

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

Complaint no. : 805 of 2018
Date of first hearing : 16.01.2019
Date of decision : 10.04.2019

1.Mr. Abhishek Maheshwari
2. Mr. Arvind Maheshwari
Both R/o 3/187-A, Vishnu Puri Kanpur, ...Complainants
208002

Versus

M/s Cosmos Infra Engineering (India) Pvt.
Ltd.
Office: Rishi Apartment 4 Battery Lane, ...Respondent
Rajpur Road, Civil Lines, New Delhi-110054

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sushil Yadav
Shri Abhishek Maheshwari
Shri Virender Singh

Advocate for the complainants
Complainant no.1 in person
Advocate for the respondent

ORDER

1. A complaint dated 05.09.2018 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 Mr. Abhishek



Maheshwari and Mr. Arvind Maheshwari, against M/s Cosmos Infra Engineering (India) Pvt. Ltd. ,in respect of apartment/unit no. D 808, 8th floor, tower 'B' in the project 'Cosmos Express 99', on account of violation of clause 3.1 of flat buyer's agreement executed on 15.03.2013 for not handing over possession by the due date i.e. 15.09.2017 which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the flat buyer's agreement has been executed on 15.03.2013 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, 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 contractual obligation on the 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 are as under: -

1.	Name and location of the project	"Cosmos Express 99" village Dhankot, Sector 99, Gurugram, Haryana
2.	Nature of project	Group housing complex
3.	Project area	12.031 acres
4.	RERA registered / Not registered	Not registered



5.	DTCP licence no.	70 of 2011 dated 22.07.2011 valid up to 21.07.2015
6.	DTCP licence holder	M/s Shivnandan Buildtech Pvt. Ltd.
7.	Unit no.	D-808,type bronze, tower D, 8 th floor
8.	Unit area	1550 sq. ft
9.	Date of execution of flat buyer agreement	15.03.2013
10.	Date of allotment	22.03.2013
11.	Date of tripartite agreement	25.03.2103
12.	Total consideration	Rs. 96,74,050/- (as per annexure I at pg-43 of complaint)
13.	Total amount paid by the complainant	Rs. 86,10,976/- (as alleged by the complainant)
14.	Payment plan	Construction linked payment plan(as per pg. 50 of the complaint)
15.	Due date of delivery of possession. Clause 3.1 read with 5.1: construction shall be completed in 4 years from the start of construction or execution of this agreement whichever is later + 6 months grace period. (The BBA was executed on 15.03.2013 and start of construction was on 12.03.2013, so due date shall be computed from execution of agreement)	15.09.2017
16.	Delay of number of months/ years	1 year 4 months
17.	Penalty clause 5.1as per flat buyer agreement	Rs. 5/- sq. ft. per month of the super area

4. As per the details provided above, which have been checked as per record of the case file. A flat buyer's agreement dated 15.03.2013 is available on record for flat no. 808, tower D, 8th floor, Sector 99, Gurugram in the project "Cosmos Express 99" for which the promoter has failed to deliver the possession of the said unit to the complainants. Therefore, the promoter has not fulfilled his committed liability till date.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The case came up for hearing on 16.01.2019, 13.02.2019 and 10.04.2019. The reply has been filed by the respondent and the same has been perused.

Facts of the complaint

6. The complainants submitted that the respondent gave advertisement in various leading newspapers about their forthcoming project named "Cosmos Express 99", Sector-99 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 respondent in the aforementioned advertisements the complainants, booked a flat admeasuring 1550 sq. ft. in

aforesaid project of the respondent for total sale consideration of Rs. 96,74,050/- which includes BSP, car parking, IFMS, club membership, PLC etc. The complainants made payment of Rs.86,10,976/- to the respondent vide different cheques on different dates.

7. The complainants submitted that as per flat buyer's agreement the respondent had allotted a unit no. D - 808 in tower D admeasuring 1550 sq. ft in Cosmos Express 99, Sector -99 Gurugram to the complainants. It is further, submitted that as per para no. 3.1 of the flat buyer agreement, the respondent had agreed to deliver the possession of the flat within 4 years from the date of signing of the said agreement dated 15.03.2013.
8. The complainants submitted that they regularly visited the site but were shocked to see that construction was very and no one was present at the site to address the queries of the complainants. The complainants contacted the respondent through mails and personal visit, about the project but the respondent did not gave any satisfactory answer and the complainants had paid Rs. 86,10,976/- by then as and when demanded by the respondent but the construction was going

on at a very slow speed and even the respondent did not know that when they will be able to deliver the project.

9. The complainants submitted that as per clause 5.1 of the flat buyer agreement dated 15.03.2013, 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 this is unjust and the respondent has exploited the complainant by neither providing the possession of the flat even after a delay nor refunded the amount paid by the complainant. The respondent cannot escape the liability merely by mentioning a clause in the agreement. It could be seen here that the respondent has incorporated the clause in a one sided buyers agreement and usurp such a huge amount from the complainants.
10. The complainants submitted that they requested the respondent several times through telephonic calls and also personally visiting the office of the respondent to refund the amount along with interest @ 24% per annum on the amount deposited by the complainant but respondent has flatly refused to do so.

11. The complainants submitted that they have taken loan amounting Rs. 71,90,000/- from Punjab National Bank. The complainants visited the site but are shocked to see that no construction was going on and complainants are paying so much amount to the bank on account of EMI of loan availed by the complainants.

12. Issues to be decided

- I. Whether the buyer's agreement is one-sided and is unjustified?
- II. Whether there is delay in giving possession of the unit to the complainants?
- III. Whether the interest cost @24% demanded by the respondent/developer is very high?

13. Relief sought

In view of the above, complainants seek the following relief:

- I. Direct the respondents to refund the amount of Rs. 86,10,976/- along with interest @ 24% per annum on compounded rate from the date of booking of the flat in question;

- II. Any other relief which this hon'ble authority deems fit and proper may also be granted in favour the complainants.

Respondent's reply

14. The respondent submitted that the present complaint is liable to be dismissed as the complainants are wrongfully trying to extract compensation from the respondent without any deficiency of service. The complainants are guilty of 'suggestio falsi' and 'suppression veri' in as much as the complainant have deliberately concealed various material facts as they purposely did not disclose the fact that they did not make timely payments as per the payment schedule despite various notice and reminders. Thus, the complaint is liable to be dismissed on this ground alone.
15. The respondent submitted that the complainants are not consumers as they invested in the property to make profit by selling the same at higher price. Further, submitted that complainants have misinterpreted the flat buyer's agreement, and as per clause 3.1 of the agreement the developer shall under normal conditions subject to force majeure, complete the construction of the tower. The construction work has



been completed till 70% and possession will be given in short span of time.

16. The respondent submitted that the present construction work is at an advance stage and all structure work, plaster work have been completed and finishing work is going on in the project and respondent will be able to complete the construction within a short span of time. Also, submitted that the respondent company has only received Rs.90.46 crores from the flat buyers and have spent an amount of Rs.159.19 crores in the project till date.
17. The respondent submitted that the complainants should be asked for strict proof of the calls and personal visits as alleged by them. Further, respondent admitted that the complainant has taken a loan amounting Rs. 71,90,000/- from the bank.

Determination of issues

18. With respect to the **first and third issue**, the delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the super area of the unit for the period of delay as per clause 5.1 of buyer's agreement is held to be very nominal and unjust. On the other hand, the respondent is demanding interest at the rate of 24% for delay in making



payment by the complainants. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided. It has also been observed 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."

In that case the interest for every month @10.75% p.a. will accrue till the possession is given.

19. With respect to the **second issue**, as per the clause 3.1 of the agreement the respondent has to handover the possession within 4 years from the start of construction or execution of agreement whichever is later plus 6 months grace period. Accordingly, the due date of possession was 15.09.2017 and there has been a delay of 1 year 4 months. Thus, the promotor is failed to fulfil its obligation as per section 11(4)(a) of the Act *ibid*. However, the complainants are entitled for delayed possession charges at prescribed rate of

interest i.e. 10.75% per annum from due date of possession till offer of possession

Findings of the authority

20. Jurisdiction of the Authority-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. 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 Town and Country Planning Department, 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. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the authority has observed that since the project is not registered, notice under section 59 of the Real Estate (Regulation and Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent.

Registration branch is directed to issue show cause notice to the builder-respondent under the Act to show cause as to why a penalty of 10% of the cost of the project may not be imposed.

22. Local Commissioner report has been received on 09.04.2019 and placed on record. The operative part of LC report is as under: -

- i) The physical progress of the overall project is approximately 55-60%.
- ii) The physical progress of the tower-D in which unit of complainant is located is approximately 60%.

As per clause 3.1 of the builder buyer agreement dated 15.03.2013 for unit No.D-808, tower-D, in project "COSMOS EXPRESS 99", village Dhankot, Sector-99, Gurugram, possession was to be handed over to the complainant within a period of 4 years from the date of execution of BBA + 6 months grace period which comes out to be 15.9.2017. However, the respondent has not delivered the unit in time.

Decision and direction of the authority-

23. After taking into consideration all the material facts produced by 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 to the parties in the interest of justice: -

- i. The respondent is directed to pay delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f **15.9.2017** as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession.
- ii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iii. The interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. ~~10.75%~~ **10.70%** by the promoter which is the same as is being granted to the complainant in case of delayed possession.
- iv. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order

*Corrected vide
order dated 05/07/19.*

and thereafter monthly payment of interest till offer of possession shall be paid on or before 10th of subsequent month.

24. The order is pronounced.
25. File be consigned to the registry.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.04.2019

Corrected Judgement uploaded on 10.07.2019

HARERA
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12. **Issues to be decided**

- I. Whether the buyer's agreement is one-sided and is unjustified?
- II. Whether there is delay in giving possession of the unit to the complainants?
- III. Whether the interest cost @24% demanded by the respondent/developer is very high?

13. **Relief sought**

In view of the above, complainants seek the following relief:

- I. Direct the respondents to refund the amount of Rs. 86,10,976/- along with interest @ 24% per annum on compounded rate from the date of booking of the flat in question;

- II. Any other relief which this hon'ble authority deems fit and proper may also be granted in favour the complainants.

Respondent's reply

14. The respondent submitted that the present complaint is liable to be dismissed as the complainants are wrongfully trying to extract compensation from the respondent without any deficiency of service. The complainants are guilty of 'suggestio falsi' and 'suppression veri' in as much as the complainant have deliberately concealed various material facts as they purposely did not disclose the fact that they did not make timely payments as per the payment schedule despite various notice and reminders. Thus, the complaint is liable to be dismissed on this ground alone.
15. The respondent submitted that the complainants are not consumers as they invested in the property to make profit by selling the same at higher price. Further, submitted that complainants have misinterpreted the flat buyer's agreement, and as per clause 3.1 of the agreement the developer shall under normal conditions subject to force majeure, complete the construction of the tower. The construction work has

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Determination of issues

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In that case the interest for every month @10.75% p.a. will accrue till the possession is given.

19. With respect to the **second issue**, as per the clause 3.1 of the agreement the respondent has to handover the possession within 4 years from the start of construction or execution of agreement whichever is later plus 6 months grace period. Accordingly, the due date of possession was 15.09.2017 and there has been a delay of 1 year 4 months. Thus, the promotor is failed to fulfil its obligation as per section 11(4)(a) of the Act *ibid*. However, the complainants are entitled for delayed possession charges at prescribed rate of

interest i.e. 10.75% per annum from due date of possession till offer of possession

Findings of the authority

20. Jurisdiction of the Authority-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. 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 Town and Country Planning Department, 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. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the authority has observed that since the project is not registered, notice under section 59 of the Real Estate (Regulation and Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent.

Registration branch is directed to issue show cause notice to the builder-respondent under the Act to show cause as to why a penalty of 10% of the cost of the project may not be imposed.

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- i) The physical progress of the overall project is approximately 55-60%.
- ii) The physical progress of the tower-D in which unit of complainant is located is approximately 60%.

As per clause 3.1 of the builder buyer agreement dated 15.03.2013 for unit No.D-808, tower-D, in project "COSMOS EXPRESS 99", village Dhankot, Sector-99, Gurugram, possession was to be handed over to the complainant within a period of 4 years from the date of execution of BBA + 6 months grace period which comes out to be 15.9.2017.

However, the respondent has not delivered the unit in time.

Decision and direction of the authority-

23. After taking into consideration all the material facts produced by 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 to the parties in the interest of justice: -

- i. The respondent is directed to pay delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f **15.9.2017** as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession.
- ii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iii. The interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.75% by the promoter which is the same as is being granted to the complainant in case of delayed possession.
- iv. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order

and thereafter monthly payment of interest till offer of possession shall be paid on or before 10th of subsequent month.

24. The order is pronounced.
25. File be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.04.2019

Judgement uploaded on 30.04.2019

HARERA
GURUGRAM