as also the compensation, which, from reading of the provisions of the Real Estate (Regulation and Development) Act, 2016 and 2017 rules, especially those mentioned herein above, would be liable for adjudication, if at all, by the adjudicating officer and not this authority. Thus, on this ground alone, the complaint is liable to be rejected.

13. The respondents submit that the project in respect of which the complaint has been made, is not even registered as on date with this authority, though the respondent no.1 has applied for its registration. Until such time the project is registered with the authority, no complaint, much less as raised by the complainant can be adjudicated upon.

14. From the conjoint reading of the sections/rules, form and annexure-A, it is evident that the 'agreement for sale', for the purposes of 2016 Act as well as 2017 Haryana Rules, which is required to be executed inter-se the promoter and the allottee.

15. It was further submitted by the respondent that it is a matter of record and rather a conceded position that no such agreement as referred to under the provisions of 2016 Act and 2017 Haryana rules, has been executed between respondents and the complainant. Rather, the agreement that has been referred to, for



the purpose of getting the adjudication of the complainant, though without jurisdiction, is the flat buyer's agreement, executed much prior to coming into force of 2016 Act. The adjudication of the complaint of interest and compensation, as provided under sections 12,14,18 and section 19 of 2016 Act, has to be in reference to the agreement for sale executed in terms of 2016 Act and 2017 Haryana rules and no other agreement.

16. It was contended by the respondent that the complainant has defaulted in making payments as per the demand and payment schedule despite several reminders to clear the outstanding dues. The respondent has also issued demand letters dated 24.01.2018 and 19.02.2018 to the complainant to clear the dues but the respondent's requests fall on deaf ears of the complainant and did not clear the outstanding dues pending against the said unit. Now with the filing of this false complaint, the complainants have tried to shift the burden on the respondent.

17. The respondent contended that all the reliefs claimed by the complainant are false and hence denied and the complaint is liable to be dismissed.

Determination of issues: -

After considering the facts of the case, submissions of the parties and perusal of records, the details wise issues have been determined below –



18. In regard to **issue i** raised by the complainants, as per clause 8.1 of the flat buyer's agreement dated 12.09.2013 of the subject flat, possession of the flat was to be delivered within a period of 36 months' plus 90 days' grace period from the date of signing of this agreement. Relevant portion of clause 8.1 of the agreement is reproduced below –

*“subject to the terms of this clause and subject to the Flat Buyer(s) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and complied with all provisions, formalities, documentation etc., as prescribed by the Developer, the Developer proposes to handover the possession of the Flat within a period of **thirty-six (36) months** from the date of signing of this Agreement. The Flat Buyer(s) agrees and understands that the Developer shall be entitled to a grace period of 90 days, after the expiry thirty-six (36) months, for applying and obtaining the Occupation Certificate in respect of the Group Housing Complex”*

Thus, on calculation the due date of delivery of possession came out to be 12.12.2016, however, the respondent has failed to deliver the possession till date which is in violation of section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016.



The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the carpet area of the said apartment as per clause 8.3 (a) of flat buyer's agreement dated 12.09.2013 is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one

sided as also held in para 181 of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and Ors. (W.P 2737 of 2017)**, wherein the Bombay HC bench held that:

“...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”

Hence, the complainants are entitled for delayed possession charges at the prescribed rate of interest as per section 18(1) of the Act *ibid*.

19. In regard to the **issue ii** raised by the complainants, open parking spaces cannot be sold/charged by the promoter. As far as issue regarding parking in common basement is concerned, the matter is to be dealt as per the terms and conditions of flat buyer agreement where the said agreement have been entered into before coming into force the Real Estate (Regulation and Development) Act, 2016. From perusal of the terms of flat buyer's agreement, it is nowhere defined that the car parking space allotted was open car parking or basement parking area. Otherwise also the complainants have made the payment of the car parking charges without raising any objections to that



effect. Hence, it is wrong to say that the respondent has charged the amount for car parking spaces illegally.

20. In regard to the **issue iii, iv** raised by the complainants, it is pertinent to note that this authority has no jurisdiction to decide the issue regarding GST, VAT, service tax, etc. and the complainants are directed to approach the appropriate forum/court for redressal of their grievance.

21. In regard to **issue v and vi** raised by the complainants, it is noted from the perusal of agreement and payment schedule the complainant has made payments of PLC and club membership charges as per the terms of agreement, moreover, no objection has ever been raised by the complainants at the time of making payment through exchange of correspondence, hence, the complainants are estopped by their act and these issues become infructuous.

22. In regard to **issue vii** raised by the complainants, the authority is of the view that the project of the respondent is covered under the definition of 'on going projects' as per rule 2 (o) of the Haryana Real Estate (Regulation and Development) Rules, 2017 and the same is registerable, therefore, the respondent is liable to follow the provisions of the Rules ibid and also liable to get its project insured.



Findings of the authority: -

23. The preliminary objection raised by the respondent regarding jurisdiction of the authority stands dismissed. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district, therefore this authority has complete territorial jurisdiction to deal with the present complaint.



24. The authority is of the considered opinion that it has been held in a catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force,

consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

25. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015***, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Supreme Court in **civil appeal no.23512-23513 of 2017** and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

26. Arguments heard. Case of the complainants is that they booked a unit/flat no. 3B, 3rd floor, tower 2 in the project in question for a total consideration of Rs. 90,19,800/- out of which the complainants have paid an amount of Rs. 68,61,823/- so far to the respondent. By virtue of clause 8.1 of the agreement dated 12.09.2013 executed inter se between the parties, the respondent was duty bound to deliver the unit to the complainants within a period of 36 months + 90 days' grace period which comes to be 12.12.2016 but no possession has been offered to the complainant till date.



27. Considering all the pros and cons of the matter and hearing the counsel for the parties, the authority is of the considered view that in the present circumstances, the complainants are entitled for delayed possession charges at prescribed rate of 10.75% p.a. from 12.12.2016 till actual offer of possession is made to the complainant.

Decision and directions of the authority: -

28. Thus, the authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions: -

- (i) The respondent is directed to pay delayed possession charges at the prescribed rate of interest of 10.75% p.a. from the due date of delivery of possession i.e. 12.12.2016 till actual delivery of possession on the paid amount of the complainants.
- (ii) The interest so accrued shall be paid by the respondent from 12.12.2016 till the date of this order i.e. 15.03.2019 be paid within 90 days and thereafter monthly interest be paid on 10th of each subsequent month.
- (iii) The respondent is directed not to charge any PLC from the complainants.

29. Since, the respondent has failed to get the project registered which is in violation of section 3(1) of the Real Estate (Regulation



and Development) Act, 2012, so the authority decides to take suo moto cognizance of initiating penal proceedings against the respondent under section 59 of the Act ibid.

30. The order is pronounced.

31. The file is consigned to the registry. Copy of this order be consigned to the registration branch.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram.

Dated :-

Judgement uploaded on 19.03.2019

HARERA
GURUGRAM

