HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 83 OF 2019

Adesh Vats ....COMPLAINANT

VERSUS

M/S TDI Infrastructure Ltd. ....RESPONDENT

CORAM: **Rajan Gupta** **Chairman**
Dilbag Singh Sihag **Member**

Date of Hearing: 23.04.2019

Hearing: 3rd

Present: - Mr. Deepak Kumar, Counsel for complainant

Mr. Shobit Phutela & Shubhnit Hans, Counsel for respondent

ORDER (RAJAN GUPTA- CHAIRMAN)

1. This is third hearing of the matter. It was earlier listed for hearing on 19.03.2019, when the complainant had stated that the actual measurements of various components of carpet area and super area is less than the area for which the respondent is charging money from him. The Authority had directed both the parties to carry out actual measurements of the carpet as well as the super area at the site in presence of their architects/representatives and to file copy of the actual measurements of carpet as well as super area as per the outcome of the proceedings.

2. In compliance of the orders of the Authority, measurements at the site have been carried out. Both parties are satisfied with the measurements done. On the basis of the such measurements, a comparative table has been prepared by the respondent and the same was considered by the Authority during the course of proceedings.

3. The case of the complainant is that he had booked a duplex unit in the project named "Espania Royale Floors (KRF)" of the respondent situated at Sonipat in March, 2012. Unit No. RF-14/Duplex measuring 1499 sq. ft. was allotted to him on 04.01.2013. Floor Buyer Agreement (hereinafter referred to as FBA) was executed between the parties on 03.04.2013. Delivery of the flat was to be made within 30 months from the date of agreement, thus

deemed date of delivery was 03.10.2015. Payments were to be made under Construction linked payment plan. He has paid about Rs.36,77,203/- against the Basic Sale Price of Rs. 34,99,999/- till date. Total sale consideration inclusive of EDC/IDC was Rs.39,27,514/-. Thus, he has paid more than 90% of the total sale consideration.

The grouse of the complainant is that the respondent has issued an Offer for Fit Out Possession cum demand letter on 01.09.2018, whereby he was informed for the first time about unilateral increase in super area by 284.81 sq. fts which amounts to an increase by 19 percent of the agreed area. The increase in super area has put an additional financial burden of Rs.9,27,903/- on him. Complainant states that such a huge increase in the super area is unreasonable and unjustified and this increase has been done without his consent. The complainant further states that the respondent has installed a temporary iron staircase in the backside of the apartment which was earmarked for green spaces, without seeking his consent which poses a serious threat to his privacy. The complainant is also aggrieved on account of about three years of delay in delivery of the possession.

From the pleadings of the complainant it is inferred that he is seeking relief against the unilateral increase in super area; for possession of the unit; and for compensation on account of delayed delivery of possession.

4. The respondent has denied all the allegations and has raised several objections as follows:

i) That provisions of Real Estate (Regulation and Development) Act, 2016 are not applicable to the present case because the FBA was executed between the parties much prior to coming into force of the Act, hence the terms of agreement executed between the parties only shall be binding on them.

ii) This Authority does not have jurisdiction to entertain this complaint because this project has not been registered with the Authority. Since it is neither registered nor registerable, the Authority has no jurisdiction to entertain any complaint in this regard. The reason for this argument is that the respondent had applied for grant of Occupation Certificate on 31.03.2017, therefore, in terms of the provisions of Rule 2(o) of the HRERA Rules, 2017, this project cannot be categorized as an "On-going Project" therefore not registerable with this Authority.

iii) Another ground for denying jurisdiction of this Authority as claimed by the respondent, is that the nature of alleged grievance of the complainant is such that the same could be agitated only before the Adjudicating Officer u/s 71 of the Act.

iv) Respondent states that delivery of possession could not be made due to pendency of an application for grant of Occupation certificate with the Director, Town & Country Planning department since 31.03.2017. Now offer

for fit out possession has been made on 01.09.2018. The unit is ready for fitouts and once the occupation certificate is granted possession of the flat will be handed over.

v) The respondent has admitted the payments made by the complainant but states that an amount of Rs.14,76,205/- is still outstanding against him.

vi) That the area of the flat measuring 1499 sq. fts. at the time booking was tentative and was subject to change till the construction of the building was completed. Now, final calculation of the super area as per the sanctioned plan is 1783.81 sq. ft. Respondent states that he is entitled to charge for the increase in area in terms of clause 6 of FBA. The clause 6 of FBA reads as follows:

> " In the event of any increase or decrease to the extent of 10% to the agreed area of the Apartment, due to alteration as aforesaid, the adjustment in the payments shall be made as per the basic rate as mentioned in Clause 2 above. However, if the increase or decrease is more than the extent of 10%, then it shall be the Company which shall have the sole discretion to fix the rate for such an increase or decrease. Further if due to change in the layout plan of the Colony or on account of any other alterations, the Apartment gets dislocated/omitted, then it shall be open for the Buyer to opt for a substituted Apartment as may be offered by the Company. In case the Buyer is not willing to opt for any substituted allocation of Apartment or in case the Apartment is

omitted or the Company is unable to hand over the same, the Company will be liable to refund only the amount received from the Buyer towards the TSC for the Apartment along with a simple interest @9% p.a. which shall be calculated from the respective dates when the company has actually received the money in its account. Nor further compensation of any sort shall be payable by the Company."

vii) As regards installation of iron staircase in the backyard, the respondent states that it was installed in accordance with approved plans and for meeting the safety norms of the Fire department. Further, the respondent has developed the colony strictly in accordance with the plans approved by the State Government.

5. The Authority has considered the written as well as oral pleadings of both the parties. It observes and orders as follows:-

i. Jurisdiction:

First of all the respondent has challenged the jurisdiction of this Authority for the reasons that the agreement between the parties was executed prior to coming into force of RERA Act. This objection is not sustainable in view of the law laid down by this Authority

in **Complaint case No.144- Sanju Jain Vs. TDI Infrastructure Ltd**. The logic and reasoning in that complaint are fully applicable on the facts of this case as well.

ii. Jurisdiction of Adjudicating Officer:

The second plea of the respondent regarding lack of the jurisdiction is that such complaint could be preferred only before the Adjudicating Officer. This also is devoid of merit. The institution of Adjudicating Officer is meant to determine the un-liquidated damages arising out of non-performance of full or a part of the contract. The core of the contract falls within the jurisdiction of the Authority only.

iii. Delay in Offer of possession/ Delivery:

Admittedly, the FBA between the parties was executed on 03.04.2013. As per Agreement delivery was to be made within 30 months from the date of execution of FBA. Therefore, there is no controversy that as per FBA, the deemed date of possession of the unit was in

Oct, 2015. The payments made by the complainant to the respondent are also admitted. The respondent further states that he had applied for OC on 31.03.2017. Further since all formalities have already been completed, he is hopeful that the Occupation Certificate will be granted soon. He states that the construction at site is complete and the offer for fit out possession has already been made on 01.09.2018 and the unit will be delivered to the complainant immediately after receipt of Occupation Certificate and payment of balance amount by the complainant.

It has been admitted by the respondent that the offer of fit out possession was made in Sept,2018 whereas the deemed date of possession was Oct,2015. Accordingly, even in offering fit out possession delay of nearly three years has been caused. Further, fit out possession cannot be called a proper offer of possession. It is presumed that the application for issuance of Occupation Certificate vide letter dated 31.03.2017 was seriously defective due to which the Department of Town & Country Planning has not yet granted him the

Occupation Certificate. In these circumstances it can be said that a proper offer of possession is yet to be made. Accordingly, the complainant is entitled to be compensated for the delay caused in delivery of possession from the deemed date of possession to actual date of offer of possession.

This Authority has disposed of a bunch of petitions with the lead case **Complaint No.113 of 2018 titled Madhu Sareen V/S BPTP Ltd**. There was consensus on all the issues except on the issue of compensation for delayed delivery of possession. Further logic and arguments in this regard were given by the dissenting member in **Complaint case No.49 of 2018- Parkash Chand Arohi V/s Pivotal Infrastructures Pvt. Ltd**. It is hereby ordered that the ratio of the said judgements will be fully applicable in this case for determining the quantum of compensation for delayed delivery of possession.

iv. Increase In Area:

The complainant is also aggrieved on account of unilateral increase in area of the apartment by

respondent no.1 from initial booked area of 1499 sq. fts to 1783.5 sq. fts i.e. increase of about 284.8 sq. fts. The Authority by way of a unanimous decision has dealt with this issue in the **Complaint case No. 607 of 2018 titled Vivek Kadyan vs. M/s TDI Infrastructure Pvt. Ltd**. Relevant portions of the said judgment are reproduced below:

"Increase In Area : The case of the complainant is that as per clause1 of the agreement dated 28.03.2013 it was agreed that the super area of the flat shall be 1499 Sq.ft. In clause (1) of the agreement definition of the super area is as shown in Annexure-I of the agreement. The definition of the super area in Annexure-I is reproduced below:-

" Super Area for the purpose of calculating the sale price in respect of the said Apartment shall be the sum of Apartment area of the said Apartment and its pro-rata share of common areas in the entire building.

Whereas the Apartment area of the said Apartment, shall mean the entire area enclosed by its periphery walls including area under walls, columns, balconies cupboards and lofts etc. and half the area of common walls with other premises/independent Floors/Apartment , which from integral part od Said Apartment and Common area shall mean all such parts / areas in the-entire said

building which the Allottee shall use by sharing with other occupants of the said building including entrance corridors and passages, staircase, mumties, service areas including but not limited to machine room, Overhead water tank, maintenance office / store etc., architectural feature, if provided and security fire control rooms.

Super Area of the Apartment provided with exclusive open terrace(s) shall also include area of such terrace(s); the purchaser however, shall not be permitted to cover such terrace(s) and shall use the same as open terrace only and in no other manner whatsoever."

It further reads as follows:-

"It is further clarified that the super area mentioned in the Agreement is tentative and for the purpose of computing sale price in respect of said Floor only and that the inclusion of common areas within the said building for the purpose of calculating super area does not give any right, title or interst in common areas to the Buyer except the right to use common areas by sharing with other occupants/allottees in the said building subject to timely payment of maintenance charges."

Clause (2) of the agreement reads as follows:

"The super area stated in this Agreement is tentative and is subject to change till the construction of the said Building is complete. The final super area of the said Floor shall be confirmed by the

Company only after the construction of the said building is complete and occupation certificate is granted by the competent authority(ies). As such, the total price payable for the said Floor shall be recalculated upon confirmation by the Company of the final super area of the said Floor. If there will be an increase in super area, the Buyer agrees and undertakes to pay for the increase in super area immediately on demand by the company, without any interest, on the rate as agreed herein, and if there shall be a reduction in the super area, then the refundable amount due to the Buyer shall be adjusted by the Company from the final installment as set forth in the Schedule of Payments in Annexure-II."

Clause (6) of the agreement provides that in the event of increase or decrease to the extent that 10% to the agreed area of the apartment, the adjustment in the payments shall be made as per the basic rate, however, if the increase or decrease is more than 10% then it shall be the company which shall have the sole discretion to fix the rate for such an increase or decrease.

The flat buyer agreement was executed on 28.3.2013. However, plans of the colony were got approved from the appropriate authority of the State Government on 12.2.2015. As per agreement the super area of the apartment was 1499 sq.ft. whereas the respondents are seeking to charge the complainant for super area measuring 1783.5 sq.ft. which represents an increase of 284.81 sq.ft. amounting to an increase of 19 percent. This is a huge variation from the agreed carpet area which has put an additional

financial burden of Rs.6,84,000/- upon the complainant, which the complainants are agitating as being unfair and unjustified.

The Authority in its earlier orders dated 20.11.2018 had assumed that when the agreement was made the plans had already been approved which underwent changes later on resulting in increase in the super area. However, it has now transpired that on the date of the agreement the plans had not been approved. They were for the first time approved in February, 2015. Therefore, a comparison of the super are is obviously not possible. Authority, therefore, shall determine whether the super area for which the payment is being demanded by the respondents is justified or not.

The respondents have placed before the Authority approved plans of the apartment as well as a comparative chart of the super area. In the chart a comparison has been drawn between the areas as per the marketing plan and as per the sanctioned plan. After careful examination of the matter and after hearing both the parties, the Authority orders as follows:-

i) **Covered Area**: In the marketing plan the covered area was proposed to be 1217 sq.ft. whereas as per sanctioned plan it has become 1252 sq.ft. The explanation for this increase is that the earlier calculation of the carpet area was done by taking external walls of 4.5" width whereas the actual external walls are of 9" width. The carpet area of an apartment is determined after accounting for full width of the external walls provided they are not shared with any other apartment. If an external wall is shared with an adjoining apartment

then only 50% of the width of such external wall shall be taken into account. After discussion of this principle the complainant agrees that the carpet area of the apartment may be determined as 1252 sq.ft.

ii) **Balcony plus projection area:-** As per plan and the actual calculation at the site the balcony plus projection area comes to 208 sq.ft. In the marketing plan however, it was proposed to be 165 sq.ft. The width as well as length of the balcony has actually increased in the sanctioned plan compared with the marketing plan. Since the actual balcony is 208 sq.ft., therefore, the complainant is bound to pay for it. Accordingly the complainant shall pay for balconies of 208 sq.ft.

iii) **Shaft Area:** The Authority examined the sanctioned plan of the apartment and found that a plumbing shaft has been provided which is enclosed on three sides and open on fourth side. Detailed examination of the shaft revealed that each of the three walls are actually external walls of one or the other apartments. Since entire external wall of the apartments has been accounted for in the carpet area of the apartment, now the same wall cannot be allowed to be charged in the form of plumbing shaft. The plumbing shaft in this case shall be considered an external open area. No additional construction, which has not been charged as carpet area, has taken place in the shaft. Also, provision of services is a part of the agreement, therefore, the cost proposed to be charged on account of the shaft is not justified at all. Accordingly, 18 sq.ft. of the shaft area

is disallowed and shall be deducted from the super area of the apartment.

iv) **Circulation Area:** In the marketing plan circulation area was proposed to be 130 sq.ft., whereas 163 sq.ft. is being charged on the basis of the actual sanctioned plan. The circulation area is comprised of corridors, lift-lobbies, entrance lobbies etc. It also includes lift areas. It is intended to facilitate horizontal and vertical movement within the apartment complex. This is a necessary feature of the housing complex. The complainants are duty bound to pay for it.

The complainants, however, shall pay only for the total circulation area divided by the total number of apartments in the complex/tower. Since calculation of the circulation area has not been challenged, the complainants shall pay for the proportionate circulation area measuring 163 sq.ft. However, in case they find that the actual circulation area is less than 163 sq.ft. they may represent accordingly to the respondent or may approach this Authority on a later date, again.

v) **Steel stair case area:** The respondents are charging 56 sq.ft. as proportionate share of the common steel stair case. Since, this is a fire escape facility, for the residents they have to pay for it. However, if the actual proportionate area of the stair case is less than 56 sq. fts., the respondent shall charge accordingly, and the complainants shall retain their rights to approach this Authority once again in case they find any discrepancy in the calculations. This,

however, is further subject to the condition that this fire escape facility has been provided in accordance with sanctioned plan.

vi) **Mumty/machine room/water tanks area:-**Typically, a Mumty is a shed made over the staircase leading to the top terrace. Machine room is a covering over the machines installed for the usage of the building, like the roof cast over the lift area and other similar facilities. Water tanks are usually kept open on the terrace area and sometime a roof is constructed over them for protection from rain etc.

The water tanks, machines, mumties etc. are a part of the basic services provided in an apartment/ complex. When a person purchases an apartment he presupposes provision of all basic services like drinking water, drainage, sewerage system, electricity supply, road and street light system etc. The cost of all such facilities is invariably a part of the overall cost of the apartments. Its cost is presumed to be included in the per square foot cost of the apartment.

Another facet of this issue is that entire super area is being charged at the same rate as the carpet area of the apartment. The carpet area of the apartment includes flooring, RCC roof, painting of the walls, conduiting, windows etc. The cost per sq.ft. of the covered area containing all these facilities is entirely different from the cost per sft. of mumty, machine rooms or the water tanks area. Therefore, the cost per square foot of these facilities is much less than the cost per square foot of the carpet area. The facilities like mumty,

machine room & water tanks areas can either be considered as a part of the services in the apartments therefore, not chargeable at all, or if there is a provision in the agreement for charging extra for these facilities then the same can be charged at the rate of the actual cost incurred divided proportionately amongst all the apartments, and not at the rate per sq. ft. of the carpet area.

The agreement made between the parties in regard to these facilities is rather vague. The respondent should have precisely defined the area to be calculated under such facilities and also the rates chargeable for the same, since costing of these facilities has not been defined properly and unambiguously, they now have to be interpreted in a reasonable manner. This Authority therefore determines that the actual cost incurred on these facilities shall be worked out and that actual cost shall be divided amongst all apartments, and that proportionate actual cost along with 15% margin shall be charged from each of the allottee and the complainants. The areas of such various facilities cannot be allowed to be charged at the same rate as the carpet area of the apartment.

Accordingly, on the basis of the above principle 104.5 Sq. ft. area shall be deducted from the 1783.5 super area charged by the respondent. The respondent accordingly shall charge the complainant for only 1783.5 (-) 104.5 = 1679 sq. ft."

6. The aforesaid principles laid down in **Complaint No. 607 of 2018 titled Vivek Kadian Versus M/s TDI Infrastructure Pvt. Ltd.** have been gone through once again. The Authority observes that the principles laid down in respect of the steel staircase area at S.No. (v) above requires reconsideration.

It is observed that the respondent is proposing to include 56 Sq.ft. in the super area on account of having constructed the steel staircase. The nature of construction of a steel staircase is entirely different from the carpet area falling within the super area. The cost of the steel stair case apportionable to each unit is much less than the cost of construction of carpet area. It appears unjust that a steel staircase which is meant to be a fire escape facility is allowed to be charged at the same rates as the carpet area.

The Authority considers it fair and just to order that the actual cost of the steel staircase plus 15% profit thereon shall be proportionately divided amongst all the residents of the building. Thus the proportionate actual cost of steel staircase plus 15% profit only shall be charged from the complainant.

In accordance with the principles laid down in complaint case No.607 of 2018 with one modification stated above, the area of 160.5 Sq.ft. shall be deducted from the1783.5 Sq.ft. super area proposed to be charged by the respondent. The respondent accordingly shall charge the complainant for only 1783.5 minus 160.5 =1623 Sq.ft.

7. Now, the respondent is directed to issue a fresh statement of accounts to the complainant after recalculating the amounts payable by the complainant and compensation payable to the complainant by the respondent in in accordance with above principles. The net payable /receivable shall be clearly communicated after accounting for each item. The accounts statement shall be issued by the respondent within a period of 45 days. Respondent shall also periodically apprise the complainant of the stage of construction of the project and the status of the application for obtaining Occupation Certificate.

Disposed of accordingly. The file be consigned to the record room and the orders be uploaded on the website of the Authority.

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RAJAN GUPTA
[CHAIRMAN]

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DILBAG SINGH SIHAG
[MEMBER]