

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

Complaint no. : 2264 of 2018
First date of hearing : 26.03.2019
Date of decision : 02.05.2019

Mr. Yoginder Kumar Chauhan
R/o. H.no. 2065, Sector-17, Jagadhari, Yamuna
Nagar, Haryana

Complainant

Versus

M/s Kashish Developers Ltd.
Corporate office: Manor One, Sector 111,
Dwarka Expressway Bajghera, Gurugram-
122017
Mr. Sushil Kumar Choudhary (Manging
Director- Cum- Chairman)
Regd. office: 87, Old A.G Colony, Kadru, Ranchi-
834002, Jharkhand

Respondents

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Devinder Kumar Jindal Advocate for the complainant
Shri Ashok Kumar Sharma Authorized representative on
behalf of the respondents
Ms. Neeta Sinha Advocate for the respondents

ORDER

1. A complaint dated 28.12.2018 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 complainant Mr. Yoginder Kumar Chauhan, against the promoters M/s Kashish Developers Ltd. and Mr. Sushil Kumar Choudhary (Managing Director- Cum- Chairman), on account of violation of the apartment buyer's agreement dated 23.02.2013 in respect of apartment described below in the project 'Manor One' for not handing over possession by the due date which is an obligation of the promoters under section 11(4)(a) of the Act *ibid*.

2. Since, the apartment buyer's agreement has been executed on 23.02.2013 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

3. The particulars of the complaint case are as under:

1.	Name and location of the project	"Manor One", Sector 111, Gurugram, Haryana
2.	Nature of the project	Group housing project

3.	Project area	14.843 acres
4.	DTCP license no.	110 of 2011
5.	RERA Registered/ not registered.	Not registered
6.	Apartment/unit no.	A-8G, 8 th Floor, Tower A
7.	Apartment measuring	895 sq. ft.
8.	Allotment letter dated	20.12.2012
9.	Date of booking	26.09.2012
10.	Date of execution of apartment buyer's agreement-	23.02.2013
11.	Payment plan	Instalment linked payment plan
12.	Total sale price of the unit	Rs.75,68,775/-
13.	Total amount paid by the complainant till date	Rs. 31,75,375/-
14.	Date of delivery of possession as per clause 3(a) 36 months from the date of execution of the agreement plus 6 months grace period	23.08.2016
15.	Delay in handing over possession till date of decision	2 years 8 months and 9 days
16.	Penalty clause as per the said apartment buyer's agreement	Clause 3(c)(iv) @ 10/- per sq. ft. per month of the super area of the said apartment for period of delay

4. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondents. The promoters have failed to deliver the possession of the said unit by the due date to the complainant. Therefore, the promoters have not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 26.03.2019 and 02.05.2019. The reply filed on behalf of the respondents has been perused.

Facts of the complaint

6. The complainant submitted that respondent no. 1 is a company which is duly incorporated under the provisions of the Companies Act, 1956 and respondent no. 2 is the whole time managing director of the respondent no. 1 and is fully liable and responsible for the day to day affairs, act, conduct, behaviour and work of the respondent no. 1 as the whole business of the respondent no. 1 has been managed and carried out by the respondent no. 2.
7. The respondent no. 1 is engaged in the business of real estate and is a land developer company which purchased the land from the land owners and after developing it, sell the developed units in the form of commercial spaces, office space, shops, flats, apartment etc. to the purchasers.
8. The complainant had been influenced and allured about the residential flat in the project "Manor One", Sector 111,

Gurugram (Haryana) by respondent company informing that there will be fully furnished wholly designed, amenities in the residential flat at the above said project by paying the total price of Rs.75,68,775/- in instalment. Thus the complainant booked the flat in the above said project and has paid an amount of Rs. 6,50,000/- to the respondents. Thereafter the respondents allotted a flat/dwelling unit bearing no. A-8G on the 8th floor, block-A admeasuring 895 sq. ft. (super area) in their project “Manor One” at Sector 111, Gurugram, Haryana vide allotment letter dated 20.12.2012.

9. At the time of booking, an assurance was given to complainant that the possession will be handed over within three years from the date of the booking in their project and in case the respondents failed to handover the possession of the flat in their project within stipulated time period of three years from the date of booking, the respondents shall be liable to pay interest on the amount lying deposited with the respondents from the date of deposit and also liable to pay the charges @ Rs. 10/- per sq. ft. of the super area of the above said flat per

month for the period such delay till its handing over the possession of the flat.

10. The complainant submitted that the respondents failed to handover the possession of the flat within the period of three years nor issue any possession letter of the above stated flat in their project within three years and as per their terms and condition of the apartment buyer agreement dated 23.02.2013.
11. The complainant submitted that when the respondents failed to handover the possession of the above stated flat, complainant several times requested the respondents for the refund of the amount of Rs. 31,75,375/- alongwith interest @ 18% on the amount lying deposited with the respondents.
12. A long period has been passed over for the delivery of the above said flat and for the above said payment and thus complainant is suffering from economic loss as well as mental agony, pain and harassment by the act and conduct of the respondents and thus complainant is entitled to the tune of Rs. 10,00,000/- as compensation.

13. The complainant several times requested the respondents for the refund of the deposited amount of Rs. 31,75,375/- alongwith interest from the date of deposit and also to pay compensation stated above through telephonically as well as through personal visit at their office and met with their official namely Vijay Kumar Sharma and other officials in this regard but the officials did not give any satisfactory reply to complainant and the matter lingering on one pretext or the other and refused to accept the cancellation application of the above stated flat.
14. As per clause 3, sub-clause (a) of the apartment buyer's agreement dated 23.02.2013, the time of handing over of the possession was 36 months from the date of execution of this agreement. And as per the said sub-clause of the said flat buyer agreement, there was a grace period of 06 months after expiry of 36 months.
15. The respondents have got unilaterally provisions in the said apartment buyer's agreement dated 23.02.2013 regarding time of handing over possession and penalty clause thereon, and compensation in failure to deliver possession in time to

complainant; favorable to the respondents, and disadvantage to complainant, which the complainant is having right to challenge the same at appropriate/competent court of Law.

16. The said period of **36 months** expired in the month of **February, 2016** and the grace period of **06 months** expired in the month of **August, 2016**.

17. The total amount which was to be paid by complainant as per apartment buyer's agreement dated 23.02.2013 to the respondents for the said flat was **Rs. 31,75,375/- (rupees thirty one lacs seventy five thousand three hundred seventy five only)**. But, the respondents, inspite of having received the said huge amount towards cost and construction of the said flat, from complainant, within time, have not so far constructed the flat in the said project, and being so, it is a clear cut case of negligence and deficiency in services on the part of the respondents.

18. The possession was to be delivered to complainant in **Aug, 2016**, after expiry of the said extended period of 06 months; but till date, complainant has not been handed over possession

of the above mentioned flat, so complainant are entitled to receive penalty as per the clause mentioned above.

19. The respondents have also committed the offence of **“Criminal Breach of Trust”** which is also punishable under the provisions of the **“Indian Penal Code”** as the respondents had **dishonestly misappropriated** the hard earned money of complainant by making false promises.

20. The respondents after indulging in **unfair trade practice** had **intentionally grabbed** the hard earned money of complainant and violated the **general principals of the real estate business**. Moreover, the respondents had given the highly **deficient & inadequate services** to complainant as the respondents had not kept their promise and had also taken the **undue advantages** by grabbing the hard money of complainant.

21. When the respondents failed to deliver the possession of the aforesaid unit to the complainant and also failed to refund the amount lying deposited with the respondents along with interest @ 18% per annum and thus the complainant sent a legal notice dated 15.10.2018 to the respondents through his

counsel “Devinder Kumar Jindal” Advocate in that regard. In spite of receipt of this notice, the respondents has not paid any heed towards the same. Despite of receiving aforesaid legal notice as well as several request of the complainant, respondents neither has taken any step to handover the possession of the unit nor refund the amount lying deposited with the respondents along with interest and also compensation of economic loss, mental agony, harassment etc.

Issues to be decided

22. The complainant has raised the following issues:
- i. Whether the promoters/respondents handed over the possession of the flat/floor to the complainant within a time period of 36 months from date of signing of the **“apartment buyer’s agreement”**?
 - ii. Whether the promoters/respondents have completed the entire project?
 - iii. Whether the respondent company is liable to be prosecuted for the violation of RERA provisions.
 - iv. Whether the respondents have taken the approval for the project from the competent authorities?

Reliefs sought:

- i. In view of the facts the complainant prays for the following compensation(s) direct the respondent (s) for an immediate 100% refund of the total amount of **Rs. 31,75,375/-** paid by the complainant, along with prescribed interest from the date of the receipt of payments made to the respondent(s);
- ii. Direct the respondent (s) to pay compensation of Rs. 10,00,000/- to the complainant for mental agony, harassment, discomfort and undue hardships caused to the complainant as a result of the above acts and omissions on the part of the respondent(s);
- iii. Grant any other relief in favour of the complainant as the hon'ble authority may deem fit and proper in the fact and circumstances of the case.

Reply on behalf of the respondents

23. The respondents submitted that the complainant approached them as he wanted to buy a flat admeasuring 895 sq. ft. in the

said project. The complainant has paid only Rs. 31,75,375/- out of total cost of Rs.74,79,275/-.

24. The complainant has not approached the hon'ble authority with clean hands as he himself has defaulted heavily in making payment towards due instalments on time as demanded by the respondents. The complainant has defaulted on last three of installments consecutively amounting to Rs. **19,35,666/-**. The complainant has failed in making payment of due instalments till date even after the repeated reminder sent to him

25. The respondent company has already completed construction up to 11th floor out of total G+15 floors in tower A in which the complainant has booked his unit. Brick work is completed upto G+8 in this tower and plaster is completed upto 0+3 in this tower. Construction in other towers of the project is also progressing very fast and construction of civil structure is complete upto various levels from G+11 to G+15 out of total G+18. Brick work is complete up to various levels from G+8 to G+13. Plaster is complete upto various levels from 0+3 to 0+4. Work in the project is progressing fast and the project is

scheduled to be handed over by 30.09.2019 after getting the OC for phase-1(total 5 towers).

26. The respondents submitted that an allotment letter for the above unit was issued on 20.12.2012. An apartment buyer's agreement was also executed on 23.02.2013 between complainant and another and respondent. It is admitted that possession was to be handed over to the complainant within a period of 42 months i.e. on or before 23.08.2016. The project is in advanced stage of completion and possession is scheduled to be given by 30.09.2019.

Determination of issues

After considering the facts submitted by the complainant, respondents and perusal of record on file, the issue wise findings of the authority are as under:

27. With respect to **first issue** raised by the complainant, the authority came across that as per clause 3(a) of the agreement dated 23.02.2013 the possession was to be handed over within 36 months from the date of execution of the agreement plus 6 months grace period. The due date of possession will be computed from 23.02.2013. Therefore, the due date of

possession comes out to be 23.08.2016 and the possession has been delayed by **2 year and 8 months and 9 days** till the date of decision. The delay compensation payable by the respondents as per **clause 3(c)(iv) is Rs.10/- per sq. ft. per month of the super area** on the amount(s) paid by the allottee for such period of delay is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondents 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.”

28. Therefore, as per section 18(1) proviso respondents are liable to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession. The

authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate of 10.70% per annum on the amount deposited by the complainant with the promoter from the due date of possession i.e. 23.08.2016 upto the date of offer of possession.

29. With respect to **second issue** raised by the complainant, authority is of view that local commissioner report dated 25.4.2019 has been received and placed on record. The relevant portion of the LC report is as under:-

“During site inspection, the overall progress of the project being developed by M/s Kashish Developers Ltd. has been accessed on the basis of actual construction at site and it is concluded that:-

- i. The physical progress of overall project is about 25 per cent.
- ii. The physical progress of tower-A is nearly 40 per cent
- iii. The physical progress of complainant's unit is about 45 per cent.

At present the work is progressing on site”.

30. With respect to **third and fourth issues** raised by the complainant, authority is of view that as the project is registerable and has not been registered by the promoters, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent under section 59 of the Act *ibid*. A copy of this order be endorsed to registration branch for further action in the matter. The respondents have also obtained the DTCP licence no. 110 of 2011 dated 19.06.2012. The respondents are directed to produce all relevant documents in relation to necessary approval for the project from the competent authorities.

Findings of the authority

31. 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 Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. 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.

32. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon the promoter.
33. Since the project is not registered, notice under section 59 of the Real Estate (Regulation & Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.
34. Local commissioner report dated 25.4.2019 has been received and placed on record. The relevant portion of the LC report is as under:-

“During site inspection, the overall progress of the project being developed by M/s Kashish Developers Ltd. has been

accessed on the basis of actual construction at site and it is concluded that:-

- A. The physical progress of overall project is about 25 per cent.
- B. The physical progress of tower-A is nearly 40 per cent
- C. The physical progress of complainant's unit is about 45 per cent.

At present the work is progressing on site”.

35. As per clause 3 (a) of the apartment buyer's agreement dated 23.2.2013 for unit no.A-8G, 8th floor, tower-A, in project “Manor One”, Sector 111, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of execution of the said agreement + 6 months grace period which comes out to be 23.8.2016. However, the respondents have not delivered the unit in time. Complainant has already paid Rs.31,75,375/- to the respondents against a total sale consideration of Rs.75,68,775/-. As such, the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.70% per annum w.e.f 23.8.2016 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till the offer of possession.

Decision and directions of the authority

36. After taking into consideration all the material facts adduced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions:

- i. The respondents are duty bound to pay the interest at the prescribed rate i.e. 10.70% for every month of delay from the due date of possession w.e.f 23.08.2016 till date of offer of possession.
- ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order. Subsequent interest to be paid by 10th of every succeeding month.
- iii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The promoter shall not charge anything from the complainant which is not part of the BBA.

- v. Interest on due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.70% by the promoter which is the same as is being granted to the complainant in case of delayed possession.

37. The order is pronounced.

38. Case file be consigned to the registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Subhash Chander Kush)

Member

Dated: 02.05.2019

Judgement uploaded on 28.05.2019



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