

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

Complaint no. : 932 of 2018
First date of hearing : 21.02.2018
Date of decision : 02.05.2019

Mr. Tarun Kumar Tyagi,
R/o. C-501, Balaji Residency,
Ahinsha Khand-II, Indirapuram,
Ghaziabad-201014, U.P.

Complainant

Versus

M/s Kashish Developers Ltd.
Regd. office: 87, Old A.G. Colony,
Kadru, Ranchi-834002, Jharkhand.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Mr. Tarun Kumar Tyagi Complainant in person

Shri Ashok Kumar Sharma Authorised representative on
behalf of respondent

Ms. Neeta Sinha Advocate for respondent

ORDER

1. A complaint dated 22.10.2018 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. Tarun Kumar Tyagi, against the promoter M/s Kashish Developers Ltd., on account of violation of the clause 3(a) of the apartment

buyer's agreement dated 14.05.2013 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 promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the apartment buyer's agreement has been executed on 14.05.2013 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 complex
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-11C, 11 th Floor, Tower A
7.	Apartment measuring	895 sq. ft.
8.	Letter of allotment	22.01.2013
9.	Date of execution of apartment buyer's agreement	14.05.2013 [page 13 of complaint]
10.	Payment plan	Construction linked payment plan
11.	Total consideration	Rs. 74,30,497/-
12.	Total amount paid by the	Rs.49,02,647/-

	complainant till date as per flat holder card dated 28.06.2018	[page 58 of complaint]
13.	Date of delivery of possession as per clause 3(a) of apartment buyer's agreement i.e. 36 months + 6 months grace period from date of execution of this agreement i.e. 14.05.2013.	14.11.2016
14.	Delay in handing over possession till date of decision i.e. 02.05.2019	2 years 5 months 18 days
15.	Penalty clause as per the said apartment buyer's agreement	Clause 3(c)(iv) of the said agreement i.e. Rs.10/- sq. ft. per month of super area of the said apartment.

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. An apartment buyer's agreement dated 14.05.2013 is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 14.11.2016. Neither the respondent has delivered the possession of the said unit till date to the complainant nor they have paid any compensation as per clause 3(c)(iv) of apartment buyer's agreement duly executed between the parties. Therefore, the promoter has 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 appearance. The respondent through its counsel appeared on 21.02.2019. The

case came up for hearing on 21.02.2019, 25.04.2019 and 02.05.2019. The reply filed on behalf of the respondent has been perused.

Facts of the complaint

6. Briefly stated, the facts of the complaint are that the complainant had booked a unit no. A-11C admeasuring 895 sq. ft. in tower A of the project 'Manor One', Sector 111, Gurugram at total cost of Rs.74,30,497/- against which complainant till date has made a payment of Rs.49,02,647/- and payments made have been received and acknowledged by the respondent company.
7. The complainant submitted that the allotment letter in respect of unit was issued on 22.01.2013 confirming the allotment in his favour. A detailed apartment buyer's agreement was executed on 14.05.2013 in complainant's favour. As per the said agreement, the possession of the unit was to be made within a period of 42 months (including grace period of 6 months) from the date of the apartment buyer's agreement which period has already expired on 13.11.2016. However, it has been noticed and also a matter of record that the completion of the project is far from over and construction is already delayed by 24 months and therefore, possession of the unit would be delayed beyond 2 years.

8. The complainant submitted that as such the objective of taking the flat in question is therefore defeated and he did not wish to continue with the booking any longer. The complainant desires refund of paid amount of Rs.49,02,647/- along with interest. The complainant requested the hon'ble authority to direct the respondent to immediately effect the cancellation of the unit in question.

Issues to be decided

9. The complainant has raised the following issues:
- Whether the respondent company has erred in its contractual obligation by failing to deliver the unit in question in time and therefore, the complainant is entitled for refund of paid amount along with interest at such rate as may be prescribed?
 - Whether the developer changed the site development plan without any notice to the complainant?

10. **Reliefs sought:**

The complainant is seeking cancellation of the unit in question and refund of the total paid amount of Rs.49,02,647/- along with interest at the prescribed rate under the Act *ibid*.

Reply on behalf of respondent

11. The respondent submitted that it is a real estate company developing a residential group housing project named 'Manor One' at Sector 111, Gurugram on an area of 14.843 acres.
12. The respondent submitted that the complainant approached them to buy a flat measuring 895 sq. ft. in the said project. The complainant has paid only Rs.49,02,647/- out of total cost of Rs.71,77,660/-
13. The respondent submitted that 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 up to G+8 in this tower and plaster is completed up to 0+3 in this tower. Construction in other towers of the project is also progressing very fast and construction of civil structure is complete up to various levels from G+15 out of total G+18. Brick work is complete up to various levels from G+8 to G+13. Plaster is complete up to 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-I (total 5 towers).

14. The respondent admitted that an allotment letter for the above unit was issued on 22.01.2013 and an apartment buyer's agreement was also executed on 14.05.2013 between the complainant and the respondent. It is admitted that the possession was to be handed over to the complainant within a period of 42 months i.e. on or before 13.11.2016. In fact, the project is in advanced stage of completion and possession is scheduled to be given by 30.09.2019.
15. The respondent denied that objectives of complainant has been defeated just because completion of project has got delayed. Moreover, project got delayed due to reason beyond reasonable control of respondent like default in payments of due instalments by existing buyers, very few new sales due to slump in real estate market, shortage of supply of material due to remote location of site, delay in getting approvals from government authorities. The respondent denied that it has changed the site development plan without any notice to the complainant.
16. The respondent denied that the complainant is entitled to relief of refund. On the other hand, the terms of apartment buyer's agreement provide remedy by way of compensation for delay in handing over possession of unit and refund of amount paid till date is not warranted. It is denied that the

complainant is entitled to relief of cancellation and refund of booking amount with interest paid by him. Relief if any for delay shall be governed by the terms and conditions of the said apartment buyer's agreement.

Determination of issues

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

17. With respect to the **first issue** raised by the complainant, the authority is of the view that the respondent has delayed the delivery of possession of the booked unit. This is fortified from the fact that as per clause 3(a) of the said apartment buyer's agreement dated 14.05.2013, the possession of the said unit was to be handed over within a period of 36 months (plus grace period of 6 months) from the date of execution of the said agreement. The relevant clause is reproduced as under:

*"3. (a) Offer of possession
...the developer proposes to handover the possession of the said apartment within a period of 36 months (excluding a grace period of 6 months) from the date of execution of this agreement..."*

18. Accordingly, the due date of possession comes out to be 14.11.2016 and the possession has been delayed by 2 years 5 months and 18 days from due date of possession till the date

of decision. Therefore, the respondent has breached the said agreement by not delivering the possession of the said unit by the due date. However, keeping in view the present status of the project and intervening circumstances, the authority is of the view that in case refund is allowed in the present complaint, it will hamper the completion of the project as the project is almost complete and the respondent in his reply is committing to deliver the project by 30.09.2019. Moreover, for protecting the right of one allottee, right of other allottees who wish to continue with the project cannot be jeopardised by allowing refund in the present case. Therefore, the refund of the deposited amount cannot be allowed. However, as the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso read with rule 15 of the Rules *ibid*, to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession.

19. With respect to the **second issue** raised by the complainant, the complainant has neither pressed the issue of change in development site in the pleadings nor the complainant is seeking any relief with respect to the same. Also, the complainant has failed to produce any document in support of

change in site development plan. Therefore, this issue is decided in negative.

Findings of the authority

20. 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.

21. An amendment to the complaint was filed by the complainant along with the complaint wherein he has stated that he is not appearing before the authority for compensation but for fulfilment of the obligations by the promoter as per provisions of the said Act and reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

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

23. Arguments heard. Local commissioner report dated 1.5.2019 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 assessed on the basis of actual construction at site and it is concluded that:-

The physical progress of overall project is about 25 per cent.

The physical progress of tower-A is nearly 40 per cent

The physical progress of complainant’s unit is about 45 per cent.

At present the work is progressing on site”

24. As per clause 3(a) of the builder buyer agreement dated 14.05.2013, for unit no.A-11C, 11th 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 apartment buyer’s agreement + 6 months grace period which comes out to be 14.11.2016. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.49,02,647/- to the respondent against a total sale consideration of Rs.72,67,160/-. As such, complainant is entitled for delayed

possession charges at prescribed rate of interest i.e. 10.70% per annum w.e.f 14.11.2016 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till the date of offer of possession.

Decision and directions of the authority

25. 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 interest at the prescribed rate i.e. 10.70% per annum for every month of delay on the amount paid by the complainant.
- (ii) The respondent is directed to pay interest accrued from 14.11.2016 to 02.05.2019 on account of delay in handing over of possession to the complainant within 90 days from the date of order.
- (iii) Thereafter, the monthly payment of interest till handing over of the possession so accrued shall be paid on or before 10th of every subsequent month.

- (iv) Complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- (v) The promoter shall not charge anything from the complainant which is not part of the apartment buyer's agreement.
- (vi) Interest on the 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 or before 10th of subsequent month.
26. As the project is registerable and has not been registered by the promoter, 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 the Act *ibid*. A copy of this order be endorsed to registration branch for further action in the matter
27. The order is pronounced.
28. 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