

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

Complaint No.: 1746 of 2019
Date of first hearing : 29.08.2019
Date of Decision : 29.08.2019

M/s. Purisons Engineers Pvt. Ltd.
Address: -C-4, Pamposh Enclave,
New Delhi - 110048.

Complainant

Versus

M/s Sepset Properties Pvt. Ltd.
Office at:- 11th Floor, Paras Twin
Towers (Tower- B), Sector -54,
Golf Course Road,
Gurugram - 122002.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri B.D. Puri M.D. on behalf of the complainant
Shri Pallavi Parmar Advocate for the complainant
Shri Jasdeep Advocate for the respondent

ORDER

1. A complaint dated 16.04.2019 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 M/s. Purisons Engineers Pvt. Ltd., against the respondent, M/s Sepset Properties Pvt. Ltd., on account of the apartment buyer agreement executed on 02.04.2013 for apartment no. 7, 9th floor, tower C having 1665 sq.ft.super area in the project "Paras Dews", located at Sector 106, Dwarka Expressway, Gurugram.

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

1.	Name and location of the project	Paras Dews, Sector 106, Dwarka expressway, Gurugram.
2.	Apartment no.	7, 9 th floor, Tower C
3.	Apartment measuring area	1665 sq. ft. Super area
4.	RERA registered/unregistered	Registered vide no. 118 of 2017 dated 28.08.2017
5.	RERA Registration valid upto	31.07.2021
6.	Project area	13.762 acres
7.	Nature of real estate project	Residential group housing colony
8.	DTCP license no.	61 of 2012 dated 13.06.2012
9.	Date of execution of apartment buyer agreement	02.04.2013 (Pg. 24 of the complaint)
10.	Payment Plan	Construction linked plan (Pg. 57 of the complaint)
11.	Total consideration amount as per statement of account	Rs. 1,05,37,726/- (Pg. 73 of the complaint)
12.	Total amount paid by the Complainant till date	Rs.92,77,759/- (as per statement of accounts at Pg. 73 of the complaint)
13.	Percentage of consideration amount	95%

14.	Due date of delivery of possession.	06.09.2017 Clause 3.1: 42 months + 6 months grace period date of execution of agreement or grant of obtaining all licenses or approvals for the commencement of construction i.e. 06.09.2013, whichever is later
15.	Date of issuance of environmental clearance	06.09.2013(as per Pg. 20 of the reply)
16.	Penalty Clause as per builder/ apartment/ buyer agreement	Clause 3.3 i.e. Rs. 5/- per sq. ft. per month
17.	Status of the project	OC received for tower A to E on 15.01.2019 (Pg. 19 of the reply)
18.	Letter of offer of possession issued on	24.01.2019 (Pg. 38 of the reply)
19.	Delay of number of months/ years till offer of possession	One year, 4 months and 18 days

3. As per the details provided above, which have been checked as per record of the case file, an apartment buyer agreement dated 02.04.2013 is available on record for apartment no. 7, 9th floor, tower C, according to which the possession of the aforesaid apartment was to be delivered by 06.09.2017. The promoter has failed to deliver the possession of the said unit to the complainant by the due date. Therefore, the promoter has not fulfilled his committed liability as on date.

4. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. Accordingly, the respondent through his counsel appeared on 29.08.2019. The case came up for hearing on 29.08.2019. The reply has been filed by the respondent on 10.05.2019 which has been perused by the authority.

Facts of the complaint: -

5. Briefly put facts relevant for the disposal of the present complaint are that the respondent- promoter came out with their project named as PARAS DEW'S to be developed at Sector-106, Dwarka Expressway, Gurugram, Haryana. A booking amount of Rs. 7,50,000/- was paid by the complainant on 29.12.2012 for booking of a 3 BHK flat in the aforesaid project.
6. An allotment letter dated 10th January 2013 was issued to the complainant while allotting unit bearing no. C/907 on 9th floor at Paras Dews, Sector-106, Dwarka Expressway, Gurugram having a tentative super area of 1665 sq. ft. at the project site. The base price of property was Rs. 5,093/- per sq. ft. plus additional charges making a total purchase price of Rs. 98,45,645 plus applicable taxes. The

complainant chose the construction linked plan for making the payments.

7. The complainant submitted that an apartment buyer agreement dated 2nd April 2013 was executed between the parties wherein vide clause 3.1. of the agreement, as regards date of delivery of possession, it has been mentioned that "the seller proposes to hand over possession of the apartment to the purchaser within period of 42 month with an additional grace period of 6 months from the date of execution of this agreement or date of obtaining all licenses or approvals for commencement of construction, whichever is later, subject to force majeure. The purchaser agrees and understands that the seller shall be entitled to a grace period of 90 business days after the expiry of grace period, for offer to handover the possession of the apartment to the purchaser.
8. Vide clause 3.3 of the apartment buyer agreement, as regards the delay compensation, it has been mentioned that subject to remittance and timely payment of instalments and adherence to the terms and conditions of this agreement by the purchaser(s) and subject to clause

11 herein, if, the seller fails to offer possession of the apartment (except for any force majeure reasons), as per clause 3.1 above, it shall be liable to pay to the purchaser(s) compensation calculated at the rate of Rs. 5/- per sq. ft. per month for the delayed period of offer to hand over the possession of the apartment provided that the purchaser(s) has paid the entire amount to the seller strictly on time or as demanded by the seller without any delay and default in any instalment and subject to the other terms mentioned in this agreement. The adjustment of such compensation shall be done only at the time of execution of the conveyance deed.

9. The complainant submitted that from April 2013 to May 2017, the complainant had already made payment of Rs. 92,86,584/- towards 95% of the BSP alongwith car parking, EDC & IDC with service tax.

10. The complainant submitted that a payment of Rs. 9,64,826/- was delayed by 80 days on which the seller imposed an interest @ 18% amounting to Rs. 39,640/- which was later waived off by them vide letter dated 24.08.2015.

11. The complainant alleged that after a delay of 22 months from the stipulated period for handing over of possession, the promoter company made the offer of possession vide letter dated 24.01.2019 but levied certain additional charges amounting to Rs. 1,82,990/- viz. demand for advance maintenance charges and club charges for two years even before handing over of possession and LPG infrastructure charges and intercom connection charges which was not within scope of the unit cost and is in clear contravention of the agreed terms and conditions of the apartment buyer agreement amounting to unfair trade practice.
12. The respondent had promised to complete the project within a period of 42 months from the date of execution of agreement i.e. 02.04.2013 with a further grace period of six months. The agreement was executed on 2.04.2013 and the offer of possession was given in January 2019 with a delay of 22 months though without giving any explanation whatsoever for such delay and also without making provision for compensation for the delay in the final demand letter which is resulting in extreme kind of mental distress, pain and agony to the complainant.

13. That without explaining about reasons for delay in completion of construction or indicative time for completion of project, the promoter company sent the offer of possession with final demand of Rs. 12,59,967/- alongwith Rs 1,82,990/- towards advance maintenance and club usage charges without adjusting Rs. 1,83,150/- towards delay compensation in terms of clause 3.3 of the apartment buyer agreement which is illegal and unfair. Hence, this complaint.

Issues to be determined:-

14. The issues raised by the complainant are as under-

1. Whether the clause 3.3 of the BBA is legally valid and justified in giving absolute discretion to the seller to deprive the buyer from the benefit of compensation for delayed offer of possession?.
2. Whether the respondent/ promoter was justified in raising final demand .letter without giving benefit of penal interest or compensation as given in the apartment buyer agreement to the complainant for the delay of 22 months in giving offer of possession?.

3. Whether the respondent/ promoter is liable for compensating the complainant in unjustifiable delay in construction and development of the project in question?
4. Whether the respondent/ promoter is liable to give penal interest @ 18% for 22 months to the complainant for the delay giving offer of possession?
5. Whether the respondent/ promoter has wrongly charged for advance maintenance charges and advance club charges for two year without even handing over the project?

Relief sought:-

The reliefs claimed by the complainant are as under: -

- a) Directions to strike off the Clause 3.3 of the apartment buyer agreement holding it be illegal, in clear violation of the provisions of the said Act and in favour of the respondent giving them discretionary power to with the condition of payment of compensation in case of delayed offer of possession;
- b) Direct the respondent to provide a penal interest @ 18% p.a, for 22 months from the date when the last payments were made till realization of the amount in full;

- c) Direct the respondent to pay compensation @ Rs. 5 per sq. ft. as listed in the BBA;
- d) Direct the respondent to withdraw the demand for advance maintenance charges and advance club charges for two years;
- e) Direct the respondent not to levy holding charges till pendency of this matter and the resolution of the issue by this Hon'ble Tribunal;
- f) Direct the respondents to pay a sum of Rs 1 lakh only to the complainant towards the cost of the litigation.

Respondent's reply: -

15. The respondent says and submits that the complainant has not come before this Authority with clean hands. The complaint has suppressed vital facts and on this ground alone, the complaint is liable to be dismissed.

16. It is submitted that the complainant herein is not a genuine apartment purchaser or consumer and has purchased the said apartment for commercial and investment purposes for which the jurisdiction of this Authority cannot be invoked, since the object of the RERA Act is to protect the interests of the consumers and not the investors. Since the complainant has not been successful in selling the apartment at a premium he filed this frivolous complaint just to avoid

making the remaining payments in terms of the agreed payment plan.

17. It is further submitted that complainant herein has been themselves guilty of not adhering to the payment schedule and has made most of the payment after passing of the respective due dates. This same is not permissible in terms of the RERA Act, 2016, and in view of the same the complaint merits outright dismissal.

18. It is further submitted that the present complaint is not maintainable and premature therefore the present complaint merits outright dismissal.

19. It is also submitted that the present complaint is infructuous and not maintainable since the construction of the project has already been completed and the occupation certificate has also been received on 15.01.2019. Thus there is no merit in the present complaint or the contention that there has been any delay on the part of the respondent since it is admittedly the complainant who has defaulted in payment of the instalments as per the agreed payment plan.

20. It is submitted that the complainant in the present complaint under reply have also admitted the fact that they have not paid the total consideration of INR 98,45,645/-.

21. It is further submitted that the present complaint is not maintainable since possession had to be handed over to the complainants in terms of clauses 3.1 and 3.2 of the apartment buyer agreement which clearly provide that subject to the complainants complying with all the terms of the builder buyer agreement and making timely payments of the instalments as and when they fall due the respondent proposes to offer the possession of the apartment within a period of 42 months with an additional grace period of 6 months of the date of execution of the apartment buyers agreement or date of obtaining all licences or approvals for commencement of construction, whichever is later, subject to force majeure.

22. Moreover, all the approvals for commencement of the construction work were received towards the end of 2013 and construction work commenced in January 2014. In view of the above and the complainant failing to adhere to the

agreed payment plan, there is no delay on the part of the respondent in completion of the project. Thus it is clear that the complaint has been filed in contravention of the provisions of the apartment buyer agreement dealing with offer of possession and the complaint merits outright dismissal in view of the same.

23. Thus completion and offer of possession was subject to the complainant having complied with all the terms and conditions of the apartment buyer agreement, which has not been done in the present case since the complainant admittedly has not paid the full consideration and the outstanding dues.

24. It is reiterated that the construction of the apartment is complete and the offer of possession has already been issued to the complainant on 24.01.2019 with the demand for the remaining payment. However, the complainant has not only failed to make the payment of the due amount, it has raised the present complaint to harass the respondent. It is submitted that the respondent is willing to handover

AUTHENTICATED
GURBACHAN KAUR
LEGAL OFFICER

possession to the complainant's subject to payment of the outstanding dues as per the builder buyer agreement.

25. It is submitted that the present complaint is not maintainable since not only is the complainant in breach of the builder buyers agreement but they are also in violation of Real Estate (Regulation and Development) Act, 2016 and the Haryana Real Estate (Regulation and Development) Rules, 2017. Section 19 of RERA, 2016, lays down the rights and duties of the allottees and sub-clause(6) of section 19 provides that the allottee shall be responsible to make payments in the manner and as per the time specified in the agreement between the parties.

In the present case it has been admitted by the complainants that they have failed to make complete payment therefore the complainant is in breach of the Real Estate (Regulation and Development) Act, 2016 and the Haryana Real Estate (Regulation and Development) Rules, 2017.

26. NCDRC in the case titled Manas Developers vs Madhur Arjun Bhabal, *RP 1563 of 2011, decided on 09.03.2015,*



has held that in cases where the complainants have failed to pay the amounts in accordance with the agreement and are defaulters then the builder cannot be held liable for delayed possession since the builder is not obligated to give possession without getting the entire payment with interest. It was further held that defaulters should not be rewarded for their own wrongs. The said judgment is squarely applicable to the facts of the present case and the present complaint merits outright dismissal with costs in view of the same.

27. Further, the Supreme Court of India in the case of *Supertech vs Rajni Goyal, decided on 23.10.2018, 2018 (14) SCALE 187*, has held that consumers cannot be allowed to reap the benefits of their own wrong by not taking possession when the same has been offered by the builder and the computation of interest also closes on the said date.

“Furthermore, the period of Interest should close on April 2016 when the Full Occupancy Certificate was obtained as per the admission of the Respondent-Purchaser herself in Para 4(j) of the Consumer Complaint, wherein she has admitted that the Appellant-Builder had obtained the Completion

Certificate as late as April 2016. The Respondent-Purchaser could not have any further grievance after April 2016 with respect to delay in handing over possession. The Respondent-Purchaser ought not to be allowed to reap the benefits of her own delay in taking possession."

28. It is also pertinent to point out that in the present complaint under reply the complainants have not been able to point out a single provision of either the Real Estate (Regulation and Development) Act, 2016 or the Haryana Real Estate (Regulation and Development) Rules, 2017 which has been violated by the respondent. Thus this complaint is not entitled to any relief at all.

Determination of issues: -

31. Regarding the **first, second, third and fourth issue** raised by the complainant, as per clause 3.1 of the apartment buyer agreement dated 02.04.2013, the company proposed to hand over the possession of the said unit by 06.09.2017. This fact is fortified from the perusal of clause 3.1 of the apartment buyer agreement dated 02.04.2013. The clause regarding possession of the said unit is reproduced below:

"3.1 POSSESSION OF FLOOR

The seller proposes to handover the possession of the Apartment to the Purchase(s) within a period of 42 moths with an additional grace period of 6 months from the date of execution of this agreement or date of obtaining all licenses or approvals for commencement of construction, whichever is later subject to Force Majure. The Purchaser (s) agrees and understands that the Seller shall be entitled take a grace period of 90 (ninety) business days, after the expiry of grace period, for offer to hand over the possession....”

The environment clearance was received by the respondent from the competent authorities on 06.09.2013 which is later than the date of execution of agreement. Accordingly, the due date of possession on calculation comes out to be 06.09.2017. However, the possession was offered by the respondent to the complainant vide letter dated 24.01.2019 (Annexure P/6) that is after a delay of 1 year, 4 months and 18 days in handing over the possession as far as the penalty clause in case of delay in possession is concerned which is Rs. 5/- per sq. ft. of the super area per month, it is held to be one sided as also held in para 181 of the judgment in 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.”

Hence, the authority is of the considered view that the complainant is entitled for delayed possession charges in the form of prescribed rate of interest as per proviso to section 18(1) of the Act read with rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 for every month of delay in handing over of possession.

ii. Regarding the **fifth issue** raised by the complainant, as per clause 8.3 of the said agreement, “the allottee is willing to execute the maintenance agreement with respect to the apartment with the maintenance service provider as designated by the seller, in such format as may be prescribed by the maintenance service provider or any other designated agency by the seller. The purchaser further undertakes to make payment of the maintenance security, annual

maintenance charges and such other charges and at such rate as determined by the maintenance service provider as and when the demand for the same is raised". Also, as per clause 8.6 of the said agreement, "the allottee shall be liable for payment of maintenance charges for use of common areas and facilities as decided by the seller or the maintenance service provider as the case may be within 30 days of the offer of possession even if the purchaser is not occupying and using or has delayed in taking over the possession of the apartment".

On perusal of record it is found that there is no such maintenance agreement has been executed between the complainant- allottee and any such maintenance provider in the project in question. Therefore, the demand of the advance maintenance charges is totally unjustified. The respondent shall, however, be entitled to demand the maintenance charges as per the Haryana Apartment Ownership Act, 1983 till the execution of the maintenance agreement.

Findings of the Authority: -

32. 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.

34. Project is registered with the Authority. Argument heard. Since, there is delay of more than one year in offering of possession by the respondent- promoter so the complainant is entitled for delayed possession charges at the prevalent prescribed rate of interest i.e. 10.45% p.a. for every month of delay from due date of delivery of possession till the offer of possession.

Decision and directions of the Authority: -

33. The authority exercising its power 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 fairplay: -

- i. The complainant is directed to take the possession of the subject flat/unit within a period of one month from the date of issuance of this order failing which he shall be liable to pay holding charges.

- ii. The respondent is duty bound to pay the delayed possession charges in the form of interest at the prevalent prescribed rate i.e. 10.45% p.a. on the amount paid by the complainant for every month of delay from the due date of possession i.e. 06.09.2017 till the date of offer of possession (24.01.2019) as per the provision of section 18(1) proviso of the Act read with rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 within a period of 90 days.
- iii. Complainant is further directed to pay the outstanding dues, if any, after adjustment of interest awarded for the delayed period. Interest on due payments shall be charged at the prescribed rate of interest i.e. 10.45% p.a. by the promoter which is the same as is being granted to the complainant in case of delayed possession.
- iv. Respondent is directed not to charge any holding charges and advance maintenance charges from the complainant and to complete the pending works of


the unit in question. Charges with respect to club facilities shall only be charges till its completion.

34. The order is pronounced.

35. Case file be consigned to the registry.


(Samir Kumar)

Member


(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram.

Dated: 29.8.2019

Judgement uploaded on 03.09.2019


HARERA
GURUGRAM