

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

**Complaint no. : 2279 of
2018**
**Date of First
hearing : 24.04.2019**
Date of decision : 24.04.2019

Mr. Pankaj Maini
Mrs. Poonam Maini

R/o. Prakrati apartment, F-303, plot75 #26,
Sector-6, Dwarka, New Delhi-1100

Complainants

M/s Tashee Developers Pvt. Ltd
M/s. KNS Infracon Pvt. Ltd
Regd. Office: 517A, Narain Manzil, Barakhamba
Road, New Delhi-110001

Respondents

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Shri Vidhur Kamra Advocate for the complainant
Shri Gaurav Srivastava Advocate for the respondent

Note: Respondent no. 2 proceeded ex parte

ORDER

1. A complaint dated 09.01.2018 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 Mr. Pankaj Maini and Mrs. Poonam Maini against respondents M/s Tashee Developers Pvt.

Ltd and M/s. KNS Infracon Pvt. Ltd. in respect of said flat described below in the project 'Capital Gateway', on account of violation of section 11(4)(a) of the Act *ibid*.

2. Since the flat buyer's agreement has been executed on 02.02.2013, i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, 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 contractual obligation on the 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 are as under: -

1.	Name and location of the project	"Capital Gateway", Sector 111, Gurugram
2.	Project area	10.462 acres
3.	Flat/unit no.	404, 4 th floor, tower F
4.	Flat measuring	1760 sq. ft.
5.	DTCP No.	34 of 2011
6.	RERA registered/ not registered.	Registered
7.	Registration no.	12 of 2018 dated 10.01.2018 Registration done in two phases -Phase I (Tower A to G) and Phase II (Tower H to J)
8.	RERA Revised date of delivery	Phase I (Tower A to G) 31.12.2020 Phase II (Tower H to J)- 31.12.2021

9.	Nature of real estate project	Group housing colony
10.	Date of execution of flat buyer's agreement	02.02.2013
11.	Payment plan	Construction linked payment plan
12.	Total sales consideration	Rs. 85,74,673/- As alleged by the complainants
13.	Total amount paid by the complainants till date	Rs. 69,02,542/- As alleged by the complainant (Basic sale consideration- Rs. 51,04,000/- as per clause 1.2 of the agreement)
14.	Date of delivery of possession as per clause 5.1 of flat buyer's agreement Clause 2: the respondent to deliver the possession of the flat within a period of 36 months from the date of sanction of building plans of the said colony with a grace period of 180 days	07.12.2015 Date of approval of building plans- 07.06.2012 (As per registration records with the authority)
15.	Delay in handing over possession till 24.04.2019	3 years 4 months 7 days
16.	Penalty clause as per flat buyer's agreement dated 02.02.2013	Clause 2.3 of the agreement i.e. Rs.5/- per sq. ft for every month of the delay

3. The details provided above have been checked on the basis of the record available in the case file provided by the complainants and respondents. A flat buyer agreement dated is placed on record for the aforesaid unit according to which the possession of the same

was to be delivered by 07.12.2015. Neither the respondent has delivered the possession of the said until nor they have paid any compensation @ Rs.5/- per sq.ft. per month of the area of the said unit for the period of such delay as per clause 2.3 of the said agreement. Therefore, the promoter has not fulfilled his committed liability as on date.

4. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and appearance. The respondent appeared on 24.04.2019. The reply has been filed by the respondent and the same has been perused.

Facts of the complaint

5. Briefly stated the facts of the case the complaint are that the complainants had booked a flat for residential purposes in the project of the respondents namely, 'Capital Gateway' situated in Sector-111, Gurugram, Haryana.
6. The complainants submitted that they were enticed and induced by the respondents to book flat in the above project, i.e. Capital Gateway, based on other representations made by the respondents.

The complainants filled the application form, dated 11.09.2010 which was in nature of a pre-printed form with attached terms & conditions and also made the necessary payment of booking amount of Rs. 3,00,000/- vide receipt no. TCG-0310. Further, it is submitted that at the time of filling of application form the complainants opted for a flat with total super area as 1695 sq. ft. though there were options available to book a flat with larger super area (1990 sq. ft.).

7. The complainants submitted that vide demand letter dated 17.01.2011, the respondent further made an additional demand towards a booking amount of Rs. 1,91,550/-. The same was paid by the complainants to the respondent through cheque no. '032234' drawn on ICICI bank.

8. The complainants submitted that it is also worthwhile to mention that though the complainants had made all timely payments as and when demanded by the respondents, the respondents levied an additional interest of Rs. 1,31,097/- through letter dated 14.01.2013 and when the complainants made objection to the same, they were threatened of cancelling their booking and

forfeiture of the amount paid, so the complainants ultimately had to give in to the arm twisting by the respondents and made the interest payment vide cheque no. 132119 dated 31.03.2013. The same was duly acknowledged by the respondent through a receipt dated 09.04.2014.

9. The complainants submitted that the said project ought to have been completed and possession was to be delivered to the complainants maximum by March, 2014, but much to the surprise of the complainants the agreement was entered into between the complainants and respondent as late as 02.02.2013 and in the same the super area was unilaterally increased to 1760 sq. ft. This was done without prior intimation and thereby increasing the cost of the flat Rs. 2,49,671/- and also seeking a further extension period of three and half years from the date of signing of the builder buyer agreement and this leaves no doubt that the respondents had induced the complainants and other members of public with knowingly false assurance on the date when they took out the public advertisements and when they accepted the booking

amounts and the booking applications with a completion date of 3 years from 2010.

10. The complainants submitted that respondents further held out and represented to the complainants that all necessary sanctions and approvals have been obtained by the respondents for executing the said project and it will be completed within the promised timeframe. The respondent no. 1 represented that the respondent no. 2 is owner of land on which the said project has to be developed, however the project will be developed by both the respondents jointly. It was however only later realised by the complainants that in this regard, the respondents had deliberately misled the complainants as the building plan for the said project was under consideration from the competent authority which was subsequent to the application for allotment as well as the builder-buyer agreement of the complainants which is dated 02.02.2013. The same was in violation of the statutory guidelines as the respondents are not allowed to invite bookings for the project before the grant of license.

11. The complainants submitted that respondents issued a letter dated 21.03.2017 purportedly as per the provisions of the builder buyer's agreement, the super area of the apartment at the time of allotment was tentative and misleadingly 'increased' the super area of apartment being unit no. 404, on the 4th floor of the tower F allotted to the complainants and sale consideration was increased by Rs. 11,20,305/- as compare to the builder buyer agreement.
12. The complainants submitted that it was the obligation of the respondent to obtain prior sanction from the competent authority of consolidated layout plan of the project before inviting applications from members of public for booking and entering into builder-buyer agreement. Moreover, under section 14 of The Real Estate (Regulation and Development) Act, 2016, no alterations or additions in to the sanctioned plans without the consent of two-thirds of allottees is permissible.
13. The complainants submitted that though it was presented that the super area was increased though in reality the actual size of the flat was decreased from the original size fixed in the builder buyer agreement. In the BBA, the liveable area was 936.6 sq. ft, and as per

the letter dated 21.03.2017 liveable area was reduced to 913.79 sq. ft, where the price of the apartment increased significantly. The same can be seen from the chart below:

Rooms	Dimensions as per BBA	Proposed Dimensions	Diff	Increase / Decrease
Dinning	11'10" x 9'7"	11'0 x 8'9"	9.77	Decrease
Drawing	10'9" x 16'0"	15'6 x 11'0"	2.8	Decrease
Master Bedroom	10'9" x 14'5"	11'0 x 14'0"	4.05	Decrease
Bedroom 2	11'3" x 10'5"	11'0 x 10'0"	8.65	Decrease
Bedroom 3	10'10" x 12'2"	11'0 x 12'3"	12.08	Increase
Dress Room	6'8" x 5'3"	5'6 x 5'6"	4.68	Decrease
Kitchen	11'1" x 8'7"	11'6 x 8'0"	3.77	Decrease
Toilet 1	7'6" x 5'3"	7'6 x 5'0"	2.28	Decrease
Toilet 2	7'6" x 5'3"	7'6 x 5'0"	2.28	Decrease
Toilet 3	5'6" x 7'4"	5'6 x 8'0"	-3.36	Increase

14. The complainants further submitted that complainants in response to letter dated 21.03.2017 by the respondents and to appraise the above stated significant decrease in living area repeatedly requested the respondents through various letters and mails addressed to officers of respondent to clarify how the said area was purportedly increased as the area of the rooms have been reduced from the area specified in the agreement and that such an increase of area, albeit notional and mischievous, is arbitrary in nature, unethical and done simply to make unjust gains at the cost of individual flat buyers. However, the respondents did not bother to reply to the said letters and instead continued with their highhanded and arm-twisting approach. The respondents without replying to the letters of complainants kept on raising payment demands, including threatening to cancel the booking if the demanded money was not paid.

15. The complainants submitted that the respondents through their savings and/or by taking loan from bank are currently living on a rented accommodation and paying a monthly rent of approximately Rs. 30,000 and interest on the loan taken from ICICI bank for

buying the above noted flat. Therefore, though there was an option to choose a bigger flat at the time of filing of the application form, but due to monetary constraints, the complainants opted for this flat and had accordingly took a loan of Rs. 40 lakhs from ICICI bank.

16. The complainants submitted that they even personally visited the office of the respondent on few occasions to make his vocal objections to the arbitrary act of the respondent. The respondent did not even bother to entertain the complainants in their office despite making complainants made to wait for long hours. At every stage, much to the dismay of the complainants, the respondents have displayed total authoritarian approach towards them.

17. It is submitted that a bare perusal of the agreement reflects the unfairness and arbitrariness on part of the respondents as the same is wholly one-sided document containing unilateral, arbitrary and legally untenable terms favouring the builder and totally against the interest of the purchaser, including the complainants herein. And, as such these documents are against public interest.

18. The complainants submitted that still the complainants under the threat of forfeiture they kept on making payments through their hard earned savings to the respondents in terms with the demands raised. It is submitted that the complainants had opted for instalment/ construction linked payment plan and as per the said plan the complainants paid the first instalment on 11.09.2010 and 18.02.2011, second instalment was paid on 17.06.2011, third instalment on 09.07.2011. It is pertinent to mention that the respondent had charged a sum of Rs. 12,60,519/- which is approx. 26% of basic sale price even before entering the flat buyer agreement. The complainants till date have made a total payment of Rs. 69,01,542/- against total sale consideration of Rs. 72,15,166/-.

19. The complainants submitted that respondents have breached the most fundamental obligation of the contract by inordinately delaying in delivery of the possession. The respondent has committed various acts of omission and commission by making incorrect and false statement in the advertisement material as well as by committing other serious acts as mentioned in preceding paragraph. The project has been inordinately delayed and thus the

complainants are entitled for interest on the amount paid till date along with the compensation for the harassment caused.

20. Issues to be decided:

The relevant issues as culled out from the complaint are as follows:

- I. Whether the promoter made false representations about the project in question in order to induce the complainants to make a booking?
- II. Whether the respondent after entering of the agreement can change the super area but decrease the carpet area (liveable area) and increase the cost of the flat without prior permission from the allottees?
- III. Whether the respondents had unjustifiably delayed the construction and development of the project in question and is liable to pay interest due to the delay caused?

21. Relief sought

- I. Direct the respondents to pay interest on the amount collected till date i.e. 69,02,542/- along-with interest @

prescribed rate of interest from the date of making payment to the complainants till the delivery of the flat.

- II. Direct the respondents to adjust the undue interest of Rs. 1,31,097 charged, in the total sale consideration.

REPLY ON BEHALF OF RESPONDENT No. 1

22. The respondent submitted that, at the very outset, the present complaint referred by the complainants under reply is devoid of merits and hence not maintainable and the same is liable to be dismissed. The complainants have miserably failed to adumbrate any illegality on the part of him. The present complaint is not maintainable in fact and law as the same is based on wrong, incorrect, false and baseless facts having no iota of truth.

23. The respondent submitted that the complainants herein had admittedly booked the unit in the aid project and made payment towards their said bookings which are duly acknowledged by the complainants. The project was launched by him with a bonafide intention to complete the construction with all honest intents within the stipulated time frame and hand over the flats good quality and facilities as advertised and committed to the respective

allottees. He further submitted that the construction at the project site is going on in full swing and the project is nearing completion and almost ready for possession.

24. The respondent submitted that at the time of execution of the flat buyer's agreement. It was categorically agreed between themselves they will be bound by the terms thereof .

25. The respondent contended that the area of subject matter flat has been increased from 1695 sq. Ft. to 1760 sq. ft but its is germane to note that such decrease was done post the revised building plan approvals dated 09.12.2016 as received from the Directorate of Town and Country planning Haryana (DTCP) an due intimation in this regard was sent to the complainants. The charge in area is within the permissible limit of 15% as stipulated in clause 1.5 of the builder buyer agreement executed between the parties and the complainants is very well versed with the clauses of the agreement. No compensation can be granted to the complainants above and beyond what is envisaged in the builder buyer agreement.

26. The respondent submitted that the construction work was first disrupted in year 2016 when the construction was put on hold

under the directions of the Delhi Government and its neighbouring states owing to the alarming and unprecedented rise in the level of air pollution post Diwali i.e 30.10.2016 and again in October 2017.

The demobilizing and remobilizing activity lead to few months delay in the construction work.

27. The respondent submitted that the same was immediately followed by surprise decision of the Indian government when on 08.11.2016, the government of India announced the demonetization of all Rs.500 and Rs 1,000 bank currencies and directly affected the; liquidity to pay the construction workers.
28. The unforeseen step undertaken by the government adversely hit the productivity and brought the construction worked at the site at a completed halt. This disabled the payments to the construction workers and discouraged the availability of materials and machinery for the continuation of the work at the site. When the work started again, there was acute shortage of workforce, which compounded the delay to the present situation.
29. The respondent further submitted that they has miserably failed to establish that there has been any deficiency in service on the part

of the answering company as maliciously alleged by him. And furthermore, there has been deficiency in services shall not suffice in absence of any cogent proof.

30. The respondent submitted that whatever damages the petitioner/ complainants is entitled to have to be calculated and paid/ adjusted at the time of offer of possession since the same cannot be determined at any stage.

Determination of issues

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

31. With respect to the **first issue**, there are no documentary evidence which shows that there was any misrepresentation by the respondent.
32. With respect to the **second and third issue** as per the agreement dated 02.02.2013, the super area of the unit in question was 1760 sq.ft. . However, vide letter dated 21.03.2017 the area was increased to 2049 sq. ft. and the carpet area(liveable area) was

reduced from 936.6 sq.ft. to 913.79 sq.ft. Upon this, the respondent failed in giving any response to the same. Further, as per clause 1.5 of the said agreement, in case of variation greater than 15% (+_) in the agreed super area and upon unwillingness of purchaser to accept the same, the allotment shall be terminated. Thus the authority is of the view that the respondent cannot arbitrarily change the area without the consent of allottees.

33. With respect to the **third issue**, as per clause 2.1 of the flat buyer's agreement dated 02.02.2013, the possession was stipulated to be handed over by 07.12.2015. thus, the respondent failed in handing over the possession on or before the said due date. Thus, the complainants are entitled to delayed possession interest @ 10.70% p.a from the due date of possession i.e 07.12.2015 till the offer of possession.

34. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

35. The complainants reserves their right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

Findings of the authority

36. **Jurisdiction of the authority-** The project “Capital Gateway” is located in Sector 111, Gurugram, thus the authority has complete territorial jurisdiction to entertain the present complaint. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

37. The authority has complete jurisdiction to decide the complaint regarding 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 complainants at a later stage.

38. As per clause 2.1 of the agreement dated 02.02.2013, the due date of possession comes out to be 07.12.2015. the promoter failed in handing over the possession by the said date. However, the project is registered with the authority. However as per revised date of delivery of possession, the respondent has committed to deliver the unit by 31.12.2020.

39. Further, as per provisions of section 19(6) of the Act, the complainants are under obligation to make timely payments to the respondent to get the project completed. However, the complainants are also entitled for late delivery payment charges. If respondent fails to deliver the possession in time as per revised date, the complainants are entitled for refund of the deposited amount along with interest. Any inordinate/undue charges which are beyond the purviews of terms and conditions of the BBA, if levied, by the respondents shall not admissible as per the provisions of the law.

40. Since, the respondent has failed to deliver the unit to the complainants on the due date, as such, the complainants are

entitled for delayed possession charges at prescribed rate of interest.

Direction and decision of the authority:

41. 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 respondent is directed to pay the complainants delayed possession charges at the prescribed rate of interest i.e 10.70% per annum w.e.f 02.08.2016 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till the offer of possession.
- (ii) The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period and the promoter shall not charge anything from the complainants which is not part of the agreement.
- (iii) The interest on the due payments from the complainants shall be charged at the prescribed rate of interest i.e

10.70% by the promoter which is same as being granted to the complainants in case of delayed possession.

- (iv) The arrears of interest so accrued so far shall be paid to the complainants within 90 days from the date of this order and thereafter monthly payment of interest's accrued shall be paid on or before 10th of every subsequent month till the offer of possession.

42. The complaint is disposed off accordingly.

43. The order is pronounced.

44. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 24.04.2019

Judgement Uploaded on 28.05.2019