

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

Complaint no. : 2354 of 2018
First date of hearing: 10.04.2019
Date of decision : 04.07.2019

Mr. Anshul Batra and Mrs. Neena Batra
R/o House no. R-1/A, Rampur Bagh, Bareilly,
Uttar Pradesh- 243001

Complainant

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

Respondents

CORAM:

Shri Samir Kumar

Shri Subhash Chander Kush

Member

Member

APPEARANCE:

Shri Sushil Yadav

Shri Satyam Thareja

Shri Naveen Jakhar

Advocate for the complainant

Advocate for the respondents

Authorized representative on
behalf of respondents

ORDER

1. A complaint dated 18.12.2018 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. Anshul Batra and Mrs. Neena Batra, 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 11.10.2013 in Sector 73, Gurugram, in the project 'Canary Greens' for not handing over possession on the due date i.e. **11.04.2017** which is an obligation under section 11(4)(a) of the Act *ibid*.

2. Since the agreement to sell has been executed on 11.10.2013, 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.	T6/0602, 6 th floor, tower no. T6
5.	Flat measuring	1640 sq. ft.
6.	DTCP licence no.	Not available
7.	RERA registered/ not registered	Not registered
8.	Date of execution of agreement to sell	11.10.2013
9.	Date of booking	20.10.2010
10.	Payment plan	Construction linked payment plan
11.	Basic sale price	Rs. 58,06,420/-
12.	Total sale consideration	Rs.70,00,220/-
13.	Total amount paid by the complainant till date	Rs.64,85,995/-
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)	11.04.2017 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	2 years 2 months and 23 days
16.	Penalty clause as per agreement to sell dated 11.10.2013	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 complainant. An agreement to sell dated 11.10.2013 is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by

11.04.2017. 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 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 10.04.2019 and 04.07.2019. The reply have been filed by the respondents on 04.07.2019 which has been perused by the authority.

Facts of the complaint

6. The complainant submitted that the respondents gave advertisement in various leading newspapers about their forthcoming project named "Today Canary Green", Sector-73, Sohna Road, Gurgaon 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 Anshul Batra and Neena Batra, booked an apartment/flat

measuring 1640 sq. ft. in aforesaid project of the respondents for total sale consideration is Rs.70,00,220/- which includes BSP, car parking, IFMS, club membership, PLC etc.

7. The complainant submitted that he made payment of Rs.64,85,995/- to the respondents vide different cheques on different dates.
8. The complainant submitted that as per agreement to sell the respondents had allotted a unit/flat bearing no. T6/0602, 6th floor, tower no. T6 having super area of 1640 sq. ft. to the complainant. As per para no.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 11.10.2013 with an extended period of six months.
9. The complainant 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 complainant. It appears that respondents have played fraud upon the complainant. 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 complainant. 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 complainant, the respondent has failed to deliver the possession of the allotted flat to the complainant within stipulated period.

10. The complainant 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 complainant 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 complainant by not providing the possession of the flat even after delay from the agreed possession plan. The respondent 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 to approximately @ 2% per annum rate of interest whereas the respondents charges 18% per annum interest on delayed payment.

11. The complainant 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 complainant but respondents have flatly refused to do so. Thus, the respondents in a pre-planned manner defrauded the complainant by taking his hard earned huge amount of money and wrongfully gained himself and caused wrongful loss to the complainant.

12. Issues raised by the complainant is as follows:

1. Whether the developers have violated the terms and conditions of the agreement to sell?
2. Whether the complainant is 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?

14. Reliefs sought:

The complainant is 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.

Reply on behalf of respondents

15. The respondents submitted that the flat-buyer agreement executed between the opposite party and original allottee on

11.10.2013, 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 are successor-in-interest of original allottee and the said clause binds the complainant as well. It is stated that no provision in Real Estate (Regulation and Development Act), 2016 (hereinafter referred to as "RERA") provides for exclusive jurisdiction to this hon'ble regulatory authority or takes away the right of parties to render jurisdiction in an arbitration tribunal.

16. The respondents submitted that, the relief sought by the complainant is that of possession of the flat along with interest per annum from the date of booking of the flat. It is submitted that the relief of possession cannot be granted as the project / unit (T-06/0602) 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.

17. The respondents has relied upon the judgment of Uttar Pradesh Real Estate Regulatory Authority in MMN v. Jaiprakash Associates Limited on the issue of section 71.
18. The respondents submitted that the complaints do not state as to any difficulty which is being faced by the complainant 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.

19. The present matter is completely beyond the jurisdiction of this hon'ble authority as the same pertains to alleged deficiency on the opposite party who is developing a project canary greens, at Sector — 73, District — Gurugram, Haryana and now, as per the provisions contained in the Real Estate (Regulation and Development) Act, 2016.
20. 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.

21. The respondents submitted that the opposite party has always acted with bona fide intents deliver timely possession of properties. The opposite party entered into agreement with original allottee anticipating all sorts of ups and downs in the market, which is evident from the following reiterated clauses of the flat - buyer agreement dated 11.10.2013:-

"21 .Subject to Force Majeure the physical possession of the said Unit is proposed to be delivered by the Company to the Allottee within 36 (Thirty Six) months from the date of execution of this Agreement. The allottee further agrees that the Company shall additionally be entitled to a period of six months grace period

"22. Subject to Force Majeure, (which shall mean any event beyond the control of the Company or in combination with other events or circumstances which cannot (i) by exercise of reasonable diligence, or (ii) despite adoption of reasonable precautions and / or alternative measures, have been prevented, or caused to have been prevented but not limited acts of God i.e. a) fire, drought, flood, earthquakeb) explosions or accidents .,c) strikes or lock outs ...d) non availability of cement, steel, or other construction material due to strikes of manufacturers, suppliers, transporters or other intermediaries . h) economic

recession the Company shall be entitled to such extension of time as may be necessary to complete the construction of the Unit

"23. The agreed sale price of the unit is escalation free, subject to the force-majeure conditions, which includes escalation for any reason beyond control of the Company€..... In case of escalation as a result of any notice, order, rule, notification or the Government / Court of Law Public / Competent Authority.... the Company shall be entitled to reasonable escalation....."

22. The respondents submitted that the opposite party, since 11.10.2013, 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, some of

I. The work at the site had been seriously hampered as disputes had arisen with the earlier contractor who was appointed to complete civil and other works in today canary green'. The ongoing work could not be completed 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. The delay on account of the said contractor was beyond the control of the opposite party and not on its account. As a result of the continuous delay and non-mobilization of the work force and non-completion of

the work in time, the opposite party was forced to terminate the contract of the first contractor and new contractor was appointed to complete the project.

II. 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,

III. 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 / unexpected demonetization policy dated 08.11.2016 put a severe dampener on the regular supply of materials et al. for the project in question in view of the financial crunch.

23. The time period of 36 months was only proposed in the flat-buyer agreement dated 11.10.2013 and it was subject to events which were described in clause 22 of flat-buyer agreement dated 11.10.2013. 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 complainant(s).

24. 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 report of the local commissioner was filed on 20.02.2019 before this hon'ble 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 complainant, and perusal of record on file, the authority decides the issues raised by the parties as under:

25. With respect to the **first, second and third issues** raised by the complainant, as per clause 21 of agreement to sell dated 11.10.2013, 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 11.10.2013. 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 paid by the allottees 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.”

26. Accordingly, the due date of possession was **11.04.2017** and the possession has been delayed by 2 years 2 months and 23 days till the date of decision. Therefore, under section 18(1) proviso respondents are liable to pay interest to the complainant, 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 complainant, at the prescribed rate, for every month of delay till the 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 complainant with the

promoter on the due date of possession i.e. 11.04.2017 upto the date of offer of possession.

Findings of the authority

27. 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.
28. 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.
29. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon the promoter.

30. The complainant 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.
31. It is stated at bar by the counsel for the respondent that they have applied for registration with the authority. It is directed that the respondent shall get the project registered within 15 days failing which penalty under section 59 of the Act ibid shall be imposed upon the respondent.
32. As per local commissioner report, 46% work is completed at the site. It has been stated at bar by the counsel as well as complainant that he is interested in getting the physical possession of the unit no. T6/0602, 6th floor, tower no. T6, in project “Canary Greens” Sector 73, Gurugram. Already a period of 2 years, 2 months and 23 days have elapsed from the due date of delivery of possession.
33. As per clause 21 of the agreement to sell dated 11.10.2013 for unit no. T6/0602, 6th floor, tower no.T6, in project “Canary Greens” Sector 73, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the

date of execution of the agreement i.e. 11.10.2013 + 6 months grace period which comes out to be 11.04.2017. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.64,85,995/- to the respondent against a total sale consideration of Rs.70,00,020/-. As such, the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.65% per annum w.e.f 11.4.2017 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession. The respondent is directed to hand over the possession of the unit to the complainant within a period of **One year** by settling the matter.

Decision and directions of the authority

34. 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 i.e. 10.65% p.a. from

due date of possession i.e. **11.04.2017** till the offer of the possession to the allottee.

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

35. The order is pronounced.
36. Case file be consigned to the registry. Copy of this order be endorsed to registration branch.

(Samir Kumar)

Member

(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.07.2019

Judgement uploaded on 09.07.2019



HARERA
GURUGRAM