

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

Complaint no. : 1770 of 2018
First date of hearing: 24.04.2019
Date of decision : 04.07.2019

1. Rupal Shah
2. Sahil Shah
R/o: C-16A, First Floor, Sector 52, Ardee City,
Gurugram 121006.

Complainants

Versus

1.M/s Today Homes and Infrastructure Pvt.
Ltd.
Regd. Office: Statesman House, 8th Floor
Barakhamba Road, New Delhi-110001
2.Mr. Mordhawaj Singh
3.Mr. Vikramjit
4.Mr. Ram Narayan Singh
5.Mr. Bhim Singh (Landowners)
Address: - Revenue Estate of Village
Behrampur, Sector 73, Gurugram

Respondents

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sushil Yadav
Shri Naveen Jakhar
Shri Satyam Thareja Adv

Advocate for complainants
Authorised representative on
behalf of respondents
Advocate for respondents

ORDER

1. A complaint dated 15.11.2018 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 Rupal Shah and Sahil Shah, against the promoters M/s Today Homes and Infrastructure Pvt. Ltd. and others, on account of violation of the clause 21 of agreement to sell executed on 16.08.2011 in Sector 73, Gurugram, in the project 'Canary Greens' for not handing over possession on the due date i.e. 16.02.2015 which is an obligation under section 11(4)(a) of the Act *ibid*.
2. Since the agreement to sell has been executed on 16.08.2011, i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, 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 the part of the promoters/respondents 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	"Canary Greens", Sector 73, Gurugram
2.	Nature of project	Group housing colony

3.	Area of project	21.55 acres
4.	Apartment/unit no.	T1/0201, 2 nd floor, tower no. T1
5.	Flat measuring	1275 sq. ft.
6.	DTCP licence no.	Not available
7.	RERA registered/ not registered	Not registered
8.	Date of execution of agreement to sell	16.08.2011 (Annx 1)
9.	Payment plan	Construction linked payment plan
10.	Basic sale price	Rs. 45,60,675/-
11.	Total sale consideration	Rs.55,55,550/-
12.	Total amount paid by the complainant till date	Rs.49,22,151/-
13.	Percentage of amount paid	95%
14.	Date of delivery of possession as per clause 21 of agreement to sell (36 months + 6 months grace period from the date of execution of agreement to sell)	16.02.2015 The grace period of 6 months has been allowed to the respondent for the delay caused due to exigencies beyond control of the respondent
15.	Delay in handing over possession till date of decision i.e. 04.07.2019	4 years 4 months 18 days
16.	Penalty clause as per agreement to sell	Clause 21 of the agreement i.e. Rs.5/- per sq. ft per month for the entire period of such delay

4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainants. An agreement to sell dated 16.08.2011 is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by

16.02.2015. Neither the respondents have delivered the possession of the said unit to the purchaser nor they have paid any compensation @ Rs.5/- per sq. ft per month of the carpet area of the said flat for the period of such delay as per clause 21 of agreement to sell. 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 24.04.2019. The reply has been filed by the respondents on 04.07.2019 and same has been perused.

Facts of the complaint

6. The complainants submitted 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 respondents in the aforementioned advertisements Isha Aggarwal, booked an apartment/flat measuring 1275 sq. ft. in aforesaid project of the respondents for total sale consideration is Rs.55,55,550/- which includes BSP, car

parking, IFMS, club membership, PLC etc. Later the aforesaid flat was get endorsed in the name of complainants i.e. Rupal Shah and Sahil Shah with the consent and permission of respondent.

7. The complainants submitted that he made payment of Rs.49,22,151/- to the respondents vide different cheques on different dates.
8. The complainants submitted that as per agreement to sell the respondents had allotted a unit/flat bearing no. T1/0201, 2nd floor, tower no. T1 having super area of 1275 sq. ft. to the complainants. As per clause 21 of the 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 to sell dated 16.08.2011 with an extended grace period of six months.
9. The 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. It appears that respondents have played fraud upon the complainants. The only intention of the respondents was to take payments for the tower without completing the work and handing over the possession on time. The respondents with

mala-fide and dishonest motives and intention cheated and defrauded the complainants. That despite receiving of 95% approximately payments on time for all the demands raised by the respondents for the said flat and despite repeated requests and reminders over phone calls and personal visits of the complainants, the respondents have failed to deliver the possession of the allotted flat to the complainants within stipulated period.

10. The complainants submitted that due to this omission on the part of the respondents he has been suffering from disruption on his living arrangement, mental torture, agony and also continues to incur severe financial losses. This could have been avoided if the respondents had given possession of the flat on time. As per clause 21 of the 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 delay from the agreed possession plan. The respondents cannot escape the liability merely by mentioning

a compensation clause in the agreement. It could be seen here that the respondents have incorporated the one sided clause in buyer's 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 approximately @ 2% per annum rate of interest whereas the respondents charges 18% per annum interest on delayed payment.

11. The complainants submitted that he has requested the respondent several times by making telephonic calls and also personally visiting the offices of the respondent either to deliver possession of the flat in question along with prescribed interest on the amount deposited by the complainants but respondents have flatly refused to do so. Thus, the respondents in a pre-planned manner has defrauded the complainants and has collected hard earned huge amount of money and wrongfully gained himself and caused wrongful loss to the complainants.

Reply on behalf of respondents: -

12. The respondents submitted that the flat-buyer agreement executed between the opposite party and original allottee on 16.08.2011, in clause 38, has an arbitration agreement which provides for all disputes between the complainants and

allottee to be resolved through arbitration to be held in Delhi. The complainants are successor-in-interest of original allottee and the said clause binds the complainants as well. It is stated that no provision in Real Estate (Regulation & Development Act),2016 (hereinafter referred to as "RERA") provides for exclusive jurisdiction to this Hon'ble Regulator Authority or takes away the right of parties to render jurisdiction in an arbitration tribunal.

13. The respondents submitted that the relief of possession cannot be granted as the project / unit (T-1/0201) is at final stages of construction and the opposite party 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. 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 hon'ble regulatory authority without the jurisdiction to determine compensation / interest, by virtue of section 71.

14. The respondents have relied on Uttar Pradesh Real Estate Regulatory Authority in MMN v. Jaiprakash Associates Limited on the issue of Section 71.
15. That, the complaint does not state as to any difficulty which is being faced by the Complainants due to the alleged delay in delivery of possession. It is stated that large number of allottees entered into agreement with opposite party solely with intent of speculative gain / investment purposes, which gain / profit was never promised by the opposite party. 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.
16. The respondents submitted that the answering opposite party had initially filed its application for RERA project registration qua project — "Canary Greens" before interim Real Estate Regulatory Authority at 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 answering opposite party was asked to file a new application before HARERA, Gurugram and accordingly a new application was filed by the opposite party for registration of its project before this authority and same is presently pending since 30.04.2018.

17. The respondents submitted that no cause of action arose in favour of the complainants to seek the desired prayer which clearly makes the present complaint of the complainant bad in law.
18. The respondents submitted that they entered into agreement with original allottee anticipating all sorts of ups and downs in the market dated 16.08.2011.
19. The respondents submitted that since 16.08.2011, they faced numerous market considerations arising as a consequence of orders from court of law and policies of Government, while making an endeavour to complete the project within the proposed time – frame.

20. The respondents submitted that the time period of 36 months was only proposed in the flat-buyer agreement dated 16.08.2011 and it was subjected to events which were described in clause 22 of flat-buyer agreement dated 16.08.2011. The opposite party cannot be bound on to the same period without considering the circumstances which occasioned the delay in delivery of possession to the complainants.
21. The respondents submitted that they have already opened a separate account in accordance with the provisions enshrined under Real Estate (Regulation and Development) Act 2016 to cover the cost of construction for its ongoing project Canary Greens and in case any order of payment of compensation is passed, the same shall be taken from the account so opened as per RERA Act which will surely affect and jeopardize the progress and completion of the entire project and shall also affect the interest of other allottees who are not in litigation.
22. The respondents submitted that 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 i.e. "Canary Greens". The respondents have requested to consider the same.

Issues raised by the complainants are as follows:

The following issues have been raised by the complainants:

1. Whether the developers have violated the terms and conditions of the agreement to sell?
2. Whether the complainants are entitled for possession along with prescribed interest for delay in possession?
3. Whether interest cost being demanded by the respondents / developers are very higher i.e. 18% which is unjustified and not reasonable?

Reliefs sought:

The complainants are seeking the following reliefs:

- i. 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.
- ii. Pass any other directions as this hon'ble authority may deem fit and proper in the facts and circumstances of the case.

Determination of issues:

After considering the facts submitted by both the parties, and perusal of record on file, the authority decides the issues raised by the parties as under:

23. With respect to the **first, second and third issues** raised by the complainants, as per clause 21 of agreement to sell dated 16.08.2011, the possession of the flat was to be handed over within 36 months + 6 months grace period from the date of execution of agreement. Therefore, the due date of handing over the possession shall be computed from 16.08.2011. The delay compensation payable by the respondents as per **clause 21 @ Rs.5/- per sq. ft per month** for the entire period of such delay on the amount(s) paid by the allottee for such period of delay of agreement to sell 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.”

Accordingly, the due date of possession was 16.02.2015 and the possession has been delayed by 4 years 4 months 18 days till date of decision. Therefore, under section 18(1) proviso respondents are liable to pay interest to the complainants, at the prescribed rate, for every month of delay till the offer of possession. As the promoters have failed to fulfil his obligation under section 11(4)(a), the promoters are liable under section 18(1) proviso of the Act *ibid* 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 date of offer of possession. The authority issues directions to the respondents u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate of 10.65% per annum on the amount deposited by the complainants with the promoter from the due date of possession i.e. 16.02.2015 till the date of offer of possession.

FINDINGS OF THE AUTHORITY

24. 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.

25. 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.
26. The complainants made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon the promoter.
27. The complainants requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions of the Act and to fulfil its obligations.
28. Reply filed by the respondents on 04.07.2019. It is stated at bar by the counsel for the respondents that they have applied for registration with the authority. It is directed that the respondents shall get the project registered within 15 days failing which penalty under section 59 of the Act ibid shall be imposed upon the respondent.

29. As per local commissioner report, 46% work is completed at the site. It has been stated at bar by the counsel as well as complainants that they are interested in getting the physical possession of the unit no. T1/0201, 2nd floor, tower no. T1, in project “Canary Greens” sector- 73, Gurugram.

As per clause 21 of the agreement to sell dated 16.08.2011 for unit No. T1/0201, 2nd floor, tower No. T1, in project “Canary Greens” Sector 73, Gurugram, possession was to be handed over to the complainants within a period of 36 months from the date of execution of the agreement i.e. 16.08.2011 + 6 months grace period which comes out to be 16.02.2015. However, the respondent has not delivered the unit in time. Complainants have already paid Rs.49,22,151/- to the respondent against a total sale consideration of Rs.55,55,550/-. As such, the complainants are entitled for delayed possession charges at prescribed rate of interest i.e. 10.65% per annum w.e.f. 16.02.2015.

Decision and directions of the authority

30. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real

Estate (Regulation and Development) Act, 2016 hereby issue direction to the respondents:

- i. The respondents shall be liable to pay interest for every month of delay at prescribed rate of interest rate i.e. 10.65% p.a. from the due date of possession i.e. 16.02.2015 till the offer of possession to the complainants.
- ii. The respondents are directed to hand over the possession of the unit to the complainant within a period of one year by settling the matter.
- iii. Complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. Interest on the due payments from the complainants shall be charged at the prescribed rate of interest i.e. 10.65% by the promoter which is the same as is being granted to the complainants in case of delayed possession.
- v. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.
- vi. The promoter shall not charge anything from the complainants which is not part of agreement.

31. The order is pronounced.
32. Case file be consigned to the registry.
33. Copy of this order be endorsed to registration branch.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated: 04.07.2019

Judgement uploaded on 09.07.2019



HARERA
GURUGRAM