

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

Complaint No. : 1706 of 2018
First date of hearing: 24.04.2019
Date of Decision : 04.07.2019

1. Mr. Suraj Parkash, and
2. Mrs. Veena Dawar.

Address:- A-868 D, Sushant Lok- I,
Gurugram, Haryana- 122002.

Complainant

Versus

1. M/s Today Homes & Infrastructure
Pvt. Ltd.

Office at: Statesman House, 8th floor,
Barakhamba Road, New Delhi-110001.

2. Mr. Mordhawaj Singh, s/o. Shri
Chaturbhuj
3. Mr. Vikramjit Singh, s/o. Shri Ram
Narayan Singh
4. Mr. Ram Narayan Singh, s/o. Shri
Chaturbhuj
5. Mr. Bhim Singh, s/o. Shri Chaturbhuj
(owners of land measuring 21.55 acres,
Revenue Estate of Village Behrampur,
Sector 73, Gurugram)

Respondents.

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sushil Yadav
Shri Suraj Parkash
Shri Naveen Jakhar
Shri Satyam Thareja

Advocate for the complainant
Complainant in person
A.R. on behalf of the respondent
Advocate for Respondent

ORDER

1. A complaint dated 12.11.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2016 by the complainant, Mr. Suraj Parkash and Mrs. Veena Dawar, against the respondents' M/s Today Homes & Infrastructures Pvt. Ltd. (promoter), Mr. Mordhawaj Singh, Mr. Vikramjit Singh, Mr. Ram Narayan Singh and Mr. Bhim Singh (landowners) in respect of agreement to sell dated 19.03.2012 for unit no. 3, 12th floor, tower T 3, admeasuring 1,940 sq. ft. in the respondent no. 1's project, namely 'Canary Greens' located at Sector 73, Gurugram for not delivering the possession on due date which in violation of obligation of promoter under section 11(4)(a) of the Act *ibid*.
2. Since the agreement to sell was executed on 19.03.2012 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat this complaint as an application for non- compliance of

obligation on the part of promoter under section 34(f) of the Act

ibid.

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

1.	Name and location of the Project	'Today Canary Greens' Sector-73, Sohna Road, Gurugram, Haryana.
2.	RERA registered / not registered	Not Registered
3.	Nature of real estate project	Group Housing Colony
4.	Total area of the project	21.55 acres
5.	Date of booking	30.11.2011 (as per the complainant's version)
6.	Allotted unit no.	3, 12 th floor, tower T3
7.	Unit measuring area	1,940 sq. ft.
8.	Date of execution of agreement to sell	19.03.2012 (Annx A)
9.	Total consideration	Rs. 82,44,300/- (Pg.32 of the complaint)
10.	Total amount paid by the complainant till date	Rs.60,06,501/- (as per the receipts attached)
11.	Percentage of consideration paid	73% approx.
12.	Payment plan	Construction linked plan
13.	Due date of delivery of possession as per the agreement dated 19.03.2012.	19.09.2015 Clause 21 – possession to be delivered within 36 months from the date of execution of agreement plus 6 months grace period.
14.	Delay of number of months/ years till date	3 years, 9 months and 15 days.



15.	Penalty clause as per agreement to sell	Clause 21, para 2 of the agreement i.e. Rs.5/- per month per sq. ft. for the period of delay.
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4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. An agreement to sell dated 19.03.2012 is available on record for the aforesaid unit. As per clause 21 of the agreement dated 19.03.2012, possession of the said unit was to be delivered by 19.09.2015 but the respondent has neither delivered the possession of unit nor paid the compensation at the rate of Rs. 5/- per sq. ft. per month for every month of delay. 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 his counsel appeared on 24.04.2019. The case came up for hearing on 24.04.2019 and 04.07.2019. The reply has been filed by the respondent on 04.07.2019 which has been perused by the authority.

Facts of the case:-

6. Briefly put facts relevant for the disposal of the present complaint are that the respondents gave advertisement in various leading newspapers about their forthcoming project named "Today Canary Green", Sector-73, Sohna Road, Gurugram promising various advantages, like world class amenities and timely completion/execution of the project etc. Relying on the promise and undertakings given by the complainants jointly, booked an apartment/flat measuring 1,940 sq. ft. in aforesaid project of the respondents for total sale consideration is Rs.82,44,300/-.

7. The complainants made total payment of Rs.60,06,501/- to the respondents vide different cheques on different dates. As per agreement to sell dated 19.03.2012 the respondents had allotted a unit/flat no.1203 in Tower-T3 having super area of 1940 sq. ft. to the complainants. As per clause 21 of the said agreement to sell, the respondents had agreed to deliver the possession of the flat within 36 months from the date of signing of the agreement dated 19.03.2012 with an extended period of six months.

8. The complainant submitted that complainants regularly visited the site but was surprised to see that construction work is not in progress and no one was present at the site to address the queries of the complainants. The respondents with mala-fide and dishonest motives and intention cheated and defrauded the complainants. Despite receiving 95% approximately payments on time and repeated requests and reminders over phone calls and personal visits of the complainants, the respondents has failed to deliver the possession of the allotted flat to the complainants within stipulated period.
9. The complainants alleged that the construction of the block in which the complainants flat was booked was not completed within time for the reasons best known to the respondents which clearly shows that ulterior motive of the respondents was to extract money from the innocent people fraudulently.
10. Due to this omission on the part of the respondents the complainants has been suffering from disruption on his living arrangement, mental torture, agony and also continues to incur severe financial losses. As per clause 23 of the flat buyer agreement it was agreed by the respondent that in case of any

delay, the respondent shall pay to the complainants a compensation @ Rs.5/- per sq. ft. per month of the super area of the apartment/flat. It is however, pertinent to mention here that a clause of compensation at such a nominal rate of Rs.5/- per sq. ft. per month for the period of delay is unjust and the respondent has exploited the complainants by not providing the possession of the flat even after a delay from the agreed possession plan. It could be seen here that the respondent has incorporated the one sided clauses in buyers agreement and offered to pay a sum of Rs.5/- per sq.ft for every month of delay. If we calculate the amount in terms of financial charges it comes to approximately @ 2% per annum rate of interest whereas the respondent charges 18% per annum interest on delayed payment.

11. That on the ground of parity and equity the respondent also be subjected to pay the same rate of interest hence the respondent is liable to pay interest on the amount paid by the complainants from the promise date of possession till the flat is actually delivered to the complainants.

12. Hence, the complainants have filed the present complaint before this authority.

Issues to be decided:-

9. Whether the developer has violated the terms and conditions of the agreement to sell?
- ii. Whether the complainants are entitled for possession along with prescribed interest for delay in possession ?
- iii. Whether the respondent should complete the construction as soon as possible and there is no reasonable justification for the delay ?
- iv. Whether interest cost being demanded by the Respondent/developer is very higher i.e. 18% which is unjustified and not reasonable?

Reliefs sought:-

- Direct the respondents to handover the possession of the flat along with prescribed interest per annum from the date of booking of the flat in question.

Respondent's reply:-

13. It is submitted that all the averments and contentions made by the complainant(s) in the present complaint, under reply, if not specifically admitted herein, be deemed to have been specifically denied and traversed.

14. The complainant(s) by suppressing the material facts have not approached this authority with clean hands in the present matter and have presented the facts of the present case in a selective & lopsided manner. The averments set out in the complaint also denote non-application of mind.
15. It is submitted that the flat-buyer agreement executed between the parties on 06.06.2011, in clause 38, has an arbitration agreement which provides for all disputes between the complainant and allottee to be resolved through arbitration to be held in Delhi. The complainant(s) are successor-in-interest of original allottee and the said clause binds the complainant as well.
16. It is submitted that the relief of possession cannot be granted as the project / unit (T-3/ 1203) is at final stages of construction and the respondent shall deliver the possession of the unit in question within 11 months from the date of filing of this reply. It is also submitted that work in the said project is going on in full swing and possession related activities has already been started in some of the Towers.

17. It is submitted that the relief of interest per annum from the date of booking cannot be granted as the RERA under section 18 envisages interest only for period of delay, until withdrawal from the project has been sought. Furthermore, RERA renders this authority without the jurisdiction to determine compensation / interest, by virtue of Section 71. A reference may be made to judgment of Uttar Pradesh Real Estate Regulatory Authority in MMN v. Jaiprakash Associates Limited on the issue of Section 71.
18. The respondent submitted that the complaint does not state as to any difficulty which is being faced by the complainant(s) due to the alleged delay in delivery of possession. It is stated that large number of allottees entered into agreement with the respondent solely with intent of speculative gain / investment purposes, which gain / profit was never promised by the respondent. However, today, such allottees are raising unfounded grievances having origin in purely commercial transactions under the garb of RERA against the intent and objective of RERA which intent and objective has been highlighted in the judgment rendered by the Hon'ble High Court

of Bombay in matter titled Neelkamal Realtors Suburban Pvt Ltd & Anr v. Union of India & ors. reported as AIR 2018 (NOC 398) 136.

19. It is imperative to mention here that the respondent had initially filed its application for RERA project registration qua Project — "Canary Greens" before interim real estate regulatory authority, Panchkula. However the said application was not processed by the interim authority as after the publication of final HRERA Rules on 28.07.2017, the interim authority is insisting that we have to submit the copy of valid license (license no.03/2009) as granted by the Department of Town and Country Planning. Now, after the passing of Haryana Real Estate Regulatory Authority, Gurugram (Registration of Projects) Regulations 2018, the respondent was asked to file a new application before HARERA, Gurugram and accordingly a new application was filed by the respondent for registration of its project before this Hon'ble Authority and same is presently pending since 30.04.2018.

20. After filing the project registration application, opportunities have been granted to the respondent to submit the valid license

copy, however, owing to non-cooperation at the end of the licensee company, the license has not been renewed at the end of the licensee company. The licensee company must also be arrayed as a necessary and proper party to this complaint as without hearing the licensee company, the proper adjudication of this case cannot be possible in order to meet its logical conclusion. Further there is a clear dissonance in the provisions enshrined under the Real Estate (Regulation and Development) Act, 2016 and Haryana Real Estate (Regulation and Development) Rules, 2017 and until the same is resolved, the present matter needs to be kept pending sine die.

21. The respondent contended that no cause of action arose in to seek the desired prayer. Further till the time, the subject project did not get the registration certificate from the authority, hence the jurisdiction of this authority cannot be invoked.
22. The respondent submitted that the work at the site had been seriously hampered as by the said contractor within time stipulated. The said contractor abandoned the work / project site which lead to the delay in the execution of the project in time. As a result of the continuous delay and non-mobilization

of the work force and non-completion of the work in time, the respondent was forced to terminate the contract of the first contractor and new contractor was appointed to complete the project.

23. There was the closure of brick kilns due to the norms of procuring permission from Ministry of Environment & Forest. This issue was also highlighted in the media. It is stated that the delay in the construction of the project was due to the non — availability of the raw materials, which is, also included in the force majeure events in clause 22.

24. The progress of the project also significantly got delayed due to demonetization policy dated 08.11.2016 which resulted in slow down/ suspension of the real estate projects for regression in various support business / companies and agencies including the supply industry and transportation industry. The government's unexpected demonetization policy dated 08.11.2016 put a severe dampener on the regular supply of material for the project in question in view of the financial crunch.

25. It is submitted that the respondent is arranging funds with great difficulties and even many customers of this project have stopped making payments of due instalments as per applicable construction linked payment plan and thus it will cause immense irreparable losses to company in case the order of payment of compensation is passed the same are detrimental to the interests of hundreds of allottees who are not in the litigation and are expecting the possession of their respective flats from the company at the earliest.
26. The authority was pleased to appoint a local commissioner Sh. Suresh Kumar Verma on 17.01.2019 for physical verification pertaining to the same project. The report of the local commissioner was filed on 20.02.2019 before this authority which submitted that the work has been completed physically about 46% approximately. It is submitted that the report was filed in the month of February which is much before the filing of this reply and since then almost 5 months have passed and it is submitted that the construction work has been completed much beyond the figure of 46% as was mentioned in the Local Commissioner's report. The same shall show and prove beyond

doubt the progress made in the project and its advance stage of construction. It is, therefore, requested that the same may be taken into consideration for the purpose of adjudication of this complaint.

Determination of issues:-

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

27. With respect to the **first, second, third and fourth issue** raised by the complainants, the authority came across that as per clause 21 of the agreement to sell dated 19.03.2012. The clause regarding the possession of the said unit is reproduced below:

".....the physical possession of the said unit is proposed to be delivered by the Company to the Allottee within 36 months from the date of execution of this agreement. The allottee further agrees that the Company shall additionally be entitled to a period of 6 months' grace period after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the company including but not limited to delays in obtaining the occupation certificate/completion certificate, etc., from the competent authority....."

Accordingly, the due date of delivery of possession by applying the abovementioned clause comes out to be 19.09.2015, but the respondent by not delivering the possession of the unit till date has breached the terms and conditions of the agreement dated 19.03.2015 which is in violation of section 11(4)(a) of the Act and the possession has been delayed by 3 years, 9 months and 15 days till date.

28. Since, there is a delay of more than 3 years, so the respondent is liable to pay delayed possession charges at the prescribed rate of interest i.e. 10.65% p.a. for every month of delay in terms of section 18(1) proviso of the Act *ibid*.

Findings of the authority: -

29. 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 complainants 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.

30. 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.

31. 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.

32. It is stated at bar by the counsel for the respondent that they have applied for registration with the authority.

33. As per local commissioner's report dated 20.02.2019 (placed on record as page no. 17 of the reply), 46% work of the project has been completed. During the course of arguments, counsel for the complainants stated at the bar they are interest in getting the physical possession of the unit in question.

34. Arguments heard. As per clause 21 of the agreement to sell dated 19.03.2012 for unit no. 3, 12th floor, tower T3 in the project "Canary Greens", Sector 73, Gurugram, possession of the unit in question was to be handed over to the complainants within a period of 36 months plus 6 months grace period from the date of execution of agreement which comes out to be 19.09.2015. However, the respondent has not delivered the possession till date. The complainants have already paid Rs. 60,06,501/- to the respondent against a total sales consideration of Rs. 82,44,300/-. As such the complainants are

entitled for delayed possession charges at the prescribed rate of interest i.e. 10.65% per annum w.e.f. 19.09.2015 as per the provisions of section 18(1) proviso of the Real Estate (Regulation and Development) Act, 2016 till the offer of possession.

35. Since the project is not registered with this authority, so the respondent is directed to get the project registered within 15 days failing which penalty under section of the Act shall be imposed upon the respondent.

Decision and directions of the authority:-

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

1. The respondent is directed to handover the possession of the unit in question to the complainants within a period of one year by settling the matter.

2. The respondent is further directed to pay delay possession charges at prevalent prescribed rate of interest @ 10.65% p.a. on the paid amount to the complainants from the due date of delivery of possession i.e. 19.09.2015 till the date of offer of possession.
3. The arrears of interest so accrued @ 10.65% p.a. from due date till the date of order, so far shall be paid to the complainants within 90 days from the date of this order. Thereafter, monthly interest at prescribed rate be paid on 10th of each subsequent English calendar month.
4. Complainants are directed to pay outstanding dues, if any, after adjustment of interest for delayed period. Interest on outstanding dues shall be charged at the prescribed rate of interest i.e. 10.65% by the respondent which is at par with as is being granted to the complainants in case of delayed possession.

5. The respondent shall not charge anything from the complainants which is not the part of agreement to sell dated 19.03.2012.
37. The order is pronounced.
38. Case file be consigned to the registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.07.2019.

(Subhash Chander Kush)

Member

Judgement uploaded on 08.07.2019


HARERA
GURUGRAM